



REPUBLIC OF KENYA



KENYA LAW
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**Mzungu v Jackson & another (Family Appeal E026 of 2025)
[2025] KEHC 9192 (KLR) (20 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 9192 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E026 OF 2025**

**G MUTAI, J
JUNE 20, 2025**

BETWEEN

WINNIE RUTHUBA MZUNGU APPELLANT

AND

ESTHER MAKUMBO JACKSON 1ST RESPONDENT

DANIEL JACKSON WATEE 2ND RESPONDENT

RULING

1. Before the Court is a Notice of Motion dated 14th April 2025, vide which the appellant/applicant seeks the stay of execution of the orders/and or the decision made on 4th April 2025 in Magistrate's Court at Mombasa, Succession Cause No E061 of 2024, until the hearing and final determination of the intended appeal by the "Court of Appeal."
2. The basis upon which the application is grounded is that the applicant is dissatisfied with the decision of the Court below and has filed a Memorandum of Appeal, and that unless the orders sought herein are granted, the applicant will suffer loss and damage and shall be prejudiced.
3. In the affidavit in support of the application, the applicant, Winnie Ruthuba Mzungu, averred on 14th April 2025 that the Court below ordered the grant to be issued to petitioners and objectors jointly, and asked them to agree on the mode of distribution of the estate. She urged that unless stay orders were issued, the estate of George Gessler Peter Michael (deceased) would suffer a substantial loss that would be irreversible if the intended appeal were successful.
4. The respondents opposed the application through a replying affidavit sworn on 5th May 2025 by Ms Esther Makumbo Jackson. Ms Jackson averred that she was still lawfully married to the deceased at the time of his death and that the child was a dependent under the *Law of Succession Act*. Ms Jackson urged that the Court below made the right decision. She therefore prayed that the application be dismissed.



5. The appellant/applicant filed a further affidavit sworn on 12th May 2025 in which she reiterated that she had a child with the deceased, James Michael Boswell Gessler. She urged that the respondent was divorced while the 2nd Respondent wasn't dependent.
6. The matter was canvassed by way of written submissions. The written submissions of the appellant/applicant are dated 12th May 2025.
7. Counsel urged that the three conditions for the grant of stay are:-
 1. Substantial loss;
 2. That the application was filed without delay; and
 3. Security has been given for the due performance of the order that may ultimately be made.
8. Regarding the first condition, it was argued that if the appeal is heard while the lower Court file was proceeding with the matter before it, then the appeal would become an academic exercise.
9. It was further argued that the impugned decision was made on 4th April 2025, whereas the application was filed on 14th April. For that reason, there was no unreasonable delay.
10. On security counsel urged that the said requirement was applicable in this case.
11. Counsel urged the Court to rely on the decision of the Court of Appeal in *Abok J. Odera v Kenya Posts & Telecommunications Corporation* [1996] KECA 204 (KLR). It was therefore urged that a stay do issue.
12. The respondent, through her counsel, Angelo Owino & Co. Advocates, made brief submissions urging that the application be dismissed. He stated that the appellant intended to frustrate the respondent.
13. I have reviewed the application, the response thereto, and submissions of the parties. I note that what is before me is a motion seeking a stay of execution of the judgment of the Court below and not a stay of proceedings. Based on the foregoing reasons, I will only consider the former.
14. Order 42 Rule 6(2) of the Civil Procedure Rules provides that:-
 - “(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.”
15. I will look at each of the grounds in turn, noting that the requirements are injunctive and not disjunctive.
16. What amounts to a substantial loss has been defined in a number of cases. In *James Wangalwa & Another V Agnes Naliaka Cheseto* [2012] KEHC 1094 (KLR) , Gikonyo, J stated as follows:-
 - “ 11. 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. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

17. In *Century Oil Trading Company Ltd vs. Kenya Shell Limited, Nairobi (Milimani)* HCMCA No. 1561 of 2007 held as follows:-

“The word “substantial” cannot mean the ordinary loss to which every judgement 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 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 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 judgment.”

18. I have perused the judgment of the Court below. What the Court did was to appoint the parties as the administrators of the estate. The Court asked the parties to agree on the mode of the distribution of the estate of the deceased, failing which any of the parties could file a summons for confirmation of the grant.
19. Although it has been claimed that the appellant/applicant would suffer substantial loss, the alleged loss hasn't been particularized. As stated by Gikonyo J in the *James Wangalwa* case, execution of a judgment/order is a lawful process action. What the Courts seek to do is to prevent an execution that would alter the substratum of the matter. I do not see how that is the case here.
20. In my view, the appellant/applicant won't suffer substantial loss.
21. Although the application was filed without delay and, despite my agreement with the applicant that production of security is unnecessary, it does not affect the outcome. As I have already indicated, the requirements are conjunctive and not disjunctive. As the applicant won't suffer a substantial loss the application fails.
22. I have already said enough. The application has no merit.



23. The orders that comment themselves are the following
1. The application dated 14th April 2025 is dismissed
 2. Each party shall bear own costs.

24. It is so ordered.

DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF JUNE 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Mr Mwangi Kihira, for the Appellant/Applicant;

Mr Angelo Owino, for the Respondent; and

Arthur – Court Assistant.

