



**Musungu v Ohutso (Probate & Administration 003 of 2000)
[2024] KEHC 15562 (KLR) (6 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15562 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
PROBATE & ADMINISTRATION 003 OF 2000**

DK KEMEL, J

DECEMBER 6, 2024

IN THE MATTER OF THE ESTATE OF PETER MABONGO MUSUNGU (DECEASED)

BETWEEN

ALBERT MABONGA MUSUNGU PETITIONER

AND

JACTON O OHUTSO INTERESTED PARTY

RULING

1. Vide an application dated 5th February 2024, the Applicant herein principally sought a stay of execution of the judgement delivered on 30/11/2-23 pending the lodging, hearing, and determination of the Petitioner/Applicant's intended appeal to the Court of Appeal.
2. The application is supported by the grounds set out thereunder and the supporting affidavit of the Applicant sworn on even date. The Applicant's gravamen is inter alia; that he is aggrieved by the judgement dated 30/11/2023 and he intends to appeal to the Court of Appeal; that the Applicant has an automatic right of appeal under section 75 of the *Civil Procedure Act*; that he merits an order for stay of execution pending the intended appeal as he stands to suffer a substantial loss as he might lose the suit property; that this court has the discretion to grant orders of stay of execution so as to preserve the status quo of the parties as well as the subject of the dispute; that the intended appeal will be rendered nugatory if the order for stay is not granted.
3. Opposing the application, the Respondent swore a replying affidavit on 20th March 2024 wherein he averred inter alia; that the present application for a stay does not meet the threshold required for the grant of stay of execution; that the application is an afterthought meant to scuttle the efforts of the Respondent from enjoying the fruits of the judgement; that there is nothing to stay since he has been in occupation of the land from the time he bought it from the deceased; that this court has already rendered its judgement and is now functus officio; that the appeal has no chances of success.



4. Vide Court directions, the parties canvassed the application by way of written submissions. Both parties filed and exchanged their respective written submissions.
5. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the advocates for the parties. I find the issue for determination is whether the Applicant should be granted the orders sought.
6. The principles upon which the Court may grant a 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.
7. A stay of execution should only be granted where sufficient cause is shown. In *Antoine Ndiaye v African Virtual University (2015)* eKLR Gikonyo J opined that -

“....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...”
8. 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.”



9. It has to be noted that the purpose of a 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:

“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.”

10. In addition, the court may draw upon the wide powers in Section 47 of the *Law of Succession Act* to entertain any application and to determine any dispute under the *Law of Succession Act*.

11. I need not state that, the Court may, in appropriate instances, draw upon its inherent jurisdiction to grant appropriate orders under Rule 73 of the Probate and Administration Rules in order to meet the ends of justice and to prevent abuse of the process of the Court. These elegant provisions of “existing law”, are in perfect conformity with *the Constitution* especially the strict command in Article 159 of *the Constitution* that Courts of law should strive to administer substantive justice. As such, the application is properly before the Court.

12. Stay of execution pending appeal is a discretionary power that must not be exercised on whims, but judiciously; on defined principles and the facts of the case.

13. The objective of a stay of execution is to prevent substantial loss from befalling the Applicant; ordinarily, it is to prevent the appeal from being rendered nugatory. Such is a lawful and reasonable reason to limit the respondent’s right to immediate realization of the fruits of judgment. See *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR: -

“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.”

14. The Applicant states that he will suffer substantial loss if the stay is not granted, as he and the beneficiaries will be displaced from their homes resulting in rude and irreparable disruption to their lives. The Respondent on the other hand averred that the mode of distribution of the estate is fair and non-discriminatory.

15. I do not see how the implementation of the grant or changes of boundaries will cause rude displacement of the Applicant. I am not persuaded that implementation of the grant herein will cause any prejudice which may occasion substantial loss to the Applicant as claimed. It is instructive that the Respondent has been in occupation on the portion that had been sold to him by the deceased and thus there is no need to disturb the said status quo pending the appeal. I do not think changes in boundaries would make resettlement so difficult as it has been claimed if it becomes necessary. In light of the foregoing, I decline to stay implementation of the grant herein.

16. In the result, the application dated 5th February 2024, lacks merit. The same is dismissed with no order as to costs.

It is so ordered.



DATED AND DELIVERED AT SIAYA THIS 6TH DAY OF DECEMBER, 2024

D. KEMEI

JUDGE

In the presence of :

Masengeli.....for Applicant

N/A for Musundi.....for Respondent

Kizito/Ogendo..... Court Assistant

