



Omwoyo & 6 others v Kiriama (Succession Appeal E001 of 2025 & Family Appeal E015 of 2025 (Consolidated)) [2025] KEHC 11518 (KLR) (31 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11518 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
SUCCESSION APPEAL E001 OF 2025 & FAMILY APPEAL E015 OF 2025 (CONSOLIDATED)**

WA OKWANY, J

JULY 31, 2025

**(AS CONSOLIDATED WITH HCFA NO. E015 OF 2025)
IN THE MATTER OF KIRIAMA OMANWA (DECEASED)**

BETWEEN

**ROBINSON OMWOYO 1ST APPELLANT
MARITA KIRIAMA 2ND APPELLANT
JULIUS MONG'ARE 3RD APPELLANT
NYAKUNDI KIRIAMA 4TH APPELLANT
JULIUS MOKAYA ONGERA 5TH APPELLANT
REBECCA KERUBO MUNGEI 6TH APPELLANT
SAMWEL NYANTIKA NYAMBANSORA 7TH APPELLANT**

AND

STANLEY OCHENGO KIRIAMA RESPONDENT

(Being an Appeal against the Ruling in the Chief Magistrate's Court at Nyamira in CMCC Succession Cause No. E125 of 2021 delivered by Hon. C.I. Agutu, Senior Resident Magistrate on 12th March 2025)

RULING

1. This ruling is in respect to two Applications brought under Certificate of Urgency. The first application is dated 16th March 2025 and was filed by the 1st to 4th Applicants in Appeal No. E001 of 2025. The second application is dated 18th March 2025 and was filed by the 5th to 7th Applicants in Appeal No. E015 of 2025. Both Applications seek orders for stay of execution of the Ruling delivered



- on 12th February 2025 in Nyamira CMCC Succession Cause No. E125 of 2021 pending the hearing and determination of their respective Appeals. The Applicants also sought costs of the Applications.
2. The 1st Application is supported by an affidavit sworn by Robinson Omwoyo on behalf of the 2nd to 4th Applicants who asserts that the Ruling of the trial court was adverse to their interests and that if stay is not granted, the intended Appeal would be rendered nugatory. The Applicants aver that they rely on the suit property for their livelihood and alleged that steps had already been taken to evict them from the land, as shown by a letter to the OCS Nyamira Police Station annexed as evidence. They expressed willingness to abide by any terms the Court may impose for the stay.
 3. The 2nd Application is supported by an affidavit sworn by Julius Mokaya Ongera, the 5th Applicant, on 18th March 2025, on behalf of the 5th to 7th Applicants. He states that the trial court's Ruling delivered on 12th February 2025 directed them to give immediate vacant possession to the Petitioner/ Respondent or face eviction, prompting their Appeal. They argue that the eviction orders were issued without being afforded a chance to present their case, and the Ruling was delivered despite the pendency of several Applications dated 10th January 2024 [by the 2nd and 3rd Respondents], 31st January 2024, and 14th November 2023. He also noted that a Preliminary Objection dated 18th March 2024 challenged the jurisdiction of the trial court to entertain the 31st January 2024 Application, and that a ruling on that objection was still pending.
 4. Additionally, the 5th Applicant contended that a Ruling dated 18th September 2024, which nullified titles derived from L.R. No. West Mugarango/Siamani/529, was delivered without notice to their advocates and was not listed on the Case Tracking System, thereby breaching procedural fairness. He claimed that they were treated as intermeddlers by the trial court without a hearing on their status as innocent purchasers, in violation of Article 25[c] of *the Constitution*. Despite filing their Application on 14th November 2023, the court proceeded to issue directions on the later Application dated 31st January 2024, effectively sidelining their earlier Application.
 5. He further averred that the trial court issued premature orders without hearing all concerned parties and despite pending Applications. The Administrator/Respondent had already begun the execution process, and if a stay was not granted, their Appeal would be rendered nugatory, resulting in substantial loss as they had resided on the disputed property since 2016 and had constructed permanent structures. He maintained that their Appeal raised serious, triable issues with strong prospects of success and that granting their prayers would not prejudice the Administrator/Respondent.
 6. The Respondent opposed the Applications through a Replying Affidavit dated 25th May 2025 and Grounds of Opposition. He contends that the Applications are made in bad faith, merely aimed at delaying the final distribution of the Estate. He states that the Applicants' prior titles were annulled by a court order in Succession Cause No. 18 of 2011, which declared those proceedings irregular and all subsequent actions null and void. The Applicants, he argued, were found to have intermeddled with the Estate and could not prove they were bonafide purchasers for lack of sale agreements or lawful basis for occupying the deceased's land.
 7. The Respondent detailed the history of the matter, stating that following the quashing of the previous succession process, he initiated fresh proceedings in Succession Cause No. E125 of 2021. He added that despite obtaining valid orders for the Applicants' eviction under Section 45 of the *Law of Succession Act*, the Applicants refused to vacate. He added that their continued occupation had impeded survey and subdivision efforts necessary for distribution of the Estate. He argued that the Applicants could not rely on illegal titles or unlawful occupation to seek stay orders.
 8. The Respondent submitted that the Applications lack merit as the Applicants had not demonstrated substantial loss, had failed to provide security for costs, and that their Appeals raised no serious or



triable issues that are likely to succeed. He urged the Court not to aid illegal occupation of the deceased's Estate by persons adjudged to be intermeddlers.

