

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

(FAMILY DIVISION)

SUCCESSION CAUSE NO.18 OF 2017

IN THE MATTER OF THE ESTATE OF MWATELA CHARO RUMBA

(DECEASED)

KAINGU USHURU MCHAROOBJECTOR

VERSUS

BARAKA MWATELA

STEPHEN NYAMAWI MWATELAPETITIONERS/RESPONDENTS

RULING

1. Before this court is a Chamber Summons application dated 11th December 2025, vide which the applicants seek the following orders:
 - a) Spent;
 - b) That there be a stay of proceedings and stay of execution of the judgment/decree of this court pending hearing and determination of this application;
 - c) That there be a stay of proceedings and stay of execution of this court's judgment/decree pending hearing and determination of the appeal; and
 - d) That the costs of this application be provided for.

2. The application is based on the grounds stated therein and the supporting affidavit of Kazungu Ushuru Mcharo. He stated that the subject judgment was delivered on 24th November 2025, allowing the administrators/respondents to file a summons for confirmation of the grant, which they did. Dissatisfied, they filed a notice of appeal. The 1st administrator/respondent is likely to dispose of the deceased's property, being Plot No. Kilifi/Mtwapa/231 as soon as the same is registered in his name. Failure to stay the proceedings and allowing the summons for confirmation of the grant will greatly prejudice them, as the appeal will be rendered nugatory and an exercise in futility. He further contended that the respondent is not a man of means able to compensate them in the case the appeal is successful. It was stated that the application was brought without delay.
3. In response, the respondents filed a replying affidavit sworn by **Stephen Nyamawi Rumbah on 19th December 2025**. He stated that the summons for revocation of the grant, which was the subject matter of the judgment delivered on 24th November 2025, was taken by the objector herein, whereas the chamber summons was filed by Kazungu and Garama Charo, who are not parties to this matter.
4. He stated that the subject judgment merely dismissed the objector's summons for revocation of the grant and therefore, there is no positive order that this court could stay. He contended that the applicants had not demonstrated the substantial loss they stood to suffer if the succession cause proceeds to confirmation. Further, the allegation that the respondent

is likely to dispose of the estate property is false, speculative, unsupported, and no evidence was tendered before this court on the same.

5. He further stated that the filing of notice of appeal without more does not automatically entitle the applicants to a stay. The applicants had not demonstrated that their appeal would be rendered nugatory, nor have they annexed a draft memorandum of appeal or any material to demonstrate the existence of an arguable appeal.
6. He stated that staying proceedings at this stage would not only unjustly delay the administration and distribution of the estate to the detriment of the beneficiaries, but also that it is not contemplated in succession laws. That the application has been brought in bad faith and is intended to delay and obstruct the lawful administration of the estate, especially as the application has been made by a nephew of the deceased who was not a dependant of the deceased. He urged the court to dismiss the application with costs.
7. The applicants filed a further affidavit sworn by both of them on 6th February 2026. They stated that there is a mistake with regard to Kaingu Ushuru Mcharo's name as indicated in the Chamber Summons and the supporting affidavit, and the same is not fatal to warrant dismissal of the application. That the Notice of Appeal was filed by both of them.
8. They further stated that there is a likelihood of substantial loss should the honourable court not grant orders of stay and that the averment concerning the respondents disposing of the property is not speculative but a possibility which needs no evidence. They contended that the appeal will be rendered nugatory should the property be sold by the respondents and

that they do not need to annex a draft memorandum of appeal or any material to demonstrate the existence of an arguable appeal since this court is not seized of the appeal. They further averred that they have a right of appeal despite any timelines by the law of succession and that the application has not been brought in bad faith.

- 9.** The applicants, through their advocates Odhiambo S. E & Co. Advocates, filed their written submissions dated 6th February 2026. Counsel submitted that there are principles upon which the court grants orders for stay of proceedings and stay of judgment/decree. It was contended that it was the Court of Appeal that would hear the appeal and determine whether the applicants had an arguable appeal.
- 10.** Counsel further submitted that the applicant's intended appeal would be rendered nugatory if the orders are not issued and the respondent proceeds to confirm the grant, obtain a title in his name, and probably dispose of all or part of the subject plot, and the applicants will not recover the same should the appeal succeed. It was urged that the respondents have not demonstrated that they have the means to compensate the applicants should the appeal succeed. Further, the respondents will suffer no prejudice while awaiting the hearing and determination of the appeal. Counsel urged the court to allow the application as prayed.
- 11.** The respondents' counsel did not file any submissions.
- 12.** I have considered the applications, the supporting affidavit and the annexures thereto, the response by the respondent, the submissions on

record, and the applicable law. Should there be a stay of execution and the proceedings?

