



**In re Estate of Joshua Githiari alias Joshua Githiari Kibui (Deceased) (Succession Cause 15 of 2019) [2024] KEHC 13704 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 13704 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NYAHURURU  
SUCCESSION CAUSE 15 OF 2019  
CM KARIUKI, J  
NOVEMBER 7, 2024  
IN THE MATTER OF THE ESTATE OF JOSHUA  
GITHIARI ALIAS JOSHUA GITHIARI KIBUI (DECEASED)**

**BETWEEN**

**PETER MUGI GITHIARI ..... ADMINISTRATOR**

**AND**

**ALICE WAMBUI KARANJA (LEGAL REPRESENTATIVE OF KARANJA KIBUI NJAU) ..... RESPONDENT**

**RULING**

1. Before the court is an application dated 9<sup>th</sup> November 2023 in which the Applicant sought the following orders: -
  - i. Spent
  - ii. Spent
  - iii. That pending the hearing and determination of the Court of Appeal Succ No. E132 of 2023 or further orders of the court, there be stay of execution of order Number 3 of the ruling delivered on 9<sup>th</sup> February 2023.
  - iv. That the costs of this summons be provided for.
2. Which application was grounded upon the Applicant's annexed affidavit and on the following grounds: -
  - i. On 9<sup>th</sup> February 2023, the court delivered ruling which determined the mode of sharing of L.R Nyandarua/ Leshau Karai Trading Centre/96 among the estates of Joshua Githiari Kibui and Karanja Kibui Njau.



- ii. The Applicant was aggrieved by the said ruling and he lodged an appeal before the Court of Appeal.
  - iii. The substratum of the appeal is the said parcel of land and as such the appeal will be rendered nugatory if the parcel of land is not preserved.
  - iv. The Respondent has initiated the process of sub dividing the said parcel of land and as such it will defeat the said appeal.
  - v. No prejudice will be caused to the Respondent if the said parcel of land is preserved pending the hearing and determination of the appeal
3. In the supporting affidavit of even date, the Applicant deponed as follows:-
- i. That by a summons dated 20th July 2022, the Applicant and his co-Administrator had sought for correction of the misspelled name of my co- Administrator, confirmation of grant before expiry of 6 months, and the setting aside of L.R Nyandarua/ Leshau Karai Trading Centre/96 in the distribution of the estate.
  - ii. That the said summons was opposed and it was subjected to hearing whereby the parties were directed to file written submissions, and on 9th February 2023 the court delivered its ruling.
  - iii. That in order number 3 of the said ruling, the court issued an order on the mode of sharing out of L.R Nyandarua/ Leshau Karai Trading Centre/96 among the estate of Joshua Githiari Kibui and Karanja Kibui Njau.
  - iv. That pursuant to the said order, the court issued certificate of confirmation, which contained the mode of distribution as ordered by the court.
  - v. That in distributing the estate, the court ordered that the estate of Karanja Kibui Njau should get the developed part of L.R. Nyandarua/Leshau Karai Trading Centre/96, whereas the estate of Joshua Githiari Kibui should get the undeveloped part.
  - vi. That the estate of Joshua Githiari Kibui was aggrieved by the said decision on the mode of distribution of L.R Nyandarua/ Leshau Karai Trading Centre/ 96 and it lodged an appeal before the Court of Appeal.
  - vii. That subsequent thereto, the estate of Joshua Githiari Kibui filed an appeal before the Court of Appeal which is currently pending.
  - viii. That the subject matter of the appeal is the said parcel of land, which is currently at risk of being sub divided, and as such the appeal will be rendered nugatory if the distribution of the parcel of land proceeds in terms with order Number 3 of the ruling read on 9th February 2023.
  - ix. That no prejudice will be suffered by the Respondent if the current summons is allowed, as the net effect will be maintenance of status quo that has prevailed for long even during the lifetime of Joshua Githiari Kibui and Karanja Kibui Njau.
4. On the other hand, the Respondent filed a replying affidavit sworn by Milka Wambui Njau dated 21<sup>st</sup> May 2024 deponing as follows:-
- i. That the summons dated 9/11/2023 by the Applicant is in bad faith and lacks basis and merits and is a calculated attempt to delay justice and hence an abuse to the court process.



