



REPUBLIC OF KENYA



**In re Estate of Ndambiri Kanyatta (Deceased) (Civil Appeal
E087 of 2023) [2024] KEHC 14292 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14292 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA**

CIVIL APPEAL E087 OF 2023

RM MWONGO, J

NOVEMBER 13, 2024

IN THE MATTER OF THE ESTATE OF NDAMBIRI KANYATTA- DCD)

BETWEEN

EPHANTUS NJOGU NDAMBIRI 1ST APPLICANT

LEAH WANJA NDAMBIRI 2ND APPLICANT

NANCY WAGUAMA NDAMBIRI 3RD APPLICANT

AND

REGINA WARUGURU NDEGWA 1ST RESPONDENT

CHARLES MAINA KARANJA 2ND RESPONDENT

DOROTHY WANJIRU KARANJA 3RD RESPONDENT

WILFRED CHOMBA KARANJA 4TH RESPONDENT

MOSES KAMAU KARANJA 5TH RESPONDENT

RULING

1. The applicants/appellants are sons and daughters of the deceased. In the succession matter in the lower court, the magistrate delivered judgment on 15th September 2023 in Gichugu SRM Court Succ. No. 27 of 2020.
2. According to them, the trial court disinherited them and they filed an appeal. This application seeks:
 - a) stay execution of the said judgment
 - b) a restriction on L.R. No. Baragwe/Guama/320



- c. That this Honourable Court be pleased to grant a temporary injunction directed at the respondents, their agents and/or servants or any person acting under their authority from selling, alienating and/or disposing off land parcel number L.R. Baragwe/Guama/320 pending hearing and determination of this Application and Appeal herein.
2. The application is supported by the grounds on the face of the application and the annexed Affidavit of Ephantus Njogu Ndambiri with the following major averments:
 1. That they are dissatisfied with the trial court's judgment and filed a Memorandum of Appeal dated 9/10/2023.
 2. That the applicants were bequeathed shares on land parcel LR.Baragwe/Guama/320 by their deceased father during his lifetime and have carried out developments on the respective shares like putting up matrimonial homes and cultivating thereon.
 3. That during the lifetime of the deceased, he had sub-divided land parcel number LR.Baragwe/Guama/320 into seven (7) portions where applicants were shown their shares which they have been living on since 2011 to date.
 4. That the respondents herein have been aware of the applicants' presence on the said land and never challenged their being there or the activities on their shares throughout the life time of the deceased.
 5. That the respondents in their Affidavit of Protest only sought to get a share in land parcel LR.Baragwe/Guama/320 but did not challenge the applicant's presence on the said land.
 6. That the applicants face the risk of losing their homes if the respondents are allowed to execute the Judgment thereby evicting the Applicants.
 3. The respondents deposed to a Replying Affidavit with the following major averments:
 1. That the Lower Court in its judgment delivered on 15/9/2023 brought into consideration all of the previous benefits including those as set up above in its determination and therefore the intended appeal does not have chance of success.
 2. That the applicants should move to their respective pieces of land as the 5 respondents and 10 other beneficiaries are prejudiced by the continued occupation in regard to title number Baragwe/Guama/320.
 3. That during the hearing, Agnes Wanjira Geoffrey, a daughter to the deceased relinquished her inheritance rights in the estate and the court proceeded to distribute the estate within the law and *constitution of Kenya, 2010*.
 4. That the applicants herein have failed to demonstrate the manner in which they would suffer substantial loss if the decree is executed as they have other parcels of land.
 4. The appellants submit that they are the deceased's children. The 1st appellant and Octavius Ndambiri were the joint administrators of the estate. They say that during the life time of their father they put up their homes on LR Baragwe/Guama/320 after their father through a surveyor sub-divided the land into seven portions and share to each person their share.
 5. The appellants urge that despite Land Control Board consent being received on 27.11.2011, their father died before he could transfer the said land portions. They believe that their late father's wishes



were clear and ought to have been taken into account by the trial court, but instead the court has disinherited them.

Applicants' submissions

There are no submissions on record.