9. The parties appeared before the Court on 7th April 2025 and agreed to canvass the Applications by way of written submissions.

Issues for Determination

10. Having considered the Applications dated 16th and 18th March 2025, the respective Affidavits in support, the Replying Affidavit dated 25th May 2025, Grounds of Opposition, and submissions by both parties, the Court identifies the following issues for determination:
 - a] Whether the Applicants have satisfied the legal requirements for the grant of an order for stay of execution pending appeal.
 - b] Whether the Applicants will suffer substantial loss if the stay is not granted.
 - c] Whether the intended Appeals raise arguable or triable issues with a likelihood of success.
 - d] Whether the Applications are brought in good faith and whether granting the orders would prejudice the Respondent or frustrate the administration of the Estate.

Analysis and Determination

1. Whether the Applicants have satisfied the legal requirements for stay

Legal Framework

11. This court notes, from the pleadings filed herein, that a ruling was delivered in Nyamira Succession Cause No. 18 of 2011 whose effect was to nullify any titles obtained in respect of the deceased's undistributed Estate. It is therefore necessary to clarify that the instant Applications are in respect to a subsequent Ruling issued, by the trial court on 12th March 2025, that sought to partly enforce the Orders emanating from the Succession Cause No. 18 of 2011 where the Respondent/Petitioner was granted eviction Orders against the Applicants so as to allow for proper distribution of the Estate.
12. The principles governing the grant of stay of execution are embedded in Order 42 Rule 6 of the Civil Procedure Rules 2010 which stipulates as follows: -
 1. No appeal or second appeal shall operate as a stay of execution or proceeding 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 order set aside.
 2. No order for stay of execution shall be made under subrule [1] unless –[a]the court is satisfied that substantial loss may result to the 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.
13. An applicant for stay of execution pending appeal must therefore satisfy the following conditions: -



- i. That substantial loss may result unless the order is made;
- ii. That the application has been made without unreasonable delay; and
- iii. That such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

[See the Court of Appeal decision in *Kenya Power & Lighting Co. Ltd v Esther Wanjiru Wokabi* [2014] eKLR, where the court held that satisfaction of these three conditions is mandatory].

14. In the present case, I find that the Applications were filed promptly following the delivery of the impugned Ruling delivered on 12th February 2025. The Applicants therefore meet the requirement for timeliness. However, the other two requirements on demonstration of substantial loss and provision of security, must be analyzed further.

2. Whether the Applicants will suffer substantial loss

15. The 1st to 4th Applicants argued that they rely on the suit property for their livelihood and have lived on it for an extended period. The 5th to 7th Applicants similarly aver that they have resided on the property since 2016 and erected permanent structures thereon. These claims of long-standing occupation, if substantiated, point to possible hardship if immediate eviction were to occur.
16. In *Kenya Shell Ltd v Benjamin Karuga Kibiru & Another* [1986] KLR 410, the Court of Appeal held that: -

“It is usually a good rule to see if order 41 rule 4 [now 42 Rule 6] of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by refusing to grant a stay.”

17. The Applicants have raised the likelihood of permanent dispossession and demolition of structures, which, in my humble view, would constitute substantial loss. I therefore find that the threshold under this limb has been satisfied.

2. Whether the Appeals raise arguable or triable issues

18. The Applicants contend that the eviction orders were issued without being heard, and that their pending Applications and Preliminary Objection challenging jurisdiction were ignored. They claim to have been unfairly labelled as intermeddlers without a hearing on their alleged status as innocent purchasers.
19. While the Respondent argued that the Applicants were found to have acquired the land irregularly and were properly evicted under Section 45 of the *Law of Succession Act*, the Applicants’ assertion of being denied audience on critical Applications raises valid concerns about procedural fairness. In *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR, the Court of Appeal held that: -

“On whether the appeal is arguable, it is sufficient if a single bona fide arguable ground of appeal is raised.”

20. I have perused the Memorandums of Appeal filed in the two matters and I am persuaded that they raise arguable issue worth ventilation on appeal.



4. Whether the Applications are made in good faith and if prejudice would be caused

21. The Respondent has accused the Applicants of bringing the Applications to delay the distribution of the Estate and perpetuate unlawful occupation. I however note that it is not disputed that the Applicants are already in occupation and that they filed their Appeals and Applications within time. I find that whether or not they are bona fide purchasers is a substantive issue that should be resolved on appeal, not at this interlocutory stage. I am guided by the decision in *Butt v Rent Restriction Tribunal* [1979] eKLR, where it was held that the court has wide discretion in granting stay orders and should do so to prevent injustice or hardship.

Conclusion and Orders

22. Upon careful consideration of the Applications and submissions by both parties, this Court is satisfied that the Applicants have met the threshold set under Order 42 Rule 6 of the Civil Procedure Rules for grant of stay of execution pending appeal.

23. Accordingly, the Court makes the following final orders: -

- a. Stay of execution of the Ruling and Orders made by the Chief Magistrate's Court at Nyamira in CMCC Succession Cause No. E125 of 2021 on 12th February 2025 is hereby granted pending the hearing and determination of the consolidated Appeals.
- b. The Applicants shall each deposit security of Kshs. 30,000 in court within 30 days from the date of this Ruling, failing which the stay granted herein shall automatically lapse.
- c. The costs of these Applications shall abide the outcome of the appeals.

24. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA VIRTUALLY VIA MICROSOFT TEAMS THIS 31ST DAY OF JULY 2025.

W. A. OKWANY

JUDGE

