



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Awadh v Abdallah (Family Appeal 47 of 2019)
[2022] KEHC 10877 (KLR) (22 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 10877 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 47 OF 2019**

JN ONYIEGO, J

APRIL 22, 2022

BETWEEN

HALIME AWADH APPELLANT

AND

FATUMA SAID ABDALLAH RESPONDENT

RULING

1. Vide petition No 55 of 2019, Fatuma Said Abdallah instituted a suit on 1st March 2019 before Mombasa Kadhi's court seeking determination of heirs and distribution of the estate of her late mother Salome Ahmed who died intestate on 7th February 1998. The late Salome was survived by Fatuma Said (herein after the respondent) and Awadh Said Abdallah now deceased. Apparently the late Awadh Said Abdallah was the father to Halime Awadh (hereafter the appellant).
2. According to the petition, the deceased left the following properties;
 - a. Two Swahili houses with nine rented shops in Manjengo on a land with title deed; and
 - b. Three bare plots at Takaungu
3. During the protracted hearing, the appellant and her siblings claimed that their late father had improved one of the deceased's houses by making extensions to which they were claiming compensation of over kshs1,000,000 before the estate could be distributed.
4. On the other hand, the respondent challenged the claim arguing that her late brother (Awadh Said Abdallah) did not consult her when he was doing the alleged extensions. That in any event the appellant's father had collected and solely enjoyed rent amounting to Kshs 30,000 per month from those extensions for 8 years thus exceeding the alleged cost incurred in carrying out the said extensions.



5. The court having agreed with the respondent's argument dismissed the appellant's claim vide its judgment dated 27th November 2019. Aggrieved by the said judgment, the appellant filed a memorandum of appeal on 23rd December 2019.
6. Subsequently, vide a notice of motion dated 1st October 2021 and filed the same day, the appellant/applicant sought various orders. The application which is expressed to have been brought pursuant to order 42 rule 6 of the civil procedure rules, sections 1A and B of the *civil procedure Act* is seeking the following orders;
 - i. Spent;
 - ii. That there be a stay of execution of the Hon. Kadhi's judgment dated 27th November 2019 pending the hearing and determination of this application
 - iii. That there be a temporary stay of execution of the Hon Kadhi's judgment dated 27th November 2019 pending the hearing and determination of this appeal.
7. The application is hinged on grounds set out on the face of it and averments contained in the affidavit in support sworn by Halime Awadh on 1st October 2021. It is the applicant's case that the impugned judgment was delivered on 27th November 2019 and on 23rd December 2019 she lodged a memorandum of appeal challenging the decision of the Honourable Kadhi.
8. That despite applying for certified copies of proceedings from the Kadhi's court for purposes of preparing a record of appeal, the same has not been forthcoming. She averred that her appeal which has high chances of success will be rendered nugatory should distribution of the estate in respect of the impugned judgment take place. She stated that she is willing to abide by any condition that the honourable court shall require or impose.
9. In response, Fatuma Said Abdallah the respondent herein filed a replying affidavit sworn on 1st September 2012 stating that the application herein is incompetent, fatally and incurably defective for failing to meet the threshold set out under order 42 rule 6 of the Civil Procedure rules. That the respondent has failed to establish that he will suffer substantial loss if the order is not granted.
10. It was averred that no evidence has been tendered to prove that proceedings were applied for nor does the absence of proceedings hinder filing of an application for stay of execution. She further stated that the application has been filed after 1 year and 11 months since the memorandum of appeal was filed hence inordinate delay.
11. It was further deponed that the application is an afterthought calculated at delaying distribution of the estate so that the appellant will continue enjoying rent collected out of the estate. She described the same as an abuse of the court process and therefore malicious and lacks merit.
12. When the application came for directions under certificate of urgency, the court granted temporary stay pending hearing and determination of the application. Later, parties agreed to file submissions to dispose of the application.

Applicant's submissions

13. Through the firm of Okanga and company advocates the applicant/appellant filed her submissions on 10th December, 2020 thus reiterating the averments contained in her affidavit in support. It was contended that the applicant was likely to suffer substantial loss if the order of stay is not granted and consequently the appeal which has high chances of success rendered nugatory.



Respondent's submissions.

