



**Maalim v Mathobe & another (Suing on Behalf of the Estate of Mathobe Maalim)
(Civil Appeal E004 of 2024) [2024] KEHC 10182 (KLR) (15 August 2024) (Ruling)**

Neutral citation: [2024] KEHC 10182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MANDERA
CIVIL APPEAL E004 OF 2024
JN ONYIEGO, J
AUGUST 15, 2024**

BETWEEN

MOHAMED MATHOBE MAALIM APPLICANT

AND

LUL MATHOBE 1ST RESPONDENT

ASLI MATHOBE 2ND RESPONDENT

SUING ON BEHALF OF THE ESTATE OF MATHOBE MAALIM

RULING

1. This ruling determines the applicants' notice of motion amended on 06.05.2024 brought under the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules and section 3A of the [Civil Procedure Act](#).
2. The applicant seeks the following orders:
 - i. Spent.
 - ii. That pending the hearing and determination of the memorandum of appeal dated 21.03.2024, the Honourable Court be pleased to grant a stay of execution of the orders of the Honourable Senior Resident Kadhi of Mandera dated 22.02.2024 directing that Plot No. 236 situated at Customs Area which was part of the estate of Mathobe Maalim (deceased) be sold.
 - iii. That pending the hearing and determination of the memorandum of appeal dated 21.03.2024, the Honourable Court be pleased to grant a stay of execution of the order of the Senior Resident Kadhi directing the transfer of Plot No. 236 situated at Customs Area which was part of the estate of Mathobe Maalim (deceased) be sold before the expiry of 90 days as contained in the judgment dated 22.02.2024.



- iv. That pending the hearing and determination of the memorandum of appeal dated 21.03.2024, the Honourable Court be pleased to grant a stay of execution of the order of the Honorable learned Senior Resident Kadhi dated 22.02.2024 directing the eviction of the applicant from Plot No. 276 situated at Bulla Jamhuri Part II.
 - v. That pending the hearing and determination of the memorandum of appeal dated 21.03.2024, the Honourable Court be pleased to grant a stay of execution of the orders of the Honorable Senior Resident Kadhi of Mandera directing the OCS Mandera Police Station, arrest the applicant.
3. The application is supported by the affidavit of Solomon Angenyi Wamwayi, counsel for the appellant / applicant. The applicant's case is that he is aggrieved by the decision of the court in Mandera KCSUCC E050 of 2021 delivered on 22.02.2024 and has since lodged an appeal challenging the judgment and decree thereof.
 4. Counsel deponed that the learned senior resident Kadhi failed to distribute Plot 236 situated at Customs area which was part of the estate of Mathobe Maalim(deceased) and ordered the said plot be sold without giving reasons for such sale. It was averred that the Kadhi ordered the eviction of the applicant from Plot 276 at Bulla Jamhuri Part II which is part of the estate of the deceased without giving any plausible reason.
 5. It was deponed that the learned senior resident Kadhi ordered for the arrest of the applicant by the OCS Mandera Police station whereas, the applicant has not been cited for contempt and the same thus amounts to bias and malice. That the applicant is apprehensive that his liberty will be violated and the estate of the deceased be wasted to his detriment.
 6. Opposing the application, the respondents through their advocate A.G. Mau & Co. filed a replying affidavit sworn on 07.06.2024 thus deposing that the issue for distribution was conclusively dealt with by the Kadhi wherein the applicant was granted a 7.46 % share in the estate of their deceased father which share is equal to all other brothers. That the applicant being a chief, has been unco-operative in the proceedings herein as he has been using his position to frustrate the other family members in their quest to have a peaceful inheritance process.
 7. That without consent from the other brothers, the applicant took possession of Plot No. 276 at Bulla Jamhuri Part II. He averred that despite protests from other beneficiaries, the applicant has been making developments thereon and claiming the property as his own which amounts to intermeddling. That upon sitting down with the rest of the beneficiaries to deliberate on raising the required money, it was agreed that Plot No. 256 at Custom be sold and proceeds be deposited in court to be divided amongst the beneficiaries after deduction of the administration expenses and legal fees.
 8. It was deposed that the judgment by the court did not direct that the applicant be arrested but the court restrained him from obstructing the smooth running of the estate. That the court further ordered the OCS Mandera Police station to arrest the applicant in the event he causes obstruction to the tenants in the estates.
 9. That the application herein is a deliberate attempt to delay the execution process since the applicant is solely benefiting by occupying one of the properties of the deceased to the disadvantage of others. This court has therefore been urged to dismiss the application herein.
 10. The applicant further filed a supplementary affidavit sworn on 12.06.2024 wherein he deposed that the alleged share of 7.46% as per para 22 of the judgment is ambiguous and incomprehensible since it did not show whether the inheritance is 7.46 % of the gross value of the estate or net value of the estate.



He denied using his position to frustrate the proceedings herein and further averred that Plot No. 276 of Bulla Jamhuria was pointed to him by his mother and that is where he has erected his house and therefore his family residence.

