



REPUBLIC OF KENYA AT KITUI
IN THE HIGH COURT OF KENYA AT KITUI
HIGH COURT CIVIL APPEAL CASE NO. E55 OF 2021

(Being Appeal in Kitui Chief Magistrate's court civil suit No. E 064/2021)

(PARTIES)

FRANCIS MUTHUSI MALOMBE.....1ST APPELLANT
JOYCE MWENDE MALOMBE.....2ND APPELLANT
SAMMY MWENDWA MALOMBE.....3RD APPELLANT
DOUGLAS MUNYALA MALOMBE.....4TH APPELLANT
PETER MUTUA MALOMBE (DECEASED).....5TH APPELLANT
MARGRET KAVINYA MALOMBE.....6TH APPELLANT
RUTH KAVATA MUTUA.....7TH APPELLANT
ANN MAKAU.....8TH APPELLANT

VERSUS

DANIEL KALOKI MALOMBE.....1ST RESPONDENT
DAVID KIOKO MALOMBE.....2ND RESPONDENT
ANTHONY MASILA MALOMBE.....3RD RESPONDENT
FLORENCE MUNANIE MAKINDI.....4TH RESPONDENT
SUSAN KALEKYE MALOMBE.....5TH RESPONDENT
DOREEN KAMBUA IRERI.....6TH RESPONDENT
MARY MUTHINI.....7TH RESPONDENT
NICHOLUS WAMBUA.....8TH RESPONDENT
MIRIAM WAMBUA.....9TH RESPONDENT
MIRIAM NDANU.....9TH RESPONDENT
JOHN MUSILI MALOMBE.....10TH RESPONDENT

RULING

1. The Notice of Motion dated 21st January 2022 now before this court relates to a buarial dispute among the children of the late **JONATHAN MALOMBE MUNYALA** (deceased herein) who was married to 2 wives namely Damaris Syombua Malombe (1st wife and now deceased) and Hellen Mwikali Malombe (2nd wife and also deceased).
2. The record of proceedings shows that the deceased herein, had two homes, one in a place called **Mulutu** where the 1st wife resided and one at a place called **Kunguluni** Kyanika where the 2nd wife resided. The deceased herein, or the patriarch died on 26th February, 2021 and after his demise, a dispute arose among the children of the 1st and 2nd house as to where the body of the deceased would be buried. The dispute escalated to court through *Kitui Chief Magistrate's court civil suit No. E 064/21* where the lower court found that the deceased ought to be buried at **Kunguluni**, the home of the 2nd wife. The lower court's decision was based on inter alia the fact that the deceased prior to his demise spent more time there and in fact had been picked from that residence when he fell ill and was taken to a Nairobi Hospital for treatment. The lower court's decision was delivered on 30th July 2021.
3. The Respondents in this application were aggrieved and preferred an appeal vide ***Kitui High Court Civil Appeal No. E55 of 2021***. The Respondents had together with the memorandum of appeal filed an application for stay of execution of the decree which was filed under Vacation Rules and taken to Machakos High Court where the duty court was then sitting. The High Court in Machakos entertained the said application and with concurrence of parties decided to have an order of status quo with a view of fast-tracking the hearing and determination of the main appeal.
4. Hon. Justice Odunga upon hearing the appeal on merit found *inter alia* that there was no evidence indicating that the deceased had abandoned his home at Mulutu and found that the evidence tendered indicated that the deceased valued his Kamba customs and used to hold his clan meetings at Mulutu home the home of the 1st wife. The court also found that where a dispute arises on where to bury a deceased person where the deceased is a polygamous man, the jurisprudence obtaining is that he should be buried in the home of the 1st wife. It is on that basis that Hon. Justice Odunga overturned the lower court's decision that the deceased should be buried at the home of the 2nd wife or Kunguluni and determined that he should be buried at his home at Mulutu or the home of the 1st wife. The decision was delivered on 20th December, 2021.
5. The Applicants aggrieved, filed a Notice of Appeal dated 3rd of January, 2022 long after they had asked the High Court orally in court for a stay of execution. The record of proceedings shows that Hon. Justice Odunga granted the applicants stay of execution for 21 days.
6. The applicants as observed above have now moved this court under certificate of urgency through a Notice of Motion dated 21st January, 2022 asking for the following reliefs namely: -
 - (i) *Spent*
 - (ii) *That pending the hearing and determination of this application interparted, this Honourable Court be pleased to direct that status quo be maintained to the end that the body of the late Jonathan Malombe Munyala is not buried, removed or collected for burial.*
 - (iii) *That this Honourable Court be pleased to extend the said stay of execution of the judgement delivered on 20th December 2021 by a further 120 days or such other time or as this Honourable Court may determine.*
7. The applicants have listed the following grounds as the basis for the reliefs sought namely: -
 - (i) *That this Honourable Court delivered its on 20th December 2021. The Applicants were aggrieved and have filed a notice of appeal accordingly. The applicants have also requested for typed proceedings and paid the requisite charges.*
 - (ii) *That this court upon delivering its judgement granted a stay of execution for 21 days. They aver that the stay had not yet lapsed by dint of the provisions of **Order 50 Rule 4** which stipulate that time does not run between 20th December and 13th January in any given year.*
 - (iii) *That the stay of the execution issued by this court on 20th December 2021 is set to lapse on 13th January 2022.*
 - (iv) *That the Respondents/Applicants appeal which has very high chances of success will be rendered nugatory unless this Honourable court grants the Respondents/Applicants order for extension of the period for stay of execution pending the hearing and determination of this application as well as the intended appeal.*
 - (v) *That the applicants have an arguable and meritorious appeal.*
 - (vi) *That the Respondents/Applicants will suffer no prejudice if this application is allowed.*
 - (vii) *That it is in the interests of justice that the prayers sought in this application are granted.*
8. The applicants have supported their application with an affidavit of Daniel Kaloki Malombe, the 1st applicant sworn on 21st January, 2022 where he has largely reiterated the above grounds.
9. The applicants through their learned Counsel Mr. Kimuli urged this court to grant them the reliefs sought arguing that under the provisions

