



**In re Estate of Oloo Onunga (Deceased) (Succession Appeal
E021 of 2025) [2025] KEHC 17406 (KLR) (20 November 2025) (Ruling)**

Neutral citation: [2025] KEHC 17406 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E021 OF 2025
S MBUNGI, J
NOVEMBER 20, 2025
IN THE MATTER OF THE ESTATE OF OLOO ONUNGA (DECEASED**

BETWEEN

VICTOR ODUOR APPELLANT

AND

ANTHONY OKELLO OLOO 1ST RESPONDENT

GEORGE OSIYE 2ND RESPONDENT

AGNETTA AWUOR OLOO 3RD RESPONDENT

RULING

1. The applicant appellant herein filed an application dated 26th May 2025 seeking the following orders;
 - a. That this matter be certified urgent in the first instance. (spent)
 - b. That there be a stay of execution of the ruling delivered on 13th May,2025, pending hearing and determination of this application.
 - c. That there be a stay of execution of the ruling delivered on 13th May,2025, pending hearing and determination of the Appeal.
 - d. The cost of the application will be provided.
2. The application is supported by the affidavit of the applicant. He stated being aggrieved by the decision of the court filed a memorandum of appeal dated 23rd May 2025. The respondent is currently in the process of executing the ruling of the lower court and the occupation of the suit land.
3. He now seeks a stay order of Mumias SPM SUCC. NO. E115 OF 2024, pending the hearing and determination of the appeal, stating that the appeal has a high chance of success.



4. In opposition to the application, the respondent filed a replying affidavit dated 17th June 2025 stating that the deceased, who died on 4th April 2024, was the registered proprietor of the land parcel No. North Wanga Lung'anyiro 1573, measuring 2.24 Ha, and that, before his demise, the deceased had instituted a civil suit, Mumias MCLE Cause No. E023 of 2022, where he obtained a permanent injunction against the Appellant, the 2nd respondent, barring them from accessing the suit parcel of land and even ejecting them from the parcel of land.
5. He avers that the defendant had even appealed the decree in Kakakmega ELC Appeal No E028 of 2023, which had been dismissed on 19th June 2024, after which they filed a succession cause No. E115 of 2024 in respect to the estate and the appellant had failed to comply with the orders of the lower court and continued cutting down the trees for which he sought a restraining order, and since the deceased's estate has not been distributed, it would be improper to lift the restraining order as the appellant would continue wasting the estate by destroying the said trees.
6. The application was canvassed by way of written submissions.
7. In their submission dated 25th July 2025, the 1st and 3rd Respondent avers that before the deceased's demise, he had issued an evicting order against the appellant in MCLE Cause No. E023 for which the Appellant remains in contempt of the eviction orders, and in Mumias Succession Cause No E.115 of 2024, the court, in its ruling made on 13th May 2025, issued an injunctive order restraining the Appellant from cutting the deceased trees pending the final distribution of the deceased estate, and the appellant filed an appeal trying to suspend the injunctive orders.
8. They claim that the appellant is still in occupation of the deceased homestead and will suffer no substantial loss if the stay orders are not granted since he still is in defiance of the court orders and further his claim over the suit land is res judicata as the same was already dealt with and dismissed at appeal hence the appeal does not raise any triable issues and on the final claim of balance of convince, they aver that the court order seeks to preserve the deceased estate and as such section 45 of the Law of succession prohibits intermeddling.
9. In their submissions, the appellant avers that he has been in peaceful possession of the land that was subdivided to him by the deceased who is the deceased and that he had been utilizing the trees for domestic purposes and that the 1st respondent has now come to interfere with his land after selling off his land and that the lower court went ahead and issued the injunction on 13th May 2025.
10. On whether they had met the threshold for stay pending appeal, they quoted Order 42 Rule 6(2) of the Civil Procedure Rules. They aver that the application was brought without any delay as the impugned ruling was delivered on 13th May 2025, and they immediately filed the appeal and application. On the issue of substantial loss, they aver that they are in actual possession of the suit land and use it for their livelihood, and the restraining orders restrain him from exercising his rights over the land, yet the respondent had no equitable claim over the land. He quoted the case of Kenya Shell Ltd vs. Benjamin Karuga Kibiru & another (1986) KLR 410.
11. He avers that the appeal raises arguable and serious questions that are not a mere academic exercise, and further, the respondent will not suffer if the stay is granted.
12. He prays that the appeal be granted on the enforcement of the injunctive orders issued on 13th May 2025 by the Magistrate's court in Mumias Civil Case No. E115 of 2024 is pending the hearing and determination of the appeal.



