Edarus & 2 others v Saggaf (Suing as Attorney of Sofia Sagafu Kiboga) (Family Appeal E014 of 2024) [2025] KEHC 11540 (KLR) (25 July 2025) (Ruling)

Neutral citation: [2025] KEHC 11540 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

FAMILY APPEAL E014 OF 2024

G MUTAI, J

JULY 25, 2025

BETWEEN

SALMA ABUBAKAR EDARUS ..... 1ST APPLICANT

ABUBAKAR MALIK FEISAL SAGGAF ALWY ..... 2ND APPLICANT

GHAZI MALIK FEISAL SAGGAF ALAWY ..... 3RD APPLICANT

AND

MOHAMED MAULA SAGGAF (SUING AS ATTORNEY OF SOFIA SAGAFU KIBOGA) ..... RESPONDENT

RULING

1. Before this court is a notice of motion application dated 1st April 2025, vide which the applicants seek the following orders: -

    a. Spent

    b. That an interim pending the hearing and determination of this application, the honourable court be pleased to order a stay of execution of the warrants of arrest issued on 18th March 2025 against the judgment delivered on 8th February 2024 in Mombasa KCSUCC E192 OF 2023; In the matter of the estate of Malik Feisal Saggaf Alawy (deceased);

    c. That pending the hearing and determination of this appeal, this honourable court be pleased to order a stay of execution of warrants issued on 18th March 2025 against the judgment delivered on 8th February 2024 and all the consequential proceedings in Mombasa KCSUCC E192 of 2023; in the matter of the estate of Malik Feisal Saggaf Alawy(deceased).

    d. That leave be granted to applicants herein to file additional documentary evidence, and such evidence be deemed to be evidence in the Kadhi's Court and be taken into account in the determination of this appeal;

e. That this honourable court be pleased to order and direct the appearance of Sofia Sagafu Kiboga before this court or the trial court for purposes of being cross-examined on renunciation of inheritance shares by herself and her late husband, Abdurahman Saggaf Alawy; and

f. That the costs of this application be provided for.

2. The application is premised on the grounds stated in the body of the motion and also on the supporting affidavit of Salma Abubakar Edarus, sworn on 1st April 2025. Vide the said affidavit, the deponent stated that the Kadhi's Court in its judgement of 8th February 2024 held that the deceased estate comprised of US$125,000, equivalent to Kes.9,200,000/-, together with a further US$125,000 paid to the 2nd applicant. In execution of the said judgment, the learned Kadhi issued a warrant of arrest, directed to Interpol, to be served on the American embassy for their arrest.

3. She further stated that the sums mentioned above were paid in respect of the deceased's life insurance as he died during his service in the United States Military and should not have been declared as part of the estate, as they were subject to nomination. He further deposed that, according to the service member's group life insurance dated 7th and 14th April 2004, the sums to the 2nd applicant were directed to him, as he was a minor at the time, and therefore do not form part of the estate. The letters in question were not available during the trial at the lower court and were only located recently. The same had been brought to the court's attention without unreasonable delay.

4. She stated that though the deceased's father, Abdulrahman Saggaf Alawy, had renounced his share of inheritance through his letter of 23rd July 2004, he later changed his mind vide affidavit sworn on 14th July 2015. It is in the interest of justice that the deceased's mother and the wife of the late Abdulrahman Saggaf Alawy be called to give evidence as to the renunciation by her and the deceased's father.

5. She stated that if a stay of execution is not granted, the respondent will execute the lower court's judgment, rendering the appeal nugatory and an academic exercise. If the warrants of execution are executed, it will erode the subject matter of the appeal and affect the freedom of the applicants who have an arguable appeal.

6. In response, the respondent filed a replying affidavit sworn on 8th April 2025. Vide the said affidavit, he stated that the application did not comply with the law as regards stay of execution and that it was over one year since the subject judgment was delivered. That he had extracted a decree and proceeded to execute to recover the award made in his favour, but the execution was not successful for the reason that the applicants have no attachable property in Kenya. As a result, he filed a Notice to Show Cause, which is still pending before the Kadhi's Court. The application herein is a tactic to delay the matter and deny him the right to enjoy the fruits of his judgment.

7. He further stated that the applicants have not offered any security. If a stay is granted without security, it will expose the decree holder, considering the applicants are American citizens and only act through their mother, who is also an American citizen with periodic residence in Kenya, and has no known assets in Kenya.

8. He stated that additional evidence sought cannot be given now for reasons that directions in this matter have already been given and submissions filed. He is opposed to the production of the additional evidence at this stage, as well as the issuance of a stay without security.

