



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Nassor Ali Nahdy (Deceased) (Succession Cause
24 of 1966) [2022] KEHC 11296 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 24 OF 1966**

JN ONYIEGO, J

JULY 29, 2022

IN THE MATTER OF THE ESTATE OF NASSOR ALI NAHDY(DECEASED

BETWEEN

MUNIR MOHAMED SKETTY APPLICANT

AND

OMAR SHARIFF AHMED RESPONDENT

AND

MOMBASA HOUSE WARES LIMITED INTERESTED PARTY

EQUITY BANK (K) LIMITED INTERESTED PARTY

RULING

1. The Notice of Motion application before this court is dated November 17, 2021. The application seeks the following orders;
 - (a) Spent
 - (b) That there be a stay of execution of the ruling of the honourable court delivered on August 31, 2021 and consequential orders pending the hearing and determination of this application.
 - (c) That there be a stay of execution of the ruling of the honourable court delivered on August 31, 2021 and the consequential orders pending the hearing and determination of the intended appeal.
 - (d) That the costs of the application be provided for.
2. The application is premised on the grounds set out on the face of it and the supporting affidavit of Omar Shariff Ahmed the applicant herein sworn on November 17, 2021 in which he stated that; this



- honourable court through its ruling delivered on August 31, 2021 cancelled his title to Plot No1004 / MN/III and made the same available to the estate for distribution; he has filed a notice of appeal dated November 8, 2021; the Notice of Appeal was filed out of time as the ruling was delivered without notice to the parties; they became aware of the existence of the ruling upon the 1st respondent's entry into the contested property announcing that he was the owner of the said property and; that he has made an application for extension of time to file an appeal out of time before the Court of Appeal.
3. He further stated that; the appeal is arguable and has high chances of success; the respondent has initiated the process of distributing and transferring Plot No 1004/MN/III hence likely to subject the 1st Interested Party and himself to a risk of substantial and irreparable loss should the application be disallowed; the respondent will not be prejudiced if the application was allowed; the application has been made without unreasonable delay; he together with the 1st interested party are willing to furnish such security as the court may deem necessary.
 4. In response, the respondent filed a replying affidavit sworn by Munir Mohamed Sketty sworn on December 3, 2021 who opposed the application arguing that; there was no competent appeal since the Notice of Appeal was lodged after the expiry of the time frame to file an appeal; the intended appeal has no likelihood of success as the matter at hand is very clear; the dealings of the estate before obtaining a grant amounted to intermeddling with the estate contrary to Section 45 of the Succession Act and therefore the appeal in not likely to succeed.
 5. He further averred that; the execution process has been completed as the orders of the court of August 31, 2021 have already been registered in the Lands' Office through entry 4 in the Title Registry hence there was nothing to stay; the applicant will suffer no harm even if he succeeds on appeal; the applicant has not established grounds for grant of stay and; that he has not provided security which is a requirement for stay.
 6. However, it is worth noting that the 1st interested party did not file any response
 7. When the matter came up for directions, parties agreed to dispose the same by way of submissions. The applicant through his advocate Mr Origi made oral submissions on March 15, 2022. Learned counsel basically adopted the averments contained in the affidavit in support of the application thus submitting that; the appeal has high chances of success; the applicant will suffer substantial loss if the application is not allowed; the ruling has already been executed but the subject property has not been distributed and; that if an order for stay is not granted, the appeal would be rendered nugatory.
 8. On the question whether there was unreasonable delay in filing the application for stay of execution after two months, counsel submitted that the ruling was delivered without notice hence they didn.t know of its existence in time until the time when the respondent took occupation of the land in question. Counsel submitted that the applicant has an arguable appeal with high chances of success.
 9. On his part, the respondent through his advocates Khatib & Co Advocates filed written submissions dated November 30, 2021. Counsel contended that the requirements before grant of stay of execution can issue as stipulated under Order 42 rule 6 of the civil procedure rules have not been established.
 10. On substantial loss, counsel relied on the case of *Butt v Rent Restriction Tribunal* (1979) EA and *James Wangalwa & Another V Agnes Naliaka Cheseto* (2012) eKLR thus submitting that the applicant had not proved how he stood to suffer if he succeeded on appeal. That the execution process sought to be stayed has already been completed as evidenced by entry number 4 of the copy of title attached as annexure MMS1. Counsel urged the court to find that there was no substantial loss likely to be suffered by the applicant if the application is not allowed.



