



REPUBLIC OF KENYA



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

**Ahmed v Habey (Civil Appeal E020 of 2021)
[2022] KEHC 13552 (KLR) (Family) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13552 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**FAMILY
CIVIL APPEAL E020 OF 2021**

MA ODERO, J

SEPTEMBER 23, 2022

BETWEEN

ISMAIL MOHAMMED AHMED APPLICANT

AND

MOHAMED ABDI HABEY RESPONDENT

RULING

1. Before this court is the notice of motion application dated March 23, 2022 by which the applicant Ismael Mohammed Ahmed seeks the following orders:-
 - “1. Spent.
 2. Spent
 3. That this honourable court be pleased to stay the execution of the orders issued by the Deputy Chief Kadhi on the January 28, 2022 in respect of the application dated September 17, 2021 and order no 1 issued in respect of the application dated the November 2, 2021 pending the hearing and determination of this appeal.
 4. That the costs be provided for.”
3. The application which was premised upon sections 1A,1B,3A and 63(c) of the *Civil Procedure Act*, order 42 rules 6 and 51 of the *Civil Procedure Rules*. The *Kadhi Court Act* and *Rules* and the *Law of Succession Act* was supported by the affidavit of even date sworn by the applicant.
4. The respondent Mohamed Abdie Habey opposed the application through his affidavit dated April 4, 2022. The matter was canvassed by way of written submissions. The applicant filed the written



submissions dated May 18, 2021 whilst the respondent relied upon his written submissions dated May 18, 2022.

Background

5. This matter arises from the ruling and orders of the Deputy Chief Kadhi Hon SH Omar made on January 28, 2022 in Kadhi Succession Cause No 131 of 2014. In that matter, the Hon Deputy Chief Kadhi made orders as follows:-
 - “ 1. That the application dated September 17, 2021 and filed in court on September 22, 2021 is hereby declared unopposed and therefore allowed as prayed.
 2. That the notice of preliminary objection dated January 21, 2022 is hereby dismissed.
 3. That the respondent, Mohamed Abdi Habey is hereby cited for contempt of court order.
 4. That within 30 days from the date of this ruling the contemnor to comply with the orders of this court by accounting for the surrendering all outstanding amount due to the applicant herein, Ismail Mohamed.”
6. The applicant being aggrieved by the above orders filed the memorandum of appeal dated February 24, 2022. Contemporaneously with said memorandum of appeal, the applicant filed this present application seeking to stay execution of the Hon Kadhi's orders.
7. The applicant alleged that he had been condemned unheard by the Kadhi's Court. He stated that his application dated November 2, 2021 was to be heard on December 1, 2021 but the court then noted that the respondents application dated September 17, 2021 had not been heard. The applicant stated that he had never been served with the later application.
8. The applicant avers that whilst rendering its decision on the application dated November 2, 2021 the Hon Deputy Chief Kadhi also proceeded to give a ruling in respect of the respondents application dated September 17, 2021 notwithstanding the fact that the appellant had not been accorded an opportunity to respond to said application.
9. The appellant laments that the court referred to the application dated September 17, 2021 as unopposed and condemned him to pay the respondent millions of shillings dating back to a period when the respondent had not been born and when the applicant had nothing to do with the administration of the estate. The applicant submits that he has an arguable appeal. He prays that execution of the orders made by the Deputy Hon Chief Kadhi be stayed pending the hearing and determination of his appeal.
10. In opposing this application for stay the respondent avers that the applicant was properly served with the application dated September 17, 2021 but that he willfully refused to file a response thereto. The respondent avers in his replying affidavit that he was not accorded an opportunity to respond to the applicants application dated November 2, 2022 and as such was denied an opportunity to be heard. He is apprehensive that if the courts orders of January 28, 2022 are stayed then he (the respondent) is likely to be arrested for contempt of court causing him substantial and irreparable loss.



Analysis and Determination

11. I have carefully considered this application for stay, the reply filed by the respondent as well as the written submission filed by both parties. The only issue for determination is whether the prayer for stay of execution ought to be granted.
12. Order 42 rule 6(2) of the [Civil Procedure Rules](#) provides for the circumstances in which a stay may be granted as follows:-
 - “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.”
13. In [Butt v Rent Restriction Tribunal \[1979\] EA eKLR](#) the court held that –
 - “1. The power of the court to grant or refuse an application for a stay execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge’s discretion.
 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements.”
14. The impugned ruling was delivered on January 28, 2022. The application herein was filed on March 23, 2022 approximately 1½ months after delivery of the ruling. I find that the appeal and the application were filed without unreasonable delay
15. The applicant pleads that if the stay orders are not granted and execution of the rulings left to proceed then he stands to suffer substantial loss. The court in [James Wangalwa & another v Agnes Naliaka Cheseto \[2012\] eKLR](#) stated as follows:-
 - “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 appellant must establish other factors which show that the execution will create a state of affairs that will irreparable affect or negate the very essential core of the appellant as the successful part 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.”

16. The order made by the Hon Deputy Kadhi read that –

“Application dated September 17, 2021 and filed in court on September 22, 2021 is hereby declared unopposed and therefore allowed as prayed.”

17. The applicant argues that the said application required him to pay a certain amount of money to the respondent. He argues that he was not allowed an opportunity to respond to the application.

18. The court at this stage is not required to delve in to the merits of the appeal. The question of whether or not the applicant was served with the application or allowed an opportunity to be heard goes to the merit of the appeal and cannot be dealt with at this stage.

19. The applicant claims that he stands to suffer substantial loss, as he will be required to pay to the respondent large summons of money. The applicant has not stated how much he will be required to pay if execution proceeds. In *Machira t/a Machira & Co. Advocates v East African Standard [2002] eKLR* Hon Justice R Kuloba (as he then was) stated that:-

“an applicant’s ground for substantial loss must be specific and detailed as it is not enough merely stating that substantial loss will result or that if the appeal is successful it will be rendered nugatory.” (own emphasis)

20. The appellant herein was not specific regarding the nature of ‘substantial loss’ which he was likely to suffer. Thus, I find that this ground of substantial loss has not been adequately demonstrated. Further the applicant has not made any offer to provide security for costs.

21. All in all I find no merit in the present application. The same is dismissed in its entirety. Each party to bear its own costs.

DATED IN NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

.....

MAUREEN A. ODERO

JUDGE

