



REPUBLIC OF KENYA



**KENYA LAW**  
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**Muthanje & another v Kungula (Civil Appeal E060 of 2023)  
[2024] KEHC 1713 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1713 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT EMBU  
CIVIL APPEAL E060 OF 2023  
LM NJUGUNA, J  
FEBRUARY 23, 2024**

**BETWEEN**

**FLORENCE MUTHANJE ..... 1<sup>ST</sup> APPELLANT**

**DAVID NDWIGA GITITI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**MARK WANJALA KUNGULA ..... RESPONDENT**

**RULING**

1. The appellants/applicants filed the notice of motion dated 27<sup>th</sup> October, 2023 seeking orders that:
  - a. Spent;
  - b. Spent;
  - c. That pending the hearing and determination of the appeal herein, there be a stay of execution of the decree issued in Embu CMCC No. E147 of 2021 and all consequential orders; and
  - d. The costs of this application be in the cause.
2. The application is premised on the grounds set out on the face of the application and in the supporting affidavit.
3. The 1<sup>st</sup> appellant/applicant stated that she and the respondent are divorced and the deceased who is their daughter was buried on parcel number Mbeti/Gachoka/2228. It is the applicants' case that if the orders are executed and the body of the deceased is exhumed and buried in Kakamega County, they will not get a chance to visit the grave, and they will suffer irreparable loss. That the 1<sup>st</sup> appellant/applicant and her other children do not have access to the home of the respondent in Kakamega County because of the divorce. That if stay of execution is not granted, the appeal will be rendered nugatory.



4. The respondent filed his replying affidavit stating that the fact that him and the 1<sup>st</sup> appellant/applicant are divorced does not mean that she has been denied access to his Kakamega home. That the applicants have never visited the grave of the deceased since September 2021 after the burial and that this is not enough to explain the substantial loss that they will suffer if the body is exhumed and buried in Kakamega. That the land on which the deceased is buried has been sold to a third party, which explains why the appellants cannot access the grave since burial.
5. That it is best for the body to be exhumed and buried on the respondent's land in Kakamega. That the 1<sup>st</sup> appellant/applicant was not present in the life of the deceased and her siblings and that the property where she is buried is a commercial plot where nobody lives, thus the grave is abandoned. That since the deceased was unmarried, she should be buried in her father's home according to Luhya Customary Laws. He urged the court to dismiss the application.
6. The applicants filed a supplementary affidavit deposing that the respondent has always abdicated his parental duties and chased the 1<sup>st</sup> appellant/applicant and the children away from their home and continued living there alone. That the deceased is buried on a piece of land adjacent to where she lives and she sees the deceased's grave every day. She deposed that as the matter in the lower court was ongoing, the respondent sold the piece of land where the grave is located, to a third party yet the said land was matrimonial property sold without her consent. That this triggered an ELC case where she is attempting to reverse the sale and the case is still pending. That at the time of burial of the deceased, the land was matrimonial property and they were not strangers to this fact. That she does not subscribe to Luhya cultures and will be discriminated if the body is exhumed and buried in Kakamega County.
7. The application was canvassed by way of written submissions.
8. The appellants/applicants deposed that the deceased was buried on parcel number Mbeti/Gachoka/2228 registered in the name of the respondent on 26<sup>th</sup> August 1996. That this property is matrimonial property and the burial took place on 20<sup>th</sup> August 2021 but the respondent did not participate in the burial rites and attempted to get orders to stop the burial because he wanted the deceased to be buried in his up-country home in Kakamega County. That on 15<sup>th</sup> October 2021, the respondent sold that land to one Isaiah Nyaga Kagoche. Reliance was placed on Order 42 Rule 6 of the [Civil Procedure Rules](#).
9. It is their submission that if the body is exhumed and removed from the piece of land situate in Rwika, the appellants will be forced to vacate the land since the respondent has sold it to a 3<sup>rd</sup> party. That this will amount to irreparable loss and considering that there is a pending case in the ELC court. That the application was filed without delay and they are willing to comply with any conditions set by the court if the orders are granted.
10. The respondent submitted that according to Order 42 Rule 6, the [Civil Procedure Rules](#) prescribe conditions under which orders for stay of execution may be granted. He relied on the case of [Rhoda Mukuma v. John Abuoga](#) (1988) eKLR and argued that the applicants have failed to demonstrate that they will suffer substantial loss if the orders are not granted. That the applicants have not come to the court with clean hands as they did not disclose that they hurried in burying the deceased on the land knowing that the respondent has filed an injunction stopping the burial. That the land is not matrimonial land and that the applicants will not suffer any substantial loss if the body of the deceased is exhumed. Further reliance was placed on the cases of [Absolom Dova v Tarbo Transporters](#) [2013] eKLR, [Ena Investment Limited v. Benard Ochau Mose & 2 Others](#) [2022] eKLR and [James Wangalwa & Another v. Agnes Naliaka Cheset](#) [2012] eKLR.



