



**In re Estate of Kararaho Kariuki (Deceased) (Succession Cause
14 of 1991) [2023] KEHC 23119 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23119 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
SUCCESSION CAUSE 14 OF 1991
RN NYAKUNDI, J
OCTOBER 3, 2023**

**IN THE MATTER OF
ANNA WAMBUI KARARAHO ADMINISTRATRIX**

RULING

1. By a notice of motion dated May 15, 2023, the applicant seeks the following orders
 1. Spent.
 2. Spent.
 3. That the implementation and or enforcement of the judgment given on December 29, 2022 be stayed pending the hearing and determination of an intended appeal against the said judgment in the Court of Appeal.
 4. That pending the hearing and the determination of an intended appeal against the judgment of this honourable court given on November 29, 2022 the status quo with regard to the assets of the estate of Kararaho Kariuki (deceased) be maintained.
 5. Spent.
 6. That this honourable court be pleased to extend time for lodging and serving the notice of appeal by the applicant against the decision of the honourable court made on November 29, 2022.
 7. That this honourable court be pleased to grant leave to the applicant to appeal to the Court of Appeal against the decision of this honourable court made on November 29, 2022.
 8. That the costs of this application be provided for.
2. The application is premised on the grounds therein and it is further supported by the affidavit sworn by the applicant on May 15, 2023.



The Applicant's Case

3. The applicant deposed that she is the administratrix and beneficiary of the estate herein. That on November 29, 2022 this court delivered a judgment in relation to a protest which had been filed by her on October 16, 2019 regarding a property known as Nakuru Municipality Block 10/23 and the distribution of the assets forming part of the estate of the deceased.
4. The applicant contends that the said judgment was delivered without notice to her and in the absence of her advocates on record. The applicant maintained that she only came to know of the delivery of the judgement on May 10, 2023 upon being shown a copy of a letter dated March 29, 2023 which had been written by Simon Peter Maina's Advocates to Mr Koigi of Kabatini by which time the 14 days limit within which to file this instant application had lapsed.
5. Being aggrieved by the said judgment the applicant herein *vide* a letter dated May 10, 2021 requested for proceedings for purposes of filing an appeal which letter is on record.
6. The applicant seeks leave of court so as to pursue the intended appeal.
7. According to the applicant the intended appeal raises fundamental issues of law which require conclusive determination by the Court of Appeal. The applicant further believes that the intended appeal has high prospects of success.
8. The applicant is apprehensive that unless stay of execution and status quo is not granted as prayed then the appeal if successful will be rendered nugatory for reasons. That the properties distributed to the various beneficiaries will in all probability be transferred to them thus rendering the intended appeal completely nugatory. That some of the beneficiaries are in the process of disposing of the estate assets and such disposal is imminent. That Margaret Nyambura and other beneficiaries of the estate of the deceased have demanded that she pays them proceeds of the rent she received from the shops and offices that she has erected on title No Nakuru Block 10/23 and have threatened to take over management and control of the property if their demands are not met. That the said beneficiaries have further been waving the court to tenants and have advised some tenants to pay the rent directly to them and have threatened to evict those tenants who do not comply with their demands. That the property known as title No Nakuru Block 10/23 has been charged to Housing Finance Company Limited in order to secure loan facilities which were used to develop a part of the property and that she used the proceeds of rent collected from the premises to repay the said loan. That if Margaret Nyambura and other beneficiaries take over management and control of the property and start collecting rent directly, it will cause the mortgage account to go into arrears thereby compelling Housing Finance Company Limited to sell the property in exercise of statutory power of sale thereby occasioning substantial loss rendering the appeal nugatory. That she has been in possession of the property since 1994 during which time she has expended millions of monies in developing it and it can be confirmed from the pictures annexed hereto and exhibited as AWK -3. According to the applicant the essence of the appeal is that by statute she has a right to continue managing the said property undisturbed for as long as the law permits. The applicant believes that if Margaret Nyambura and other beneficiaries of the deceased's estate take over the management and control of the property now and the Court of Appeal subsequently holds that title No Nakuru Block 10/23 does not form part of the deceased's estate and that the same belongs to her, her power to possess the premises will have been removed beyond recall and the appeal will thus be rendered nugatory.
9. The applicant is ready and willing to give an undertaking as to the issue of damages and or comply with such other conditions as regards security that this court may impose or order pending the determination of the appeal.



10. The applicant believes that on a balance of convenience even if her appeal does not succeed, there is nothing stop Margaret Nyambura and the other beneficiaries of the deceased from seeking possession of the premises.
11. According to the applicant she has acted with speed and diligence in pursuing both the intended appeal and this instant application. The applicant is further willing to prosecute the appeal with the same diligence and speed.
12. The application is opposed.
13. Robert Kariuki a beneficiary is the estate herein opposed the applicant's application *vide* his replying affidavit dated June 15, 2023.
14. He deposed that that succession cause herein has been in court since the year 1991 and that the late Kariuki Kararaho died in the year 1990. He maintained that a decision of the High Court gives finality in succession matters.
15. He further contends that the applicant herein has not demonstrated to this court any extra ordinary circumstances to warrant the court to grant leave to appeal. He maintained that there should be closure in the estate of Kariuki Kararaho and further that there should be an end to litigation. That to that extent to which there is no order to warrant status quo and thus none should be granted.
16. He added that court orders should not be issued in vain. He further deposed that the second house wishes to proceed with their life and that there was an order of partial confirmation which should be allowed to follow its course up to the time of distribution.
17. He urged the court that it is in the interest of justice that this instant application be dismissed with costs.