Respondent submissions

6. The respondents submits that the law governing the jurisdiction of this court to grant stay of execution pending appeal is found in Order 42 Rule 6(1) and (2) of the Civil Procedure Rules. The provision requires the applicant to satisfy the court that they may suffer substantial loss, that there was no unreasonable delay in filing the application, and that security may be availed for the orders.
7. The Respondents relied on *Kenya Shell Limited v Kibiru & Another* 1986 K.L.R.410, where the issue of substantial loss was pointed to as a cornerstone for granting a stay.
8. The Respondents also relied on *Re Estate Of Richard Churko Stephen alias Richard Churko Guyo (Deceased)* (2021) eKLR which referred to the case of *Arun C.Sharma v Ashana Raikundalia T/A Rairundalia & Co Advocates* (2014) eKLR where it was pointed out that the purpose of providing the security 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 intended to punish the judgment debtor.
9. The respondent submits that the applicants have satisfied the conditions as set out under Order 42 Rule 6(1) and (2) of the Civil Procedure Rules and the cited authorities.

Issues for Determination

10. The core issue for determination is whether stay of execution should be granted.

Analysis and Determination

11. The gravamen of the application is that the applicants are aggrieved with the trial court's judgment delivered on 15th September, 2023 in Succession Cause No.27 of 2020-Gichugu. They have already filed an appeal being High Court of Appeal No. E087 of 2023-Kerugoya, That the intended appeal is not frivolous and will be rendered nugatory if the decree is executed and therefor further proceedings should be stayed.
12. On whether stay of execution should be granted the principles guiding the grant of a stay of execution pending appeal are well settled. These are set out under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“No order for stay of execution shall be made under sub rule (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.

a. That substantial loss may result to the applicant unless the order is made”

13. The applicants case is that they are reasonably apprehensive that the Respondents may evict them from land parcel LR.Baragwe/Guama/320 where they have built their matrimonial homes.



14. On their part, the respondents are opposed to the application for stay of execution, and deposed that the applicants should move to their respective pieces of land as the 5 respondents and 10 other beneficiaries are prejudiced by the continued occupation in regard to title number Baragwe/Guama/320. Further, that the applicants herein have failed to demonstrate the manner in which they would suffer substantial loss if the decree is executed as they have other parcels of land.

15. In *Kenya Shell Limited v Kibiru & Another* 1986 K, L.R.410, the court addressed the issue of substantial loss as follows:

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other even...Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money”

16. It is clear to me that the applicant has an arguable appeal and will suffer substantial loss in case stay of execution is not granted. In addition, the appeal would be rendered nugatory if the respondents executed sub-divided the suit land.

17. On whether the application has been made without unreasonable delay, the trial court delivered its judgement on 15th September, 2023. The appellant filed his Notice of Motion application of 9th October, 2023 on 12th October, 2023. The test on timeousness is set out in *Netplan East Africa Limited v Investment & Mortgages Bank Limited* [2013] eKLR as follows:

“The test is whether the delay is prolonged and inexcusable, and, if it is, can justice be done despite the delay. When such delay is established, unless it is well explained, it becomes inexcusable”

In my view the application was filed timeously.

18. On question of security for performance of the decree, it has been held as follows: *Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & another* [2018] eKLR, stated that:

“Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The Applicant has offered to provide security and has therefore satisfied this ground for stay.”

19. The applicant in this matter has not offered any security in the event that the appeal fails. It is the discretion of the court to determine the suitable security in the circumstances. In the present case, the property in issue is family land that is in dispute. This is emotive as parties have built on it and have family connections. This is not the type of scenario in which, in my view, security deposit should be considered.

Conclusion and Disposition

20. In light of the foregoing there is no doubt that the applicants have satisfied the threshold for stay of execution.



21. Accordingly, stay of execution is hereby granted pending hearing of the appeal.
22. The prayer for temporary injunction is therefore otiose in that stay of execution is sufficient protection for the applicants.
23. Orders accordingly.

DATED AT KERUGOYA THIS 13TH DAY OF NOVEMBER, 2024.

R. MWONGO

JUDGE

Delivered in the present of:

1. Mrs. Ndiangui for Applicant/Appellant
2. Munene- holding brief for Ngigi for Respondent
3. Murage, Court Assistant

