



**AMA v TYMA (Family Appeal 34 of 2021)
[2022] KEHC 14887 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14887 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL 34 OF 2021
JN ONYIEGO, J
OCTOBER 21, 2022**

BETWEEN

AMA APPELLANT

AND

TYMA RESPONDENT

RULING

1. The respondent herein petitioned the Kadhi’s Court for determination of the following issues; heirs, properties and distribution of the estate of the late YMAA. The Hon Kadhi in his judgement delivered on October 13, 2020 listed the following as the rightful heirs of the estate of the deceased;
 - a. NY- widow
 - b. MY -son
 - c. TYMA-son
 - d. AY-son
 - e. WY -daughter
 - f. ZY-daughter

2. He also listed the following as the properties of the estate of the deceased;
 - a. Swahili house erected on plot no xxxx situated at Kongowea area, within Mombasa County.
 - b. Half share of the Swahili house erected on plot no xxxx situated at Kongowea area, within Mombasa County.
 - c. An undivided share of the Swahili house erected on plot no xxxx situated at Bamburi, within Mombasa County.



- d. A beneficial share from one million Kenyan shillings from the estate of the deceased's father.
 - e. Monies or balance at D T B Bank, Nkrumah Road Branch- A/C no xxxx.
3. A dispute having arisen over the actual heirs of the deceased, the matter proceeded to full hearing. After canvassing the petition, the hon court delivered its judgment on October 13, 2020 thus recognizing the rightful heirs as N, M, t, A,W and Z.
 4. The hon Kadhi then distributed the estate as follows; N 12.5%, M, T and A each 21.9% and W and Z each 10.9%.
 5. The court further directed the respondent (the appellant/applicant herein) to give account of all the monies collected from the rental houses erected on plot no xxxx, xxxx and xxxx from 2010 to the date of judgement; to file a bank statement of the A/C no xxxx held at D T B Bank, Nkrumah Road Branch, to the Kadhi's court, not later than November 5, 2020 and to hand over the relevant title & ownership documents of house erected on plot no xxxx to the petitioner (the respondent herein).
 6. Dissatisfied with the decision of the court, the appellant/applicant herein lodged a Memorandum of Appeal dated October 26, 2020 and filed on October 29, 2020 (Civil Appeal No E007 of 2020) against the entire judgement. He subsequently filed an application dated November 2, 2020 before the Kadhi's Court seeking stay of execution of the judgement. The same was allowed on February 2, 2021 pending the hearing and determination of Mombasa HCCA No 007 of 2020.
 7. The hon court also ordered that a joint account be opened between the appellant and respondent herein within seven days; the appellant herein to deposit one million in the said joint account within 15 days and all the rental incomes from the properties of the estate be deposited in the said joint account commencing with the rental income of February, 2021 until the appeal is heard and determined. That in default the orders of stay would automatically lapse and the petitioner be at liberty to execute.
 8. Having defaulted in fulfilling the conditions set upon granting stay of execution, the respondent herein proceeded to apply for execution of the decree issued by the Kadhi's Court vide a notice to show cause application dated April 8, 2021. To avert the execution process, parties entered into a consent on April 27, 2021 where it was agreed as follows;
 - a. That by consent, kshs 1,000,000 held by the respondent and kshs 483,700 held by the agent amounting to a total of kshs 1,483,700 be distributed to the rightful beneficiaries based on the court
 - b. That the money being held by the agent be released to the petitioner's advocates together with his share of the kshs 1,000,000
 - c. That because house number no 123 is not subject of appeal, the beneficiaries to continue collecting rent through the agent and upon deduction of the agents' collection charges, the money be released to the respondent's advocates for distribution
 - d. That for purposes of security, an amount of kshs 1, 079, 579 be deposited in a joint interest earning account held in the names of the parties' advocates
 - e. That the agent will prepare rent collected for house no 39 and 40 and issue a joint cheque in the name of the parties advocates from April 2021
 - f. That consent be adopted as an order of the court



