

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT CHUKA
CIVIL APPEAL NO. E022 OF 2025
IN THE MATTER OF THE ESTATE OF JERUSHA
NKABUNE (DECEASED)

CHARLES VITINYA.....APPLICANT

VERSUS

JOHN MUCHIRI MUTHOMI.....1ST RESPONDENT

THURANIRA NKABUNE.....2ND RESPONDENT

RULING

1. For determination is the Application dated 27th October 2025 seeking the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of the application interpartes, the honourable court be pleased to order a stay of execution of the entire judgment of Hon. D.A Ocharo in Chuka Succession Cause No. 175 of 2013 which was delivered on 5th June 2025.

- c. That pending the hearing and determination of the appeal, the honourable court be pleased to order a stay of execution of the entire judgment of Hon. D.A Ocharo in Chuka Succession Cause No. 175 of 2013 which was delivered on 5th June 2025.
 - d. That the honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this application
 - e. That costs of this application be provided for.
2. The Application is premised on the grounds on the face of the application and on the supporting affidavit of John Muchiri Muthomi the Applicant who deposed that he had filed a Memorandum of Appeal against the judgment of Hon. D.A Ocharo in Chuka Succession Cause No. 175 of 2013 delivered on 5th June 2025.

3. He stated that on 9th November 2015, the Respondent who was the administrator of the estate of the late Jerusha Nkabune vide a confirmation of grant sold to him his beneficial interest of 0.64 acres excised from Igoji/Kiangua/1886. Further, the Respondent has already commenced the execution of the said judgment and decree against him and if he succeeds he will be rendered homeless and destitute.

4. He also stated that in order to preserve the suit premises whereupon he has been in possession since 2019 and it is imperative he be granted stay of execution to safeguard his interests as purchaser. In addition, his intended appeal has a high probability of success and it will be rendered nugatory if stay orders are not granted.

5. In response, the Respondent filed a replying affidavit dated 10th July 2025. He stated that the

estate of the late Jerusha Nkabune comprised of:-
LR Igoji/Kiangua/1866 measuring 2 acres, LR
Igoji/Kiangua/1862 measuring 2 acres and LR
Igoji/Kiangua/1867 measuring one acre.

6. He also stated that the estate was to be shared as per paragraph 3 of the impugned judgment amongst the six beneficiaries to which the appellant is not a beneficiary of the estate thus locking the distribution of the estate and preventing the beneficiaries from enjoying their respective shares.

7. He further stated that the Appellant has obtained stay of the entire judgment which involves three acres of land which he alleges to have bought 0.64 acres without demonstrating what interest he has in the other parcels to object to the distribution as per the grant.

8. It was stated that the appellant's interest is to frustrate the beneficiaries to the estate as he has

leased almost three and half of tea bushes from those who have been using the land yet the estate has only 5 acres. Further, that his share in parcel No. LR Igoji/Kiangua/1866 is 0.83 acre while the Appellant is alleging to have bought 0.64 acres and if he had any claim he should have lodged a claim from his share and not the whole estate. In addition, that the Appellant does not stay on the deceased's estate and he has no structure therefore he would not be rendered homeless and destitute.

9. It was also stated that the beneficiaries being; Mercy Kaburi Muriithi, Polly Kanana Muriithi, and Gitonga Ngaruthi have never been in occupation of the estate whose shares have been unlawfully leased to the Appellant who does not want the estate to be distributed as he continues to enjoy picking tea on the 3.5 acres of the entire estate

thus the application should be dismissed in the interest of justice.

10. The Application was canvassed by way of written submissions. the Appellant filed written submissions dated 2nd October 2025 raising the following issues for determination: -

- i. Whether the judgment should be stayed pending the hearing and determination of the Appeal
- ii. Whether the Application should be allowed as prayed
- iii. Who shall bear the costs of the application.

11. The Respondent filed written submissions dated 31st October 2025 which submissions address the entire application in whole.

12. From the pleadings and submissions on record, I find one issue for determination, being whether the orders sought for stay of execution are meritorious.

13. The Applicant submitted that he bought land from the deceased which forms part of the estate of the deceased. He contended that he bought the land one year after the Respondent obtained confirmation of grant and the portion he bought was to be excised from LR. No. Igoji/Kiangua/1866 to wit the Respondent's portion as per the distribution was 0.64 acres. That the Respondent transferred the same to him on 3rd July 2019.

14. He submitted that this application was made without unreasonable delay.

15. It was his contention that he stands to suffer great substantial loss if stay is not granted as he is a bonafide purchaser for value. That after he purchased the portion of land, the grant issued to the Respondent was revoked due to issues among the beneficiaries which revocation has made him live in fear of losing the land he purchased. In support of his argument, he relied on the case of

Stanley Kiplagat Rono v William Kiprotich Cherus [2021] eKLR where the court stated that the purpose of stay pending appeal is to preserve the substratum of the case especially in land matters where the character of the suit property may be changed while the appeal is pending.