Analysis and Determination

18. I have considered the application, the grounds thereof, the supporting affidavit and the replying affidavit. The following issues arise for determination: -
 - a. Whether leave to appeal is necessary and or merited?
 - b. Whether execution of the ruling herein should be stayed pending appeal.
19. The debate on whether leave is necessary before filing appeal from the High Court exercising its original jurisdiction in succession cases is not quite closed. Although there seems to be a dichotomy of opinion and two schools of thought on the necessity of leave to appeal in succession matters, insistence has been that appeal from the decision of the High court in exercise of its original jurisdiction is only with the leave of the court.
20. The first one was well captured in the case of *Rhoda Wairimu Karanja & another v Mary Wangui Karanja & another* [2014] eKLR by the Court of Appeal in these words: -

“We think we have said enough to demonstrate that under the *Law of Succession Act*, there is no express automatic right of appeal to the Court of Appeal; that an appeal will lie to the Court of Appeal from the decision of the High Court exercising original jurisdiction with leave of the High Court or where the application for leave is refused, with leave of this court. Leave to appeal will normally be granted where *prima facie* it appears that there are grounds which merits serious consideration. We think this is good practice that ought to be



retained in order to promote finality and expedition in the determination of probate and administration disputes."

21. The reasons for the position taken is explained by the Court of Appeal in the above case thus...: -

We think this is good practice that ought to be retained in order to promote finality and expedition in the determination of probate and administration disputes."
22. The second, which has its origins in the *Anarita Karimi* case, was enunciated in the case of *Mary Wangui Karanja & another v Rhoda Wairimu Karanja & another* [2014] eKLR, by Musyoka J. to be that:-

“...A right of appeal is statutory and since the *Law of Succession Act* has not provided for such a right the same does not exist. “
23. The *Constitution* of Kenya, 2010 however provides for unfettered right of appeal. And such provisions in the *Law of Succession Act* requiring leave to appeal being existing law should be dealt with in accordance with section 7(1) of the transitional provisions in the sixth schedule of the *Constitution*: -
 7. Existing laws
 - (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.
24. Be as it may, in this case the court is not in any position or in possession of any material in this case which may make it to appreciate whether there are weighty issues requiring further serious judicial consideration and interrogations. The applicant talks of having an arguable appeal as has been demonstrated on his draft memorandum of appeal which is not on record and therefore, I have not had the benefit to peruse it.
25. The principles upon which the court may grant stay of execution pending appeal are well-settled.
26. Order 42 rule 6(1) and (2) of the *Civil Procedure Rule* provides as follows:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceeding under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 - (2) No order for stay of execution shall be made under subrule (1) unless –
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”



27. Grant of stay of execution pending appeal is a discretion of the court. In *Butt v Rent Restriction Tribunal* (1982) KLR the court gave guidance on how such discretion should be exercised and 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.”
28. In *Visbram Ravji Halai v Thornton & Turpin* civil application No Nai 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal’s power to grant a stay pending appeal is unfettered, the High Court’s jurisdiction to do so under order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.
29. The Court of Appeal in *Halai and another v Thornton & Turpin (1963) Ltd* [1990] KLR in considering the conditions for stay of execution pending appeal held that; -
- “The High Court’s discretion to order stay of execution of its order or decree is fettered by three conditions, namely;- sufficient cause, substantial loss would ensue from a refusal to grant stay, the applicant must furnish security, the application must be made without unreasonable delay.
- In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman EA Ltd* (2013) as follows:-
- “In addition, the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory.”
- These twin principles go hand in hand and failure to prove one dislodges the other”
30. With the above principles in mind, the first consideration is whether the applicant has demonstrated the substantial loss he likely to suffer if stay orders are granted.



31. As to what substantial loss is, it was observed in *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

32. In the present case, the applicant seeks stay of execution of the judgment that was delivered on November 29, 2022. It is the duty of the applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. The applicant herein alleges that she has been in control of that property known as Nakuru Block 10/23 and as such if the same was to be taken over by the other beneficiaries of the deceased herein then she will suffer substantial loss in the event that she succeeds in the appeal.

33. The other consideration is security. In the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co Advocates* (2014) eKLR the court held that:

“The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor ... civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”

34. In the present case, the decree is not a money decree and thus no need to provide security for due performance.

35. Lastly, the application has to be brought without unreasonable delay. The judgment herein was delivered on November 29, 2022, this instant application was filed on May 16, 2023. The delay in bringing this application is for (5) months. The applicant has not tendered any reasons whatsoever explaining the delay herein. In my view the delay in the instant case is inordinate.

36. Nevertheless, when it comes to matters distribution in intestate succession, the guiding framework is usually section 35, 38 and 40 of the *Law of Succession Act*. The spirit behind the said sections is the equal distribution of a deceased person estate. In doing so, there ought to be no classification into categories of male, female, married or unmarried; there ought to be no discrimination against the male or female children of a deceased person; nor discrimination between the married daughters and unmarried daughters of a deceased person.

37. At this juncture, I must remind parties that litigation must always come to an end. I take judicial notice that the matter herein is an old matter that has been pending in court for over (32) years now. I must also emphasize further that once a certificate of confirmation of grant has been issued it has been deemed that all the beneficiaries of deceased then get enjoy their respective shares resulting from the deceased's estate without any interference from the rest of the beneficiaries.



38. The upshot is that there is no merit in the application dated May 15, 2023. The same is hereby dismissed. This being a family matter there shall be no orders as to costs.

Orders accordingly.

DATED SIGNED AND DELIVERED AT ELMORE THIS 3RD DAY OF OCTOBER 2023.

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R. NYAKUNDI

JUDGE

