



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MERU**

**SUCCESSION APPEAL NO. E002 OF 2025**

**IN THE MATTER OF THE ESTATE OF M'KIUGU M'RINJURI-  
DECEASED**

FLORAH KATHURE MURIUNGI.....1<sup>ST</sup>  
APPLICANT

CELINA MWENDA KIUGU.....2<sup>ND</sup>  
APPLICANT

ELIZABETH KANANU M'IKIUGU.....3<sup>RD</sup>  
APPLICANT

QUILINA MATARA.....4<sup>TH</sup>  
APPLICANT

VERSUS

TERESIA KARURI M'ITUBIRI.....1<sup>ST</sup>  
RESPONDENT

SARAH MWARI.....2<sup>ND</sup>  
RESPONDENT

RAPHAEL KIRUAI KIUGU.....3<sup>RD</sup>  
RESPONDENT

## **RULING**

1. Vide application dated 18.2.2025 brought under Section Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B & 3A of the Civil Procedure Act, Rule 63 of the Probate and Administration Rules and Section 47 of the Law of Succession Act, the Applicant seeks the following orders:-
  - a. Spent
  - b. Spent
  - c. That this Honourable Court be pleased to grant stay of execution of the ruling delivered on 30<sup>th</sup> January,2025 in Succession Cause No. E004/2020 and CERTIFICATE OF CONFIRMATION OF GRANT issued on 9<sup>th</sup> November,2022 pending the hearing and determination of the Appeal.
  - d. The Costs of this Application be in the cause.
2. The Application is supported by an affidavit sworn by the 1<sup>st</sup> Applicant, Florah Kathure Muriungi, on the even date.
3. She deposed that she is aggrieved by a ruling delivered on 30<sup>th</sup> January,2025 in Meru Chief Magistrate's Succession

Cause No. E004/2020 and has lodged an appeal against the whole of the said ruling.

4. She deponed that she has an arguable appeal with high chances of success and unless stay of execution is granted, execution of the said ruling may proceed leading to irreparable harm and rendering her appeal nugatory.
5. She averred that respondents have recently brought a surveyor with the intention of subdividing the estate and they have also solicited for potential purchasers. That she is ready and willing to comply with any reasonable conditions that may be imposed by this court for the grant of stay.
6. In opposition to the Application, the respondents herein jointly swore a Replying Affidavit dated 17<sup>th</sup> March, 2025 wherein they deponed that the averments by the Applicant are false and intended to hoodwink, deceive, mislead and misdirect this Honourable Court.
7. They contended that the intended Appeal has no merits and aimed at delaying them from enjoying the fruits of their judgement.

8. They averred that the Applicant will not be prejudiced if they proceed with the execution of the ruling and prayed that if this court will be inclined to allow the Application, the Applicants should be ordered to pay a substantial sum and deposit the same in a joint interest earning account in the names of both advocates.
9. They prayed that the application be dismissed with costs to them.
10. The Application was canvassed by way of written submissions.

### **Applicant's Submissions**

11. The Applicants submitted that the Respondents have brought surveyors to subdivide the estate and have procured potential purchasers of part of the estate, and as such if stay is not granted, they stand to suffer substantial loss as they will lose a quarter of an acre from parcel No. KIRUA/RUIRI/5653 where the matrimonial home of the 4<sup>th</sup> Respondents sit and where their brother and father was interred.

12. On whether the Application has been made without unreasonable delay, the Applicants submitted that the ruling was delivered on 30<sup>th</sup> January,2025 and the instant application filed on 18<sup>th</sup> February,2025 and therefore the duration of 19 days amount to reasonable delay considering the 4<sup>th</sup> Applicant is an elderly woman and was hosted by the 2<sup>nd</sup> Applicant at Mombasa after the respondents destroyed her home.
13. Regarding Security of Costs, the Applicants submitted urged the court to consider that this is a succession cause and therefore there is no need for security to be provided.
14. They thus urged this court to preserve the subject matter.
15. On costs, the Applicants submitted that it is trite that costs follow the event.
- 16.** In buttressing their submissions, reliance was placed on the cases of **Butt v Rent Restriction Tribunal** (1979) e KLR; **Cotton L J in Wilson -Vs- Church (No 2)** (1879) 12ChD 454 at page 458; **Mohammed Salim t/a Choice Butchery v Nasserpuria Memon Jamat [2013] eKLR**

## **Respondents' Submissions**

17. The respondents submitted that trial's court's decision re-affirmed the certificate of confirmation of grant issued on 9<sup>th</sup> November,2022 and therefore, technically, the applicants are not appealing against the ruling of the lower court dated 30.1.2025 but appealing against the mode of distribution as per the said certificate of grant issued on 9.11.2022.
18. They thus posited that the Applicants had already sought review in the trial courts on its ruling delivered on 30<sup>th</sup> January,2025 thus this appeal is an attempt through the backdoor to defeat the rules on appeal as provided by law.
19. The Respondents submitted that nevertheless the certificate of confirmation of grant issued on 9<sup>th</sup> November,2022 had been implemented fully and therefore there is nothing to be stayed.
20. They argued that the ruling of the court dated 30.1.2025 did not interfere with the certificate of confirmation of grant dated 9.11.2022 and that it is negative order against the prayers of the Applicants.

