

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT THIKA
FAMILY APPEAL NO. E014 OF 2025
IN THE MATTER OF THE ESTATE OF EKIRA NJERI THUKU
alias NJERI THUKU (DECEASED)

MARY NJERI NGURE.....1ST

APPELLANT/APPLICANT

ALICE WANJIKU NGURE.....2ND

APPELLANT/APPLICANT

ALAN THUKU NGURE.....3RD

APPELLANT/APPLICANT

VERSUS

VIRGINIA NJOKI THUKU.....

RESPONDENT

R U L I N G

Brief facts

1. This application dated 12th August 2025 seeks for orders of stay of execution in respect of the judgment in Thika CM Succession Cause No. 312 of 1998 In the Matter of the Estate of Ekira Njeri Thuku (Deceased) delivered on 24th July 2025 pending hearing and determination of the

appeal and further to restrain the respondent from executing the said ruling.

2. In opposition to the application, the respondent filed a Replying Affidavit dated 29th August 2025.

Appellants'/Applicants' Case.

3. The applicants state that the trial court in Thika CM Succession Cause No. 312 of 1998 delivered its ruling on 24th July 2025 in favour of the respondent where the trial court granted an order amending both the grant of letters of administration intestate and certificate of confirmation of grant. The trial court further ordered the removal of caution on Title No. LOC 3/MUKANGU/311 placed by the 1st applicant and ordered the OCS Githumu Police Station to provide security during the survey works and subdivision of the suit property.
4. The applicants argue that the caution placed on the suit land is critical to preserving their interests in the estate and its premature removal will cause irreparable harm to them and other beneficiaries.
5. The applicants aver that they have an arguable appeal and that they are ready and willing to abide by any reasonable conditions that the court may make as a condition for the orders of stay of execution.

The Respondent's Case

6. The respondent states the deceased died intestate leaving behind two biological children who are herself and her late brother James Ngure. The late James Ngure had two wives namely Mary Njeri Ngure and the late Victoria Mueni who bore him a total of ten children. The respondent states she together with Mary Njeri Ngure and two children of the late Victoria Mueni participated in the succession cause.

7. The respondent argues that the 1st applicant, a daughter in law of the deceased, was given her share of the estate as per the certificate of confirmation of grant. The respondent further argues that pursuant to **Section 38 and 66 of the Law of Succession Act**, grandchildren are not primary beneficiaries where their parent is alive or provided for. Thus, the 2nd and 3rd applicants being children of the 1st applicant are not entitled to the deceased's estate.

8. The respondent states that the applicants have not demonstrated any substantial loss they are likely to suffer if the orders sought are not granted. Further, the respondent states that the present application has been brought in bad faith and is intended to delay and frustrate the conclusion of the succession cause.

9. The respondent argues that the applicants have no locus standi to interfere with the administration of the estate especially where their parent was already included and represented.

10. Parties disposed of the application by way of written submissions.

The Applicants' Submissions

11. The applicants rely on **Order 42 Rule 6 of the Civil Procedure Rules** and the cases of **Antoine Ndiaye vs African Virtual University [2015] KEHC 6783 (KLR)** and **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** and submit that they stand to suffer substantial loss if the orders sought are not granted as they will be permanently disinherited from the estate of the deceased. Furthermore, the removal of the caution will result in the sub division and distribution of the estate to their exclusion before the appeal is heard rendering the appeal nugatory.
12. The applicants submit that the core substratum of the appeal is the rightful entitlement of the 1st and 2nd applicants as children of the late James Ngure which arises under **Section 41 of the Law of Succession Act**. The applicants argue that the Section 38 of the Law of Succession Act applies to situations where the intestate is survived by children and Section 66 of the Act guides the court on preference in appointment of administrators. Neither provision displaces the clear mandate of Section 41 which specifically provides that the children of a deceased child of the intestate are entitled to take directly the share their parent would have taken had he been alive.

13. The applicants further argue that Section 41 of the Act does not allow the 1st applicant as a daughter in law to displace the rights of her children by virtue of her survival. The failure to name the 2nd and 3rd applicants expressly as beneficiaries while his two other children Boniface Kimani Ngure and Gerald Thuku Ngure were duly recognized amounts to unlawful exclusion contrary to Section 41 of the Act. To support their contentions, the applicants refer to the case of **Re Estate of Wanaki Mutongawanjiru alias Wanaki Mungai (2024) KEHC 604 (KLR)**.
14. The applicants submit that they have been in use of the suit land by cultivating and planting thereon and they risk being deprived of the land and losing the fruits of their cultivation and their means of livelihood occasioning substantial loss to them as rightful heirs to the deceased's estate.
15. Relying on the decision in **Appleton Resort vs Muthaiga Fine Meats Limited (Civil Appeal E310 of 2023) [2024] KEHC 2690**, the applicants argue that they would be placed at a more prejudicial position than the respondent if the orders sought are not granted.
16. The applicants submit that the application has been filed timeously as the impugned ruling was delivered on 24th July 2025 while the instant application was filed on 12th August 2025. The applicants further rely on the case of **Focin Motorcycle Co. Limited vs Ann Wambui**

Wangui & Another [2018] KEHC 8358 (KLR) and submit that they are ready and willing to abide by such terms or conditions that may be imposed by the court as a condition for granting stay of execution.

