



Consolidated Bank of Kenya Limited v Mwangi (Suing on Behalf of the Estate of Wilson Mwangi Manuthu (Deceased)); Gitau t/a Rem Enterprises (Third party) (Commercial Appeal E025 of 2024) [2025] KEHC 4125 (KLR) (27 March 2025) (Ruling)

Neutral citation: [2025] KEHC 4125 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT THIKA
COMMERCIAL APPEAL E025 OF 2024
FN MUCHEMI, J
MARCH 27, 2025**

BETWEEN

CONSOLIDATED BANK OF KENYA LIMITED APPELLANT

AND

ROBERT KANG'ETHE MWANGI RESPONDENT

**SUING ON BEHALF OF THE ESTATE OF WILSON MWANGI MANUTHU
(DECEASED)**

AND

ROSEMARY NJAMBI GITAU T/A REM ENTERPRISES THIRD PARTY

RULING

Brief facts

1. The application dated 2nd October 2024 seeks for orders of stay of execution in respect of the judgment and decree in Ruiru CMCC ELC Court Case No. E161 of 2021 delivered on 16th August 2024 pending the hearing and determination of the appeal.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 14th November 2024.

Appellant's/Applicant's Case

3. The applicant states that judgment in Ruiru CMCC ELC Case No. E161 of 2021 was delivered on 16th August 2024 whereby the trial court held in favour of the respondent as follows:- a loan facility of Kshs. 4,500,000/- was extended to the Third Party by the defendant; the plaintiff's parcel of land being RUIRU EAST/JUJA EAST BLOCK 2/519 was not properly charged as security to guarantee the loan facility extended to the third party; a declaration was issued that the registration of the charge



- against the deceased's property known as RUIRU EAST/JUJA EAST BLOCK 2/519 in favour of the defendant was illegal, null and void; an order was issued for the discharge of charge against the deceased's property known as RUIRU EAST/JUJA EAST BLOCK 2/519 in favour of the deceased's estate for not later than 30 days from the date of the said judgment; the prayer for general damages for wrongful charge of the suit property was declined; no orders were made against the third party and the costs of the suit were awarded to the 1st respondent.
4. Being aggrieved by the said judgment, the applicant sought an oral stay of execution for 30 days and preferred an appeal before the High Court Kiambu in Commercial Appeal No. E007 of 2024 on 16th September 2024 and a subsequent application dated on even date which sought stay orders be granted on ground that the appeal would be rendered nugatory in the event that the stay orders were not granted.
 5. The applicant states that when the High Court at Kiambu issued its directions on the stay application, it noted that it lacked the territorial jurisdiction and transferred the matter to the instant court with directions that the matter be mentioned before the Deputy Registrar on 25th September 2024 for further directions.
 6. The applicant avers that when the matter came up for mention on 25th September 2024, the Deputy Registrar advised that he lacked the requisite powers to grant stay orders and instead directed that the stay application be heard by the presiding judge on 5th November 2024 being the earliest available date given that the judge was away on leave.
 7. The applicant states that the stay orders issued by the trial court lapsed on 17th September 2024 and there is a real danger of the deceased's estate proceeding to alienate the suit property through succession proceedings on the strength of the judgment if stay is not granted hence causing the applicant irreparable damage.
 8. The applicant argues that the trial court erred by shifting the burden of proof on fraud and illegality on it as the bank despite the respondent's lacking evidence save alleging that it's charge on the suit property was illegal, null and void. Further the applicant argues that the trial court erred by placing reliance on an unqualified document forensic examiner's testimony introduced into the proceedings on the sole basis to tarnish its evidence. Furthermore, the trial court erred by wholly relying on hearsay evidence by the respondent to infer evidence and arrive at the finding that the deceased lacked the mental capacity to execute the guarantee and indemnity agreement in favour of the applicant. Despite the lack of evidence, the applicant argues that the trial court proceeded to invalidate its charge on the basis of hearsay and without substantiating evidence to infer fraud and illegality. The applicant further argues that the court erred by failing to address or determine its counterclaim as against the deceased's estate for the sum of Kshs. 7,529,686/-.
 9. The applicant states that the oral stay of execution granted lapsed on 17th September 2024 which has placed it in danger of execution of the lower court's decree dated 16th August 2024 by the respondent. Unless interim orders for stay of execution are granted, the respondent shall proceed to discharge the applicant's bank charge over the deceased's suit property and transfer the suit property to the deceased's dependants in succession to its detriment.
 10. The applicant states that if the respondent is permitted to embark on executing the lower court's decree, the same shall be highly prejudicial to its security rights. The applicant further states that it stands to suffer substantial loss as it shall be left with an unsecured loan of Kshs. 7,529,686/- gravely affecting its chances of recovery from the deceased's estate and render the appeal nugatory.



