Kibuna & another v Kibuna (Family Appeal E007 of 2025)
[2026] KEHC 4583 (KLR) (9 April 2026) (Ruling)

Neutral citation: [2026] KEHC 4583 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

FAMILY APPEAL E007 OF 2025

TW OUYA, J

APRIL 9, 2026

BETWEEN

WAITARA KIBUNA ..... 1ST APPELLANT

PAUL KARANJA KIBUNA ..... 2ND APPELLANT

AND

DAVID NGURE KIBUNA ..... RESPONDENT

(Being an appeal arising from judgment and order of the Hon. J Irura SPM delivered in Kigumo Senior Principal Magistrate's Succession Cause no. 9 of 2017)

RULING

1. By an application dated 11th June 2025, the Applicants moved this honourable court seeking an inhibition restraining the Respondent from selling, alienating, disposing or in any other way dealing with land parcels no. LOC.2/Kangari/6038; LOC.2/Kangari/5598 and LOC.2/Kinyona/4650 pending the determination of the appeal. The application was hinged on the grounds that the Respondent secretly filed Kigumo Succession cause No. 9 of 2017 without involving other beneficiaries. That he subsequently acted in haste and administered the estate in accordance with the sham confirmed grant and is benefitting from his illegal scheme.

2. The Respondent opposed the application through his affidavit of 11th July 2025 where he contended that the allegation of concealment was a misrepresentation of facts calculated to delay the administration of the estate of Kibuna Watara. The Respondent contended that he commenced the succession proceedings via a citation dated 21st February 2017 which he duly served upon the applicants and all other beneficiaries. Nevertheless, the applicants neither entered appearance nor responded to the application. Accordingly, the Respondent proceeded to institute Kigumo Succession Cause no. 9 of 2017 and all the pleadings served upon the applicants and all other beneficiaries. At the end of the trial, all the assets were equally shared among the beneficiaries. There was no objection during the

pendency of the succession cause at the trial court. Nevertheless, the applicants filed summons for revocation of grant but the same was dismissed by the trial court. It was the Respondent's averment that the applicant's case was vexatious and an abuse of the court process.

3. The court directed that the application be canvassed through written submissions.

4. The Applicant submitted that the application for confirmation of grant lodged by the Respondent failed to conform with Rule 26 of the Probate and Administration rules for failure to be accompanied by a consent duly signed by all persons entitled to the share of the same estate. The Applicant contends that the Respondent, having been convicted of causing grievous harm, to his brother, the 2nd Applicant had no standing to take out letters of administration on behalf of the estate of the deceased. Also, the Applicants submitted that the Respondent distributed properties to Mary Nyambura Kibuna despite the said Mary renouncing her share of the deceased's estate. Without the consent form required under the rules being duly signed by the beneficiaries, it was submitted by the Applicants, that the succession cause was not proper. Reliance was placed on the case of Al Amin Abdulrehman Hatimy v Mohamed Abdurehman Mohamed and another (2013) KLR. The applicants thus desired that the application be allowed as prayed.

5. The Respondent submitted that the Applicants, contrary to the established principle that whoever desires a court to believe a fact in issue should lead evidence to prove that fact, has failed to demonstrate any evidence of fraud, concealment or exclusion to support their allegations. The Respondent submitted that he had duly demonstrated, by three affidavits of service annexed to his Replying affidavit, that the Applicants had been duly served with all the court pleadings. Therefore, a party once served lacks the competence to feign ignorance of the proceedings. In any case, the issues raised by the Applicants had already been canvassed before the trial court in the summons for revocation of grant but the same were duly dismissed. The Respondent demonstrated to the court that the estate of the deceased was duly distributed in compliance with the grant and the properties forming part of the estate subdivided and transmitted to lawful beneficiaries. New titles were also issued vesting absolute ownership on the beneficiaries in accordance with the law. the application was therefore an attempt to circumvent the court process.

6. It was also submitted by the Respondent that the applicants had failed to demonstrate any real or imminent risk that the suit properties are about to be disposed, alienated or transferred as the parcels have already been transferred to the lawful beneficiaries as per the confirmed grant issued in Kigumo Succession No. 9 of 2017. The applicants were therefore not entitled to an order of inhibition. The Respondent thus prayed that the application be dismissed with costs.

7. The main issue for determination is whether the application is merited.

8. The attendant provision governing issuance of stay of execution orders in succession matters, as invoked by the applicants is Rule 49 of the Probate and Administration Rules. Rule 49 of the Probate and Administration Rules provides that:

> "A person desiring to make an application to the court relating to the estate of a deceased person for which no provision is made elsewhere in these Rules shall file a summons supported, if necessary, by affidavit."

9. Additionally, the court can draw upon the powers under section 47 and Rule 73 of the Probate and Administration Rules in order to meet the ends of justice.

10. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

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.

11. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely

a. that substantial loss may result to the applicant unless the order is made,

b. that the application has been made without unreasonable delay, and

c. that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

The above was reiterated in Antoine Ndiaye v African Virtual University [2015] eKLR.

12. In James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, the Court observed that:

> " 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 ... 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."

13. As this is a succession matter, the applicants are not in a position to offer security as a condition of stay. The main determinant would be the substantial loss that would be occasioned if the orders sought are not granted. In Machira t/a Machira & Co. Advocates v East African Standard (No 2) (2002) KLR 63 the Court of appeal considered as to what amounts to substantial loss and held that:

> " 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 ... 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. Rather than establishing substantial loss, the applicants' arguments reveal a deep-seated hatred for the Respondent without any demonstrable evidence that he has not faithfully dealt with the estate as per the confirmed grant. The applicants have not demonstrated any genuine concern about equitable distribution of the estate. The court's distribution, developed through extensive processes, already ensures that each beneficiary receives a fair share while respecting existing occupancy patterns. Further

delay in implementing this scheme would only prolong the delay that beneficiaries have already endured to access their rightful inheritance.

15. The Court, in RWW v EKW [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs."

16. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.

17. The deceased herein died intestate and the intended appeal does not challenge the dismissal of the protest but rather the confirmation of grant in the absence of the consents signed by beneficiaries after a protest was heard, determined and dismissed.

18. Having regard to the matter, I am not inclined to grant the stay of transmission of the estate as the Respondent's assertion that the appellants were duly served with court process was not controverted. Moreover, the 2nd Appellant confirmed that he attended a meeting at the chief's office prior to the commencement of the succession cause and was thus aware of its existence. I therefore find that the instant application is unmerited and decline to grant the stay order pending the hearing and determination of the appeal.

19. In conclusion, the final orders are that the application for stay of execution pending appeal is hereby dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF APRIL, 2026.

HON. T. W. OUYA

JUDGE

For Appellant/Applicants – Ms. Mugo h/b for Karanja Kanyiri

For Respondent – Ms. Murira

Court Assistant - Nyabuto