



REPUBLIC OF KENYA



KENYA LAW
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**Chepkwony v Chemutai (Civil Appeal E001 of 2025)
[2025] KEHC 1212 (KLR) (26 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1212 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERICHO
CIVIL APPEAL E001 OF 2025
JK SERGON, J
FEBRUARY 26, 2025**

BETWEEN

NICHOLAS CHEPKWONY PETITIONER

AND

NANCY CHEMUTAI OBJECTOR

RULING

1. The application coming up for determination is a notice of motion dated 16th January, 2025 seeking the following orders;
 - (i) Spent
 - (ii) Spent
 - (iii) That this Honorable Court be pleased to issue a temporary order staying judgment and orders made against the Objector in Kericho Succession Cause No. E070 of 2021 on 17th December 2024 pending hearing and determination of her Appeal in HCCA No. E001 of 2025;
 - (iv) That the Appellant/Applicant be at liberty to apply for further orders;
 - (v) That the Court be at liberty to make such further and other orders that as it deems fit to meet the ends of Justice;
 - (vi) Cost of this Application be provided for.
2. The application is base on the grounds set out on the face of it and the facts deponed in the supporting affidavit of Joyner E. Okonjo, an Advocate of the High Court of Kenya practicing in manner and style in the firm of JNO AdvocatesLLP, who have the conduct of this matter on behalf of the Appellant/Applicant, therefore duly authorized to swear this affidavit on her behalf.



3. She avers that the lower court delivered its judgment on 17th December, 2024 against the Applicant and the Applicant being dissatisfied by the judgment, intends to appeal to the High Court.
4. She also avers that the applicant has a good appeal with high chances of success. She annexed a copy of the Memorandum of Appeal.
5. She further avers that the Objector/Applicant is an elderly woman incapable of undertaking any gainful employment, having lived on the suit property that is her matrimonial home for the last 32 years, and on which property measuring 2.5 acres, she has invested in tea bushes/farms for over 20 years, whose proceeds are her only source of livelihood as she is an elderly woman incapable of undertaking any gainful employment. She avers that third parties have already approached her at her home and asked her to leave the property.
6. She avers that she is reasonably apprehensive that any delay in the hearing of this application will be prejudicial to the Objector/Applicant, and if the orders are not granted, the Respondent will proceed with execution to evict her from the said property to her detriment and that she will suffer irreparably pending appeal in HCCA No. E001 of 2025 which will be rendered nugatory.
7. She avers that the respondent will not suffer any prejudice if this application is allowed.
8. She avers that it is in the interests of justice and fairness that the orders sought in the application be granted and that the application has been made without any unreasonable delay.
9. Nicholas Chepkwony the Petitioner/Respondent filed a replying affidavit in response to the application.
10. He avers that having read the Notice of Motion Application dated 16th day of January, 2025 together with supporting Affidavit, the conditions for stay of execution pending appeal are set out under order 42 rule 6 and developed by case law follows; (a) the Appeal must be arguable and (b) the Applicant must demonstrate the she is likely to suffer substantial loss unless the order made or the appeal will be rendered nugatory if the stay is not granted.
11. He avers that the Applicant is not the spouse of the late Samwel Kipsiele Matayoas alleged.
12. He avers that the Applicant has not advanced any ground of appeal, the Applicant is merely trying to appeal a court decision in which all the beneficiaries of the deceased were allocated equally shares, he attached a copy of the confirmed grant.
13. He avers that the lower court succession cause has been pending in court for a period of 4 years, and the applicant did not want the same to be heard and determined since she is enjoying and utilizing a larger share of the estate than that of any other beneficiaries. He further avers that the Applicant is desirous of utilising the estate of the deceased herself, since the share was fairly distributed equally among all the beneficiaries including herself who was allocated 0.6 acres.
14. He avers that having the right of appeal and/or filing a notice of appeal does not in itself guarantee a party a stay of judgment.
15. He avers that the Applicant will not suffer any substantial loss and in any event the Applicant can be compensated by way of damages should the Appeal succeed.
16. Having considered the pleadings by the parties, the sole issue for determination is whether to grant a stay of execution pending appeal.



17. On the issue as to whether to grant a stay of execution, staying judgment and orders in Kericho Succession Cause No. E070 of 2021 delivered on 17th December, 2024 pending hearing and determination of the Appeal in HCCA No. E001 of 2025.
18. On one part the Appellant argues that if the orders sought are not granted, the Respondent will proceed with execution to evict her from the property, constituting the estate of the deceased, to her detriment and that she will suffer irreparably pending hearing and determination of the appeal vide HCCA No. E001 of 2025 which will be rendered nugatory. On the other part, the Respondent argues that the Appellant has not met the threshold for stay of execution or offered any viable ground of appeal, the Applicant is merely trying to appeal a court decision in which all the beneficiaries of the deceased including the Appellant were allocated equal shares of the subject parcel, he attached a copy of the confirmed grant. The Respondent further contended that the Appellant will not suffer any substantial loss and in any event the Appellant can be compensated by way of damages should the Appeal succeed.
19. 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 for stay of execution is 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. 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." Having considered the rival arguments by the parties, it is the finding of this court that the instant application does not meet the threshold set out in order 42 rule 6 of the *Civil Procedure Rules* and that having the right of appeal does not in itself guarantee a party a stay of judgment, in any event execution is a lawful process. See *Machira t/a Machira & Co. Advocates v East African Standard* (No 2) [2002] KLR 63 the Court of Appeal 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."
20. Consequently, the notice of motion dated 16th January, 2025 is hereby dismissed with no order as to cost.

DELIVERED, SIGNED AND DATED AT KERICHO THIS 26TH DAY OF FEBRUARY, 2025.

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J.K. SERGON

JUDGE

In the Presence of:-

C/Assistant – Rutoh



Mwanzia holding brief for Karanja for the Applicant
Respondent – Present in Person