11. The applicant is apprehensive that if the orders are not stayed and the appeal succeeds, it is unlikely to recover the funds and render the appeal nugatory and a mere academic exercise.
12. The applicant avers that it is ready and willing to abide by any order of the court as shall be issued with regard to security as the decree issued to the respondent is not a money decree.
13. The applicant avers that it has brought the instant application timeously and it is in the interests of justice that the orders sought be granted.

The Respondent's Case

14. The respondent states that he is the legal administrator of the estate of his father, Wilson Mwangi Manuthu deceased, who passed away on 18th January 2014. After his demise, the respondent states that they came to learn that land parcel RUIRU EAST/JUJA BLOCK 2/519 had been used to secure a loan of Kshs. 4,500,000/- for the benefit of a third party, Rosemary Njambi Gitau t/a REMS Enterprises without the knowledge of any beneficiaries while conducting due diligence of the estate for purposes of succession.
15. The respondent states that he moved the lower court in Ruiru CMCC ELC Case No. E161 of 2021 to challenge the improper and illegal charge against the suit property imposed by the applicant and enjoined the 3rd party in the proceedings. The respondent argues that the loan was advanced to the 3rd party and not the deceased who was unwell and incapable of giving consent for his property to being used as security for he had memory lapses at the material time.
16. The respondent states that he commissioned an expert to check and authenticate the deceased's signature on the charge documents and his report which was produced during the hearing and it clearly showed the sample signatures were made by different people. It then followed that the charge, and securitization documents presented to have been allegedly executed by the deceased are a nullity in law as they were not signed by him and must have been obtained fraudulently by the 3rd party.
17. The respondent argues that the applicant did not produce any iota of forensic examination evidence to rebut the examination report findings on the securitization documents thus remaining uncontroverted.
18. The respondent states that the lower court being a court of competent jurisdiction was properly seized to hear and determine Ruiru CMCC ELC Case No. E161 of 2021 and had the advantage of observing the demeanor of the witnesses and hearing their evidence first hand. Further, it is improper for the applicant to trash the evidence presented as though it is non-existent and fault a court of competent jurisdiction for arriving at a legally sound determination for they did not adduce any evidence to support their case.
19. The respondent avers that the applicant has no legal recourse against the deceased's estate and they ought to pursue the 3rd party who for all intents and purposes was the beneficiary of the said loan.
20. The respondent further avers that the instant application is incompetent and is a deliberate attempt aimed at hoodwinking this court into unjustly depriving the beneficiaries of the deceased's estate of their property which they have lived on for many years and known as home, based on an improper and illegal charge.
21. The respondent argues that the applicant has not demonstrated and explained any hardship or injury that they will incur on execution of the judgment that cannot be compensated by way of damages.



22. The respondent states that stay of execution orders can only be deployed by a court of law where it will not occasion prejudice to any of the parties and defeat the object of justice. A cursory look at the applicant's affidavit reveals that apart from stating that they are likely to be prejudiced if stay of execution is not granted since they will be left with a non performing loan issued to and for the benefit of a 3rd party without the authority of the deceased, they have failed to explain why they cannot pursue the 3rd party who was enjoined in proceedings before the trial court and singularly benefited from the loan.
23. The respondent avers that he and the deceased's beneficiaries shall suffer prejudice as they shall be put on hold and denied a chance of enjoying the fruits of their judgment. Additionally, the respondent states that the applicant has failed to show and meet the condition of payment of security for due performance of the decree that may become due upon them.
24. The respondent states that upon perusal of the grounds set in the memorandum of appeal reveals that the issues raised therein are trivial and not arguable.
25. Directions were issued that the application be canvassed by way of written submissions and from the record, it is only the applicant complied by filing its submissions on 13th February 2025.