21. The Respondents further argued that the Applicants have neither demonstrated that they have an arguable appeal with chances of success nor demonstrated the prejudice they will suffer as the said Moses Riungu had been in possession and utilizing the said portion of the land since he was bequeathed the same by the deceased in his lifetime.
22. They submitted that the applicants have not met the threshold to warrant the court issue stay order as prayed and it is for the interest of justice that the application be dismissed with costs.
23. In bolstering their submissions, the respondents relied on the cases of **RWW vs EKW (2019)** eKLR; **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014]** eKLR; **James Wangalwa & Another vs Agnes Naliaka Cheseto (2012)** eKLR; **Equity Bank Ltd v Taiga Adams Company Ltd [2006]** eKLR & **Nduhiu Gitahi and Another v Anna Wambui Warugongo [1988] 2 KAR 621**.

### **Analysis & determination**

24. Having considered the application, affidavits, submissions and authorities cited, it is my considered view that the issue for determination is whether the Applicants have met the threshold for grant of stay pending appeal.

25. Order 42 rule 6(2) of the Civil Procedure Rules provides:

***“(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.”***

26. In the case of Butt v Rent Restriction Tribunal [1982] KLR 417 the court of Appeal gave guidance on how

a court should exercise discretion in an application of stay of execution and held that:

***“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. 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. 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. 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. 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.”***

27. In **Vishram 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.
28. On whether the Appellants will suffer substantial loss, substantial loss would entail what was aptly discussed by Kimaru, J in **Century Oil Trading Company Ltd v Kenya**

**Shell Limited Nairobi (Milimani) HCMCA No. 1561 of 2007** where he stated that:

***“The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”***

29. In the instant case the Applicants claim that they will suffer substantial loss should execution proceedings commence against them as their appeal will be rendered nugatory in view of the fact that the Respondents have procured a surveyor to subdivide the estate and have also solicited for potential buyers.

30. The respondents submitted that the Applicants had already sought review in the trial courts on its ruling delivered on 30<sup>th</sup> January, 2025 and thus this appeal is not proper in law and that the order of 30<sup>th</sup> January, 2025 are negative against the prayers sought by the Applicant. This position is unascertainable since lower court file is not on record. Be that as it may, I note the Respondents did not controvert the Applicants' aforementioned averment. I opine therefore that if stay is not granted the respondents will proceed with the intended sale thus rendering the appeal nugatory. It would be in the interest of justice to preserve the subject matter pending the determination of the Intended appeal. From the foregoing, it is my view that the Applicants

have established substantial loss they would suffer if stay is declined.

31. On the issue of security, the Applicants averred that they are willing to abide by any conditions that may be imposed by this Court. However, in their submissions, they contended that since this is a succession matter the requirement for security is not necessary. On the other hand, the Respondents urged the Court to direct that security be deposited in a joint account held in the names of the advocates for both parties. In my view, considering the nature of this matter as one arising from succession proceedings, an order for security is not appropriate.

32. On whether the application has been filed without unreasonable delay. I note that impugned ruling was indisputably delivered on 30<sup>th</sup> January, 2025 while the current application was filed on 18<sup>th</sup> February, 2025, in less than a month. I therefore find that this Application has been filed without unreasonable delay.

33. With regard to whether the appeal is arguable, I am alive to the fact that in deciding an application of this nature,

the court must be careful not to delve into the merits of the case as that is under the purview of the appellate court after hearing the merits of the same. The court should therefore only be concerned with the question of whether or not the appeal will be rendered nugatory. The court in the case of **Beatrice Ndunguri Mwai & another v Sicily Wawira Titus & another** [2020] eKLR stated:-

***“There is no requirement for a party to prove that he has an arguable appeal or one that has chances of success. Where a party has satisfied the above conditions, the court exercises discretion to order a stay. In the exercise of the discretion the court is supposed to do so in a manner that would not prevent the appeal from being heard and determined on merits. This was so held by the Court of Appeal in the case of Bhutt -v- Rent Restriction Tribunal (1982) KLR 417. The Court of Appeal held that discretion must be exercised in a manner that would not prevent an appeal. The purpose of a stay of***

***execution may be stated to be a measure to preserve the subject matter so that the right of appeal can be exercised without any prejudice to the Applicant, as the appeal would be rendered nugatory if the stay is not ordered. An applicant in this kind of application invokes the discretionary powers of the court.”***

34. A cursory look at the Memorandum of Appeal shows that the grounds raised therein are triable. The Applicants inter alia contend that the deceased's widow was not provided for and that trial court failed to take into account gift inter vivos made by the deceased. This court will thus not impede the Applicants' quest to get a second opinion regarding their grievances.

35. In light of the above analysis, I find that the Applicants have met the threshold for grant of stay of execution of the orders issued on 30<sup>th</sup> January 2025 pending appeal.

36. I therefore grant order 3 of the Application dated 18.2.2025. I shall give further directions on the appeal shortly after delivery of this ruling.

37. This being a family matter, parties will bear their own costs.

38. Orders accordingly.

**Dated, signed and delivered at Meru this 8<sup>th</sup> day of October, 2025.**

**H. M. NYAGA  
JUDGE.**