16. He also relied on the case of **Wajibu Ventures Limited v Mungai; Muthui (3rd Party) [2022] KEELC 15247 (KLR)** where the court cited the authority of **Mwangi & Another v Mwangi & Another [1986] KLR 328** that rights of a person in possession or occupation are equitable rights and binding on the land.

17. He also submitted that the Respondent has not provided any proof that he has leased 3.5 acres of the land. That he is a bonafide purchaser protected by Section 93 (1) of the Law of succession Act. In support of his argument, he relied on the case of **Wajibu Ventures limited**

(Supra). He urged the court to allow the application with costs to the Respondent.

18. On his part, the Respondent submitted that the Applicant has not demonstrated why he seeks to have the entire judgment stayed yet his interest is in part of parcel no. Igoji/Kiangua/1866. That the Respondent has been allocated 0.64 acres in LR. Igoji/Kiangua/1866 which the Applicant should place a caveat on. He urged the court to allow the rest of parcels not in dispute be distributed as he has not demonstrated what loss he will suffer in the rest of the estate is distributed.

19. The law governing stay of execution pending appeal is found under Order 42 Rule 6(2) of the Civil Procedure Rules. An applicant must demonstrate that the application has been brought without unreasonable delay, that he stands to suffer substantial loss unless the order is granted,

and that he is willing to provide security for the due performance of the decree.

20. These principles have been consistently applied by the courts. In **Butt v Rent Restriction Tribunal, [1982] KLR 417** the Court of Appeal held that the power to grant stay is discretionary and must be exercised in a manner that does not render an appeal nugatory. Similarly, in **Kenya Shell Limited v Benjamin Karuga Kibiru [1986] KECA 94 KLR**, the Court of Appeal emphasized that substantial loss is the cornerstone of the jurisdiction to grant stay, and it must be specifically demonstrated.

21. Turning to the present application, the impugned judgment was delivered on 5th June 2025 while the application was filed on 27th October 2025, a period of approximately four months later. The Applicant has not offered any explanation for this delay. While there is no rigid

timeline for filing such applications, delay must be satisfactorily explained. In the absence of any explanation, this court finds that the application was not brought without unreasonable delay.

22. On the question of substantial loss, the Applicant contends that he will be rendered homeless and destitute if stay is not granted. However, this assertion has been challenged by the Respondent, who states that the Applicant does not reside on the suit property and has no developments thereon. The Applicant has not provided evidence to demonstrate occupation or developments on the land in question.

23. Moreover, it is not lost to me that the Applicant's alleged interest is limited to a portion measuring 0.64 acres out of one parcel of land, namely LR No. Igoji/Kiangua/1866. Despite this, the Applicant seeks to stay execution of the entire judgment affecting multiple parcels and

beneficiaries. Such a blanket order would be disproportionate. In **James Wangalwa & Another v Agnes Naliaka Cheseto**, Gikonyo J. held that execution alone does not amount to substantial loss; an applicant must demonstrate other factors that would irreparably affect the subject matter of the appeal. The Applicant herein has failed to do so.

24. Further, the court must consider whether the appeal would be rendered nugatory if stay is not granted. While the purpose of stay is to preserve the substratum of the appeal, such preservation must be commensurate with the interest claimed. The distribution of the remainder of the estate, which does not directly concern the Applicant, would not render the appeal nugatory.

25. Finally, the Applicant has not offered any security for the due performance of the decree as required under Order 42 Rule 6(2). This

requirement is mandatory. In **Focin Motorcycle Co. Limited v Ann Wambui Wangui & Another**, Gitari J. held that failure to provide security is a sufficient ground to decline an application for stay.

26. In light of the foregoing, I find that the Applicant has failed to satisfy the conditions for the grant of stay of execution of the entire judgement pending appeal.

I am however mindful of the Applicant's claim as a purchaser of a portion of LR No. Igoji/Kiangua/1866. Indeed, the Respondents have acknowledged this claim in their response to the application, while stating that the distribution of the entire estate should not be halted as a result of the Applicant's claim.

27. Section 93(1) of the Law of Succession provides:-

93.”(1) All transfers of any interest in immovable or movable property made to a purchaser either before or after the

commencement of this Act by a person to whom representation has been granted shall be valid, notwithstanding any subsequent revocation or variation of the grant either before or after the commencement of this Act.”

27. In the interests of justice, it is appropriate to preserve the Applicant’s limited interest pending the hearing and determination of the appeal.

28. Accordingly, the prayer for stay of execution of the entire judgment is declined. I however issue stay of judgement to wit a conservatory order in respect of the LR No. Igoji/Kiangua/1866 only pending the hearing and determination of the appeal.

29. The Applicant shall deposit in court one hundred and fifty thousand shillings (Kshs.150,000/=) being security for costs within thirty (30) days, in default of which the limited stay

shall lapse automatically. The remainder of the estate shall proceed to distribution in accordance with the judgement of the trial court.

30. Costs shall abide the outcome of the appeal.

**Ruling delivered, dated and signed at Chuka
this 11th day of May, 2026.**

.....
R. LAGAT-KORIR

JUDGE

**Ruling delivered in the absence of the
parties. Muriuki (Court Assistant).**