



**Githanga (Suing on her personal capacity and in her capacity as the administrator of the Estate of the Late David Githanga Kinyanjui) v Githanga & 2 others (Environment and Land Case Civil Suit 366 of 2016) [2024] KEELC 5647 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5647 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 366 OF 2016**

**JA MOGENI, J  
JULY 24, 2024**

**BETWEEN**

**ANASTACIA WACUKA GITHANGA ..... PLAINTIFF  
SUING ON HER PERSONAL CAPACITY AND IN HER CAPACITY AS THE  
ADMINISTRATOR OF THE ESTATE OF THE LATE DAVID GITHANGA  
KINYANJUI**

**AND**

**JAMES NGENGA GITHANGA ..... 1<sup>ST</sup> DEFENDANT  
THE REGISTRAR OF TITLES ..... 2<sup>ND</sup> DEFENDANT  
THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect if the Notice of Motion Application dated 30/04/2024 filed by the plaintiff/applicant under Order 9 B Rule 8 Order 40 Rule 1 & 2, Order 21 Rule 22, Order 51 Rule 1 & 2 of the Civil Procedure Rule 2010, Article 159 of the Kenya Constitution 2010, Section 1A, 1B and 3, 3A of the Civil Procedure Act. Seeking the following orders:
  - i. Spent
  - ii. That this Honorable Court be pleased to grant a stay of execution of the judgment and decree entered in this matter on the 22<sup>nd</sup> April 2024 pending the hearing and determination of this application.
  - iii. That this Honorable Court be pleased to issue orders of stay of execution of the judgment and decree issued on 22<sup>nd</sup> April 2024 pending the hearing and disposals of the appeal



- iv. That costs of this application be provided for in any event.
2. The Application was supported by an affidavit sworn by the plaintiff sworn on 30/04/2024. The grounds of the application are that the plaintiff/applicant has preferred an Appeal from the judgement of this Court that was delivered on 22/04/2024, being aggrieved by the whole judgment of the court. He alleged further that he is likely to suffer substantial loss and damage unless the orders sought are granted hence in the interest of justice the orders should be granted.
  3. I have considered the grounds in support of the application, the grounds in opposition thereto and the submissions by the advocates for the parties. The issues that were before the trial court were whether the suit property belonged to the 1<sup>st</sup> defendant/applicant. The trial court found that it did not and instead decreed that it should revert back to the late David Gathanga Kinyanjui and to be distributed as an estate of a deceased person who died intestate. The applicant being aggrieved by the finding of the learned judge and filed a Notice of Appeal and also filed an application seeking stay of execution of the Court's Judgment.
  4. In the affidavit the applicant/1<sup>st</sup> defendant deponed that he was gifted the suit property by his late father in 1979 as a gift and that he has stayed and developed the suit property since then. That his appeal shall be rendered nugatory if the orders sought are not granted. Lastly, that his other siblings will proceed and to take possession of his home if the orders sought are not granted and this will cause irreparable damage.
  5. The application was opposed by the plaintiff/respondent who has filed a replying affidavit sworn on 22/05/2024 on the grounds that the judgment issued directed that the title document is rectified to ensure that the property reverts back to the late David Githanga Kinyanjui to facilitate distribution to all siblings who are advanced in age. That it would only be fair that the distribution should be done as early as possible for the gain of every child of the late David Githanga Kinyanjui.
  6. Thus allowing the applicant's application for stay would be prejudicial to the respondents to continue locking out the respondents from the suit property which belong to all of them. That it is therefore the respondents who stand to suffer loss, damage and prejudice if the application is allowed.
  7. When the parties appeared in court on 27/05/2024 they agreed to canvass the application by way of written submissions. At the time of writing of this ruling only the applicant's submissions dated 28/05/2024 were on record. While the respondent's submissions had not been filed. I have considered the submissions the authorities cited which are relevant to the application and the various legal provisions considered therein.
  8. The applicant was represented by Ms. Owino, Advocate, while the respondents were represented by Mr Kandere Advocate. In their submission the applicant/1<sup>st</sup> defendant submitted that the applicant will be prejudiced if the stay is not issued since he has developed the suit property and that if the plaintiffs/respondents were allowed to execute the judgment they will cause damage to the suit property. That some of the properties have been charged to various banks.
  9. Further that if the respondents are allowed to inherit the property of the estate the applicant will suffer substantial loss. That the plaintiff/respondents have not exhibited any prejudice if the stay is granted. That the appeal will be rendered nugatory if the stay is not granted as prayed.
  10. The plaintiff/respondents on their part submitted that the court has already made a finding as to who are the beneficiaries of the estate. Counsel submitted that there is no evidence of substantial loss disclosed in the notice of motion. That the applicant has not offered any security in the event that



the appeal fails. That a grant of stay of proceedings will derail and delay the expeditious conclusion of distribution of the estate to all siblings.