9. The application was canvassed by way of written submissions. The applicants, through their advocates H.A. Mwadzogo Advocates, filed their written submissions dated 2nd May 2025. Counsel relied

on order 42 rule 6(1)(2) and submitted on the three factors for consideration by the court when considering whether or not to issue orders for stay of execution.

10. On timely filing of the application, counsel submitted that the warrant of arrest having been issued on 18th March 2025, they moved the court on 1st April 2025 to stop execution of the same and to stop any further proceedings. In his view, the action was timely and the application was filed without unreasonable delay.

11. Counsel submitted that if the applicants are arrested and jailed, the same is irreversible, notwithstanding any judgment that this court will deliver. The applicants would therefore suffer substantial loss unless the orders sought were granted.

12. Mr Mwadzogo urged that the substratum of the appeal is a challenge to whether the subject matter of the appeal constituted part of the estate of the deceased. The judgment of the Kadhi's Court cannot be classified as a money decree.

13. It was urged that there exist special circumstances in this case which favour the issuance of stay of execution orders as sought by the applicants.

14. On whether the applicant should be granted leave to file additional documents, counsel submitted that the documents were not in the applicant's custody or reach at the time of prosecuting the matter at the trial court, and the same are crucial in the determination of the instant matter.

15. Counsel for the applicants thus urged the court to allow the application.

16. The respondent, on the other hand, through his advocates, Messrs. Stephen Oddiaga & Company Advocates, dated 8th April 2025, opposed the application. Mr Oddiaga relied on Order 42, Rule 6.

17. On substantial loss, Mr Oddiaga submitted that the applicants have not demonstrated the same and that the pendency of an appeal is not enough for a stay of execution to be issued.

18. Mr Oddiaga submitted that the applicants have not offered security for the due performance of any order that may ultimately be binding on them.

19. Counsel submitted that the application was made one year after delivery of the Kadhi Court's judgment and therefore the delay is inordinate and cannot be explained.

20. In conclusion, counsel urged the court to dismiss the application with costs, and if it allows the application, to place a condition requiring the applicants to deposit a decretal amount as security for the due performance of the decree.

21. Order 42 rule 6 (1) and (2) of the Civil Procedure Rules provides that: -

    1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

22. From the provision above, it is evident that in the issuance of stay of execution orders, the court has to consider three factors, namely: -

i. Substantial loss;

ii. The application has been made without unreasonable delay; and

iii. Security.

23. In discussing substantial loss, the court in the case of James Wangalwa & Another V Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR) stated: -

> " 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:
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> "...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."

24. Further, the court in the case of Premier Industries Limted v Stephen Kilonzo Matiliku [2021] KEHC 4835 (KLR) stated:-

> " ...Put differently, the purpose of the jurisdiction to stay execution of judgment pending appeal is to prevent substantial loss being suffered by the party appealing, while protecting the rights of the decree holder. One of the most enduring legal authorities on the question of substantial loss is the case of Kenya Shell Kenya Ltd v Kibiru & Another [1986] KLR 410, cited by the Respondent. The principles enunciated in this authority have been applied in countless decisions of superior courts, including those cited by the parties herein. Holdings 2, 3 and 4 of the Shell case are especially pertinent. These are that:
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> "1. .....
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> 2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

The decision of Platt Ag JA, in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4th holding above. The Ag JA (as he then was) stated inter alia that:

> "The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages...It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded, which would cause difficulty to the Applicant itself, or because it would lose its money, if payment were made, since the Respondents would be unable to repay the decretal sum plus costs in the two courts..."

25. The applicants have argued that if they are arrested and jailed, the same is irreversible, notwithstanding any judgment that this court will deliver. They argue that if a stay of execution is not granted, the respondent will execute the lower court's judgment, rendering the appeal nugatory and an academic exercise. If the warrants of execution are executed, it will erode the subject matter of the appeal and affect the freedom of the applicants who have an arguable appeal.

26. I have considered the grounds of appeal raised in the Memorandum of Appeal dated 23rd February 2024. In my view, the applicants have an arguable appeal. If a stay of execution is not granted, it will render the appeal nugatory, resulting in a substantial loss to them.

27. On whether the application was filed without unreasonable delay, the warrants were issued on 18th March 2025, and the application herein filed on 1st April 2025. In my view, there was no inordinate delay.

28. On security, the court in the case of James Wangalwa & Another V Agnes Naliaka Cheseto (supra) stated that:-

> "But my reading of order 42 rule 6(2) (b) of the CPR reveals that it is the court that orders the kind of security the applicant should give, as may ultimately be binding on the applicant. This modelling of the law is to ensure the discretion of the court is not fettered."