- g. That this matter be mentioned on May 11, 2021 to confirm depositing of monies in a joint interest earning account
9. For some reason, the appellant/applicant herein did not honour the consent order. Instead, he filed a Notice of Motion Application Dated August 24, 2021 seeking orders to set aside and/or quash the Notice to Show Cause which he termed as irregular, erroneous and unlawful. The Principal Kadhi in his ruling delivered on September 30, 2021 dismissed the said application. As a result, the appellant/applicant herein lodged an appeal vide a Memorandum of Appeal dated October 12, 2022 and filed on the same day challenging the said decision (Family Appeal No 34 of 2021) which is the subject of this appeal.
10. The appellant/applicant also moved this court via a Notice of Motion application dated November 11, 2021 filed under Certificate of Urgency and supported by the affidavit of AMA sworn and filed on the same date. The application seeks the following orders;
 - a. Spent
 - b. spent
 - c. That this court be pleased to issue a stay of proceedings in MSA Kadhi Succession Cause No 30 of 2020 between TYMA V AMA pending the hearing and determination of this appeal.
 - d. That the costs of this application be provided for.
11. The application is premised on the grounds therein and the supporting affidavit of AMA.
12. The appellant/applicant gave a chronology of events that led to the filing of the application herein and stated that the appeal has high chances of success and if stay is not granted the respondent will proceed with execution of the decree which is being challenged in the appeal thereby rendering the same nugatory and an academic exercise.
13. He further stated that if stay is not granted, he is likely to suffer substantial and irreparable loss as an award of damages will not be sufficient to compensate him for the losses and damages that have been occasioned to him.
14. He averred that the application for execution of the decree did not conform to the decree nor the judgement thus it would be prudent that before any execution is allowed to proceed, this honourable court does determine whether the said application for execution of the decree is regular or otherwise.
15. It was further averred that the respondent will suffer no prejudice if stay is granted. That the court did not order payment of monies to the respondent herein and thus any application contrary to orders issued is erroneous and irregular. That any loss suffered by the respondent herein can be monetarily compensated in the unlikely event the appeal fails.
16. In response, the respondent filed a replying affidavit sworn on November 25, 2021 and filed on the same day. He stated that the appellant herein failed to comply with the orders of stay issued by the Kadhi's Court resulting to his application for execution by way of a Notice to Show Cause which was disposed off by consent entered into by the advocates for both parties on April 27, 2021 and adopted as order of the court on the same day. That the appellant defaulted in obeying the consent order thus resulting to his application for enforcement of the consent orders.
17. The respondent stated that the appellant's interest is to delay this matter and avoid payment and or compliance with the judgement of the trial court and the consent orders thereof. That pursuant to the consent order, parties herein have shared rent for house no 39 and 70 which was in the custody of



- the appellant and rent for house no 123 which the appellant has remitted rent up to June 2021 with arrears of rent for July to November, 2021. That the orders for stay are meant to help the applicant in avoiding to pay him his share of the rent.
18. He further stated that the issue of execution was settled by the consent order and the only matter pending in the kadhi's court was his application seeking for accounts from 2010 for house no 123 which had not been heard and the appellant's application for recusal which was pending ruling.
 19. The application was canvassed by way of written submissions.
 20. The appellant through his advocate Khalid Salim & Company Advocates filed his written submissions dated February 7, 2022. Counsel submitted on one issue whether the applicant /appellant's application of stay pending appeal dated November 11, 2021 is merited.
 21. It was counsel's submission that the grounds to be met in seeking a stay of proceedings pending appeal are; the *prima facie* merits of the intended appeal; whether the court is satisfied that it is in the interest of justice to grant the orders sought and whether the application has been brought expeditiously.
 22. On the first ground, counsel reiterated the appellant's position in his supporting affidavit on the chronology of events that led to this application and submitted that the issues raised in the appeal are pertinent and have to be determined so as to establish whether the respondent's application for execution was regular, justifiable and/or legal. It was counsel's submission that the pending appeal is meritorious with high chances of success hence might be rendered nugatory if the orders sought are not granted. According to learned counsel, if the orders sought are not granted, he will suffer great prejudice and substantial loss as award of damages will not be sufficient to compensate him.
 23. On the issue of unreasonable delay in filing the application, counsel submitted that the ruling sought to be appealed against was delivered on September 30, 2021 and a Memorandum of Appeal filed on October 12, 2021 while the application herein was filed on November 11, 2021 thus the application was filed without unreasonable delay.
 24. The respondent through his advocates Stephen Oddiaga & Company advocates filed his written submissions dated February 17, 2022.
 25. Counsel submitted that the orders the appellant wishes to have stayed are consent orders and that the consent orders were specific on what was to be done in respect to rents from house no 123 which the appellant did not comply with.
 26. Counsel further submitted that the respondent was not opposed to the application but demanded that the appellant should strictly comply with order 42 rule 6(2) of the [Civil Procedure Rules](#) 2010. That the appellant should give security equivalent to the rent due and the accumulated rent arrears for house no 123 now in excess of Kshs 800,000. Counsel proposed that the appellant do deposit a security of kshs 2 million. Counsel further submitted that the respondent will suffer more than the applicant as he will be kept away from his income for a long time.
 27. In conclusion, counsel urged the court to dismiss the application with costs and that if it allows the same, to order the appellant furnish security as proposed in their submissions.
 28. I have considered the application herein, response thereof and rival submissions by both counsels. The only issue which emerges for determination is Whether the applicant has met the threshold for grant of the reliefs sought.
 29. The application herein has basically been argued under order 42 rule 6(1) (2) and (6) of the [Civil Procedure Rules](#) which provides:



