



**Munene v Mithamo & another (Civil Appeal E092 of 2022)
[2024] KEHC 14291 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14291 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E092 OF 2022
RM MWONGO, J
NOVEMBER 14, 2024**

BETWEEN

ROSE WANJIKU MUNENE APPELLANT

AND

PETER MURIUKI MITHAMO 1ST RESPONDENT

ANTHONY MURIITHI MITHAMO 2ND RESPONDENT

(Being an appeal from the judgment of Hon. G.W. Kirugumi Principal Magistrate Sitting in Kerugoya CM'S Succession Cause No. 237 of 2019 delivered on 19th September 2022)

RULING

1. On 19th September, 2022 judgment was delivered by Hon. G. W Kirugumi Principal Magistrate sitting in Kerugoya CM's Succession Cause No. 237 of 2019. The court ordered, inter alia, that the Respondents who are the applicant's brothers and sons of the late Mithamo Gichoya, be given 1.215 hectares each out of her father's estate namely Inoi/Kamondo/327 which measures 6.50 hectares. The applicant was given only 0.20 hectares.
2. Aggrieved and dissatisfied with the judgment the applicant filed the present appeal. She also then moved the lower court and applied for stay of execution against the orders of 19th September, 2022. Her application for stay was dismissed on 20.2.2023.
3. The applicant therefore filed this application dated 12th April, 2023 seeking the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to issue an order of stay of execution of the grant issued on 19.9.2022 pending hearing and determination of this appeal.



4. The application is supported by the applicant's supporting affidavit in which she avers, inter alia: That she is afraid that the Respondents might proceed to execute the confirmed grant and in the event that this happens, her appeal will be rendered nugatory; That she will suffer loss since she will be disinherited and will not get her rightful share from her father's estate; That she has an arguable appeal with high chances of success.
5. On 30th May, 2023 the Respondents filed a Replying Affidavit with the following major averments:
 1. That the applicant's intention is merely to cause delay and deny the respondents from obtaining certificates of their shares from the deceased's estate and also deny them from enjoyment of the judgment already in their favour.
 2. That it is in full knowledge of the applicant that the deceased had prior to his demise demonstrated his wishes over his estate, where the deceased after allocated the respondents each 1.215 ha, and left 0.20ha for himself and the applicant. The applicant utilized the 0.20 ha until the demise of the deceased without any complaint at all.
 3. That respondents have both developed their relevant portions extensively since the year 2008 when the deceased positioned them each to his portion.
 4. That the deceased went further and took out letters of consent dated 16th October, 2008 to both respondents being for land parcel No.Inoi/Kamondo/3377 and Inoi/Kamondo/3379 to the respondents, respectively.
 5. The applicant in this case cannot be prejudiced in any way because she neither stays on the estate nor cultivates her share comprised in land parcel No.Inoi/Kamondo/3378.
 6. The parties filed written submissions as directed by the court.

Applicant's submissions

7. The Appellant/Applicant was dissatisfied with the trial court's judgment distributing the deceased's estate comprised of land parcel Inoi/Kamondo/327 measuring 6.50 hectares. She considers the distribution unfair as she got 0.20 hectares while her two brothers, the Respondents herein, got 1.215 hectares each. The Applicant complains her application for stay in the trial court was dismissed. She submitted that she has a meritorious appeal with high chances of success on the ground that the court discriminated against her since she is a female and is married.
8. The Applicant is therefore afraid that if stay orders are not granted, then her appeal will be rendered nugatory. She submits that should the appeal succeed, and if the grant will have been executed, then there may be complications since reversing the whole process by cancelling the titles will be more complicated if not impossible. She asserts that she is ready and willing to abide with any terms given to her by the court in terms of security.

Respondent submissions

9. The respondents submit that the filing of an appeal is not a ground for orders for stay of execution. They argue that such an applicant must at the same time satisfy the court of the substantial loss she will suffer if the stay orders are not granted. The Appellant has not demonstrated any such substantial loss because in fact there is none.