11. I have considered the application for stay, grounds thereof, supporting affidavit the Replying affidavit and submissions together with case law cited by both parties and in my view the issue for determination is whether the applicants should be granted stay of execution pending appeal.

12. Stay of execution is provided for under Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides:

“(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 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. In the case of [Nicholas Stephen Okaka & another v Alfred Waga Wesonga](#) [2022] eKLR, the court held that:

“The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.

9. 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.”

14. In the present application, it is the appellants’ case that the orders of the trial court, if executed, will extinguish the subject matter of the appeal being that the body of the deceased will be exhumed from land upon which the 1<sup>st</sup> appellant/applicant is residing. That if the body will be exhumed and buried in Kakamega County, the 1<sup>st</sup> appellant/applicant will not be able to visit the grave of the deceased because she no longer has access to the respondent’s home upcountry because they are divorced. That



- the respondent, having sold the property to third party, will cause the 1<sup>st</sup> appellant/applicant to be evicted from the land.
15. In essence, the 1<sup>st</sup> appellant/applicant is only living on the said land because the grave of the deceased is still there. It was also her averment that the land where the grave of the deceased is located is matrimonial property and that the respondent sold it to a third party without the consent of the 1<sup>st</sup> appellant/applicant. That the issue has been raised and is pending before the ELC in Embu. The respondent refuted claims that the 1<sup>st</sup> appellant/applicant cannot access his home in Kakamega County and stated that being divorced does not mean that the 1<sup>st</sup> appellant/applicant cannot access his home in Kakamega County.
  16. On the question of whether the applicants will suffer irreparable loss if the orders are not granted, it is my view that the impending execution may extinguish the subject matter. The 1<sup>st</sup> appellant/applicant has demonstrated that indeed the land is the subject of Embu ELC Case No6 of 2023, which I have perused and found that the case is ongoing and the respondent is actively participating therein. Whatever the case, the 1<sup>st</sup> appellant/applicant will suffer loss if the orders are denied.
  17. As to whether the application has been brought timeously, the application was filed within 5 days of delivery of the impugned judgment.
  18. On the issue of whether security should be provided according to Order 42 Rule 6(2)(b) of the [Civil Procedure Rules](#), the orders sought herein are not for a money decree. Therefore, the provision of security will not apply in this case. The applicants have filed a memorandum of appeal which I have perused and, in my view, it raises an arguable case. The applicants will not be denied an opportunity to litigate their appeal. However, this is not to say that the respondent's right to execute the orders of the trial court are of lesser value in the eyes of this court. In fact, I do emphasize that the rights of the parties on the opposing sides are equally important in the eyes of the law. In any event, the body of the deceased can be exhumed at any point in time, when the legal issues have been settled. In the case of [Nicholas Stephen Okaka & another v Alfred Waga Wesonga](#) [2022] eKLR, the court held that:

“The court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:

“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.”
  19. In the interest of justice and according to Article 159(2)(d) of the [Constitution of Kenya](#) 2010 and Sections 1A, 1B and 3A of the [Civil Procedure Act](#), I find that the application has merit and I hereby allow prayer 3 of the same.
  20. Costs of the application shall abide the outcome of the appeal.
  21. It is so ordered.



**DELIVERED, DATED AND SIGNED AT EMBU THIS 23<sup>RD</sup> DAY OF FEBRUARY, 2024.**

**L. NJUGUNA**

**JUDGE**

.....for the 1st Appellant/Applicant

.....for the 2nd Appellant/Applicant

.....for the Respondent

