



**In re Estate of Kaguamba Iraki (Deceased) (Family Appeal
E022 of 2024) [2025] KEHC 1734 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1734 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
FAMILY APPEAL E022 OF 2024
H NAMISI, J
FEBRUARY 27, 2025**

BETWEEN

WANJIRU NGARI APPLICANT

AND

HENRY KAMANDE KAGUAMBA RESPONDENT

RULING

1. The Appellant, being dissatisfied with the Ruling delivered on 29 July 2024 by Hon. O. Wanyanga in Thika CM Succession Case No. 465 of 1998, lodged an appeal on the following grounds:
 - i. That the learned trial Magistrate erred in law and fact in failing to appreciate that “an erroneous conclusion of law or evidence is not a ground for review but may be a ground for appeal”;
 - ii. That the learned trial Magistrate erred in law and fact in applying the wrong principles of law in allowing a review, varying and/or setting aside his own ruling and order dated 26 January 2022;
 - iii. That the learned trial Magistrate erred in law and fact in sitting on an appeal of its own decision of the 26 January 2022;
 - iv. That the learned trial Magistrate erred in law and fact in failing to note that a probate court lacked jurisdiction to determine or even comment issues of ownership of LR LOC 1/ Mukarara/T.27 which were before another court of concurrent jurisdiction in ELC No. 253 of 2018;
 - v. That the learned trial Magistrate erred in law and fact in failing to note if there was another matter related to the issue before him he should/ought to have stayed the ruling or proceedings awaiting the determination of ELC No. 253 of 2018 and not to allow the orders sought on grounds that there is another suit;



- vi. That the learned trial Magistrate erred in law and fact in failing to appreciate that there were no grounds for review that were tabled before him to warrant the variance of the orders granted or review;
 - vii. That the learned trial Magistrate erred in law and fact in failing to note that the Application for review was brought after 2 years and 27 days in which no plausible explanation was adduced for the inordinate delay;
 - viii. That the learned trial Magistrate erred in law and fact in failing to note that the Application of 22 February 2024 had been overtaken by events as the Appellant had been issued with a title to LR LOC1/ Mukarara/T.27;
 - ix. That the learned trial Magistrate erred in law and fact in failing to note that the Respondent's application dated 22 February 2024 was an attempt to amend the ruling delivered in ELC No. 253 of 2018 by Hon. Atambo
2. The Appellant has filed Chamber Summons dated 26 September 2024 seeking the following orders:
- i. (spent)
 - ii. That there be a stay of proceeding and execution of the Ruling of Hon. Wanyanga dated 29 July 2024 in Thika Succession Cause No. 465 of 1998 pending hearing of this Application;
 - iii. That there be a stay of proceeding and execution of the Ruling of Hon. Wanyanga dated 29 July 2024 in Thika Succession Cause No. 465 of 1998 pending hearing of the appeal before this Court
 - iv. For an order that costs of this Application do abide the result of the intended appeal
3. The Application is supported by Affidavit sworn by the Applicant and premised on the following grounds:
- a. This court had already set this appeal for mention on 3 March 2025 but in the intervening period the trial court intends to proceed with the Applicant's application before it;
 - b. The Applicant is aggrieved by the Ruling of Hon. Wanyanga dated 29 July 2024 and has filed and served a Memorandum of Appeal against the said decision before this court;
 - c. That the said Ruling of the trial court set in motion the hearing of the Applicant's Application dated 21 October 2021;
 - d. That on 29 July 2024 the court delivered the said ruling through uploading the same on e-filing system;
 - e. That upon perusal of the said Ruling, the applicant found out that the court had suo moto allowed the Respondent's application and set a date suo moto for inter partes hearing of the Applicant's application dated 21 October 2021 on 12 August 2024;
 - f. That on the said 29 July 2024, the Applicant could not have sought for 30 days stay of execution since the Ruling was delivered through the e-filing system;
 - g. That on 12 August 2024, this court was set to start its vacation on 15 August 2024;
 - h. That thereafter the matter was set for a mention on 30 September 2024 with a view to taking a date for hearing of the said application dated 21 October 2021;



- i. The intended appeal is arguable and has high prospects of success;
 - j. If an order of stay of execution is not granted, the intended appeal, if successful, will be rendered completely nugatory by the refusal to grant a stay as prayed herein.
4. The Supporting Affidavit reiterates the grounds of the Application. The Applicant also filed a Supplementary Affidavit.
5. The Respondent filed a Replying Affidavit in which he averred that judgement in ELC No. 253 of 2018 was delivered on 29 June 2021. The Applicant then filed the Summons for Revocation of Grant dated 27 October 2021 but concealed material facts from the Court causing the court to issue adverse orders against the Respondent. It is on this basis that the impugned Ruling was delivered setting aside the orders of 26 February 2022.
6. The Respondent averred that the Applicant is hellbent on ensuring that the Respondent's right to be heard is denied since the Appellant is aware that she misled the Court in issuing orders that were averse to the Respondent and against the laws of succession.

Analysis and Determination

7. Parties were directed to canvass the Application herein by way of written submissions. I have keenly read through the lengthy submissions by the Applicant and those by the Respondent.
8. Under Order 42 Rule 6(2) of the *Civil Procedure Rules*, 2010 in an application for stay pending appeal, an applicant should satisfy the court that:
 - a. Substantial loss may result to him/her unless the order is made;
 - b. That the application has been made without unreasonable delay; and
 - c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.
9. The power of a court to grant stay of execution is discretionary. This discretionary power must not be exercised capriciously or whimsically but must be exercised in a way that does not prevent a party from pursuing its appeal so that the same is not rendered nugatory should the appeal overturn the trial court's decision. (see *Butt vs. Rent Restriction Tribunal* [1979]).
10. The purpose of stay of execution is to preserve the subject matter in dispute while balancing the interests of the parties and considering the circumstances of the case. The Court of Appeal in *RWW vs. EKW* (2019) eKLR addressed itself on this as hereunder:-

“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.

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.”



11. The right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR the court stated:

“The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion.”

12. I have read the accusations and counter accusations by the parties. Most importantly, in the Affidavits filed by the Applicant, the main ground for the stay of execution appears to be the fact that the Ruling was delivered and uploaded on the electronic filing system, thus denying the Applicant the chance to apply for the stay of execution at the time of delivery of the Ruling.
13. With respect to the requirements under Order 42 Rule 6(2), the Applicant submitted only on the issue of inordinate delay. The Applicant did not address the issues of substantial loss or security. It goes without saying that for an application for stay of execution to succeed, a party must demonstrate the substantial loss that may result in the absence of the stay orders. The Applicant has not done so. Similarly, the Applicant has not addressed the issue of security of costs, therefore, this condition has not been met.
14. The upshot is that there is no merit in the application and the same is dismissed with costs to the Respondent.

DATED AND DELIVERED AT THIKA THIS 27 DAY OF FEBRUARY 2025.

HELENE R. NAMISI

JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:

Mr. Amutalah.....for the Appellant/Applicant

Wanjiru Mwangi.....for the Respondent

Libertine AchiengCourt Assistant