- ii. That summons made under certificate of urgency lacks merit since the summons are dated 9th November 2023 however the same was served upon my advocates on record on 28th March, 2024.
  - iii. That it is very clear from the judiciary e-filing portal that the said application was filed on 14/3/2024 which clearly shows that the said application was back dated.
  - iv. That the above actions clearly indicate that the application herein is an afterthought after the said issue of subdivision arose in Nyahururu ELC No. E037 of 2022 and this application is only meant to defeat the said lower court case which is pending for ruling.
  - v. That the Applicant's appeal has no arguable case with high prospects of success or in the very least that warrant serious consideration by the court of appeal.
  - vi. That the Applicant has not demonstrated Intent to furnish security of cost to cater for eventual order if his appeal is unsuccessful.
  - vii. That the intended appeal has been filed after unreasonable delay. The judgement appealed against was delivered on 9<sup>th</sup> February 2023.
5. The parties were directed to canvass the application via submissions, but the Applicant's Submissions, was not in the file at the time of drafting this ruling.
  6. Respondent's Submission
  7. It was submitted that the subject matter before the honorable court is LR Nyandarua/Leshau Karai Trading Centre/96 registered in the joint names of Karanja Kibui Njau(deceased) and Joshua Njau Githiari as proprietors. The fact of the joint registration of Karanja Kibui Njau(deceased) and Joshua Njau Githiari (deceased) as the proprietors of the subject land parcel is not in dispute. The gist of the summons dated 9<sup>th</sup> November 2023 is to stay execution of distribution of the subject land parcel LR Nyandarua/Leshau Karai Trading Centre/96 pending appeal.
  8. It was contended that the said parcel of land is already in the process of subdivision and the Applicant is aware of the same and has never opposed the said process until now over one year later and that this application is a clearly a delaying tactic meant to deny the beneficiaries of Kenneth Njau Githiari (deceased) from enjoying the fruits of the ruling delivered on 9/2/2023. Further, that the appeal is an afterthought legal gimmicks solely calculated to derail justice and hence an abuse of the court process.
  9. Reliance was placed on Order 42 Rule 6 of the Civil Procedure Rules, Antoine Ndiaye vs African Virtual University (2015) eKLR, RWW vs. EKW [2019] eKLR
  10. It was argued that the summons is especially incompetent for inordinate delayed filing, which is point to manifest afterthought. That the summons made under certificate of urgency lacks merit since the summons are dated 9th November, 2023 however the same was served upon my advocates on record on 28th March, 2024. From the judiciary e- filing portal, it is very clear that the said application was filed on 14/3/2024 which clearly shows that the said application was back dated to 9th November 2023. That the Applicant in filing the summons dated 9th November, 2023 has duty to adduce credible reasons for inordinate delay in filling the summons for over one year later.
  11. Further, it was asserted that the Applicant herein has not offered any security as required in case the appeal does not succeed. Reliance was placed on Focin Motorcycle Co. Limited vs. Ann Wambui Wangui & Another [2018] eKLR
  12. Analysis and Determination



13. Having considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the advocates for the parties. The issue that arises is whether the Applicant should be granted the stay orders sought for.
14. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the Civil Procedure Rules which requires an Applicant seeking a stay of execution pending appeal to demonstrate that -
  - a. Substantial loss may result to the Applicant unless the order was made;
  - b. The application was made without unreasonable delay; and
  - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the Applicant.
15. Accordingly, the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In *RWW vs. EKW* [2019] eKLR, it was observed that:-
  - a. "The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
16. In *Antoine Ndiaye v African Virtual University* (2015) eKLR, Gikonyo J opined that -
  - a. ....stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules...
17. Further, in *Butt v Rent Restriction Tribunal* (1982) KLR the asserted stated that grant of stay of execution pending appeal is a discretion of the court. The court gave guidance on how such discretion should be exercised and held that –
  - (a) "The power of the court to grant or refuse an application for a stay of execution
    1. is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  - (b) 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.
    - 2.
  - (c) 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.
    - 3.
  - (d) 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.
    - 4.



- (e) 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.”

18. Consequently, I will consider the above are the principles while determining the application. The first consideration is whether the application was filed timeously. The judgment of the High Court in this matter was delivered on the 9<sup>th</sup> February 2019 and the notice of appeal filed with the court on the 23<sup>rd</sup> February 2023. The Applicant also attached a memorandum of appeal which I believe was erroneously dated but he asserted that the appeal was pending. The summons herein was then filed on 9<sup>th</sup> November 2023. It is my considered finding that though there was delay in filing the summons in my view it is not inordinate and/or unreasonable.
19. Further, the Applicant contended that they will suffer substantial loss if the orders sought are not granted. It was stated that on 9<sup>th</sup> February 2023, the court delivered ruling which determined the mode of sharing of L.R Nyandarua/ Leshau Karai Trading Centre/96 among the estates of Joshua Githiari Kibui and Karanja Kibui Njau. The Applicant being aggrieved by the said ruling, lodged an appeal.
20. He asserted that the substrum of the appeal is the aforesaid parcel and if the stay orders sought are not granted, the appeal will be rendered nugatory as the Respondents will end up sub-dividing the suit land. It is my consider view, that since there is an appeal on record and execution of the impugned order may occasion substantial loss on the Applicant’s part and render the appeal nugatory, the appeal should see the light of day and be properly determined and therefore the subject matter should be preserved.
21. Moreover, the Respondent contended that the Applicant has not offered any security as required in case the appeal does not succeed. However, since there is no money decree in place, the same will not apply in this case and so I will not impose any such condition. The application is seeking to stay distribution of the estate of the deceased and so the order that is targeted at preserving the subject matter of the appeal.
22. The upshot is that that I find the application dated 9<sup>th</sup> November 2023 has merit and thus make the orders;
- i. The application is hereby allowed with no orders as to costs.

**RULING, DATED, SIGNED AND DELIVERED AT NYANDARUA THIS 7<sup>TH</sup> DAY OF NOVEMBER 2024**

.....

**C KARIUKI**  
**JUDGE**