of **Order 42 Rule 6(1) of the Civil Procedure Rule** this court is empowered as the court that the intended appeal emanates from to issue the reliefs sought and in particular the stay of execution pending the hearing and determination of the intended appeal.

10. They argue that when the Respondents herein lost in the lower court and approached this court for stay of execution, they graciously conceded despite having filed grounds of opposition. They contend that they waited for 4 months in this court sitting at Machakos for the determination of the appeal.

11. The applicants argue that because the boot is now on the other foot, they expected the Respondents to be magnanimous towards them. They undertook to move with speed and process the intended appeal and ask the court of appeal to prioritize the matter.

12. They urged this court to take judicial notice of the fact that in Africa, some communities attach great value to a dead body and that among the Kamba people great significance is still attached to a dead body and where it is buried.

13. They ask this court to consider the fact that both mothers of the two homes are now deceased and to forestall more agony, they need to access justice in the appellate court to ventilate their grievances.

14. They have through counsel undertaken to foot mortuary fees accruing from 20th December 2021 to the time when the intended appeal will be determined.

15. The Respondents have opposed this application through a replying affidavit sworn by Francis Muthusi Malombe sworn on 26th January, 2022.

16. The Respondents claim that the body of their father has been lying in the mortuary from February 2021 to date and that it has accumulated mortuary charges of Kshs. 680,000 and continue to attract daily costs of Kshs. 2,000.

17. The Respondents have accused 2 of their siblings for prolonging this matter stating that all the other siblings have agreed to put the matter to rest after the decision by Justice Odunga.

18. They argue that this court is not in a proper position to determine whether or not the appeal filed is arguable or has a high chances of success having rendered itself on all the issues raised before it.

19. They contest the allegation that the parties agreed on a stay of execution when they first appeared in Machakos High Court. It is their position that it is the court which on its own motion impressed upon the parties to take note of the position the court usually takes in such matters.

20. The Respondents have through their learned Counsel Mr. Mwalimu further argued that the 21 day stay of execution granted by the Judge in Machakos long lapsed and that the Respondents were simply making arrangements to give their father a proper befitting sendoff rather than a hurried burial. They aver that in that regard they have been consulting other family members.

