



In re Estate of Andrikus Henry Oyugi Ogawo (Deceased) (Succession Appeal E001 of 2024) [2025] KEHC 9025 (KLR) (25 June 2025) (Ruling)

Neutral citation: [2025] KEHC 9025 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL E001 OF 2024**

S MBUNGI, J

JUNE 25, 2025

IN THE MATTER OF THE ESTATE OF ANDRIKUS HENRY OYUGI OGAWO(DECEASED)

BETWEEN

MAURICE OUMA OYUGI APPELLANT

AND

LUCY ATIENO RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF JOHN OTHO
- DECEASED**

RULING

1. The applicant filed a Notice of Motion under Certificate of Urgency seeking the following orders:
 - a. Spent
 - b. That there be stay of execution of the judgment delivered herein on 31/1/2024, the consequent decree thereon which might be effected concerning land parcel number Isukha/Shirere/2052 pending the hearing and determination of this application interpartes.
 - c. That there be a stay of execution of the judgment delivered on 31/1/2024 and the consequent decree thereon pending the hearing and determination of the appeal herein.
 - d. That the costs of this application be provided for.
 - e. That Any other order to be made as this Honorable Court may deem fit.
2. The application was premised on the grounds on its face and supported by an affidavit sworn by applicant who stated that having been aggrieved by the judgment of the trial court delivered on 31st January 2024, he had filed a Memorandum of Appeal without unreasonable delay. He stated that the



- judgment ordered cancellation of the title to the suit property; Isukha/Shirere/2052, which if executed, would result in the title reverting to the name of the Respondent's deceased relative, John Otho Ogawo.
3. He further deponed that he had occupied the said land for a long time and that it was his only place of residence. He feared imminent eviction if the execution proceeded, which he argued would occasion him substantial loss and render the appeal nugatory. He expressed his willingness to abide by any conditions the Court might impose for the grant of stay.
 4. The Respondent opposed the application through a replying affidavit sworn by her counsel, Aggrey Shikanga Shitsama. He averred that the Applicant had previously filed a similar application dated 9th February 2024 before the lower court seeking stay of execution, which was dismissed on 31st January 2024.
 5. He adopted the contents of the Respondent's earlier replying affidavit sworn on 13th May 2024, asserting that the current application raised no new issues and was therefore res judicata.
 6. It was his contention that the Applicant had failed to demonstrate substantial loss and had not provided security as required under Order 42 Rule 6 of the *Civil Procedure Rules*, rendering the application fatally defective.
 7. Counsel further stated that the Applicant was not in occupation of the suit land prior to the succession proceedings and that his title was obtained through an irregular process. He urged the Court to dismiss the application for being unmeritorious and an abuse of the court process.
 8. The court directed that the application be disposed off by way of written submissions. On record are the applicant's submissions dated 30.01.2025 and the respondent's submissions dated 04.02.2025.

Applicant's Case.

9. The applicant submitted that he sought stay of execution of the judgment delivered on 31st January 2024 in Kakamega *MCSUCC/1316/2018*, which ordered cancellation of title to land parcel number Isukha/Shirere/2052. He submitted that he was aggrieved by the said decision and promptly filed an appeal on 5th February 2024.
10. The applicant contended that the appeal raised arguable issues, particularly concerning the propriety of the trial court's decision to cancel title, which he maintained was not supported by the evidence. He submitted that if stay was not granted, the appeal would be rendered nugatory as he risked eviction from the land, which he claimed was his only place of residence and source of livelihood.
11. He maintained that the application had been filed without unreasonable delay, and emphasized that he was willing to comply with any terms the Court may impose as security for due performance of the decree. He argued that the respondent would not suffer prejudice that could not be remedied by costs, while he stood to suffer substantial loss if execution was allowed to proceed.
12. In support of the application, the applicant cited *Chris Munga N. Bichage v Richard Nyagaka Tongi & 2 Others* [eKLR], where the Court underscored the threshold for stay of execution; that the appeal must be arguable and that the success of the appeal would be rendered nugatory absent a stay. He prayed for the court to find that the threshold under Order 42 Rule 6 of the *Civil Procedure Rules* had been met and to allow the application as prayed.

Respondent's Case

13. The respondent submitted that the applicant had previously filed a similar application before the trial court which was dismissed for lack of merit. The respondent adopted the contents of her earlier



replying affidavit sworn on 13th May 2024, specifically paragraphs *para_44*, *para_55*, *para_77*, *para_88*, *para_99*, and *para_1010*, which challenged the merits of the application and denied the applicant's claim of substantial loss.

