Gakio & another v Gakio & 2 others (Succession Cause E077 of 2022) [2026] KEHC 65 (KLR) (15 January 2026) (Ruling)

Neutral citation: [2026] KEHC 65 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

SUCCESSION CAUSE E077 OF 2022

RN NYAKUNDI, J

JANUARY 15, 2026

BETWEEN

NAOMI WANJIRU GAKIO ..... 1ST APPLICANT

NELSON MWANIKI GAKIO ..... 2ND APPLICANT

AND

DANIEL G KARANJA GAKIO ..... 1ST RESPONDENT

SAMUEL MWANIKI GAKIO ..... 2ND RESPONDENT

FAITH TABITHA NYANJORA GAKIO ..... 3RD RESPONDENT

RULING

1. Before this Court is an application dated 3rd of October 2025 seeking the following orders:
   a. Spent.
   b. That there be stay of execution of the orders issued on 16th September 2025 in this cause pending the hearing and determination of this application inter-parties.
   c. That there be a stay of execution of the orders issued on 16th September 2025 in this cause pending the hearing and determination of the appeal to the Court of appeal.
   d. That costs of this application be provided for.
2. Which application is based on the following grounds:
   a. That the intended appeal is arguable with high chances of success.
   b. That the intended appeal will be rendered nugatory.
   c. That the application has been brought without undue delay.

d. That this honourable Court has unfettered discretion to grant orders ought.

3. In support of the application is the supporting affidavit sworn by Naomi Wanjiru Gakio who deponed as follows:

a. That I am a female adult individual of sound mind and the 1st administrator/applicant hereto, well versed with the facts hereof and duly authorized by the 2nd administrator/applicant hereto to swear this affidavit on my behalf and on his behalf thus competent to swear this affidavit.

b. That the honourable Court pursuant to the Applicants/Respondents application dated 30th May 2024 delivered its ruling on 16th September 2025 in favour of the Applicants/ Respondents.

c. That being aggrieved by the said ruling and/or decision made on 16th September 2025, the 2nd administrator/applicant and I instructed our advocates M/s Mukabane & Kagunza Advocates ILP to lodge a notice of appeal to the Court of appeal to challenge the said decision which appeal we wish to be heard on.

d. That our appeal raises matters which are arguable to warrant a pronouncement by the full Court as follows: -

i. That the learned Judge erred in law and in fact in failing to appreciate and apply correctly the principle of survivorship and dependency.

ii. That the learned Judge erred in law and in fact in holding that authorities cited establish that survivorship operates to exclude property from succession law, but they do not preclude a Court from examining whether true joint tenancy was intended in the first place hence an erroneous conclusion.

iii. That the learned Judge erred in law and in fact in holding that Dorcas Njoki Mwangi's consistent behavior in treating the properties as family assets, approving equal sharing arrangements and never asserting exclusive ownership rights created legitimate expectations among the Applicants that they would continue to benefit from these properties.

iv. That the learned Judge erred in law and in fact in holding that the Applicants are entitled to a reasonable provision reflecting both their connection to the properties through their father's original ownership and the legitimate expectations created over a decade of joint family management with the deceased approval.

v. That the learned Judge erred in law and in fact in failing to find that the Respondents had failed to prove that they were dependants of the deceased within the meaning of section 29(a) of the Succession Act to qualify as beneficiaries to the deceased estate.

vi. That the learned Judge erred in law and in fact in ordering that the properties Eldoret Municipality Block 13/277, Block 13/278, Block13/284 and Block 15 (Huruma) be held in equal shares by all the five children of Evanson Gakio Mwaniki without any basis in law.

vii. That the learned Judge erred in fact and law by failing to find that the Respondents had not proven dependency upon the estate of Dorcas Njoki Mwangi.

viii. That the learned Judge erred in law and fact in predisposing his mind to a position favourable to the Respondents against the Appellant and thereby arrived at a wrong decision.

ix. That the learned Judge erred in fact and law by failing to consider the weighty evidence and affidavit made by the Appellants.

x. That the learned Judge erred in law and in fact in considering issues that were neither raised, neither pleaded nor submitted upon by the Respondents.

xi. That the learned Judge erred in law and in fact in failing to consider the issues pleaded and dealt on extraneous issues thereby arriving at a wrong decision.

e. That being dissatisfied we have put in our memorandum of appeal dated 3/10/2025 (marked as NWG3)

f. That we are advised by our advocate on record which advise we verily believe to be correct that the appeal to the Court of appeal raises very serious and weighty legal issues with high chances of success for determination hence the need to grant the orders sought.