21. They have faulted the applicants for giving an undertaking to pay morgue charges from the bar contending that they should have put it in writing.

22. It is the Respondents position that this application has totally failed to fulfill or satisfy any conditions set under **Order 42 Rule 6 of the Civil Procedure Rules**.

23. The Respondents further submits that the stay granted to the applicants upon delivery of judgement was injunctive in nature as it practically stopped the burial of the deceased body at his home in Mulutu and that owing to that, **Order 50 Rule 2 of Civil Procedure Rules** do not apply. In their view, the 21 days' stay granted ran from 20th December 2021 and that the same has now lapsed. They contend that what has lapsed cannot be extended.

24. The Respondents further contend that this court has no control over appeals filed in the Court of Appeal and argue that if a stay is granted, the applicants could as well go to sleep. They argue that the applicants have only filed a Notice of Appeal and there is no guarantee that they would file the actual appeal on time or at all.

25. They aver that the applicants should make their application for stay on the Court of Appeal which according to them is the only court that can determine whether Appeal filed has high chances of success.

26. This court due to the nature of this application and work related pressure has taken the little available time after normal court hours to consider this application and the response made.

27. This is an application for stay of execution. The subject matter of this appeal is the body of the deceased herein and where he should be buried. From the documents filed, it is evident that the matter is highly contested that and efforts by this court to implore the parties to try and agree were evidently futile.

28. The applicants have invoked the provisions of **Order 42 Rule 6 1&2 of the Civil Procedure Rules**. The Order provides: -

“ (1) *No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from*

expect 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 made such orders 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 to set aside.

(2) No order for stay of execution shall be made under sub rule (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.

29. Having set out the relevant provisions applicable to the application before me, I will directly go to the issues raised.

30. One of the issues raised is whether the 21 days stay of execution issued by the High Court in Machakos on 21st December, 2021 was an injunctive order to kick in the operations of **Order 50 Rule 4** which provide:

‘‘**When time does not run**

Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteen day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act:

Provided that this rule shall not apply to any application in respect of a temporary injunction.’’

The Respondents argue that by dint of the above rule, the order of stay issued was injunctive in nature as such the orders lapsed after 21 calendar days.

31. This court has considered the argument put forward by the Respondents and though this court agrees that in effect there is little difference between the order of stay issued on 21st December, 2021 and an injunction, still there is a distinction in law. **Hon. Judge Mativo in Republic versus Kenya Urban Roads Authority & Kenya Urban Roads Authority & 3 Others Ex-parte Cytonn Investments Management Ltd. [2018] eKLR**, grappled with that issue and gave the following distinction when it held as follows;

‘‘It is also important to mention that the applicant prays for an injunction pending the hearing of the appeal as opposed to a stay order. Identifying the difference between the two terms, namely, an injunction and stay order is important. An Injunction is defined in law as **a court order or writ that requires a person to perform or to refrain from performing a particular act.**

43. A Stay Order is defined as **a court order halting or suspending a judicial proceeding either fully or temporarily.** Such orders are issued in order to suspend or stop a legal action until a certain condition is fulfilled or a particular event occurs. The court can lift the suspension later on and re-commence the legal proceeding. In general, however, there are two types of Stay Orders: A Stay of Execution and a Stay of Proceedings. A **Stay of Execution** is a Stay Order issued by court suspending or delaying the enforcement of a **judgment** against a person.’’

32. The **Supreme Court in Gatirau Peter Munya versus Dickson Muenda Kithanji and 2 Others [2014] eKLR** dealt with the issue in paragraph 85 of its judgement where it noted as follows: -

‘‘{85} **These are issues to be resolved on the basis of recognizable concept. The domain of interlocutory orders is somewhat ruffled, being characterized by injunctions, orders of stay, conservatory orders and yet others. Injunctions, in a proper sense, belong to the sphere of civil claims, and are issued essentially on the basis of convenience as between the parties, and of balances of probabilities. The concept of “stay orders” is more general, and merely denotes that no party nor interested individual or entity is to take action until the Court has given the green light.**

33. Flowing from the above decisions, it is apparent that an order for stay of execution and an injunction are different. A stay of execution relates to halting/suspension of judicial proceedings, pending determination of an appeal, review or an application. An injunction relates to interlocutory relief stopping party from doing an act until the issues at hand are determined or resolved.