14. The respondent submitted that the applicant had not demonstrated any new grounds to warrant this Court's intervention. Relying on Order 42 Rule 6(2) of the *Civil Procedure Rules*, the respondent argued that the applicant had failed to satisfy the two mandatory conditions for stay of execution: first, that substantial loss would result if stay was not granted; and second, that the applicant had offered no security for the due performance of the decree.
15. On the issue of substantial loss, the respondent cited *James Wangalwa & Another v Agnes Naliaka Chebet* [2012] eKLR and *Machira t/a Machira & Co. Advocates v East African Standard* (No. 2) [2002] KLR 63, emphasizing that execution is a lawful process and does not, in itself, constitute substantial loss. The respondent submitted that the applicant had not presented evidence to show any steps taken by the respondent that threatened his occupation or possession since the judgment was delivered, and therefore no substantial loss had been established.
16. On the question of security, the respondent relied on *Gianfranco Manentbi & Another v Africa Merchant Assurance Co. Ltd* [2019] eKLR and argued that the applicant had not offered any security, making the application fatally defective under Order 42 Rule 6(2)(b). It was contended that even where the subject matter was land, the requirement for security remained fundamental to protect the successful party's right to enjoy the fruits of judgment.
17. On costs, the respondent submitted that costs should follow the event pursuant to Section 27 of the *Civil Procedure Act*. Citing *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai & 4 Others* [2014] eKLR, it was argued that the applicant had not demonstrated any special circumstances to warrant departure from this general rule. The Court was therefore urged to dismiss the application with costs to the respondent.

Analysis and Determination.

18. I have carefully looked at the application and considered the affidavits filed, and submissions by parties.
19. I identify the issue for determination to be whether the applicant has satisfied the threshold for grant of stay of execution pending appeal as stipulated under Order 42 Rule 6(2) of the *Civil Procedure Rules*. Specifically, the applicant must demonstrate:
 - i. That substantial loss may result if the order is not made;
 - ii. That the application was made without unreasonable delay; and
 - iii. That such security as the court orders has been given.
20. The applicant contends that the judgment delivered on 31st January 2024 ordered cancellation of his title to the suit land, Isukha/Shirere/2052, and if implemented, would cause him to be evicted from what he considers his only home. He asserts that the appeal raises arguable grounds, particularly regarding the legal propriety of the trial court's findings.
21. I note that the appeal was filed promptly on 5th February 2024, only five days after judgment. This, in my view, demonstrates no unreasonable delay in pursuing his appellate rights.
22. On the issue of substantial loss, I agree with the respondent that execution in and of itself is a lawful consequence of judgment and not necessarily indicative of substantial loss. However, I also note that the applicant deponed that the suit land is his only home and that he has resided there for a significant



period. If the title is cancelled and execution proceeds, it could lead to irreversible dispossession. In such cases where land rights are in question, and where there is no evidence that damages would be an adequate remedy, the Court must act cautiously to preserve the status quo pending appeal.

23. The respondent's assertion that the applicant previously filed a similar application before the lower court is noted. However, it is settled law that an appellate court is not bound by an interlocutory decision of the subordinate court in respect of an application for stay, especially where circumstances have changed, or where the appeal is properly before the appellate court. In this instance, the applicant is seeking stay pending an active appeal, and has expressed willingness to comply with conditions for security. I therefore decline to find the application *res judicata*.
24. As to security, while the applicant has not deposited any amount or specific proposal, he has explicitly stated that he is willing to provide any security the Court may deem fit.
25. The court in *Kisaina v Kisaina & 3 others* (Succession Appeal 5 of 2023) [2024] KEHC 10533 (KLR) while addressing a similar case held as follows:

“The Applicant has submitted that it is ready to comply with such orders as this court may direct. I have pointed out that this is not a money decree and the value of the property is not ascertainable unless a valuation of the land is carried out. Getting a land valuer to go and value the property will be costly in terms of time lost and the valuation fees. In the circumstances of this case, I find that security need not be provided.”

26. This Court is also mindful of the fact that land matters are inherently emotive, as they often touch on livelihoods, shelter, family heritage, and deeply rooted social dynamics. Thus, it is always prudent to allow parties the opportunity to fully ventilate their grievances if dissatisfied through the appellate process to the very end.

Conclusion and Orders

27. Having considered all the facts, submissions, and applicable principles, I find that the applicant has met the threshold under Order 42 Rule 6(2) of the *Civil Procedure Rules*.
28. Accordingly, I make the following orders:
 - I. There shall be a stay of execution of the judgment delivered on 31st January 2024 in Kakamega *MCSUCC/1316/2018* and the resultant decree, pending the hearing and determination of the appeal filed herein.
 - II. Costs of this application shall abide the outcome of the appeal.
29. For direction on 24.9.2025 on the memorandum of appeal.
30. Right of Appeal 30 days explained.

DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 25TH DAY OF JUNE, 2025.

S.N MBUNGI

JUDGE

In the presence of :

Court Assistant – Elizabeth Angong'a

Mr. Mandila for the Appellant present online.



Mr. Buketi for Respondent present online.

