

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MURANG'A
HCFA E010 OF 2024

**HUMPHREY NJOROGE GIKONYO (suing as the legal
representative of GIKONYO
NJUGUNA.....
.....APPELLANT**

VERSUS

MUNGAI **NJUGUNA.....**
.....RESPONDENT

RULING

- 1.This ruling is in respect to the applicant's Notice of Motion dated 31st July, 2024, seeking an order for stay of execution of the decree in Murang'a Succession Cause No. 355 Of 1986, pending the hearing and determination of this appeal.
- 2.The application is anchored on the grounds stated on its face, and on the depositions made in the supporting affidavit sworn on the 31st of July, 2024, by the applicant, *Humphrey Njoroge Gikonyo*. In brief, the applicant avers that he contested the respondent's mode of distribution of land parcel Loc 5/Kagumoini/504, at the lower court as he is entitled to an equal share in the said parcel of land.
- 3.He deposed that a decree had been issued by the Chief Magistrate's Court at Murang'a in Succession Cause No. 355 of 1986, and that execution of the said decree is imminent; consequently, if execution proceeds, the appeal will be rendered nugatory. He contended that the substratum of his appeal is the distribution of land parcel Loc 5/Kagumoini/504, which the lower court dismissed without costs, and if the execution of the decree proceeds, the substratum of the appeal will be defeated.

4. The applicant further contended that he will suffer substantial loss if the execution of the decree proceeds, that the application has been filed without delay and that no prejudice will be suffered by the respondent if the orders sought are granted, as he will be heard during the trial. He averred that unless the prayers sought are granted, he will suffer irreparable damage and substantial loss.
5. The respondent did not file his response to the application despite this court giving him several opportunities to do so.
6. The application was canvassed by way of written submissions. In his written submissions dated 7th August, 2025, the appellant submitted that the ruling by the lower court dismissing his application for revocation of grant was delivered on 26th March, 2024, and that he filed his Memorandum of Appeal on 2nd May, 2024. Consequently, the present application was brought without undue delay, thereby demonstrating his diligence and genuine intention to prosecute the appeal.
7. The applicant contended that unless stay is granted, he risks imminent eviction from the suit property, which he currently occupies with his family, and which he has used for more than 40 years. He further contended that the property forms part of the deceased estate, and being a grandson of the deceased, he has a legitimate claim in the said property, given that his late father, Gikonyo Njuguna, a son to the deceased, was not given a share of the property.
8. He submitted that an eviction would cause irreparable harm, emotional distress and render the intended appeal nugatory, as his property would be damaged and alienated during execution. He further submitted that his appeal is arguable and not frivolous. The respondent did not file his written submissions.
9. I have duly considered the application and the written submissions by the applicant, having done so, I find that the

main issue arising for determination is whether the applicant should be granted the orders sought.

10. The law governing stay of execution pending appeals is found **in Order 42 rule 6 of the Civil Procedure rules**. Order 42 rule 6 (1) of the Civil Procedure rules provides as follows:

“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.”

11. On the other hand, **Order 42 rule 6 (2)** which provides for conditions to be fulfilled before a party is granted an order for stay of execution pending appeal, stipulates thus:

“No order for stay of execution shall be made under sub rule (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.”

12. It is trite that an order for stay of execution is a discretionary power which must be exercised on defined

principles and facts. This position was restated by the court in the case of **Butt v Rent Restriction Tribunal (1982) KLR**; as follows:

“If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal, if successful, may not be nugatory. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings. It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise its best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson v Church (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p 458: “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.” Megarry J, as he then was, followed Wilson (supra) in Erinford Properties Limited v Cheshire County Council [1974] 2 All ER 448 at p 454 and also held that there was no inconsistency in granting such an injunction after dismissing the motion, for the purpose of the order is to prevent the Court of Appeal’s decision being rendered nugatory should that court reverse the judge’s decision. The court will grant a stay where special circumstances of the case so require....”

13. The main objective of an order of stay of execution is to prevent substantial loss and to ensure that an appeal is not rendered nugatory before it is heard. This position was reiterated by the court in **James Wangalwa & Another versus Agnes Naliaka Cheseto [2012] eKLR** where the court held as follows:

“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.”

14. Suffice it to say, a stay of execution should only be granted where sufficient cause is shown. In **Antoine Ndiaye versus African Virtual University (2015) eKLR**; *Gikonyo J* opined as follows:

“stay of execution should only be granted where sufficient cause has been shown by the applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the Civil Procedure Rules.”

15. That said, the applicant in his written submissions deposes that he had filed an application for revocation of grant at the lower court, which application was dismissed by the said court. He stated that the grant in question, relates to land parcel no. Loc 5/Kagumoini/504, which he is entitled to as grandson of the deceased, given that his late father, Gikonyo Njuguna, a son to the deceased, was not given a share of the property.

16. The applicant averred that he and his family are currently in occupation of the suit land and have been in continuous use of it for a period of about forty (40) years. He further contended that there is a real risk of eviction from the suit property, which would render the intended appeal nugatory should an order of stay of execution not be granted.

17. Based on the above analysis, I am of the considered view that the applicant has demonstrated that he is likely to suffer

substantial loss if an order of stay of execution is not granted. This is because the applicant has shown that he stands to be disinherited and evicted from the suit land, to which he claims entitlement as a beneficiary, being a grandson of the deceased and further considering his allegation that his late father was excluded from inheriting the said land.

18. I have also noted that the present application was brought before court without undue delay. I say so having noted that the ruling by the trial court was delivered on 26th of March, 2024, and the present application was filed on 31st of July, 2024, a period of about four (4) months, which in my view is not inordinate. As regards security for costs, given that this is a succession matter, the applicant is not required to offer security for costs as a condition for stay of execution pending appeal.

19. ***Flowing from the foregoing, the applicant's prayer for stay of execution pending the hearing and determination of his appeal is hereby granted. This being a succession matter, and considering also that the respondent did not file any documents in this suit, each party shall bear their own costs.***

DATED, SIGNED AND DELIVERED ELECTRONICALLY THIS 12TH DAY OF MARCH, 2026.

**HON. T. W. Ouya
JUDGE**

ORIGINAL