11. On the aspect of delay in filing the application out of time, counsel submitted that the applicant was well aware of the delivery of the ruling through the notice of ruling delivery dated August 26, 2021 which was served upon both parties. That no sufficient reasons have been given to justify filing of the application outside the 30 days' grace period.
12. On security, counsel placed reliance on the case of *Mwana Karuga T/A Limit Enterprises v Kenya Bus Services Limited & 4 Others* (2015) eKLR expressing the point that the respondent had already incurred costs to execute the ruling by registering the ruling against the title deed at the land registry thus the security to be paid should cover the already incurred costs.
13. In conclusion, counsel submitted that the applicant's application lacked merit and should be dismissed with costs. I must however point out that the respondent did not have the courtesy to attach the authorities referred to in his submission thus diluting their relevance of his submissions.
14. The 2nd interested party through its advocate Mr Wangombe holding brief for Mrs Kaguri submitted that they were not interested in the application herein. That they had brought an application seeking directions as to whom they should hand over the property to. For clarity purposes, the application referred to by the 2nd interested party is a Notice of Motion dated March 15, 2022 which was held in abeyance pending delivery of this ruling.
15. I have considered the application herein, response thereof and rival submissions by both counsel. The only issue that emerges for determination is; Whether an order of stay of execution should issue.
16. The applicant's application is against this court's ruling delivered on August 31, 2021 in which the applicant had filed an application seeking revocation of grant of letters of administration-De Bonis Non granted to Munir Mohamed Sketty (the respondent herein); stay of the administration of the Estate of Nassor Ali Nahdy (Deceased) and submission of accounts of all assets of Nassor Ali Nahdy (Deceased) and Nassor Muhammad Nahdy (Deceased).
17. For avoidance of doubt, the court in its ruling gave the following orders;
 - a) The transfer of the property known as Plot No1004/III/MN was a nullity and void *ab initio*.
 - b) The said property shall revert back to the estate of Nassor Ali Nahdy the original owner.
 - c) The application for revocation is dismissed.
 - d) The will dated 16 June 2015, is not applicable to the application herein.
 - e) The claim of the 2nd interested party over property known as Plot No1004/III/MN is dismissed.
18. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules*, 2010 provides for the elements to be considered by a court before issuing an order for stay of execution. It does provide as follows;
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.



- (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.
19. It is therefore incumbent upon the applicant to establish the grounds set out under Order 42 rule 6 (2) of the *Civil Procedure Rules* 2010 to enable the court reasonably exercise its discretion in his favour. In the case of *Richard Muthusi v Patrick Gituma Ngomo & another* [2017] eKLR the court emphasized on the need for a party seeking stay to meet the requirements under order 42 R6(2) as follows;
- “Under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an Applicant should satisfy the Court that:-Substantial loss may result to him unless the order is made; That the Application has been made without unreasonable delay; and The Applicant has given such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him.”
20. On substantial, loss the applicant argued that the respondent had initiated the process of distributing and transferring Plot No1004/MN/III, subjecting the 1st Interested Party and himself to a risk of substantial and irreparable loss should the application be disallowed.
21. On the other hand, the respondent argued that the execution process has been completed as the orders of the court of August 31, 2021 had already been registered in the Lands Office through entry number 4 in the Title Registry thus there was nothing to stay. That the applicant would suffer no harm even if he succeeded in appeal.
22. In any application for stay, the key consideration is proof that substantial loss is likely to occur in the event such order is declined. In the case of *Premier Industries Limited v Stephen Kilonzo Matiliku* [2021] eKLR the court expressed itself on the subject of substantial loss as follows;
- “...Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of *Kenya Shell Kenya Ltd v Kibiru & Another* [1986] KLR 410}} cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:
- “1...
 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.