Analysis and determination

13. This court has considered the applications, the respondents' response to the application, as well as the parties' submissions. The main issue for determination is whether the applicant has met the threshold for the grant of stay of execution pending appeal under Order 42 Rule 6(2) of the Civil Procedure Rules.
14. Order 42 Rule 6(2) of the Civil Procedure Rules state as follows;
 - “No order for stay of execution shall be made unless the court is satisfied—
 - (a) that substantial loss may result to the applicant unless the order is made;
 - (b) that the application has been made without unreasonable delay; and
 - (c) that 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.”
15. The guiding principle was stated in the case of *Antoine Ndiaye v African Virtual University* [2015] KEHC 6783 (KLR), where the court emphasised that stay is discretionary and must balance the interests of both parties, the right of the successful litigant to enjoy the fruits of judgment, and the right of the appellant to pursue an appeal that is not rendered nugatory.
16. The first issue for determination is whether the applicant will suffer any substantial loss if the stay is not granted.
17. The applicant asserts that he still resided on the suit land and further that he depended on the land for his domestic use daily and that the injunction orders that were issued will deny him access to resources which he avers are essential for his livelihood.
18. The respondents on the other hand content that the injunction orders that were granted were in fact to preserve the deceased estate from wastage by the appellant who is currently using it contrary to the wishes of the deceased this court is left to balance out the rights of the appellant to pursue an appeal with the need to protect the estate and that of the respondent for preserving the estate from being intermeddled. The primary object of stay is preservation of the subject matter pending determination of the appeal, as was stated in the case of *RWW v EKW* [2019] KEHC 6523 (KLR), where the court observed that stay serves to ensure that “the appeal is not rendered nugatory by the execution of the decree.”
19. I also bear in mind Section 45 of the *akn ke act 1972 14 Law of Succession Act*, which prohibits intermeddling with estate property before confirmation of the grant. However, granting a stay does not in itself amount to intermeddling; rather, it preserves the status quo as the parties await the appellant court's decision.
20. I am persuaded that the injunction, if executed in full, would occasion him hardship and render the appeal nugatory.
21. On whether the stay application was instituted without undue delay, I note that the lower court ruling was delivered on 13th May 2025, and the present application was filed on 26th May 2025, within a fortnight. There is therefore no unreasonable delay.
22. On whether the appeal raises an arguable issue as alluded to by the appellant, without delving into the appeal, I note that the case raises issues to do with intermeddling and who is the rightful owner of the deceased land as the appellant claimed that that the deceased subdivided the land among his children



and they each had their own share for which the respondent now wants a portion. The issues raised are not frivolous in my view and need to be addressed at appeal, and kindly note that an arguable appeal need not necessarily succeed.

23. Having considered all the evidence placed before me for consideration, I am persuaded that the applicant has satisfied the conditions for the grant of a stay pending appeal.

24. Accordingly, the court makes the following orders:

- a. The Notice of Motion dated 26th May 2025 is hereby allowed.
- b. There shall be a stay of execution of the ruling delivered on 13th May 2025 in Mumias SPM Succession Cause No. E115 of 2024, pending the hearing and determination of Succession Appeal Cause No. E021 of 2025.
 - i. The parties shall not alienate, waste, or interfere with the estate property (North Wanga Lung'anyiro 1573) and shall maintain the status quo pending appeal.
 - ii. Each party to bear its own costs for this Application.
 - iii. Mention 24.6.2026 for Directions on the motion of Appeal.
 - iv. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT KAKAMEGA THIS 20TH DAY OF NOVEMBER, 2025.

S.MBUNGI

JUDGE

In the presence of:-

CA: Angong'a

Parties present.

Advocates absent.

