



**Mbarak & 3 others v Mohamed & 4 others (Environment & Land
Case 71 of 2021) [2025] KEELC 3697 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3697 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 71 OF 2021**

JO OLOLA, J

MAY 8, 2025

BETWEEN

**ZUBEDA NASSER MBARAK 1ST PLAINTIFF
UMU KULTUM MOHAMED KARAMA 2ND PLAINTIFF
SUMEYE MOHAMED KARAMA 3RD PLAINTIFF
HAMZA MOHAMED KARAMA 4TH PLAINTIFF**

AND

**AMINA SHEIKH MOHAMED 1ST DEFENDANT
ALI MOHAMED KARAMA 2ND DEFENDANT
KARAMA MOHAMED KARAMA 3RD DEFENDANT
KARIMA MOHAMED KARAMA 4TH DEFENDANT
BILAL MOHAMED KARAMA 5TH DEFENDANT**

RULING

1. By a Notice of Motion dated 25th November, 2024, the Defendants herein pray for an order of stay of execution of the Judgment of this court delivered on 31st October, 2024 pending the hearing and determination of an intended Appeal.
2. The Application which is supported by an Affidavit sworn on 25th November, 2024 by Amina Sheikh Mohamed (the 1st Defendant) is premised on the grounds inter alia, that:
 - i. The Court ordered that any transfer and registration of the suit properties other than to the Estate of Mohamed Karama are invalid and void and that the same be cancelled and annulled by the Land Registrar Mombasa;



- ii. The said order effectively took away the suit properties from the 1st Defendant;
 - iii. The Court granted a stay of execution for 30 days which order lapsed on 4th December, 2024;
 - iv. By cancelling the whole title for Plot No. MN/1/8502 which is registered in the name of Stamford Properties Ltd, the court made a drastic order which has a ripple effect of revoking titles for parties who were not parties to the suit and who were not given a chance to be heard;
 - v. There is a real danger that, the Plaintiff will execute the judgment upon lapse of the stay order because they have commenced the execution process by seeking to extract the decree of this court;
 - vi. The 1st, 3rd, 4th and 5th Defendants intend to Appeal against the Judgment and have filed a Notice of Appeal dated 7th November, 2024;
 - vii. The Appeal is arguable as the 1st Defendant is the owner of the suit properties and the same do not belong to the late Mohamed Karama; and
 - viii. The Applicants will suffer irreparable harm if stay is not granted because they will lose their properties
3. Hamza Mohamed Karama (the 4th Plaintiff) is opposed to the application. In her Replying Affidavit sworn on 24th February, 2025, the 4th Plaintiff avers that the Court has already allowed their case and declared the transfers of the suit properties other than to the Estate of Mohamed Karama as invalid and void. It is her case that the matter has already been determined and cannot be re-determined again.
 4. The 4th Plaintiff avers that Stamford Properties Limited is not a party to this suit and the Defendants do not have any capacity or legal interest to enable them to litigate on its behalf or to represent them. It is the 4th Plaintiff's case that if stay of execution orders are granted, they stand to suffer prejudice as they will be prevented from inheriting their father's estate and from enjoying the fruits of their judgment.
 5. I have carefully perused and considered the application as well as the response thereto. I have equally perused and considered the submissions placed before the Court by the Learned Advocates representing the parties.
 6. By their application before the Court, the Defendants pray for an order of stay of execution of the Judgment delivered herein on 31st October, 2024 pending the hearing and determination of an intended Appeal.
 7. In regard to an order of stay of execution, Order 42 Rule 6 ((1) and (2) of the Civil Procedure Rules, 2010 provides as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.”

8. As was held in *RWW v EKW* [2019] eKLR:

“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.”

9. In the matter herein, judgment was delivered on 31st October, 2024 upon which the Court granted a temporary order of stay to last for 30 days. Before the expiry of the said 30 days, the Applicants filed the application before the court on 25th November, 2024. Considering the circumstances herein, it was clear to me that the application had been filed without unreasonable delay.

10. In regard to substantial loss, the court in the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR observed 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 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 ... 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.”

11. Again as was stated by Warsame, J. (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited Nairobi, (Milimani)* HCCC No. 795 of 1997: (Unreported)

“.....For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss.....”

12. In the matter herein, the Defendants/Applicants assert that the result of the Judgement delivered on 31st October, 2024 was that it effectively took away the suit properties from the 1st Defendant who was the registered proprietor thereof. It is their case that unless an order of stay is granted herein, they stand to suffer irreparable harm as they will lose the only home they have known.



13. From the material placed before the court, it was apparent that the disputants herein are members of the family of one Mohamed Karama who passed away on 15th January, 2015. It was evident that following his death, the family could not agree on the distribution of his estate thereby necessitating this suit. It was also clear to me that one of the issues in contention was whether or not the property described as Maisonette No. 2 erected on Plot No. MN/I/8502 registered in the name of the 1st Defendant was part of the deceased's estate.
14. Given that the said property was registered in the name of the 1st Defendant it was clear to me that the Defendants stood to be deprived of the same unless an order of stay is issued pending the exhaustion of their Appeal. In the premises, I do find merit in the Motion dated November 25, 2024 and allow the same in terms of prayer No. 3 thereof.
15. There shall be no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT MOMBASA THIS 8TH DAY OF MAY, 2025.

J.O. OLOLA

JUDGE

In the presence of:

- a. Ms. Firdaus Court Assistant.
- b. Mr. Hassan Advocate for the Plaintiff
- c. Mr. Oluga Advocate for the 1st, 2nd, 3rd, 4th and 5th Defendants

