



**In re Estate of Mehmuda Husseinbhai Anjarwalla (Deceased) (Succession Cause 66 of 2017) [2024] KEHC 10729 (KLR) (26 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10729 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 66 OF 2017**

**G MUTAI, J**

**JULY 26, 2024**

**IN THE MATTER OF THE ESTATE OF MEHMUDA  
HUSSEINBHAJI ANJARWALLA (DECEASED)**

**BETWEEN**

**SALMA ANJARWALLA ..... APPLICANT**

**AND**

**SALIM ANJARWALLA ..... 1<sup>ST</sup> RESPONDENT**

**TEHZEEN ANJARWALLA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. In a ruling delivered on 15<sup>th</sup> April 2024, in respect of the Notice of Motion dated 8<sup>th</sup> July 2022, through which the 2<sup>nd</sup> Administrator/Applicant had sought, *inter alia*, for orders that:-

“This honourable Court be pleased to discharge order No. 1 of the orders issued by this honourable Court on 27<sup>th</sup> May 2022.”

This Court held at paragraph 27 as follows:-

“the orders that the Court gave on 27<sup>th</sup> May 2022 were, as I have stated, self-executing. Salma neither appealed against the said decision nor sought to have it reviewed. In the circumstances, I order that a new grant be issued to Tehzeen Anjarwalla and Salim Anjarwalla forthwith.”

2. The orders of this Court were based on:-



1. Firstly, the ruling of Onyiego, J above referenced, which found in paragraph 32 that  
“Having found, as above, I am inclined to find that Salma is Obligated to execute all necessary transfer forms or any other documents relevant to facilitate full and complete administration and distribution of the estate within 45 days in default, she shall cease to be an administrator and a fresh grant issued to the two remaining administrators”; and
2. Secondly, the determination by this Court that almost 2 years after Onyiego, J’s ruling, Salma had still not complied fully with orders above referenced and wasn’t likely to do so.
3. The 2<sup>nd</sup> Administrator/Applicant (hereafter “Salma”) was aggrieved by the said decision and filed a Notice of Appeal dated 19th April 2024, vide which an intention to appeal against the ruling was expressed.

#### **The Notice of Motion dated 28<sup>th</sup> April 2024**

4. The Notice of Motion dated 28<sup>th</sup> April 2024 seeks the following orders:-
  1. Spent;
  2. Spent;
  3. That pending the hearing and determination of Salma Anjarwalla’s intended appeal to the Court of Appeal, this Honourable Court be pleased to grant a stay of execution of the ruling and orders issued on 15<sup>th</sup> April 2024 for the removal of Salma Anjarwalla as an administrator of the estate of the deceased (the late Mehmuda Husseinbhai Anjarwalla) and stay of the order that a fresh grant should be issued to the remaining two administrators, Salim Anjarwalla and Tehzeen Anjarwalla; and
  4. That an appropriate order be made for the costs of the application.
  5. The grounds upon which the application is based are set out in the body of the said Motion and the Supporting Affidavit of the Applicant. Briefly, Salma is aggrieved with the decision of this Court and intends to appeal at the Court of Appeal against the same. She avers that she has an arguable appeal as she had fully complied with this Court’s previous orders, and thus there is no basis for her removal. She is apprehensive that she will be removed as an administrator of the estate of the deceased and that her intended appeal will be rendered nugatory should her application not be allowed in terms of the prayers in her motion. Additionally, she deposed that there is a risk that the estate will be wasted if left in the hands of Salim and Tehzeen.

#### **The Response by the 1<sup>st</sup> & 3<sup>rd</sup> Administrators/Respondents**

6. The 1<sup>st</sup> Administrator/Respondent, Salim Anjarwalla (hereafter “Salim”), filed grounds of opposition, through his counsels, Echessa & Bwire Advocates LLP, in which he urged that there was no appeal against the decision made by Onyiego, J on 27<sup>th</sup> May 2022. Counsels averred that an appeal couldn’t be filed against a decision giving effect to a default provision of the previous decision. Further, the order issued by this Court on 15<sup>th</sup> April 2024 was a negative order dismissing the application dated 8<sup>th</sup> July 2022 and was thus incapable of being stayed. It was stated that Salma had not demonstrated that she would suffer substantial loss if the administration of the estate is concluded by the two administrators and that there was no evidence that the two administrators had, since the grant was issued, wasted or



acted in any manner prejudicial to the proper administration of the estate. Lastly, It was also stated that no pledge for security had been made.

