

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MURANG'A**

**HCFA NO. E020 OF 2024**

**AGNES  
APPELLANT**

**NJERI.....**

**VERSUS**

**JOSEPH NJUGUNA  
RESPONDENT**

**KABUGUA.....**

**RULING**

1. This ruling is in respect of the Notice of Motion dated 12<sup>th</sup> November 2024. Prayers I, II, and III, are now spent and what is pending this court's determination are the following prayers:
  - i. That there be stay of ruling and all consequential orders pending the hearing and determination of this appeal;  
and
  - ii. That the costs of this application be provided for.
  
2. The application is anchored on the grounds stated on its face and the depositions made in the supporting affidavit sworn by the applicant, *Agnes Njeri* on 12<sup>th</sup> November, 2024. In

brief, the applicant claims that she filed an application for revocation of grant before the lower court which was dismissed with costs to the respondent on 6<sup>th</sup> September 2024.

- 3.** She averred that the respondent has filed a bill of costs in the lower court and if stay of execution was not granted, she stands to suffer irreparable damage as she will be condemned to pay costs before she was heard on her appeal. She further stated that the application was made in good faith and that if allowed, it will not occasion any prejudice to the respondent.
  - 4.** The application is opposed vide a replying affidavit sworn by the respondent on 17<sup>th</sup> December 2024. In the affidavit, the respondent deposed that the applicant's application was frivolous, malicious and a mere academic exercise as her appeal had been overtaken by events; that the appeal did not have any chances of success.
  - 5.** Further, the respondent contended that the application was not filed in good faith as it was calculated to delay the matter and deny him enjoyment of fruits of his judgement.
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- 6.** It was also the respondent's case that the applicant had not met the conditions required for grant of an order of stay of execution pending appeal; that she had not demonstrated that she was likely to suffer substantial loss if stay orders were not granted nor had she shown her willingness to furnish security for costs for the bill of costs filed in the lower court and costs of the appeal should it be eventually dismissed.
- 7.** On 26<sup>th</sup> March 2025, this court directed that the application be prosecuted by way of written submissions. The applicant's submissions dated 14<sup>th</sup> May 2025, were filed by his advocates on record *Ms. Waweru Nyambura & Co. Advocates* while those by the respondent dated 5<sup>th</sup> June 2025 were filed by his advocates, *Ms. Wambo Munyala & Co. Advocates*.
- 8.** I have carefully considered the application together with the affidavits filed in support and in opposition to the application alongside the submissions filed by the parties. Having done so, I find that the only issue arising for my determination is

whether the applicant had demonstrated that he was deserving of the orders of stay as sought.

9. Although *Order 42* of the *Civil Procedure Rules* is not one of the provisions that were imported into the law of succession and conduct of succession proceedings by *Rule 63 (1)* of the *Probate and Administration Rules*, the conditions set out under *Order 42 Rule 6 (2)* of the *Civil Procedure rules* which an applicant must satisfy before being entitled to orders of stay of execution pending appeal are a good guide to the court when exercising its discretion in determining application such as the instant one in succession matters.
10. One of the key conditions that an applicant seeking stay pending appeal should demonstrate is that he or she stood to suffer substantial loss if the stay orders were not granted.
11. What constitutes substantial loss was articulated by the Court of Appeal in ***Kenya Shell Limited V Benjamin Karuga Kibiru & another (1986) eKLR*** when it expressed itself as follows:

***“.....If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence it is difficult to see why the respondents should be kept out of their money.”***

12. Similarly, in ***James Wangalwa & Another V Agnes Naliaka Cheseto (2012) eKLR*** the court held as follows:

***“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. 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.....”***

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I wholly agree with the above holding.

- 13.** In the instant application, the applicant contends that she will suffer substantial loss if stay was not granted as the respondent had already filed a bill of costs in the lower court. She expressed apprehension that if stay was not granted, the bill will be taxed and if execution proceeded for the taxed costs, she will be compelled to pay the costs before getting an opportunity to challenge the lower court's ruling.
- 14.** The applicant also contended that if execution of the impugned ruling proceeded, the respondent will interfere with her proprietary rights in the land subject matter of the appeal.
- 15.** The respondent on the other hand urged the court to find that the orders sought had been overtaken by events as the Ministry of lands had already effected changes over titles to *land parcels Loc.1/Thuita/1077 and Loc.1/Thuita/1078* pursuant to the orders issued by the ELC court sitting in Murang'a in ELC MISC E004 of 2023 and fresh titles issued; that the orders sought have consequently become moot.

- 16.** From the material placed before me in this application, it is apparent that the applicants main concern is that the respondent had filed a bill of costs and if stay was not granted, taxation would proceed as well as execution for the taxed costs before she was heard on her appeal.
- 17.** I have noted the bill of costs which has been annexed to the application. The total amount claimed in the bill is Kshs. 118,320. The amount is likely to reduce if the bill was taxed but even if the amount was maintained after taxation, the applicant has not claimed let alone demonstrated that if stay was not granted and the taxed costs were paid to the respondent, the respondent was incapable of refunding the amount paid if her appeal was successful. The applicant has not therefore satisfied this court that if stay was not granted, her appeal would be rendered nugatory.
- 18.** It is also clear from the impugned ruling and the decisions made by the ELC Court which were availed to this court that the parties are embroiled in a bitter dispute involving

ownership of land whose title has already passed to the respondent.

**19.** In addition, the ruling sought to be stayed dismissed the applicant's summons for revocation of grant of letters of administration issued to the respondent and consequently, it resulted in negative orders. There is therefore nothing capable of being stayed by this court.

**20.** For the above reasons, I am satisfied that this application lacks merit and it is hereby dismissed with costs to the respondent.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **MURANGA** this 16<sup>th</sup> day of December 2025.

**HON. C. W. GITHUA**  
**JUDGE**

**In the presence of;**

*Mr. Gachari for Mr. Waweru Nyambura for the Appellant*

*Mr. Mwaura for Mr. Andati for the Respondent*

*Ms Susan Waiganjo, Court Assistant*