10. The respondents submit that the appellant neither stays nor cultivates on the deceased's estate, and that the deceased decided to distribute his estate during his lifetime. The Appellant was summoned to attend the meeting called by the deceased but she declined, saying she did not want land as she was satisfied with her husband's land.
11. It was submitted that if the orders issued by the subordinate court on 19th September, 2022 are to be executed, the land will be there, and that there will be no complications over any transactions applied over the estate whatsoever. As such the respondents state that the applicant must comply with the conditions set out under Order 42 rule 6(2) of the Civil Procedure Rules which requires proof that: the applicant will suffer substantial loss if the orders sought is are not granted; that the application has been filed without undue delay; and that security for the due performance of the decree has been furnished.
12. The respondents argue that the applicant has not shown any proof of substantial loss she is likely to suffer if orders for stay are not granted, and no sufficient security has been deposited or is proposed to be deposited. The respondent submits that execution is a lawful process and should therefore not be prevented in the present case because the respondents share of 1.215 Ha each were given to them inter vivos by the deceased.

Issues for Determination

13. . The core issue for determination by the court is whether stay of execution pending appeal should be granted.

Analysis and Determination

14. The applicant seeks an order of stay of execution of the grant issued on 19th September, 2022 pending hearing and determination of the appeal herein.
15. In an application for stay of execution of a decree or order pending appeal the applicant is obliged to satisfy the conditions set out in Order 42 Rule6(2) of the Civil Procedure Rules. The order provides as follows:

“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.”
16. On whether substantial loss may result to the applicant unless the order of stay is made, the applicant prefaces this with her dissatisfaction with the trial court's judgment asserting that the court unfairly granted her a smaller portion of her father's estate compared to her brothers. She received 0.20 ha while the applicants 2 brothers, the Respondents herein each received 1.215 hectares
17. The Applicant's position is that the imbalance means she has a meritorious appeal with high chances of success; that the court discriminated against her due to her being a female who is married. The Applicant is therefore afraid that if stay orders are not granted, then her appeal will be rendered nugatory, particularly since the respondents are likely to obtain titles.
18. The respondents' position is that the Applicant's intention is to cause delay and deny the respondents from enjoying a judgment already issued in their favour. They assert that their father allocated them



1.215 Hectares each and left 0.20 Hectares for himself and that they started developing their respective portions since 2008, which is over fifteen years ago. They urge that the Applicant would not be prejudiced in any way because she does not stay on the land nor cultivate her share comprised of Inoi/Kamondo/3378.

19. In the case of Kenya Shell Limited vs Kibiru & Another 1986 K, L.R.410, Platt Ag.J.A.(as he then was) 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 event...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.”

20. It is clear that the applicant will suffer if stay orders are not granted as she may lose a portion of her rightful inheritance, if the respondents go ahead and subdivide the land and obtain titles.

21. As to whether the application has been made without unreasonable delay, the appellant submits that it was filed without any undue delay. The trial court delivered its judgement on 19th September, 2022. The appellant filed this Notice of Motion application dated on 12th April, 2023.

22. In *Netplan East Africa Limited v Investment & Mortgages Bank Limited* [2013] eKLR that:

“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 the present case, the application has been brought without delay.

23. In *RWW v EKW* [2019] eKLR, the court held as follows:

“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.”

That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.”

24. The applicant submits that she is ready to abide by any condition that court deems necessary for it to grant the order. However, the respondent submits that the applicant has not shown any proof of substantial loss she is subjected to suffer from if orders for stay are not granted and no sufficient security has been deposited or is proposed to be deposited.

25. In MM *Butt v Rent Restriction Tribunal Civil Application No.6 of 1979*, it was stated that;

“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.”

26. In the present case, I do not see any persuasive reason to exercise discretion to order the applicant to provide security as the dispute involves family land.



Conclusion and disposition

27. From the foregoing discussion, I come to conclusion that the applicant has met the threshold for grant of stay of execution pending appeal. Accordingly, I do grant stay of execution.
28. This being a family matter, I do not see any rationale for receiving deposit of security as the land which is subject of the dispute will not be interfered with.
29. Orders accordingly.

DATED AT KERUGOYA THIS 14TH DAY OF NOVEMBER 2024

R. MWONGO

JUDGE

Delivered in the present of:

1. Kamuga for Respondents
2. Waweru Wanjiru for Applicants
3. Murage, Court Assistant