14. The firm of Khalid Salim and company advocates appearing for the respondent filed their submissions also on 21st December 2021 thus reiterating the content contained in the replying affidavit to the extent that; the appellant has not established that she will suffer substantial loss; the application has been filed outside the stipulated period and that no security has been deposited. In support of this submission, counsel relied on the holding in the case of [Joseph Kariuki T/a Jofoco contractors vs P Mbogo Karanja \(chairman\) and 2 others](#) (2021) eKLR where the court held that proof of substantial loss is the cornerstone of both jurisdiction and that that is what has to be prevented by preserving that status quo so as not to render the appeal nugatory.
15. Regarding time lines, counsel contented that the delay in filing the application was unreasonable and inexcusable and that an indolent party should not be entertained. To buttress that submission, counsel relied on the holding in the case of [ANM Vs VN](#) (202121) eKLR citing with approval the finding in the case of [Dickson Miriti Kamonde vs Kenya Commercial Bank Ltd](#) (2006) eKLR where the court held that;

“...the delay cannot be excused and an indolent party must reckon with consequences of in action”.

Determination

16. I have considered the application herein and the response thereto. I have also considered oral submissions by both parties. The only issue that crystalize for determination is whether the applicant has met the threshold for grant of stay of execution orders.
17. Order 42 rule 6 (2) is quite candid that, before a court can issue an order for stay, the party in whose favour the order is sought must prove that he or she is likely to suffer substantial loss should the order sought be declined; the application has been filed timeously and that security for due performance of the decree has been offered or deposited.
18. It is incumbent upon the applicant to establish that; he is likely to suffer substantial loss if the order for stay is not granted; the application has been filed without inordinate delay and that she has deposited reasonable security. This position was succinctly addressed in the case of [Kenya Power and Lighting Company Ltd Vs Esther Wanjiru Wokabi](#) (2014) eKLR.
19. However, whether to grant or not a stay of execution is a matter of discretion by the presiding court without losing sight the need to preserve the purpose of the intended appeal. see [Edward Njane Ng'ang'a and another vs Damaris Wanjiku Kamau & another](#) (2016) eKLR and [Butt Vs Rent Restriction Tribunal](#) (1982) of KLR 417.
20. According to the applicant, her father the original heir to the estate had improved one of the houses comprising the estate to the tune of about kshs1,000,000. That the family or heirs of her father must be compensated before the estate is distributed. From the pleadings and the Kadhi's judgment, the alleged developments were done without the consent of the other beneficiaries (respondents). Further, that the extensions made to the house were generating kshs 30,000 per month as rent which rent the appellant's father enjoyed for over 8 years. The Hon Kadhi was of the view that the appellant's father must have recovered in excess the amount spent to improve the property. This position was not challenged or at all.
21. The estate has been fully distributed and the only pending thing is execution which is being challenged on grounds that the amount spent in improving part of the estate must be considered. I do not find this



to be sufficient ground to plead substantial loss. The claim of compensation is recoverable in monetary terms hence nothing substantial to suffer as a consequence. For those reasons the appellant/applicant has failed to prove that she is likely to suffer substantial loss that cannot be compensated in monetary terms.

22. Regarding delay in filing the application since 27th November 2019 up to 1st October 2021 almost two years down the line, the applicant claimed that it was occasioned by failure to get certified proceedings from the trial court. There was no evidence adduced as proof that she did apply for proceedings in time and that they could not be secured. In any event, an application for stay of execution does not require certified court proceedings as the applicant purports. A period of about two years is ultimately unreasonable and inexcusable.
23. In the case of *Jaber Mohsen ali & another vs Priscillah Boit & another* (2014) eKLR the court had this to say;

“The court does not condone an illegality. The reason that there ought not to be unseasonable delay for one to be entitled to stay pending appeal was not placed there in vain. It is incumbent upon a litigant to move with speed”
24. It is trite that he who seeks an equitable remedy must come to court with clean hands. It is not the duty of the court to aid an indolent party. Indeed, the fact that an appeal has strong grounds alone is not sufficient ground to grant stay if there is no proof of substantial loss. See *Carter and Sons Ltd vs Deposit Protection Fund Board and 2 others* Civil Appeal No 29/1997.
25. In the instant case, I need not delve into the remoteness or the possibility of the appeal succeeding as that will prejudice the outcome of the intended appeal.
26. In a nutshell, I do not find any good ground to enable me issue stay orders given the period these proceedings have taken since 2019. Accordingly, application is dismissed with no order as to costs. Parties to fast-track the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 22ND DAY OF APRIL 2022

J. N. ONYIEGO

JUDGE

