



REPUBLIC OF KENYA



**In re Estate of Mwangi Kimanga (Deceased) (Succession Cause 1728 of 2000)
[2023] KEHC 24912 (KLR) (Family) (6 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1728 OF 2000
PM NYAUNDI, J
OCTOBER 6, 2023
IN THE MATTER OF: THE ESTATE OF MWANGI KIMANGA
(DECEASED)**

BETWEEN

**ALICE WANJIKU MWANGI 1ST APPLICANT
MARY WAITHERA KIMANGA 2ND APPLICANT
JANE WAMAITHA KIMANGA 3RD APPLICANT**

AND

**PRISCAH WANJIKU KIMANGA 1ST RESPONDENT
STEPHEN MAINA KIMANGA 2ND RESPONDENT**

AND

**GERALD IRUNGU INTERESTED PARTY
ALICE WANJIRU INTERESTED PARTY**

RULING

1. The Application for determination is the Application dated 29th May 2023 supported by the affidavits of Jonathan Omangi and Stephen Maina Kimanga both sworn on 29/5/2023 and further affidavit of Stephen Maina Kimanga sworn on 16th June 2023
2. The Application is opposed by the Affidavit of Wangalwa Oundo, Advocate sworn on 7th June 2023.
3. The Application is presented under Oder 42 Rule (6) of the [Civil Procedure Rule](#) and Sections 3, 3(a), 63 (e) of the [Civil Procedure Act](#) and seeks the following orders



- a. Spent
 - b. Spent
 - c. That stay of execution of the ruling herein delivered on 16th May 2023 or any orders emanating thereof be granted pending hearing and determination of the reference dated 29th May 2023
 - d. That costs be in the Cause
4. The parties agreed to canvass the Application by way of written submissions. The Applicants submissions are dated 29th June 2023, while those of the Respondent are dated 25th July 2023.

Summary of the Applicants' Submissions

5. The Applicant challenges the ruling of the taxing matter as relates to the Respondents Bill of costs dated 20th December 2022 and has filed Reference dated 29th May 2023. It is argued that the Reference raises arguable issues and that therefore the conditions for stay of execution have been met.

Summary Of Respondent's Submissions

6. The Respondent contends that the Applicant has failed to meet the threshold provided for under Order 42 rule 6(2) of the *Civil Procedure* and therefore does not qualify for the grant of the orders sought. The Respondent submits that if the Court is inclined to grant stay the same ought to be conditional and that half of the sum be deposited in an interest earning bank account in the name of both Advocates.

Analysis And Determination

7. Having considered the pleadings and rival submissions by the parties, I derive the following issue for determination
- a. Whether the Applicant has met the threshold for the grant of the stay of execution.
 - b. Who should pay costs
8. In arriving at my decision, I am guided by the decision in *Butt v Rent Restriction Tribunal* (1982) KLR 417 the Court of Appeal held that

“

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there



was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion.

Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”

9. Further the Court of Appeal in *RWW vs. EKW* (2019) eKLR addressed itself on this as hereunder: -

“Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”

10. I observe that the Reference does raise arguable issues and may be rendered nugatory if the stay is not granted
11. I am also mindful of the interests of the Respondents, who are keen to have their interest safeguarded and be assured of easy access to the amount awarded in the event the reference fails. The Court is dutybound to examine how it can ensure that the interests of the Respondent are protected in the circumstances of this case.
12. In exercise of my discretion, I therefore grant stay of execution on the following conditions:
 - a. That half of the judgment sum, Kshs Twenty Million Sixty-Four Thousand Seven Hundred and Thirty-Three (Kshs 20,064,733) be deposited in an interest earning account in the names of both Counsel within 14 days
 - b. The Reference proceed by way of written submissions. The Applicant to file submissions within 14 days. The Respondent to file Submissions within 14 days of service. The Applicant granted leave to file supplementary submissions within 7 days of service. The Matter be mentioned on the 22nd of November 2023 to confirm compliance and take a date for ruling.
 - c. The Respondent to have costs of the Application assessed at Kshs 20000 to be paid within 21 days

It is so ordered

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

P M NYAUNDI

JUDGE

In the presence of:

Sylvia Court Assistant