- 13.** Order 42 Rule 6 of the Civil Procedure Rules provides that:
- 6. (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.**
- 14.** Order 42 rule 6(2) outlines three conditions that an applicant for a stay of execution pending appeal must satisfy. These are:
- (a) Show that he will suffer substantial loss unless a stay is granted;**
 - (b) Demonstrate that the application was filed without undue delay; and**
 - (c) Provide security for the due performance of any decree or order that may ultimately be binding.**
- 15.** In dealing with this issue of substantial loss, I am tasked with balancing the interests of both parties by considering the applicant's right to appeal and the respondent's right to enjoy the fruits of the judgment. In the

case of **Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & another (Garnishee) [2018] KEHC 446 (KLR)**, the court stated that:

“In dealing with the issue of substantial loss, I am alive to the fact that the applicant ought to establish that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful party in the appeal...

I have very carefully considered that the onus of proving substantial loss lies with the applicant, and while appreciating the applicant’s undisputed right to appeal, I have to balance the applicant’s right to appeal with the corresponding right of the Respondent to enjoy its fruits of its judgement; as well as the need to demonstrate that the Respondent couldn’t repay the decretal sum if the appeal is successful. The burden of proof does not shift as he who alleges must prove.”

16. The applicants have argued that they will suffer substantial loss as there is a likelihood of the 1st respondent disposing of the deceased’s property, being Plot No. Kilifi/Mtwapa/231 as soon as the same is registered in his name.

17. The court in the case of **JAMES WANGALWA & ANOTHER V AGNES NALIAKA CHESETO [2012] KEHC 1094 (KLR)** stated,

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

18. The applicants had the burden of proving their allegation. Reading their application, I am not persuaded that there is a likelihood that the respondent will sell the suit premises. It is my view that the argument by the applicants is speculative, as the matter is still pending confirmation of the grant. Further, the applicants have not tendered any evidence to prove their case on substantial loss, and thus, it is my view that they have not established grounds for substantial loss.

19. On whether the application was filed without undue delay, the judgment was delivered on 25th November 2025, and the application was filed on 11th December 2025, seventeen days later. In my view, the application was filed without undue delay.
20. On the provision of security, the parties have not submitted on the same. Being a succession matter, it is my view that it is not applicable in this matter.
21. The three conditions under Order 42 Rule 6(2) of the Civil Procedure Rules are conjunctive, and not disjunctive; they must all exist for the order of stay to issue. I have found that the applicants have not demonstrated that they would suffer substantial loss. That being the case, the prayer for stay of execution pending appeal must fail.
22. The foregoing notwithstanding, it would seem to me that the judgment of the court dismissed the summons for revocation of the grant. The respondents argued that no order staying execution could issue in this matter as the order in the judgment was negative.
23. In the impugned judgment, the court stated as follows:
“The upshot of the foregoing is that the applicant hasn’t proved his case. The summons for revocation of the grant dated 21st June 2018 is hereby dismissed for being without merit...having said that, the applicant's conduct has been oppressive. He and his siblings have done everything possible to disinherit the 1st

petitioner and his mother, and have even gone to the extent of uttering false/forged documents. This court cannot ignore such misconduct. In the circumstances, I dismiss the summons dated 21st June, 2018. I grant the petitioners/respondents the costs of the application.”

24. In the case of **Electro Watts Limited v Alios Finance Kenya Limited [2018] KEHC 9459 (KLR)**, the court stated that:

“This court dealt with the issue of negative orders in the case of Milcah Jeruto vs Fina Bank Ltd [2013] eKLR , where it held that an order for stay cannot be granted where a negative order had been issued. Under Section 2 of the Civil Procedure Act, the definition of a decree holder alludes to an order that was capable of being executed.”

25. I agree with the above-stated holding.

26. On stay of proceedings, the court in the case of **Kenya Wildlife Service v James Mutembei [2019] KEHC 10478 (KLR)** stated:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, the right to be heard without delay, and overall, the right to a fair trial. Therefore, the test for stay of proceedings is high and stringent. See Ringera J in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, persuasively stated thus:

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)”

27. I have not seen any extraordinary circumstances in this case that would warrant such an extraordinary remedy. It is therefore my view that the applicants have not established grounds for issuing stay of proceedings pending appeal. The said prayer must fail.

28. To stay proceedings would be unjust in any case. This is an old matter. The deceased has been dead for almost 40 years. At some point, litigation must end. Further delay in distributing the estate of the deceased is unjust and inequitable.

- 29.** Based on the foregoing, I find and hold that the application herein lacks merit. The same is hereby dismissed with no orders as to costs.
- 30.** Orders accordingly.

**Dated, signed in Mombasa this 25th day of February 2026. Delivered
virtually through Microsoft TEAMS.**

**Gregory Mutai
JUDGE**

In the presence of:

Mr. Omollo, for the Administrators/Respondents;

No appearance for the Applicants

Hamisi – Court Assistant.