

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

HIGH COURT SUCCESSION CAUSE NO. E026 OF 2023

IN THE ESTATE OF REGINA WAIRIMU WACHIRA

[DECEASED]

EMMAH WAMBUI WACHIRA &

PANGARASIO WACHIRA WANGOMBE

PETITIONERS

RULING

1. This is in respect of an application filed under a certificate of urgency on 13. 10.2025. It is opposed on the grounds of opposition filed on 21.11.2025. The application seeks the following orders:
 - a. Spent
 - b. That pending the hearing and determination of this application inter-partes there be a stay of execution of the Judgment (Honourable Justice Kizito Magare) on 18th day of September, 2025 in Nyeri High Court Succession No. E026 of 2023 in the Matter of the Estate of Regina Wairimu Wachira - Deceased and all consequential orders including the transmission of the parcel of land known as Nairobi/Block/108/13.

- c. That pending the hearing and determination of this application inter-partes there be a stay of execution of the Judgment (Honourable Justice Kizito Magare) on 18th day of September, 2025 in Nyeri High Court Succession No. E026 of 2023 in the Matter of the Estate of Regina Wairimu Wachira - Deceased and orders including the transmission of the parcel of land known as Nairobi/Block/108/13 and order *status quo* in regard to the transmission of the parcel of land known as Nairobi/Block/108/13.
- d. That the costs of this application abide in the appeal.
2. The curse of generations is usually manifested in succession matters. It is never over until it is over. Parties appeared before me and stated that they had agreed. The agreement did not have a consensus *ad idem*. I proceeded to hear their views and delivered a judgment on 18.09.2025 in respect of one parcel of land in Nairobi/Block 108/13. had agreed in respect of parcels of land as follows:
- a. Land Parcel Number No. Muhito.Muyu.1172;
 - b. Land Parcel Number No. Nairobi/Block/108/13;
 - c. Land Parcel Number No. Nairobi/Block/84/811;
 - d. Land Parcel Number No.
Nairobi/Block/70(unregistered)

3. The parties shared out properties, leaving Land Parcel Number No. Nairobi/Block 108/13. The rest were shared as follows:
 - a. Land Parcel Number No. /Muhito/Muyu/1054 be shared equally between Pangarasio Wachira Wangombe and Clement Gathuku Wachira;
 - b. Land Parcel Number No. Nairobi/Block/84/811 be given to Clement Gathuku Wachira and:
 - c. Land Parcel Number No. Nairobi/Block/70 to Emmah Wambui Wachira
4. It was said that the entitlement of Pangarasio Wachira Wangombe was sold after being given a gift *inter vivos*. After listening to the evidence, I directed that the property be given to Emmah Wambui Wachira. It should be remembered that there was consensus on the other three properties.
5. The application before the court seeks orders for stay of execution. Evidence was placed before the court that a sum of Ksh. 1,200,000/= was paid after the deceased had gifted the suit land to Emmah Wambui Wachira *inter vivos*. Further, payments for land rates were made in the year 2016. When the application came up for *inter partes* hearing, the applicant proposed that each of the beneficiaries refund Emmah Wambui Wachira a sum of Ksh.

400,000/=. He was categorical that he was unwilling to refund any amount exceeding Ksh. 400,000/=. Notably, the applicant was indifferent to the fact that Clement Gathuku Wachira had expressed no interest in the intended appeal.

6. The respondent opposed the application on the grounds that the threshold set out in Order 42 rule 6(1) of the Civil Procedure Rules was not met. These were in respect of the lack of security and the loss. The applicant was of the view that the residue of the estate can be distributed, and that each of the beneficiaries should share in the payments of Ksh. 400,000/=. I slated the ruling for today.

7. Order 42 rule 6(1) of the Civil Procedure Rules provides the basis for a 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.

8. There are three conditions for the grant of a stay. These are:

- a. Substantial loss.
- b. The application has been made without unreasonable delay.
- c. Security.

9. The issue of stay was addressed 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.

10. The applicant’s claim is decidedly a land question. The court is unable to discern any substantial loss the applicant will suffer. Secondly, the applicant had not given security for the due performance of the decree. There is no substantive loss to be suffered before the appeal is heard and determined. Demonstrating a substantial loss is central to an application for a stay. This was addressed in the case of **Adah Nyabok vs Uganda Holding Properties Limited** (2021), Mwera J, (as he then was) stated that:

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

11. The appellant declined to provide security for the due performance of the decree. Without security and substantial loss, the court cannot order a stay of execution. In any case, the applicant admits that the Respondent has expended substantial amounts of money on the suit. It is the Respondent who may suffer some prejudice. However, there is no loss if the court transmits the estate.

12. In the circumstances, I find and hold that the application herein is misplaced and lacks merit. It is accordingly dismissed. I decline to determine the question of competence of the underlying appeal as it does not change the subject matter.

13. Costs are generally discretionary. However, the discretion is not arbitrary. The Court of Appeal in the case of **Farah Awad Gullet v CMC Motors Group Limited [2018] KECA 158 (KLR)** had this to say:

"It is our finding that the position in law if that costs are at the discretion of the court seized up of the matter with the usual caveat being that such discretion should be exercised judiciously meaning without caprice or whim and on sound reasoning secondly that a court can only withhold costs either partially or wholly from a successful party for good cause to be shown.

14. The parties are siblings, and it will be important that the costs lie where they are. Each party to bear its own costs.

Determination

15. In the upshot, I make the following orders:
a) The application for stay is dismissed.
b) Each party to bear its own costs.

DELIVERED, DATED and SIGNED at **NYERI** on this **26th** day of **January, 2026**. Ruling delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of: -

Mr. Tango for Mr. Ndung'u for the Respondent

Mr. Chango for the Applicant (muted)

Court Assistant – Michael