### **Analysis and Determination**

11. Upon consideration of the Notice of Motion application dated 30/04/2024 including the rivalling affidavits and submissions, there is only one issue for consideration which is Whether there should be a stay of execution pending appeal from the Judgement delivered on 22/04/2024.
12. The applicant/1<sup>st</sup> defendant have reiterated their claim and stated that they are entitled to inherit their father's estate as the court decreed. They insisted that the defendant/applicant had not met the threshold set in Order 42 Rule 6 of the [Civil Procedure Rules](#) as they have not shown sufficient cause to warrant the orders sought.
13. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the [Civil Procedure Rules](#) which requires an applicant seeking a stay of execution pending appeal to demonstrate that; -
  - a. Substantial loss may result to the applicant unless the order was made;
  - b. The application was made without unreasonable delay; and
  - c. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.
14. Essentially a stay of execution should only be granted where sufficient cause is shown. In [Antoine Ndiaye v African Virtual University](#) [2015]eKLR Gikonyo J opined that -

“.....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. Infact, grant of stay of execution pending appeal is a discretion of the court. In [Butt v Rent Restriction Tribunal](#)[1982] KLR the court gave guidance on how such discretion should be exercised and held that:-
  1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
  2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
  3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
  4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.



5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
16. It has to be noted that the purpose of stay of execution is to preserve the status quo pending the hearing of the appeal. In RWW v EKW [2019] eKLR, it was observed that:
- “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.”
17. The principles captured above are the ones that the court has to bear in mind in determining the application. The first consideration is whether the application was filed timeously. The judgment herein was delivered on 22/04/2024 the notice of appeal filed on the same date 22/04/2024 and this application was filed on 30/04/2024. There is no indication when the memorandum of appeal was filed with the Court of Appeal.
18. The applicant contends that he will suffer substantial loss if the orders sought are not granted as the respondents will end up inheriting the estate property when they have no right to do so.
19. Now it is the duty of the applicant in an application for stay of execution to establish that he/she will suffer substantial loss 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 –
- “ a. 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.”
20. The applicant contends that his late father gave him the suit property as a gift and he has made improvements on the same and also charged some portions of the said property. The respondents contend that they are entitled to inherit their father’s property which the applicant has denied belonged to the father but to him and this court decreed that the title should be cancelled and reverted to the name of the late David Gathanga Kinyanjui. The applicant has not presented before the court any evidence to support his claim that the respondents have extracted the court decree and are interfering with the suit property. There is then no immediate risk of execution. Infact if the title is rectified for it to revert to the name of the Late David Gathanga Kinyanjui, there is still a long process of taking out letters of administration which is a mandate of a different court and not this court.



- 21. Thus the applicant has not established that he will suffer any loss, leave alone substantial loss, if the orders sought are not granted.
- 22. The other consideration is security. In the case of *Arun C. Sharma v Ashana Raikundalia T/A Rairundalia & Co. Advocates*[2014] eKLR the court held that:

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the Applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the Applicants. I presume the security must be one which can serve that purpose.”
- 23. The applicant in this matter has not offered any security in the event that the appeal fails. The condition of security has therefore not been met. I do find that the applicant has not met the threshold for stay of execution and I decline to grant the said orders.

**Disposal Orders**

- a. The upshot is that there is no merit in the application.
- b. I award the costs of the application to the plaintiff/respondent.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF JULY 2024.**

.....

**MOGENI J**  
**JUDGE**

In the virtual presence of:-  
Mrs Owino for the Applicants  
Mr. Kendere for the Respondent  
Ms. Caroline Sagina - Court Assistant

.....

**MOGENI J**  
**JUDGE**

