



CKC & 2 others v AC & another (Succession Cause 436 of 2004) [2025] KEHC 5079 (KLR) (7 April 2025) (Ruling)

Neutral citation: [2025] KEHC 5079 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 436 OF 2004**

G MUTAI, J

APRIL 7, 2025

IN THE MATTER OF THE ESTATE OF CHUBA BAKARI HAMISI (DECEASED)

BETWEEN

**CKC 1ST APPLICANT
CC (MINORS SUING THROUGH THEIR MOTHER AND NEXT FRIEND) 2ND APPLICANT
JWN 3RD APPLICANT**

AND

**AC 1ST RESPONDENT
ANC 2ND RESPONDENT**

RULING

1. In a decision this court delivered on 24th October 2024, it was ordered as follows:-

“27. In the circumstances and to complete the distribution of the estate, I order as follows:-

1. The respondents/applicants are hereby ordered to provide to the Court a statement of account, setting out what amounts were received upon sale of Plot No. 1763 MN/III & Plot No. 1756/MN/III, expenses incurred and what sums are payable to the applicants/respondents within 30 days of the date hereof;
2. The Administrators are further ordered to sell Plot Nos. 1059 and 3287/MN/III within 90 days of the hereof and share proceeds in the ratios identified by the Court. However, the



applicants/respondents shall be reimbursed Kes.912,000.00, which was wrongfully deducted from them from the sale proceeds. For the avoidance of doubt, there shall be no further deductions of any sums due to the applicants/respondents on account of rent;

3. Houses without land on Plots No. 807, 2888 and 535/III shall similarly be sold within 90 days of the date hereof, and proceeds shared out in the ratios identified by the Court;
 4. The Land Registrar Kilifi County is hereby directed to register Title No Kilifi/Mtwapa/5038 in the names of the applicants/respondents within 30 days of the date hereof;
 5. In the interest of justice and to allow the respondents/applicants to comply with the Court orders, I suspend the warrants of arrest issued against the respondents/applicants for 90 days; and
 6. As this is a family matter I make no order as to costs.”
2. The respondents/applicants were aggrieved by the said decision. They immediately sought and were granted leave to appeal the said decision to the Court of Appeal. Pursuant to the said leave, they filed a notice of appeal dated 30th October 2024, evincing an intention of appeal against the whole of the said decision. They sought certified copies of the proceedings and judgment via a letter of the said date.
 3. On 6th November 2024, the respondents/applicants filed a notice of motion application of even date seeking leave to appeal and for costs to be provided on the ground that there was an imminent danger that the applicants/respondents would execute this court’s ruling. As I understand it, the respondents/applicants’ reason for appealing was that it would not be possible to comply with the directions of this court given the material change of circumstances.
 4. On 20th November 2024, the respondents/applicants filed another application vide which they sought a stay of execution of the orders of this court pending the hearing and determination of the application and also the appeal. The basis for this second application, as disclosed in the grounds in support of the application is that the decision of this court adversely affects other beneficiaries who aren’t complaining about the distribution of the estate and that part of the estate had been dispensed with and transferred. It was stated that the applicants were willing to comply with any conditions the court may give as a condition for the grant of stay pending appeal.
 5. The advocates for the applicants /respondent filed a notice of preliminary objection dated 20th November 2024 in which they stated that the two applications dated 6th and 20th November 2024 were res judicata since the court considered similar applications. The counsels also object to the application on the grounds that the court was functus officio and lacked the requisite jurisdiction to hear and determine the notice of motion dated 20th November 2024.
 6. The applicants/respondents’ counsels filed a replying affidavit sworn by Josephine Wanjiru Njuki on 21st January 2025 in which she deposed that the appeal was frivolous as what was sought to be challenged were the consequential proceedings. Ms Njuki averred that, consequently, decisions couldn’t be challenged when the main decision was undisturbed. She urged that their status as beneficiaries was settled by the Court of Appeal in Civil Appeal No. 121 of 2018, Christine Kimwana Chuba & another vs Asha Nifusi Chuba & another, and that the appeal to that extent was frivolous.