7. Tehzeen Anjarwalla (hereafter referred to as “Tehzeen”) filed a replying affidavit sworn on 3<sup>rd</sup> May 2024 in opposition to the application. Tehzeen deposed that Salma’s appeal wasn’t arguable, denied that Salma would be severely prejudiced if she were removed as an administrator, refuted the allegation that the estate would be wasted if Salim and Tehzeen were the only administrators, asserted that the estate would be severely prejudiced if the application were granted, as would the beneficiaries. She also stated that the outcome of the intended appeal shouldn’t be of consequence as this Court has the primary obligation of distributing the deceased’s estate and that the Court would be shirking its responsibilities if it allowed the application.
8. Tehzeen stated that the intended appeal was not arguable and was frivolous and idle. She averred that the grant in respect of the subject estate was confirmed by Lady Justice Mugure Thande and that all that remained was for the estate to devolve to the beneficiaries. In her words, “the applicant’s intended appeal will not change anything to do with the substance of the estate, its mode of distribution or the time frame. The only matter to be addressed is whether it will require 3 people or 2 to execute the required documents to effect the distribution and administration of the estate”. She argued that Salma would not, therefore, be prejudiced.
9. Tehzeen further stated that Salma’s averment that the estate would be wasted in Salim’s and her hands was unfounded and unsupported by evidence. She averred that granting the orders sought would delay the conclusion of the succession process by 2 to 3 years and be prejudicial to the beneficiaries.
10. Lastly, she urged that having succeeded in the said ruling, she and Salim shouldn’t be denied the fruits of a ruling in their favour. Tehzeen deposed that even if Salma was removed, she wouldn’t lose her right as a beneficiary of the estate in any way.

#### **Supplementary Affidavit of Salma Anjarwalla**

11. Salma responded to Tehzeen’s affidavit vide an affidavit sworn on 16<sup>th</sup> May 2024. She deposed that she complied with the court orders and that it was for that reason that Onyiego did not order her removal but merely directed all the parties to ensure the completion of the administration of the estate. She averred that the fact that there were some pending matters was solely attributable to her, stating in particular that:-

“as stated in the Memorandum of Appeal, the administration and distribution of the estate is not complete due to factors that cannot be solely attributed to me.”

12. Salma denied that Tehzeen and Salim would faithfully administer the estate. She referred to the disputed debt of Kes.88,000,000.00 and averred that they had failed to collect it. Further, she deposed that the order that this Court issued wasn’t a negative order but rather a positive one that called for her removal and for the issuance of a fresh grant. Salma deposed that she is willing to comply with any reasonable condition this Court may impose as a condition for the grant of stay.

#### **Submissions by the Parties**

13. The application was canvassed through both oral and Written Submissions.



### Submissions of Salma Anjarwalla

14. The submissions of Salma Anjarwalla were filed by her advocates, Kaplan & Stratton Advocates, on 16<sup>th</sup> May 2024. The said counsels urged that for a Court to grant a stay of proceedings, it must be satisfied with 3 things to wit:-
  1. There was an arguable appeal;
  2. It was in the interest of justice to grant the orders sought; and
  3. The application for stay was filed with due dispatch.
15. On whether the appeal was arguable, her counsels urged that it was. In their opinion, this Court failed to appreciate that the litigation in respect of the Shanzu property was not complete and that, for that reason, the property couldn't be transferred. It was submitted that Salma, as a beneficiary of the funds in Habib Bank PLC, UK, had disclaimed the gift and that preparation of the estate accounts would require all the administrators to act together, not just her. She submitted that I did not consider that there was no application to remove her as an administrator and that the Court had, on 30th January 2023, varied its orders by asking all the parties to collaborate. Thirdly, her removal would make it difficult for the estate to recover the Kes.88,000,000/- from Salim, which she asserted he owes the estate. Lastly, it was urged that the Court acted with alacrity in removing Salma when it should have been cautious.
16. Counsels urged that it had demonstrated that there was an arguable appeal in support of their submissions I was referred to the decision of the Court in *Kenya Airports Authority v Mitubel Welfare Society & another* [2014]eKLR where it was held that:-

