



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of Masai Salimban (Deceased) (Succession Cause
34 of 2013) [2025] KEHC 11084 (KLR) (23 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11084 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE 34 OF 2013**

REA OUGO, J

JULY 23, 2025

IN THE MATTER OF THE ESTATE OF MASAI SALIMBANI (DECEASED)

BETWEEN

RICHARD CHEMOS MASAI ADMINISTRATOR

AND

KUNDOS TULEI JOSEPH ADMINISTRATOR

AND

BRAMWEL TULEI 1ST OBJECTOR

JOHN KARIKA TULEI 2ND OBJECTOR

RULING

1. On the 5th November 2024 the applicant filed a Motion seeking the following orders;
 - i. Spent
 - ii. That leave be granted to the 1st administrator/applicant to act in person in place of the law firm of M/s J B Otulsa & Associate Advocates.
 - iii. That there be a stay of execution of the Ruling delivered on the 14th August 2024 pending the hearing and determination of the application inter partes.
 - iv. That there be a stay of execution of the Ruling delivered on the 14th August 2024 pending the hearing and determination of the appeal preferred by the applicant
 - v. That leave be granted to the 1st administrator/applicant enlarging time for purposes of the applicant to launch an appeal at the Court of Appeal



- vi. That the draft notice of appeal attached to the supporting affidavit be deemed as dully filed upon payment of the court requisite fees upon granting prayers herein above.
2. The application is supported by his affidavits dated 5th November 2024 and 6th February 2025. The applicant depones as follows: he is aggrieved by the court's Ruling dated 14th August 2024, which is a subject of an intended appeal. His former lawyer did not inform of the Ruling. He learned of it through social media, which was being circulated by the second administrator, thus prompting his prayer seeking the enlargement of time. He was never served through the chief, as alleged by the respondent. The respondent is in the process of executing the decree to his detriment. His intended appeal has a high chance of success. He has attached a copy of the memorandum of appeal. He is ready to comply with any conditions on security. The application was made without delay, and the respondent will not be prejudiced.
3. The application was opposed. The 1st respondent filed an affidavit dated 20th January 2025, asserting that the applicant's affidavit is full of falsehoods and misleading statements. The applicant was represented by counsel. The ruling was delivered on 14th August 2024, and he was represented by his counsel. It is not true that he was unaware of the judgment; he learnt of it two days after it was delivered from the area chief. His counsel attempted to serve the applicant's counsel, but he declined to accept the judgment, stating he had no instructions. The applicant must explain the delay before an order of enlargement of time is granted, but has failed to do so reasonably. The applicant only moved to court when he began winding up the estate. An order of stay would mean that part of the family continues to remain homeless while the applicant and purchasers occupy the estate of the deceased at their expense. The applicant moved to court three (3) months later without a reasonable explanation. He also failed to annex a memorandum of appeal to demonstrate that he has an arguable case. Regarding irreparable loss, it is their part of the family that will continue to suffer loss because of the applicant, who continues to interfere with the estate.

Determination

4. Having carefully considered the affidavits of the parties, it is my view that the main issue to determine is whether the application meets the threshold for granting the orders for a stay of execution of the judgment pending appeal.
5. Order 42 Rule 6 of the *Civil Procedure Rules*, provides as follows:
 - 6.(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 sub rule (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. The purpose of an application for a stay of execution pending appeal is to protect the subject matter in dispute so that the rights of the applicant, who is exercising the undeniable right of appeal, are preserved and the appeal, if successful, is not rendered pointless. However, in doing so, the court should balance this right against the interests of a litigant who should not be deprived of the benefits of their judgment. To grant or refuse an application for a stay of execution pending appeal is a matter of discretion.
7. As I consider this application, I need to balance the interests of the applicant with those of the Respondent. Order 42 above guides what I have to consider. Will there be a substantial loss if the stay is not granted? The court in the case of *James Wangalwa & Another v 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.”
8. The applicant claims that the respondent has begun the process of execution; however, he has failed to demonstrate the substantial loss that will be incurred or suffered. The distribution of the deceased’s assets was contested, but in my view, the applicant has failed to demonstrate the substantial loss he will suffer.
9. On whether the application was filed without unreasonable delay, the Ruling was issued on 14 August 2024, and the application was filed on 15 November 2024, approximately three months later. The applicant attributes the delay to his former counsel for failing to inform him that the Ruling had been delivered. In my opinion, three months does not constitute an excessive or inordinate delay.
10. The next condition for granting stay orders is the security to be offered. The law requires that a party seeking a stay must provide security for the proper performance of the orders that may be binding on the applicant. The applicant has not provided any form of security but has left it to the court to decide. The respondent has stated that the applicant continues to enjoy the deceased’s assets. I believe that granting the stay order will cause prejudice to the respondents. Therefore, I decline to grant the stay order.
11. Regarding the applicant’s request for an extension of time to file the Notice of Appeal, I am persuaded that his former counsel did not inform him that the Ruling had been delivered. The applicant shall file and serve his Notice of Appeal within the next 21 days. Each party shall bear its own costs.

DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 23RD DAY OF JULY, 2025.

R. E. OUGO

JUDGE

In the presence of:

Richard Chemosi Masai/Applicant

Respondent - Absent