In my considered view, the stay granted in this matter by Justice Odunga was a stay of execution of his judgement which going by the cited provision of **Order 50 Rule 2)** meant time begun running from 15th January 2021.

34. The 2nd issue and main issue for determination is whether this court has jurisdiction to grant stay and whether the applicants have made out a case to merit the said relief.

35. I have already cited the provisions of **Order 42 Rule 6 (i) of the Civil Procedure Rule** above. It is clear from the cited Rule that in the 1st instance, the court appealed from may for ‘‘**sufficient cause**’’ order stay of execution. Granted that a stay of execution is discretionary

matter, this court must be satisfied that the following conditions are met by the applicant: -

- (i) He/she must show a good cause.**
- (ii) He/she must show that a substantial loss may result unless the stay is granted.**
- (iii) He must show that there is no unreasonable delay in filing the application for stay.**
- (iv) Such security as the court may order for due performance of such decree or order as may ultimately be binding on him.**

36. An applicant going by the above rule also has the option of seeking the same relief in the appellate court which in this instance is the Court of Appeal.

The applicants are seeking extension of interim orders of stay and this court has the jurisdiction and discretion to grant the same based on the above listed guidelines. The court in **RWW versus EKW [2019] eKLR** the court addressed its mind to the question and purpose of stay of execution pending appeal when it observed 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 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.”

37. This court has considered the conditions placed on the applicants by **Order 42 of Civil Procedure Rules** which is to demonstrate a good cause, show that there would be a substantial loss occasioned, that the application has been brought without unreasonable delay and finally, security for due performance.

38. This court has been persuaded that the applicants have satisfied the conditions and the reasons for my conclusion are as follows:-

(i) The application herein, has been filed timely since the decision they intend to appeal against was delivered on 20th December 2021. This application was filed under Certificate of Urgency on 21st January, 2022. There is no delay in the circumstances.

(ii) Secondly, and more importantly, the applicants have demonstrated a good cause by persuading me that they desire to pursue their right of appeal, the same way the Respondents exercised also theirs in this court. That access was made meaningful with an order of stay of execution which preserved the subject matter of the appeal. If the stay had not been granted the subject matter may have dissipated rendering the whole exercise meaningless or academic. The Respondents enjoyed their right of appeal and a stay of execution. I agree with the applicants that what is good for the goose must probably be also good for the gander.

(iii) Thirdly, related to the above point, I am satisfied that, unless stay is granted, the applicant may suffer substantial loss in terms of social and or emotional loss in the event of success in their appeal.

(iv) The applicants have offered to pay mortuary fees accruing from 20th December 2021 to the time that the intended appeal will be determined. That condition in my view would certainly push them to speedily move the Court of Appeal to dispose-off intended appeal. It is true that the applicants have only filed a Notice of Appeal but under Order 42 Rule 6(5) of the Civil Procedure Rule, a Notice of Appeal filed is deemed an appeal for purposes of an application for stay of execution. Again, any mischief to delay the matter can easily be handled at the Court of Appeal pursuant to the rules of that court.

In sum, this court finds merit in the preservation of the subject matter of the intended appeal. The application dated 21st January, 2022 is merited and is hereby allowed in the following terms: -

I. The order of stay of execution granted in Machakos High Court in this appeal is hereby extended for a further 60 days from the date of this ruling.

II. The order in (1) above is given on the following conditions: -

a) The applicants must prepare the Record of Appeal and file their intended appeal within 30 days from the date of this ruling.

b) The applicants must deposit security for costs inclusive of the mortuary fees which security should not be less than Kshs. 700,000 (Seven hundred thousand) within 14 days from the date of this Ruling.

In default of any of the conditions in (a) and (b) the stay granted herein will automatically lapse

DATED, SIGNED AND DELIVERED AT KITUI THIS 27TH DAY OF JANUARY, 2022.

HON. JUSTICE R. K. LIMO

JUDGE