11. Parties agreed to canvass the application by way of written submissions. Vide his submissions dated 8-7-2024, the applicant urged that he has since abandoned prayers 2 and 3 as it's common ground that plot no. 236 situate at Customs Area did not form part of the estate of the deceased. This court was urged that the Kadhi failed to assign any reasons for not distributing any part of Plot No. 276 of Bulla Jamhuria part II to the applicant.
12. It was further contended that in as much as there was an error in the court records in regards to Plot No. 236 situate at Customs Area and that the respondent was in the process of amending the error to review plot no.256, on 22.02.2024, with the knowledge of the Kadhi and/ or the participation of the Land Registrar Mandera County, the said land was transferred from the deceased's estate to one Fatuma Issak Adan, a buyer. It was therefore urged that this application be allowed as the respondents did not demonstrate any loss that they would suffer if the prayers sought were granted.
13. On their part, the respondents filed their submissions dated 4-7-24 contending that the applicant had not met the threshold for grant of stay of execution orders as envisaged under Order 42 rule 6 (2) of the CPRS. Counsel submitted that for an order of stay of execution to issue, the applicant must prove that he is likely to suffer substantial loss if the orders sought are not granted. To buttress that position, the court was referred to the case of Samvir Trustee Limited v Guardian Bank limited Nairobi Milimani HCC No.795 of 1995 where the court stated that for one to claim substantial loss, there has to be empirical evidence and not mere assertions.
14. Learned counsel opined that the applicant had blatantly disobeyed a court order which directed sale of the subject property to facilitate equal distribution of the sale proceeds to beneficiaries him included. That the applicant has continued to develop the property thus exercising exclusive use thereon for his personal benefit hence disadvantaging the rest of the beneficiaries.
15. I have considered the application for stay, grounds of appeal thereof, supporting affidavit, the replying affidavit and submissions as filed by the respective parties. Having done so, the main issue for determination is whether the applicant has demonstrated that the orders of stay of execution pending appeal are merited.
16. The principles guiding grant of stay of execution orders pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides:

“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.

[Also see Antoine Ndiaye v African Virtual University [2015] eKLR].
17. Besides the above stated conditions, stay may also be granted if sufficient cause is demonstrated. The Court in deciding whether or not to grant a stay order, it has to take into account the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act* as the baseline for determining the appropriate orders to make to meet the ends of justice.



18. As to what constitutes substantial loss, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“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.”

19. In the same breadth, in the case of *Kenya Hotel Properties Limited v Willesden Investments Limited* [2007] eKLR, the Court of Appeal stated that:

“...It does appear to us that in considering the question as to whether the success of the intended appeal would be rendered nugatory were we to refuse the application for stay, the main requirement is to weigh the position of the parties before the court with the background of ensuring justice in mind...”

20. In the instant case, the applicant did not address the issue of stay of execution but instead delved into the merits of the appeal. This is evident from a scrutiny of the submissions filed in support of the application.

21. The above notwithstanding, the applicant was dissatisfied by the ruling of the Kadhi in that; no reason was given for his immediate eviction from Plot No. 276 situated at Bulla Jamhuri part II; the Kadhi failed to give reasons why the said plot had to be sold after expiry of 90 days or; what was to happen to the developments made by the applicant on the said land if stay of execution is not given.

22. On their part, the respondents addressed the issue of stay of execution claiming that the applicant had not proved the specific loss he was likely to suffer in the event the prayer for stay was rejected and that the appeal had no high chances of success.

23. It is trite that the applicant is duty bound to establish that he is likely to suffer substantial loss if the application is not allowed; that the application has been filed within reasonable time and that he has deposited or offered reasonable security in due performance and execution of the decree, his appeal has high chances of success; his appeal is likely to be rendered nugatory if application is not allowed or for any other sufficient cause.

24. 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.”

25. It has been stated by the applicant that he has done some development and his family resides in the subject property hence any eviction will render his family homeless. He has also argued that if the order for his arrest is executed, it would amount to substantial loss and that his appeal will be rendered nugatory.
26. The respondents do not deny that the applicant has done some developments on the disputed property and that he is staying there. With those facts in mind, if the execution process takes place, the applicant and his family will be rendered homeless hence substantial loss. Further, the developments already made may be demolished thus rendering the appeal an academic exercise(nugatory). Besides, if the applicant were to be arrested for disobeying the aforesaid court order, his liberty will be at stake hence substantial loss.
27. Regarding filing the application in time, there has been no inordinate delay in bringing the instant appeal as the judgment and decree being appealed against was delivered on the 22.02.2024 and the memorandum of appeal dated 21.03.2024 was filed on 22-03-24 while the instant application was filed on 30-03-24. It therefore follows that the instant application was filed after 38 days of delivery of the impugned judgment. In my view, the application was filed within reasonable time.
28. Taking into consideration the totality of the facts surrounding this appeal, it is only fair that the applicant/appellant be given an opportunity to exhaust his right of legal redress. [See article 50 of [the constitution](#)].
29. As to deposition of security, parties did not submit on the same. However, given the nature of the matter involving family members and the fact that the respondents did not submit on the same, it is my considered view that in the interests of justice the scales tilt in favour of the applicant.
30. Taking all the above factors into account and in order not to render the intended appeal nugatory as well as to give effect to the overriding objective of the [Civil Procedure Act](#), I find and hold that the applicant has fulfilled the requirements for grant of stay of execution pending appeal.
31. Accordingly, I hereby issue the following orders:
 - i. The application amended on 06.05.2024 is hereby allowed in terms of prayer four
 - ii. The appellant to file and serve a record of appeal within thirty (30) days of this ruling;
 - iii. Costs shall be in the cause;

DATED, SIGNED AND DELIVERED VIRTUALLY AT GARISSA THIS 15TH DAY OF AUGUST 2024

J. N. ONYIEGO
JUDGE

