



CKC & another (Minors Suing Through their Mother and Next Friend JN) v AC & another (Succession Cause 436 of 2004) [2023] KEHC 26561 (KLR) (18 December 2023) (Ruling)

Neutral citation: [2023] KEHC 26561 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 436 OF 2004
G MUTAI, J
DECEMBER 18, 2023**

BETWEEN

CKC 1ST APPLICANT

CC 2ND APPLICANT

MINORS SUING THROUGH THEIR MOTHER AND NEXT FRIEND JN

AND

AC 1ST RESPONDENT

ANC 2ND RESPONDENT

RULING

1. Before this court is an amended notice of motion dated November 29, 2023, seeking the following orders;
 - a. Spent;
 - b. That there be a stay of execution of warrants of arrest issued on November 22, 2023 against the respondents pending the hearing and determination of this application;
 - c. That there be a stay of execution of the warrants of arrest issued on November 22, 2023 against the respondents pending the determination of an appeal to the court of appeal; and
 - d. Costs of the application.
2. The application is premised on the grounds therein and the supporting affidavit of ANC, sworn on November 29, 2023. In the said affidavit, she stated that the respondent/applicants complied with the court orders by giving the applicants a share of the estate of SCB. She deposed that had already filed a notice of appeal against the ruling of the court made on January 31, 2022.



3. She further stated that their appeal raises serious issues of law under article 24(4) of the Constitution and that they should be allowed to proceed with the appeal to its logical conclusion.
4. She averred that she is 71 years old and suffers from hypertension, ulcers and diabetes, and unless a stay of the warrant of arrest is issued, she may be arrested and subjected to shock and trauma. She urged the court to allow the application.
5. In response, the respondents filed a replying affidavit sworn by JN, their mother, on November 30, 2023. She stated that on March 27, 2023, parties recorded a consent which lifted the warrants of arrest against the respondents/applicants on condition that they comply with the orders issued on January 23, 2023, and thus, the intended appeal was unnecessary.
6. She further stated that the respondents/applicants filed Mombasa Court of Appeal Civil Application No E19 of 2023, *AC & another v CKC* seeking an order for stay of the warrants pending appeal, which was dismissed by the court on April 17, 2023. The respondents/applicants did not prefer an appeal against the ruling of hon Mr Justice Onyiego of January 31, 2022, and thus, the failure to comply with the same amounted to contempt of court.
7. She deposed that the respondents/applicants have been given enough chances to purge the contempt but failed to do so. Litigation must come to an end, and her children have suffered enough. She urged the court to dismiss the application with costs.
8. When the matter came up for hearing, Mr Khatib, counsel for the applicant, submitted that they were seeking a stay pending appeal and that the appeal raises fundamental questions regarding article 24 (4) of the Constitution. They filed the notice of appeal and also applied for certified proceedings. They have also provided accounts and handed over what they believed to belong to the respondents.
9. Counsel further submitted that the applicant is over 80 years old, suffering from hypertension and diabetes and that the warrants of arrest have caused her anxiety and suffering. Counsel submitted that they were willing to abide by any order that the court may issue on security. Regarding the issue of accounts, it was submitted that the same can be resolved before the court or the deputy registrar. Counsel urged the court to allow the application.
10. Mr Magolo, counsel for the respondents/applicants, submitted that based on the affidavit of ANC, what was seen as contempt has since been purged. That arrest will be revenge and punishment. The applicants will be imprisoned if the stay is not granted, and the appeal shall be rendered nugatory. He urged the court to allow the application.
11. Mr Mwanzia, counsel for the applicants/respondents, submitted that they were opposed to the application as the warrants are in pursuance of the orders of the court of September 23, 2022, which they have partially complied with. The applicants have no option other than to comply with the court orders. Further, the respondents/applicants are indolent as the decision they are challenging was made on January 31, 2022. She urged the court to punish the applicants for contempt of court and dismiss the application.
12. Mr Khatib, an advocate for the applicant, submitted that they were willing to comply with any order the court may issue as a condition precedent and urged the court to grant a stay of execution.
13. I have considered the application, the response therein and rival submissions by both counsels, and I am now tasked to determine whether a stay of execution of the warrants of arrest should be issued.
14. Stay of execution is provided for under order 42 rule 6 (1) and (2) of the Civil Procedure Rules, 2010 which provides that:-



- a. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
 - b. 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.
15. From the above rule there are three grounds for consideration by a court when determining a stay of execution application. They are:-
- a. Substantial loss;
 - b. Application has been filed without unreasonable delay; and
 - c. Security for due performance of such decree or order.
16. On substantial loss, the applicant’s argument is that if the stay of execution is not granted, she is apprehensive the respondent will proceed to execute the warrants of arrest. She is likely to suffer prejudice due to health problems and old age.
17. In discussing substantial loss, the court in the case of *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR stated:-

“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.”



18. This is an old matter. The court has previously issued warrants of arrest in this matter. Execution, as the above decision has stated, is a lawful process. I do not see how the execution of the court's orders could occasion substantial loss. Accordingly, it is my finding that the Respondents/Applicant have not satisfied this ground for a stay of execution.
19. On whether the application has been filed without unreasonable delay, the court in the case of *Jaber Mobsen Ali & another v Priscillah Boit & another* [2014] eKLR stated that:-
- “The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be an unreasonable delay depending on the judgment of the court and any order given thereafter.”
20. In this case the decision the respondents/applicants seek to challenge before the Court of Appeal was made on January 31, 2022. The instant application for stay pending appeal was filed on November 29, 2023, one year and 10 months later. The delay in presenting the application has not been explained. To the contrary, it would appear to me that the application is merely intended to frustrate execution. Therefore, it is my view that the application was filed after a long, unreasonable delay.
21. The third factor for consideration is security for the performance of such decree or order. The applicants have submitted that they are willing to abide by the orders of the court on security. Accordingly, it's my view that the applicant has satisfied this ground. I am guided by the case of *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR where the court stated:-
- “Where the applicant proposes to provide security as the Applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the Court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay.”
22. I must add that the test under order 42 rule 6 is conjunctive and not disjunctive; each of the three elements must be present, failing which the application must fail.
23. The upshot of the foregoing is that it is my finding that this application lacks merit. The same is hereby dismissed with no orders as to costs.

**DATED, SIGNED, AND DELIVERED AT MOMBASA ON THE 18TH DAY OF DECEMBER 2023
VIA MICROSOFT TEAMS.**

GREGORY MUTAI

JUDGE

In the presence of:-

Mr. Mwanzia for the Applicants/Respondents;

Mrs. Omondi, holding brief for Mr. Khatib, and Mr. Magolo for the Respondents/Applicants

Arthur – Court Assistant