4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
23. My understanding of the applicant’s argument is that execution of the order of August 31, 2021 is what would result to substantial loss. He does not dispute the fact that the impugned order has already been executed by registering the order in the relevant land register. It is therefore clear that the property has reverted back to the original registered owner the deceased herein.
24. However, it is trite that commencement of execution process perse is not on its own a ground for stay of execution order to issue. See the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* (*supra*) where the court 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.”
25. In view of the wisdom drawn from the above holding, it is clear that where there are sufficient grounds to justify a possibility that substantial loss is likely to occur if stay of execution is denied, then, a court of equity will in the interest of substantive justice be bound to grant stay. In this case, If the respondent takes possession of the subject property immediately and then transfers the same further to 3rd parties, it is will be cumbersome and costly to recover it hence substantial loss likely to occur thereby negating the very essence of the appeal.
26. In the circumstances of this case therefore, I do not find any prejudice likely to be suffered by the respondent if further execution is stayed pending the outcome of the intended appeal.
27. On whether the application was filed without unreasonable delay, the applicant’s counsel submitted that the reason for filing the application two months later was that the ruling was delivered without notice. That the applicant learnt of the ruling when the respondent took occupation of the land in question.
28. The respondent’s counsel on the other hand submitted that the intended appeal was filed out of time yet the applicant was well aware of the delivery of the ruling through the notice of ruling delivery dated August 26, 2021 which was served upon both parties. That no sufficient reason was given to justify why the application was not made within the 30 days’ grace period. That orders had already been executed and there was nothing to stay.
29. The ruling in question was delivered on August 31, 2021 and the application herein filed on November 17, 2021. From the record, there is no acknowledgement filed to prove that notice of delivery of ruling was effected upon counsel for the respondent. In the circumstances, I will give him a benefit of doubt and therefore hold that three months’ delay is not inordinate in the circumstances.
30. The third element to be established is furnishing of security. The applicant said that he together with the 1st interested party were willing to furnish such security as the court may order, if the court deems such security as necessary.



31. On the other hand, counsel for the respondent submitted that the respondent had already incurred costs to execute the ruling by registering the order thereof against the title deed at the land registry thus the security to be paid should cover the already incurred costs.
32. The question regarding furnishing security is a matter of discretion to be determined by the presiding court after due consideration of the circumstances and merits of the case. It is therefore not automatic that such order must apply as a matter of course. The order is meant to protect a successful party from suffering unnecessary financial loss like costs or monetary award should the appellant lose out on appeal. In the case of *Premier Industries Limited v Stephen Kilonzo Matiliku* (*supra*) the court observed as follows;

“The Court of Appeal in *Ndubiu Gitabi and Another v Anna Wambui Warugongo* [1988] 2 KAR 621, citing among others the decision of *Sir John Donaldson M R in Rosengrens v Safe Deposit Centers Limited* [1984] 3 ALLER 198 explained the rationale behind the requirement for depositing security by stating that:

“The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed, or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The Respondent is not entitled, for instance, to make life difficult for the Applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates...”

33. Upon consideration of all facts and evidence tendered in this application, there is no justification for me to order for deposition of security as the property is already back to the estate hence no risk of losing anything or suffering any prejudice.
34. The fourth ground cited by the applicant is that he has an arguable appeal with high chances of success. While addressing the element of whether an appeal is arguable as a ground to granting stay, the court in the case of *Maryanne Camene Ojiambo v Samuel Muchoki* [2021] eKLR expressed itself as follows;

“Plainly therefore, the appeal is arguable, bearing in mind that an arguable appeal is not necessarily an appeal that must ultimately succeed. In *Kenya Tea Growers Association & Another v Kenya Planters & Agricultural Workers Union* (*supra*), the Court of Appeal made this clear when it held that:



“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the Court should pronounce its decision.”

35. This court is adjudicating over this matter as a court of first instance and not as an appellate court. The question whether the appeal is arguable is a subject properly reserved for the appellate court. Accordingly, I will not delve into the merits of the appeal to ascertain whether it is arguable or not. This position is further fortified with the fact that there is a pending application for extension of time to file the intended appeal out of time before the Court of appeal.
36. In a nutshell, and in view of the above stated reasons, I am inclined to stay further execution of the impugned orders thereby maintaining the *statusquo* pending the hearing and determination of the intended appeal.

CONCLUSIONS

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 29TH DAY OF JULY 2022

J.N.ONYIEGO

JUDGE