“an arguable appeal is not more than one that raises a legitimate point of points deserving judicial determination. An appeal need not raise a multiplicity or any number of such points; a single arguable point is sufficient to earn an appeal such appellation... Moreover, an arguable point need not be one that will necessarily succeed when the appeal is heard, for it is not the function of the Court at the hearing of such an application to make a final determination on the points to be argued an appeal.”
17. It was submitted that if the orders sought were not granted, Salma's appeal would be rendered nugatory, and she would have no recourse as the estate would likely be wasted. Her counsel also submitted that the application was filed timely and without undue delay.

### Submissions of Salim Anjarwalla

18. Salim's counsels, Echessa & Bwire Advocates LLP, filed written submissions dated 17th May 2024. In their said submissions, counsels urged that the application be dismissed. They submitted that even though the application for stay was brought under Order 42 Rule 6 of the *Civil Procedure Rules*, the arguments made by Salam's counsels were those applicable under Rule 5(2) (b) of the *Court of Appeal Rules*, 2022, which require that there should be an arguable appeal and also proof that if the stay sought is not granted the intended appeal would be rendered nugatory.
19. Counsels urged that this Court was being asked to second-guess itself in so far as it was being called upon to determine whether an appeal against its own decision was arguable. Counsels urged that the proper test was whether there had been a demonstration of substantial loss likely to be suffered by the applicant, whether the application was filed without delay, and whether security was provided or an undertaking to that effect was made.



20. Regarding the above tests, it was urged that no substantial loss had been established, nor had it been shown that the two remaining administrators had conducted themselves in a manner likely to result in Salma sustaining a substantial loss.
21. This Court was invited to find that since Onyiego J's orders were self-executing, Salma was removed automatically upon the lapse of 45 days and that what I did in my ruling was to recognize a preexisting state of the matter.

### **Submissions of Tehzeen Anjarwalla**

22. Njoroge Regeru & Co. Advocates, counsels for Tehzeen Anjarwalla, submitted that the extension of time granted to Salma to comply with the orders of 27<sup>th</sup> May 2022 did not have the effect of revising or setting aside said orders.
23. Counsels identified two issues for determination: whether Salma had met the prerequisites for an order of stay of execution to be issued and who should pay the application's costs.
24. It was submitted that Salma failed to demonstrate to this Honourable Court that she would suffer substantial loss. Tehzeen's counsels urged further that she failed to meet the strict threshold for the grant of stay of execution by failing to provide specific details of the alleged substantial loss that she would suffer should the Court decline to allow the application. It was also asserted that her removal would not affect her rights as a beneficiary of the estate. Further, she did not appeal against the ruling delivered on 27<sup>th</sup> May 2022, in which the substantial decision for her removal was made.
25. On whether the application was made without undue delay, the Court Tehzeen's counsels conceded that she had filed her application without delay. Nevertheless, they submitted that her application should be dismissed in the interest of justice as it was merely intended to delay the distribution of the estate.
26. It was submitted that there is a requirement to provide security even in succession proceedings. In support of the said contention, I was referred to the decision of the Court in *Patrick Kimanzi v Marcus Mutua Muluvi & 2 others* [2013]eKLR, *In re Estate of Francis Waitthanje Munaithaga alias Waitthanje Munaithaga* [2021]eKLR, *In re Estate of Maria Wanjiru Karanja (deceased)* [2021]eKLR and *In re Estate of Solomon Mungura Mathia (deceased)* [2021]eKLR.
27. Regarding costs it was submitted that the Court ought to compel Salma to pay costs as her application was filed in bad faith and for personal gain.
28. The Court was thus urged to dismiss the application with costs.