order 42 rule 6 (1), (2) and (6)

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.
 - 6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.
30. It is worth noting that the appellant/applicant brought and also argued the application herein under the provisions for stay of execution while the orders sought are for stay of proceedings in the Kadhi's Court pending hearing and determination of the appeal.
31. Stay of execution and stay of proceedings are two different issues which have to be dealt with separately as the conditions for dealing with the two distinct. See *Kenya Wildlife Service v James Mutembei* [2019] eKLR where the court stated;
- “Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent. See Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000* persuasively stated thus;
- “As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice The sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously” (emphasis added)”
32. From the above citation it's evident that there are two critical conditions that a court has to consider before issuing stay of proceedings namely;



- a. Whether the appeal is arguable.
 - b. Whether the application was brought expeditiously.
33. From the chain of events, it is clear that the gist of this application and the appeal herein is execution of what is said to be an irregular decree thereby seeking to enforce payment of an amount that has not been ascertained from the statement of accounts ordered by the court hence an arguable ground of appeal to warrant stay of execution. In that regard, I am guided by the holding in the case of *Maryanne Camene Ojiambo v Samuels Muchoki* [2021] eKLR where the court stated that;
- “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 vs 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.”
34. However, it is evident that the applicant/ appellant completely avoided the subject of the consent order which is still subsisting. This is because the application for execution was compromised by entry of the consent order. Despite the respondent raising it, there was no rejoinder nor submission made on the subject. I must emphasize that a party who seeks equity must approach the court with clean hands hence the court cannot ignore the existence of lawful orders. Consequently, grant of any stay order whether against execution or proceedings must be subject to compliance of the consent order first.
35. On whether the appeal was brought expeditiously, the ruling being appealed against was delivered on October 30, 2021, a Memorandum of Appeal filed on October 12, 2021 and the application herein filed on November 11, 2021 which was one month later. Clearly, one month was not inordinate.
36. In a nutshell, it is my holding that the hon Kadhi’s order of stay of execution pending appeal is still subsisting subject to the appellant fulfilling the conditions attached. It is trite that parties should be given a chance to exhausts their legal redress. However, the court has the discretion to attach conditions where appropriate.
37. In this case, the only remedy commending itself is stay of further proceedings before the Kadhi’s court pending hearing and determination of the pending appeal herein. This order is subject to the applicant/appellant honouring the consent order of April 27 of 2021 within 45 days in default the stay order herein shall lapse.
38. The upshot of the above is that the application dated November 11, 2021 is hereby allowed on condition that the said consent order is complied with. As to costs, same shall be in the cause.

DATED, SIGNED AND DELIVERED IN MOMBASA THIS 21ST DAY OF OCTOBER, 2022.

J N ONYIEGO

JUDGE