g. That the appeal will be rendered nugatory for the reason that in the event that the appeal succeeds to undo any dealings on the estate of the deceased by the Applicants/Respondents will be a difficult exercise that will costs finances and use of judicial time which can be put to better use.

h. That if the Applicants/Respondents are allowed to proceed to execute and/or give effect the decision of the Court and/or order made on 16th September 2025, the 2nd administrator/ applicant and I will be seriously prejudiced.

i. That the 2nd administrator and I are willing to abide by any condition that this Court may impose for grant of the orders sought.

j. That this application is brought promptly.

k. That this honourable Court has powers to grant the orders sought in orders to prevent the ends of justice from being defeated.

l. That no prejudice will be suffered if the orders sought are granted.

4. The application is opposed by a way of a Replying affidavit dated 3rd of October 2025 and sworn by Naomi Wanjiru Gakio who deponed as follows:

a. That I am the 2nd Respondent herein duly authorized by my co-Respondents to swear this affidavit on their own behalf and, therefore, swear the same on their behalf as well as on own behalf.

b. That I am well versed with the issues herein and therefore, competent to make and swear this affidavit.

c. That I have read, understood and where necessary I have taken legal advice from M/s Stanley Advocates who are on record for the Respondents, the Applicants summons dated 3rd October 2025 and the supporting affidavit thereto sworn by Naomi Wanjiru Gakio and wish to state as follows in opposition thereto: -

d. That I verily believe that no sufficient cause has been laid out by the Applicants to warrant the grant of the orders of stay of execution pending appeal sought for the reason that the Applicants have failed to demonstrate what substantial loss they may face unless a stay of execution is granted in their favour for the following reasons: -

e. That the state of affairs which the current stay seeks to disrupt is the one that has subsisted for almost two decades, with a miniature hiatus between June 2023 and 15th November 2024, when the orders for preservation of the rent income were issued, for the following reason: -

   a. That upon the demise of the family patriarch, Evanson Gakio Mwaniki. in 2012 through to demise of the deceased herein in 2019 and further to June 2023. The Respondents and the Applicants had been jointly managing the properties and sharing the surplus arising from the rents collected thereon in equal shares between themselves with the proceeds thereon being channeled into a bank account held in the names of all the Applicants and the Respondents.

   b. That prior thereto the family patriarch was the one who solely managed the properties up to his demise.

   c. That the contrary directive of June 2023 by the Applicants to tenants to channel the rent income to a separate account was the one that led my co-Respondents and Ito appoint the current advocates whose investigations revealed the introduction of the deceased herein as a joint owner to the family patriarch on 28.11.1994 with respect to the Eldoret Municipality/Block 13/277, Eldoret Municipality/ Block13/278 and Eldoret Municipality/Block13/284 (described as Pioneers plots numbers 277, 278 and 284) situated at Pioneer area of Eldoret municipality, now city) and on 05.07.2005 with respect to Eldoret Municipality/ Block 15/ 33(described as Huruma property) situate in Huruma area of Eldoret Municipality now city, and further the discovery of filing of the present succession proceedings clandestinely filed without our knowledge and thereby the institution of the proceedings for acknowledgement as dependents of the deceased's estate with respect to the four (4) properties and determination of their shares.

   d. That this honourable Court had further on 15th November 2024 issued orders directing the Applicants to forthwith channel all the rental income into a joint account to be opened in the joint names of their advocates.

   e. That the full import and purport of the orders issued by the honourable Court herein is for joint ownership and management of the properties by the Applicants and the Respondents. As such, the properties are not in danger of being wasted pending the hearing and determination of the intended appeal as the Applicants will and have always been participants in the management thereof.

   f. That from the foregoing no substantial loss would be endured by the Applicants herein.

   g. That the Applicants are coming before this honourable Court with unclean hands in that they have failed to observe the orders granted by this honourable Court on 15th November 2024, almost a year now gone by, for deposit of the rents collected from the subject properties in a joint account opened in the name of the advocates for the parties.

h. That I validly believe that the raison d'etre of the present application is to unjustly allow the Applicants to continue enjoying the rent income, both present, past and future, accruing from the four (4) properties to the exclusion of the Respondents who have a valid and regular judgment from this honourable Court.

i. That I therefore swear this affidavit urging the honourable Court to decline the orders sought by the Applicants.

Applicant's Submissions Summary

1. The learned Counsel for the Applicant, Mr. Kagunza, submitted that the Applicants are aggrieved by the ruling delivered on 16 September 2025 and have already lodged an appeal, hence the present application for stay of execution and/or proceedings pending appeal. Counsel argued that the intended appeal is arguable, raises serious and weighty points of law, and has high chances of success. It was contended that unless stay is granted, the substratum of the appeal will be destroyed, rendering the appeal nugatory.