### **Analysis & Determination**

29. I have considered the application and the responses thereto and the parties' submissions, both oral and written. I am called upon to determine if a stay of execution should be issued pending the hearing and determination of Salma's appeal against my decision and whether and by whom costs should be payable.
30. What should the Court consider when determining the matter, and which provision of the law should I consider?



31. The purpose of stay of execution was considered in the case of *RWW v EKW* [2019]eKLR. In the said case, the Court pronounced itself as follows:-

“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 weight this right against the success of a litigant who should not be deprived of the fruits or his or her judgment...”

32. The determination of an application for stay of execution pending appeal is an exercise of discretion by the Court. As with all discretionary powers, the Court must exercise them judiciously and sagaciously, on sound principles, and not capriciously. The Court must also balance the competing interests of the applicant and the respondent and make a decision that best protects those interests.

33. I note that under the *Probate & Administration Rules*, 1980, the applicability of the *Civil Procedure Rules* is restricted. Rule 63(1) of the said Rules provides that:-

“Save as is in the Act or in these Rules otherwise provided, and subject to any order of the court or a registrar in any particular case for reasons to be recorded, the following provisions of the *Civil Procedure Rules*, namely Order 5, rule 2 to 34 and Orders 11, 16, 19, 26, 40, 45 and 50, together with the *High Court (Practice and Procedure) Rules*, shall apply so far as relevant to proceedings under these Rules.”

34. It is thus evident that Order 42 of the *Civil Procedure Rules* is not among the provisions that Rule 63 of the *Probate & Administration Rules* has deemed applicable to succession proceedings. The latter rule, however, gives Courts the discretion to issue directions or adopt a procedure suitable to the circumstances of the proceedings before them. Taking into account the latitude Rule 63 of the *Probate & Administration Rules* gives the Courts and being cognizant of the current practice in the Probate and Administration Courts I will adopt the test in Order 42 Rules 6 of the *Civil Procedure Rules*.

35. Order 42 Rule 6(2) of the *Civil Procedure Rules* provides as follows:-

- “(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.”

36. In my view, the said provision of the *Civil Procedure Rules* lays down three requirements that the applicant must demonstrate before a stay of execution pending appeal is granted. These are:-

1. Whether the applicant will suffer substantial loss if the stay is not granted?
2. Whether the application was filed without undue delay?
3. Whether the security for costs has been provided?

37. These requirements are conjunctive and not disjunctive. They must all be present for an order, staying execution of the decree or order of the Court, to issue.



38. The test under the Civil Procedure Rules is different from that in the Court of Appeal Rules, 2022 in so far as, unlike Rule 5 (2) (b) of the Court of Appeal Rules, 2022, there is no requirement that a party must show that there is an arguable appeal. In my view, the difference is deliberate; having made the impugned decision, the Court whose decision is being appealed against may not be in a good or independent position to determine whether an appeal against its very own decision is arguable. Such an exercise would, as Salim’s counsels have rightly put it, amount to second-guessing itself.
39. For that reason, I am unable to agree with the submissions of the Applicant to the extent that it seeks to demonstrate that the appeal is arguable.
40. Notwithstanding the foregoing, has Salma demonstrated that I should issue an order staying execution of the orders I issued? I will examine each of the 3 requirements in turn.

