



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of Ngari Thuo alias Ngari Thuu (Deceased) (Succession Appeal E016 of 2023) [2025] KEHC 16450 (KLR) (12 November 2025) (Ruling)

Neutral citation: [2025] KEHC 16450 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
SUCCESSION APPEAL E016 OF 2023
DKN MAGARE, J
NOVEMBER 12, 2025
IN THE MATTER OF THE ESTATE OF NGARI THUO ALIAS
NGARI THUU**

BETWEEN

LUCY WANJA NDURURI 1ST APPELLANT

JOHN KARURI KARIUKI 2ND APPELLANT

AND

MARGARET NYAGUTHII GITONGA 1ST RESPONDENT

JOSEPHAT NGARI NDERITU 2ND RESPONDENT

LYDIA GATHIGIA 3RD RESPONDENT

ESTHER WANJUGU NDIRITU 4TH RESPONDENT

JANE NJERI MAINA 5TH RESPONDENT

JOHN KAROKI GATHIRIKE 6TH RESPONDENT

HELINA GATHIGIA GATHIRIKE 7TH RESPONDENT

RULING

1. The matter arises from allowing the Respondents' protest on 11.09.2023. The applicants seek stay of the said judgment and decree. They allege they have occupied the suit land for a long time. The court heard the matter and found the protestors to be rightful owners.
2. This gave rise to the appeal herein and an application for stay pending appeal. In the intervening period an application dated 21.03.2024 was filed and subsequently withdrawn. It had sought to restrain burial



of Margaret Mugure Gitonga on land parcel number Kirimukuyu/Mutathini/584. This was the land that the court had in its judgment decreed that it belonged to the respondents.

3. Parties filed lengthy submissions on this simple application. I shall subsume the same in the ruling. Order 42 rule 6(1) of the Civil Procedure Rules provides the basis for stay. It provides as follows:

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(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.

4. There has to be three conditions for grant of stay. The court may not at this time deal with the prima facie case or sufficient cause. The other two conditions, that is security and substantial loss, are not met. There is no loss that is likely to arise if the transmission occurs. In the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] KECA 94 (KLR), Hancox JA stated as follows:

It is also true to say that, in consideration an application for a stay, the court doing so must address its collective mind to the question of whether to refuse it would, as Mr Kwach, urges, render the appeal nugatory. This is shown by the following passage from the judgment of Cotton LJ in *Wilson v Church (No 2)* (1879) 12 Ch D 454 at p 458, where he said:-

“I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”

That passage was cited with approval by Megarry J, as he then was, in *Erinford Properties v Cheshire County Council* [1974] 2 All ER 448 at p 454, in which case he was considering whether, having refused an interlocutory injunction to the plaintiffs on the expiry of the undertaking previously given by the Council, he yet considered whether he had jurisdiction to grant what was in effect the same relief pending the plaintiff's appeal from the dismissal of their application with costs. It was the opposite situation from an application for a stay, because, the injunction having been refused, there was nothing left, so it was submitted, to stay. Megarry J rejected that contention and held that there was nothing inconsistent with the two orders because as he said:-

“A judge who feels no doubt in dismissing a claim to an interlocutory injunction may, perfectly consistently with his decision, recognise that his decision might be reversed, and that the comparative effects of granting or refusing an injunction pending an appeal are such that it would be right to preserve the status quo pending the appeal.

5. The applicants' claim is decidedly a land question. It will be interesting to see how the appeal proceeds. However, there is no substantive loss to be suffered before the appeal is heard and determined. I agree with the Appellant that demonstrating a substantial loss is at the core of an application for stay. This



was addressed in the case of Adah Nyabok vs Uganda Holding Properties Limited (2021), where Mwera J, (as he then was) stated that:

Demonstration what substantial loss is likely to be suffered, is the core to granting a stay order pending appeal.

6. Unfortunately, on the affidavit evidence before the court there was no demonstration of loss. Any transmission is reversible. However, loss may occur if sale takes place. This is by dint of section 93 of the Succession Act, which provides as follows:
 - (1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the commencement of this Act, by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.
 - (2) A transfer of immovable property by a personal representative to a purchaser shall not be invalidated by reason only that the purchaser may have notice that all the debts, liabilities, funeral and testamentary or administration expenses, duties, and legacies of the deceased have not been discharged nor provided for.
7. It is unfortunate that the matter has dragged in court for over two years. In order to do justice to the parties, I will order that the status quo be maintained for only one year. The said order shall lapse if the appeal is not concluded by 11.11.2026.
8. In regard to costs, each party should bear their own costs. The matter will be fixed for directions shortly.

Determination

9. In the upshot, I make the following orders:
 - a. The application is partly allowed in that the status quo should be maintained pending appeal.
 - b. Costs be in the cause.
 - c. Directions to be issued shortly on hearing of the appeal.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 12TH DAY OF NOVEMBER, 2025 .
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of: -

Applicants present

Respondents present

Court Assistant – Michael