2. On substantial loss, Mr. Kagunza submitted that execution of the impugned orders would drastically alter the existing status quo to the detriment of the Applicants. In particular, the equal sharing of ownership and rental income from Eldoret Municipality Block 13/277, 13/278, 13/284 and Block 15 (Huruma) would occasion irreparable prejudice, given that the Applicants currently enjoy the rental income exclusively following the demise of Dorcas Njoki Mwangi and by operation of the principle of jus accrescendi. Counsel argued that reversal of such execution, should the appeal succeed, would be costly, time-consuming, and detrimental to the estate, thus constituting substantial loss. The Applicants further submitted that the appeal was filed promptly and expressed willingness to abide by any security terms imposed by the Court.

3. In support, reliance was placed on In Re Estate of Erastus Sagala Lunyaga (Deceased) [2023] KEHC 22243 (KLR), where the Court emphasized caution in succession matters to avoid reversals that would render an appeal futile. Further reliance was placed on Mugah v Kungai (1988) eKLR, Butt v Rent Restriction Tribunal, John Kuria v Kalen Wahito, and Hannah Ngina & 2 Others v Francis Kamau Thairu, all cited for the principle that in land and succession disputes, preservation of the status quo is paramount pending appeal. Counsel therefore urged the Court, in the interests of justice, to grant stay orders as prayed.

Respondent's Submissions Summary

4. The learned Counsel for the Respondents, Mr. Gachuba, submitted that the Applicants' application seeks stay of execution of the orders issued on 16 September 2025 pending appeal, a jurisdiction well settled in both statute and precedent. He argued that the Applicants have failed to demonstrate substantial loss, which is the cornerstone for grant of stay. Counsel emphasized that this case is distinguishable from typical monetary decrees, as the subject properties are rental properties jointly owned and managed by the parties.

5. Mr. Gachuba submitted that historically, the Applicants and Respondents had shared rental income equally for over fourteen years, even before Court intervention. He further argued that even the deceased herself did not treat the properties as exclusively hers, but allowed all the children to enjoy equal rights. The brief period during which the Applicants exclusively enjoyed rental income (June–November 2024) was said to be an anomaly arising from interim legal complexities. Counsel contended that the orders of 16 September 2025 merely restored joint ownership and management and do not expose the estate to waste or dissipation.

6. On the question of status quo, it was submitted that the operative status quo flows from the orders of 15th November 2024, which required rental income to be deposited in a joint advocates' account. Any exclusive enjoyment of rent by the Applicants thereafter was in disobedience of Court orders and cannot ground a claim for substantial loss. Counsel further invoked equitable principles, arguing that the Applicants have approached the Court with unclean hands, having allegedly defied existing Court orders, and therefore do not merit equitable relief.

7. Finally, Mr. Gachuba submitted that the balance of convenience favours continued equal enjoyment of the properties and rental income, as had been the position for over fifteen years. He argued that granting stay would unjustly perpetuate exclusive benefit to the Applicants at the expense of the Respondents, notwithstanding a valid judgment in their favour. Consequently, the Respondents urged the Court to dismiss the application for stay for failure to demonstrate sufficient cause or substantial loss.

Decision

5. The point of contention is the decision of this Court which was pronounced with the following declarations in mind:

    i. Taking into account the substantial nature of the estate (valued at approximately Kshs. 90 million), the fact that the disputed properties originated from the Applicants' father's sole ownership, and the pattern of equal sharing that operated with the deceased's blessing for over eleven years, this Court finds that justice and equity require that the four properties be distributed equally among all five children of Evanson Gakio Mwaniki.

    ii. Accordingly, the Court orders that the properties Eldoret Municipality Block13/277, Block 13/278, Block 13/284, and Block 15 (Huruma) be held in equal shares by all five children. The rental income from these properties, from the date of this judgment going forward, shall be distributed equally among all five children in the same proportions. Any rental income that was diverted to the Respondents' exclusive control from June 2023 to the date of this judgment shall be accounted for and distributed equally among all parties.

    iii. There shall be no order as to costs, given the family nature of this dispute.