### **Whether the Applicant will suffer substantial loss?**

41. What amounts to substantial loss was discussed in the case of James Wangalwa & another v Agness Naliaka Cheseto [2012]eKLR. The Court stated that:-
  11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein v Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus: “...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.”
42. Would the denial of the stay render the appeal nugatory? To determine this question I must first note some salient facts:-
  1. Lady Justice Mugure Thande, in her decision delivered on 2<sup>nd</sup> February 2021, confirmed the grant in respect of the subject estate;
  2. Identified the properties forming the estate and provided for their mode of distribution;
  3. Ordered the administrators to cooperate and work together to give effect to the orders the court had issued;
  4. The said decision was not appealed against, nor was it set aside or reviewed;
  5. Mr Justice John Onyiego, in a decision made on 27<sup>th</sup> May 2022 found at paragraph 30 that:-

“I do not find the grounds advanced by Salma for her refusal to sign necessary transfer documents justified. She should honour the Court order or she exists so as to enable the rest of the administrators serve.”; and



6. The decision made by Justice Onyiego, too, wasn't appealed against, nor has it been set aside or reviewed.
43. The applicant has submitted that she would suffer substantial loss if stay is not granted. It has been argued on her behalf that the estate would be wasted and that her appeal would be rendered nugatory.
44. Would her appeal be rendered nugatory? I do not agree with her counsel's submission on this point. The decision this Court made, as was rightly submitted by counsel for Tehzeen, in effect, reduced the number of signatories to the transfer deeds. Further, the Court, in essence, merely recognized the reality of the decision made by Onyiego J and effectuated it. The substantive property rights of the parties were decided by Thande, J in her above-referenced decision. Even if the Court of Appeal overrules this Court, the size of the estate and the interests of the parties will not change. She will still be entitled to a portion of the estate that Thande, J identified as belonging to the deceased. Her entitlement would be the proportion the Judge rules as being her share. In light of this, I am unable to see how a denial of the orders she seeks will render her appeal nugatory.
45. On whether the estate would be wasted if Salma is removed, this Court notes that no justification was provided. In the circumstances, I find and hold that Salma's fears lack foundation.
46. I note that if Salim and Tehzeen act contrary to their obligation under section 83 of the *Law of Succession Act*, Salma would have a remedy under sections 76 and 94 of the said Act.
47. I agree with counsels for the respondents that allowing the application would delay the completion of the administration of the estate and be contrary to Article 159(2) of the *Constitution* of Kenya, which provides that:-
- “(b) justice shall not be delayed.”
48. In view of the foregoing, I find and hold that Salma won't suffer a substantial loss if the orders sought are denied.

### **Was the application filed without undue delay?**

49. The Court agrees with the applicant that the application was made without undue delay.

### **Provision of security for costs**

50. As this is a family matter, the Court is of the opinion that the provision of security is inapplicable. Although the counsels for Tehzeen have provided authorities in support of the contrary, I note that the said decisions were made by courts with similar jurisdiction and are, hence, of persuasive authority only. Having said that, I note that this point is moot, as Salma offered to provide security.

### **Disposition**

51. In the case of *re Estate of the late Kaburachi Peter (deceased)*[2021]eKLR, the Court stated as follows:-

“24. In the instant case, the applicant having failed to prove that she will suffer substantial loss if the orders sought are not granted, then even if the application was brought without unreasonable delay and further even if the applicant is willing to provide security, nonetheless, failure to prove the first condition dislodges the others. The application as such ought to fail and it is hereby dismissed.”



52. I agree with the above decision. The prerequisites for a grant of stay under Order 42 Rule 6 are, as we have seen, conjunctive, not disjunctive. Therefore, as no substantial loss has been demonstrated, if the prayers sought by the applicant are denied, the application must fail. In the circumstances, I find and hold that the application has no merit and is for dismissal.
53. This is a succession cause among siblings. In the circumstances, I am most reluctant to award costs to the respondents. Parties will, therefore, bear their own costs.
54. It is so ordered.

**DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF JULY 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Onyango, holding brief for Mr Gachuhi, for 2<sup>nd</sup> Administrator/Applicant;

Ms Werimo, holding brief for Mr Echesa for the 1<sup>st</sup> Administrator/Respondent;

Ms Amuka, holding brief for Mr Njoroge Regeru, SC, and Ms Ng'onde, for the 3<sup>rd</sup> Administrator/Respondent; and

Arthur - Court Assistant.