29. Further, the court in the case of Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd [2019] KEHC 7586 (KLR) stated: -

> "Thirdly, the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the

opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.

Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal."

30. The applicants have argued that the subject matter is not a money decree and therefore that there is no need for security. At the same time, the respondent has insisted on security if an order for stay is to be granted. Order for security is a matter of discretion. I have perused the warrants of arrest, and note that they are regarding a decretal sum. I hereby direct the applicants to deposit Kes.3,072,800/- in court as security within 30 days of the date hereof, failing which the stay hereby granted will lapse. The said amount represents the 16.7% share of the deceased's estate, as established by the Honourable Kadhi, that the respondent is entitled to.

31. Should the applicants be allowed to file and adduce additional documentary evidence? Order 42 Rules 27, 28 and 29 of the Civil Procedure Rules, 2010 provide that:-

1. The parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the court to which the appeal is preferred; but if

    a. the court from whose decree the appeal is preferred has refused to admit evidence which ought to have been admitted; or

    b. the court to which the appeal is preferred requires any document to be produced or any witness to be examined to enable it to pronounce judgment, or for any other substantial cause, the court to which the appeal is preferred may allow such evidence or document to be produced, or witness to be examined.

2. Wherever additional evidence is allowed to be produced by the court to which the appeal is preferred, the court shall record the reason for its admission.

    28. Wherever additional evidence is allowed to be produced, the court to which the appeal is preferred may either take such evidence or direct the court from whose decree the appeal is preferred or any other subordinate court to take such evidence and to send it when taken to the court to which the appeal is preferred.

    29. Where additional evidence is directed or allowed to be taken, the court to which the appeal is preferred shall specify the limits to which the evidence is to be confined and record on its proceedings the points so specified.

32. The Supreme Court in the case of Mahamud v Mohamad & 3 others [2018] KESC 62 (KLR):-

> "... We therefore lay down the governing principles on allowing additional evidence in appellate courts in Kenya as follows:-
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> a. the additional evidence must be directly relevant to the matter before the court and be in the interest of justice;

b. it must be such that, if given, it would influence or impact upon the result of the verdict, although it need not be decisive;

c. it is shown that it could not have been obtained with reasonable diligence for use at the trial, was not within the knowledge of, or could not have been produced at the time of the suit or petition by the party seeking to adduce the additional evidence;

d. Where the additional evidence sought to be adduced removes any vagueness or doubt over the case and has a direct bearing on the main issue in the suit;

e. the evidence must be credible in the sense that it is capable of belief;

f. the additional evidence must not be so voluminous making it difficult or impossible for the other party to respond effectively;

g. whether a party would reasonably have been aware of and procured the further evidence in the course of trial is an essential consideration to ensure fairness and due process;

h. where the additional evidence discloses a strong prima facie case of willful deception of the Court;

i. The Court must be satisfied that the additional evidence is not utilized for the purpose of removing lacunae and filling gaps in evidence. The Court must find the further evidence needful.

j. A party who has been unsuccessful at the trial must not seek to adduce additional evidence to, make a fresh case in appeal, fill up omissions or patch up the weak points in his/her case.

k. The court will consider the proportionality and prejudice of allowing the additional evidence. This requires the court to assess the balance between the significance of the additional evidence, on the one hand, and the need for the swift conduct of litigation together with any prejudice that might arise from the additional evidence on the other."

33. The applicants have argued that the subject letters were not available during trial at the lower court and were only traced recently. The same has been brought to the court's attention without unreasonable delay. It is my view that disallowing additional evidence would deny the applicants a fair trial, and that this would not be prejudicial to any party, as it would help the court determine the issues of inheritance conclusively. In the case of Mahamud v Mohamad & 3 others (supra), the apex court stated that: -

> " We are convinced that disallowing the additional evidence would deny the Appellant a fair trial, which is a non-derogable right under our Constitution."

34. Having allowed the adduction of additional evidence, it is my view that it is in the interest of justice to order that Sofia Sagafu Kiboga appear before the court for purposes of cross-examination on the alleged renunciation of inheritance shares by herself and her late husband, Abdulrahman Saggaf Alawy.

35. In conclusion, it is my view that the application herein has merits and is hereby allowed subject to the deposit of security as ordered in paragraph *30* above.

36. Due to the nature of the matter, I am of the opinion that an award of costs won't be an appropriate remedy. Each party will therefore bear his/her costs.

37. It is so ordered.

DATED AND SIGNED IN MOMBASA, THIS 25TH DAY OF JULY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Ms Mwanzia,holding brief for Mr Oddiaga, for

the Respondents/Applicants;

No appearance for the Appellants/Applicants; and

Arthur - Court Assistant.