The Applicant's Submissions

26. The applicant relies on Order 42 Rule 6 of the Civil Procedure Rules and the case of *Ena Investment Limited vs Benard Ochau Mose & 2 Others* [2022] eKLR and submits that it has met the conditions for stay pending appeal.
27. The applicant refers to the case of *Kuko & Another vs Ali & Another; Robinson (Interested Party) (Civil Application E023 of 2023)* [2024] KECA 305 (KLR) (22 March 2024) (Ruling) and submits that it has an arguable appeal which revolves around the lower court's error in finding that the registration of its legal charge over the suit property was illegal, null and void in the absence of any substantiating evidence by the respondent estate to infer the same.
28. The applicant argues that the respondent estate claim before the magistrate was that in securitizing its financing of Kshs. 4,500,000/- to the third party, it procured a fraudulent third party charge over the suit property in the name of the deceased without his knowledge, consent or approval. In addition to its further security over the financed amount, being a guarantee and indemnity agreement dated 26th May 2011, to which the deceased acted as the guarantor for the sum of Kshs. 4,500,000/-. The applicant argues that having filed the claim, the respondent estate was tasked with the legal burden to demonstrate that it failed to exercise due diligence in charging the suit property and that the deceased's mental state at the point of executing the charge was impaired.
29. The applicant relies on Section 107 of the *Evidence Act* and the case of *Mbuthia Macharia vs Annah Mutua & Another* [2017] eKLR and submits that the trial court erroneously shifted that burden of proof towards it solely relying on hearsay evidence by the respondent who admittedly gave evidence on execution of the charge despite his admission that he was not present at the time when the deceased executed the charge in favour of the applicant bank.
30. The applicant further submits that the trial court made numerous inferences as to its own concerns over the execution of the deceased's guarantee and indemnity agreement dated 26th May 2011 but at no given point did the court challenge or accost the validity of the bank's legal charge being a separate security document. The applicant further argues that while the respondent led no evidence regarding the deceased's impaired mental faculties or fraudulent signatures under the charge, the trial court opted



to deviate on its own tangent to manufacture and infer its own justifications into the claim albeit with no supporting documents or evidence from the respondent estate.

31. The applicant relies on the case of Daniel Torotich arap Moi vs Mwangi Stephen Muriithi & Another [2014] eKLR and submits that despite the respondent estate's failure to lead evidence in support of their own allegations on its charge, none was presented leading the court to erroneously assume its own inferences into the claim resulting in a flawed decision to invalidate the applicant's charge over the suit property without any valid reasons.
32. The applicant refers to the case of Kagina vs Kagina (no citation given) and submits that the respondent introduced a forensic document examiner's report dated 10th February 2023 which was presented by Mr. Emmanuel Kenga, who despite alleging to be a qualified document examiner failed to provide the court with his credentials before the court. Furthermore, the applicant argues that even though the trial court was to rely on the forensic document examiner's report disputing the authenticity of the deceased's signatures, the said report did not make any findings or analysis of the bank's charge. The applicant submits that it has demonstrated that it possesses an arguable appeal with high chances of success meriting stay orders against the trial court's finding requiring that it proceed to discharge its charge and release the title documents to the respondent estate.
33. The applicant refers to the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR and submits that the trial court's determination was to the effect of invalidating its security rights over the suit property exposing it with an unsecured and outstanding loan facility of Kshs. 7,529,686/- due from the respondent estate and the third party. Thus, if a stay order is not granted, the applicant shall be compelled to discharge its security interest in the suit property with complete disregard to the deceased's contractual obligation. The applicant further submits that the respondent has commenced succession of the deceased's estate and if the suit property was to be discharged and thereafter alienated to a third party, its appeal would be rendered nugatory as its opportunity to recover the contracted outstanding debt of Kshs. 7,529,686/- from the estate would be eradicated. Furthermore, the applicant argues that the respondent estate has deliberately not addressed the issue of how it shall recover its security in the suit property in the event the appeal succeeds demonstrating inclination to evade the debt altogether. To support its contentions, the applicant relies on the case of Geoffrey Muriungi & Another vs John Rukunga M'imonyo suing as the legal representative of the estate of Kinoti Simon Rukunga (Deceased) [2016] eKLR cited with approval in Henry vs Kithinji (Environment and Land Appeal E024 of 2022) [2023] KEELC 18118 (KLR) (21 June 2023) (Ruling).
34. The applicant submits that no prejudice will be occasioned to the respondent estate if stay of execution is granted, as the primary issue at hand is the legal determination of its bank security rights over the charged suit property rather than prejudicial order of immediate enforcement or eviction.
35. The applicant relies on the cases of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates (2014) eKLR as cited in Njenga vs Njeri & 2 Others (Civil Appeal E125 of 2023) [2023] KEHC 23991 (KLR) (24 October 2023) (Ruling) and Anthony Warui Wanjiru vs David Niyibizi & Another; Nairobi High Court Civil Appeal No. 748 of 2019 [2020] eKLR cited with approval in Melisa Buluma vs Jane Adhiambo Tambo [2021] KEELC 2137 (KLR) and submits that the present dispute does not emanate from a money decree thus any form of money as security would not serve the purpose of security as should the appeal succeed, no present judgment debt is due to the respondent estate. Thus, the deposit of security is unlikely to fit the circumstances.
36. The applicant submits that should the court be inclined to take a different view, it shall be willing to abide with any conditions stipulated for an order of stay pending appeal.