7. She urged that it hadn't been shown what irreparable /substantial loss or injury the respondents/applicants would suffer to entitle them to grant a stay of execution.
8. Lastly, she stated that the respondents/applicants were involved in these proceedings not in a private capacity but as administrators, and as such, they would suffer any personal loss or damage if the orders sought were not granted.
9. The application as canvassed by way of written submissions pursuant to this court's directions of 21st November 2024.
10. The written submissions of the respondents/applicants are dated 13th December 2024. The respondents/applicants' counsel submitted that the five properties mentioned in the impugned ruling had been distributed to other beneficiaries. Counsel submitted that the said ruling affected other beneficiaries who had no problems with the distribution and had taken their shares.
11. Counsel for the respondents/applicants relied on the case of James Wangalwa & another vs Agnes Naliaka Cheseto [2012]eKLR.
12. Counsel for the respondents/applicants urged that there were issues which needed to be sorted out to wit:-
 - a. What is the value of 9.21% of the of the estate?
 - b. What value had been transferred to the applicants/respondents by the administrators? Was it less or more than 9.21%?
 - c. What is the position of the house occupied by the applicants/respondents? and
 - d. Should rent be refundable?
13. Counsel urged the court to allow the application.
14. The applicants/respondents' submissions are dated 22nd January 2025. The sole issue, as identified by the said advocates, was whether the court should grant a stay of execution pending appeal.
15. Counsel submitted that it hadn't been shown what substantial loss the respondents/applicants would suffer. Counsel stated that the unnamed beneficiaries, who, it was stated, would suffer loss and damage if the prayers weren't granted, hadn't been identified and that whatever would happen would not amount to substantial loss. It was thus agreed that the notice of motion dated 20th November 2024 was bereft of merit.
16. I have considered the two applications, the responses to each of them, the notice of preliminary objection filed by the counsel for the applicants/respondents, and the written submissions of the parties.
17. In my view, the notice of motion dated 6th November 2024 has no merit. I agree with the counsel for the applicants/respondents that it is res judicata. It seeks orders that this court considered and granted on 24th October 2024 at the point the decision was made. There is already leave to appeal, and there is, therefore, no need for this court to issue another leave to appeal in respect of the same decision. In the circumstances, the application dated 6th November is dismissed.
18. Should this court issue a stay of execution pending appeal? Order 42 rule 6 (2) states as follows:-

“(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, up to the respondents/applicants to demonstrate:-

- a. That they will suffer substantial loss unless a stay is granted;
- b. That application was filed with undue delay;
- c. That they have provided security for the due performance of the orders that may ultimately be binding.

20. From the way order 42 rule 6 (2) is couched, the orders are conjunctive, in so far as the three elements must simultaneously exist for the order of stay of execution to issue.

21. What is substantial loss? This question has been the subject of numerous decisions by the court. Substantial loss is what is sought to be prevented by the issuance of the orders of stay. Kimaru, J (as he then was), while considering an application for stay of execution pending appeal, stated as follows in *Century Oil Trading Company Ltd vs Kenya Shell Limited* Nairobi (Milimani) HCMCA No. 1561 of 2007:-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case, and since the Code expressly prohibits the stay of execution as an ordinary rule, it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer a substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant, who is seeking to preserve the status quo pending the hearing of the appeal, so that his appeal is not rendered nugatory, and the interest of the respondent, who is seeking to enjoy the fruits of his judgement.”

22. Similarly in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012]eKLR stated that:-

“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.”



23. In this case, it wasn't stated beyond the mention of what appears to me to be mere generalities what loss the respondents/applicants will suffer. The said persons are administrators. How will they suffer personally? The identities of the beneficiaries likely to be prejudiced haven't been given. In the circumstances, I am not able to agree that the respondents/applicants will suffer substantial loss. Given the lack of details in the application, I am not convinced that there is a case for denying the applicants/respondents fruits of a ruling in their favour, given that this matter has been in court for a very long period of time.
24. Although the application was filed without undue delay, the fact that substantial loss hasn't been shown dooms the application to failure. Thus, even if the respondents/applicants had undertaken to abide by the court's orders or provide security for the due performance of any orders that may ultimately be binding, the application would still have failed.
25. In the circumstances, I find and hold that the application dated 20th November 2024 has no merit. The same is dismissed.
26. Who should bear the costs of the application? Although this court does not ordinarily award costs, it would appear to me that what the respondents/applicants are doing amounts to stalling the distribution of the estate. In the circumstances, I award the applicants/respondents the costs of the application.
27. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 7TH DAY OF APRIL 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Mark Mwanzia, for the Applicants/Respondents;

Mr Paul Magolo, for the Respondents/Applicants; and

Arthur - Court Assistant.