6. The application is anchored in Order 42 Rule 6(2) of the CPR. This provisions have been articulated in the case of Stephen Wanjohi v Central Glass Industries Ltd, Nairobi High Court Civil Case No. 6726 of 1991 in which the Court observed that for an order of stay of execution to issue there must be:Sufficient causeSubstantial lossNo unreasonable delaySecurity.The grant of stay is discretionary and the High Court is also a Court of equity. It is not just to deny a successful party the benefit of judgment because he is poor. The Court does not make a practice of depriving a successful litigant of the fruits of his litigation and locking up funds to which prima facie he is entitled pending appeal. Financial ability of a decree holder solely is not a reason for allowing stay; it is enough that the decree holder is not a dishonourable miscreant without any form of income.

7. In a brief elaboration on these general principles which underscore exercise of discretion, I take the liberty to discuss the contemplation of the law.Substantial Loss/Rendering Appeal Nugatory: The primary consideration is whether refusing a stay would render the appeal nugatory or cause the applicant to suffer substantial loss that could not be compensated by damages.Prospect of Success: The court often assesses whether the appeal has some prospect of success, a "real" chance rather than a "fanciful" one.Balancing Rights: The court balances the competing rights of the appellant (to have a meaningful appeal) and the judgment holder (to the fruits of their judgment).Security for Costs: The court may order the applicant to provide security for the due performance of the decree,

such as depositing the decretal sum into an interest-earning joint account or court.Promptness: The application for a stay must be made without unreasonable delay.

8. The other principles in which the Court exercises its unfettered discretion to grant a stay of execution, amongst other interlocutory reliefs are settled that the applicant should satisfy the Court not only that the intended appeal is not frivolous but also that unless the order of stay of execution is made the appeal or intended appeal, if successful, would be rendered nugatory.

9. I take cognizance of the right of appeal as a constitutional imperative but at the same time parties should bear in mind that its not an absolute right. In answer to the issues raised by the Applicant notwithstanding the legal discussion alluded to elsewhere in this ruling I am persuaded to include the cases of Marie Makhoul and Marguerita Desir V Sabina James Alcide SLYHCVAP No. 30/2011The general rule is for no stay, as a successful litigant is entitled to the fruits of his judgment without fetter. Accordingly, there must be good reasons advanced for depriving or in essence enjoining a successful litigant from reaping the fruits of adjudgment in his favor, particularly after a full trial on the merits.The modern authority on the guiding principles the court employs in exercising its discretion to grant a stay is the case of Linotype-Hell Finance Ltd v Baker where Stoughton L.J. opined that a stay would normally be granted if the appellant would face ruin without the stay and that the appeal has some prospect of success. It must be emphasized that it is not enough to merely make a bald assertion to the effect that an applicant will be ruined. Rather what is required is evidence which demonstrates that ruination would occur in the absence of a stay.The authority of Hammond Saddar Solicitors v Agrichem International Holdings is grounded in the same principle though formulated differently. In that case the court pointed out that the evidence in support of a stay needs to be full, frank and clear. They went on to state the principle thus: u ... " whether the court should exercise its discretion to grant a stay will depend on all the circumstances of the case, but the essential question is whether there is a risk of injustice to one or other or both parties if it grants or refuses a stay. In particular, if a stay is refused what are the risks of the appeal being stifled? If a stay is granted and the appeal fails, what are the risks that the respondent will be unable to enforce the judgment? On the other hand if a stay is refused and the appeal succeeds and the judgment is enforced in the meantime what are the risks of the appellant being able to recover any monies paid from the respondent?"Similarly, in the Marguerite Desir case the court held inter alia as follows: "The court's jurisdiction to grant a stay is based upon the principle that justice requires that the court should be able to take steps to ensure that its judgments are not rendered valueless. The essential question for the court is whether there is a risk of injustice to one or both parties jf it grants or refused a stay. Further, the evidence in support of the application for stay of execution should be full, frank and clear. The normal rule is for no stay and if a court is to consider a stay, the applicant has to make out a case by evidence which shows special circumstances for granting one. The mere existence of arguable grounds of appeal is not by itself a good enough reason."

10. Applying the above principles, the court is required to look at all of the circumstances of the case in considering whether there is a risk of injustice to one or other or both parties, and whether the appeal has some prospect of success. The onus is on the applicant to adduce evidence to show that there is a risk of injustice to the applicant if the stay is not granted.

11. I having considered the notice of motion, the affidavit of the applicant and the counter affidavit by the respondent I am of the view that the applicant has not placed before Court exceptional circumstances to warrant the grant of this application on stay of execution. This application therefore is standing on nothing and the inevitable fate is that it must fall like a pack of cards. As for costs the same shall be shared equally by each party.

12. Accordingly, the application fails and is hereby dismissed.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 15th DAY OF JANUARY 2026

…….

R. NYAKUNDI

JUDGE