



REPUBLIC OF KENYA



**In re Estate of Elijah Onyango Abeka (Deceased) (Succession Cause E054 of 2021) [2024] KEHC 15232 (KLR) (29 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15232 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE E054 OF 2021  
G MUTAI, J  
NOVEMBER 29, 2024  
IN THE MATTER OF THE ESTATE OF ELIJAH ONYANGO ABEKA (DECEASED)**

**BETWEEN**

**SARAH CHELAGAT ..... APPLICANT**

**AND**

**SHADIA CAROLINE ABEKA ..... 1<sup>ST</sup> RESPONDENT**

**STAFFORD ONYANGO ABEKA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. In a ruling delivered on 5<sup>th</sup> June 2024, this Court, in paragraphs 95 and 96 of the ruling, stated as follows:-

“95. In the circumstances, it is fair and just that the grant of letter of administration intestate issued on 13<sup>th</sup> September 2021 be revoked for having been procured without full disclosure of all material facts and for being incurably defective.

96. I order that Sarah Chelagat, Stafford Onyango Abeka, and Muhaymina Ebrahim Minawa jointly petition for letters of administration intestate within 60 days of the date hereof, failing which the Court will issue the grant to the Public Trustee.”

2. Aggrieved by the decision, the Applicant filed a Notice of Appeal dated 7<sup>th</sup> June 2024.



3. Vide the Notice of Motion dated 14<sup>th</sup> August 2024, the 1st Respondent sought a stay of execution of the ruling or the judgment of this Court pending appeal. The order prayed for, which is relevant at this point, is prayer 4, which seeks:-

“4. That this Honourable Court be pleased to order a stay of execution of the decree and or order herein pending the hearing of the appeal intended to be filed by the 1<sup>st</sup> Respondent herein; and

5. That costs of the application be provided for.”

4. The application is grounded on the supporting affidavit of the 1<sup>st</sup> Applicant in which she deposed that she would suffer substantial loss if the application were not allowed as the Public Trustee would be appointed as the administrator of the estate, something which she reckoned would render her appeal nugatory.

5. The application is opposed. In her deposition sworn on 29<sup>th</sup> August 2024, Ms Shadia Caroline Abeka stated that they had attempted to comply with the Court orders by forwarding a draft petition to the Applicant but that she declined to sign and chose instead to file an application for a stay of execution. Ms Abeka averred that the joint petition ought to have been filed by 5<sup>th</sup> August 2024 and that after the said date, due to the self-executing nature of the orders of the Court, the Public Trustee stood appointed as the administrator of the estate.

6. Ms Abeka further deposed that the deceased's estate could not remain un-administered as it would be wasted. She also averred that the appeal would take too long. She thus urged that the application be dismissed.

7. The application was canvassed by way of Written Submissions.

8. The Submissions of the Applicant are dated 18<sup>th</sup> September 2024. Counsel for the Applicant urged that if the grant were issued to the Public Trustee, the appeal she had filed would be rendered nugatory. It was that “it is therefore in the interest of justice that the orders given by this Court be stayed to enable me prosecute the intended appeal.”

9. Counsel further submitted that the Applicant was ready to comply with any condition(s) that this Court may give when granting a stay of execution.

10. The submissions of the Respondents are dated 4<sup>th</sup> October 2024. The Respondents' counsels averred that the horse had bolted, and that closing the stables after that would be futile. They urged that upon effluxion of 60 days from the date of delivery by this Court of its ruling the Public Trustee stood appointed as the administrator of the estate. On that ground, it was submitted that the application had been filed after an inordinate delay.

11. On whether the Applicant would suffer a substantial loss, it was urged that she would not. Counsel for the Respondent urged that she had failed to demonstrate how complying with the Court order, by filing a fresh petition for letters of administration intestate together with Stafford and Muhaymina would result in any real prejudice or harm to her.

12. Relying on *Machira t/a Machira & Co Advocates vs East African Standard* [2002]eKLR, they urged that merely stating that one would suffer substantial loss was not enough; the same had to be demonstrated.

13. It was urged that it would not be in the interstate of the estate of the deceased for it to remain un-administered.



14. I have considered the application, the replying affidavit and the submissions of the parties. Has a case for the grant of stay pending appeal been made?
15. Although Rule 63 of the Probate & Administration Rules, 1980 does not list Order 42 as being among the provisions applicable to Probate & Administration proceedings, I note that High Courts in Kenya have applied the provisions of Order 42. I see no reason to depart from a practice that, in my view, is sound. Thus, in assessing this application, I will consider the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
16. Order 42 provides as follow: -

“(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.”

17. It is therefore evident that an applicant for stay pending appeal must show that
1. He/she will suffer substantial loss unless a stay is granted;
  2. The application was filed without undue delay; and
  3. Provide security.
18. What is the purpose of a grant of stay of execution, and under what circumstances is it issued? The Court of Appeal in *RWW v EKW* (2019) eKLR addressed itself on this as hereunder:

“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.”

19. Substantial loss was discussed by Kimaru, J (as he then was) in *Century Oil Trading Co. Ltd vs Kenya Shell Ltd; Nairobi (Milimani) HCMCA No 1561 of 2007* where he stated that:-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal



so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

20. The above-quoted holding was echoed in the off-quoted case of James Wangalwa & another vs Agnes Naliaka Chesoto [2012]eKLR wherein he held 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.”

21. Although the Applicant has averred that she will suffer substantial loss if the application is not allowed, no particulars of the likely loss have been provided. All that the Court has been provided with is conjecture and speculation. Is that a sufficient basis for granting a stay of execution? I think not.

22. I am guided by the holding of the Court in the Machira case (supra), where it was held that:-

“If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant’s business (e.g. appeal or intended appeal).”

23. It would appear to me that this Court, having revoked the previous grant, the vast estate of the deceased is in imminent danger of being wasted. Appointment of the Public Trustee as the administrator will, therefore, be in the interest of the estate.

24. I find and hold that the Applicant will not suffer substantial loss in the circumstances.

25. In my view, the orders I made were self-executing. As 60 days have lapsed, the Public Trustee is now the administrator of the estate, having automatically assumed office on 6th August 2024. An event which has already taken place cannot be stayed.

26. Was the application filed without undue delay? Although an explanation has been given for the delay, the requirements in Order 42 Rule 6 of the Civil Procedure Rules are conjunctive, not disjunctive. All requirements must be present. In the absence of proof of substantial loss, the mere fact that the application was filed without delay, that the delay can be explained or that security has been offered is not helpful.

27. In the circumstances, I find and hold that this application has no merit, and consequently, I dismiss it.

28. I make no orders regarding costs as the dispute is between close family members. An award of costs will not promote family amity.

29. Orders accordingly.



**DATED AND SIGNED AT MOMBASA THIS 29<sup>TH</sup> DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of: -

Ms Okumu, holding brief for Mr Magolo, for the Applicant;

Mr Amuyunzu, holding brief for Mr Waweru Kihara, for the Respondents; and

Arthur - Court Assistant.