37. The main issue for determination is whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

The Law

Whether the applicant has satisfied the conditions set out in Order 42 Rule 6 of the Civil Procedure Rules for stay of execution pending appeal.

38. It is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates:-

1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
2. No order for stay of execution shall be made under sub rule 1 unless:-
 - a. The Court is satisfied that substantial loss may result to the 1st 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.

39. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;
2. That the application has been made without unreasonable delay; and
3. 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.

40. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR:-

“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.



41. The applicant states that it stands to suffer substantial loss if an interim stay order is not granted as it shall be left with an unsecured loan of Kshs. 7,529,686/- due to the deceased's estate gravely affecting its chances of recovery of the outstanding loan amount from the deceased's estate and render the appeal nugatory. The applicant further states that it is apprehensive that if the orders are not stayed and the appeal succeeds, it is unlikely to recover the funds and render the appeal nugatory and a mere academic exercise.
42. It is trite law that in money decrees, substantial loss is demonstrated by the inability of the respondent to pay the decretal sum should the appeal be successful. In the instant case, the decree is not a money decree and therefore the applicant need not demonstrate the inability of the respondent to pay. The applicant has however argued that it shall be left with a non performing loan of Kshs. 7,529,686/- due from the deceased's estate without any form of security interest and which shall affect its chances of recovery from the deceased's estate. It is my considered view that if stay is not granted, the applicant stands to suffer substantial loss as the land parcel in the trial suit which was allegedly charged will be free for distribution in the deceased's estate. Thus, upon distribution, it shall render the appeal nugatory. In the circumstances, it is my view that the applicant has sufficiently demonstrated that it stands to suffer substantial loss.

Has the application has been made without unreasonable delay

43. Judgment was delivered on 16th August 2024 and the applicant filed the instant application on 2nd October 2024. The applicant had earlier filed an application for stay of execution in the High court at Kiambu in Commercial Appeal No. E007 of 2024 but the court held that it did not have territorial jurisdiction to determine the matter and transferred it to the instant court. The matter then came up for directions before the Deputy Registrar on 25th September 2024. In the circumstances, it is my considered view that the application has been filed timeously.

Security of costs.

44. The purpose of security was explained in the case of Arun C. Sharma vs Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated:-

“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 the 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.

45. Evidently, the issue of security is discretionary and it is upon the court to determine the same. The applicant has just stated that it is ready and willing to abide by any order of the court as shall be issued with regard to security as the decree issued to the respondent is not a money decree.

46. It is trite that 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 vs 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.”

47. The court in granting stay has to carry out a balancing act between the rights of the two parties. The question then begs as to whether there is just cause for depriving the respondent his right of enjoying his judgment. On the grounds of appeal, it is my considered view that they raise arguable points of law.
48. In my considered view, the applicant has met the threshold of granting stay of execution pending appeal. Accordingly, the application dated 2nd October 2024 has merit and it is hereby allowed. Orders for stay of execution pending hearing and determination of the appeal are hereby issued.
49. The costs shall abide in the appeal
50. It is hereby so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT THIKA THIS 27TH DAY OF MARCH 2025.

F. MUCHEMI

JUDGE