The Respondent's Submissions

17. The respondent relies on **Order 42 Rule 6 of the Civil Procedure Rules** and the case of **Butt vs Rent Restriction Tribunal [1982] KLR 417** and submit that the applicants have failed to demonstrate how they stand to suffer substantial loss. The respondent further argues that the orders made by the learned magistrate on 24th July 2025 were purely administrative and procedural in nature. The respondent submits that the estate was already distributed and she is merely seeking enforcement of what was already decreed by the succession court.
18. The respondent argues that the act of removing a caution or directing police to oversee a lawful subdivision exercise cannot amount to irreparable harm or substantial loss. The respondent submits that the applicants will still retain their share in accordance with the confirmed grant.
19. The respondent submits that the applicants are desirous of delaying the matter which has taken over 25 years to finalize. Further, the applicants were part of the succession proceedings and they were fully aware of the distribution of the estate. The respondent argues that the orders being challenged were made to correct technical

errors and facilitate implementation and not to redistribute the estate.

The Law

Whether the applicants have satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal

20. **Section 47 of the Law of Succession Act** gives the court jurisdiction to entertain any application such as the present one which seeks to preserve the status quo pending the appeal. Order 42 Rule 6(2) of the Civil Procedure Rules lays down the conditions which a party must establish in order for this court to order stay of execution. These conditions are:-

- a) Substantial loss may result to him/her unless the order is made;
- b) That the application has been made without unreasonable delay; and
- c) The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

21. These principles were enunciated in **Butt vs Rent Restriction Tribunal [1979]** the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that:-

- 1. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.**
- 2. Secondly, 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 the appeal court reverse the judge's discretion.**
- 3. Thirdly, 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. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. 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 of costs as ordered will cause the order for stay of execution to lapse.**

22. On the issue of substantial loss, the case of **Re Estate of Wanga Ole Oiyie [2022] eKLR** Gikonyo J. relied on the case of **James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR** where the court held:-

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.

23. The applicants state in their affidavit that they stand to suffer substantial loss if stay is granted. It is only in their submissions that the applicants argue that they stand to suffer substantial loss as the estate of the deceased shall be subdivided and distributed to their exclusion. The respondent argues that the applicants have not been excluded as the 1st applicant has been provided for and therefore her children cannot inherit from the deceased as being their surviving parent, they cannot inherit from their grandfather pursuant to Section 38 and 66 of the law of Succession Act. I have perused the pleadings and noted that the applicants did not demonstrate that they stand to suffer substantial loss. The issue was brought up in their submissions. That notwithstanding, I have noted that the 1st applicant

was present in the succession proceedings as she is an administrator and she was provided for as the daughter in law of the deceased for her benefit and that of her children.

24. It is my considered view that the applicants have not demonstrated that they stand to suffer any substantial loss. The record shows that the applicants were provided for in the estate and as such, they shall not be rendered homeless and destitute as they claim. Additionally, the applicants have contended that the appeal shall be rendered nugatory if the orders sought are not granted. It is my considered view that the impugned ruling and the subject of appeal herein arise from an application for rectification of a grant and not on the mode of distribution of the estate. It is further noted that the applicants have not lodged an appeal against the distribution of the estate as per the grant certificate dated 25th November 2005.

25. Having considered the foregoing issues, I am not convinced that the appeal will be rendered nugatory as the appeal lies on the amendment of the grant and does not touch on the distribution of the estate.

26. The instant application was filed on 12th August 2025 and the ruling was delivered on 24th July 2025, thus the application has been brought timeously.

27. On the issue of security, it is trite law that security is discretionary and it is upon the court to determine the

same. However, the applicants ought to have offered security of costs just in case the appeal does not succeed. They have simply stated that they are ready and willing to abide by any reasonable conditions that the court may make as a condition for stay of execution.

28. Additionally, grant of stay being a discretionary order, the court is expected to balance out the interests of the successful litigant and the applicants' unfettered right to file an appeal to fully ventilate their grievances. This was well stated in the case of **M/s Porteitz Maternity vs James Karanga Kabia Civil Appeal No. 63 of 1997** where the court held:-

That the right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the plaintiff of that right.

In this appeal, the respondents are likely to suffer awaiting the determination of this appeal if the orders sought are granted.

29. Bearing the said balance in mind and considering the provisions of Order 42 Rule 6 of the Civil Procedure Rules, it is my considered view that the applicants have not met the threshold of granting stay of execution pending appeal. I have also perused the grounds of appeal and without going into the merits of the appeal

noted that the appeal raises arguable points of law but the appeal has limited chances of success. However, the applicant shall have his day in court with or without orders of stay of execution.

30. Accordingly, it is my considered view that the application dated 12th August 2025 lacks merit and is hereby be dismissed.

31. The costs shall abide in the appeal.

32. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 13TH DAY OF NOVEMBER 2025.

F. MUCHEMI
JUDGE