



In re Estate of Abdullahi Ali Dhima alias Abdullahi Dalacha (Deceased) (Civil Appeal E022 of 2023) [2024] KEHC 9548 (KLR) (25 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9548 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
CIVIL APPEAL E022 OF 2023**

EM MURIITHI, J

JULY 25, 2024

**IN THE MATTER OF THE ESTATE OF ABDULLAHI ALI
DHIMA ALIAS ABDULLAHI DALACHA (DECEASED)**

BETWEEN

SHUKRI WAKO HUKA APPELLANT

AND

SAIDA ABDULLAHI DALACHA RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 6th December 2023 brought under Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules, Article 159 (2) (d) of *the Constitution* and all enabling provisions of the law, the Applicant seeks:
 1. Spent
 2. Spent
 3. That this Honorable Court be pleased to stay of execution of the judgment/decree of the honourable Kadhi in Isiolo Kadhi's Court Succession No. E019 of 2021 delivered on 12th October 2023 together with all other orders/proceedings incidental thereto pending hearing and determination of this appeal.
 4. The costs of this application be provided for.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of the Applicant herein sworn on even date. She avers that the Respondent filed Isiolo Kadhis Court Succession Cause No. E019 of 2021 seeking determination of the estate, the legal heirs and distribution of the estate of the deceased. The court, vide its judgment of 12/10/2023, distributed the suit properties despite evidence that some of the properties like National Housing



Corporation Plot No.115, Plot No. J Kiwanjani also known as uns. Residential plot ‘J’ Isiolo, Bula Pesa III Unregistered (formerly Kambi ya Juu), Isiolo Township plot No. ISL/117/98/77, Unregistered residential Plot No. 89B Zone D- Isiolo Township, Mwangaza B Plot No. 350 and Mwangaza B Plot No. 476 were owned by her and her children. She has always paid rates and rent to the County Government of Isiolo for all her other plots. The Kadhi ordered revocation of allotment letters and other ownership documents for her properties and proceeded to distribute them as if they belonged to the deceased herein, and if stay is not granted, she will suffer substantial loss of losing her properties and her appeal will be rendered nugatory. The appeal is merited, arguable and has overwhelming chances of success and the Respondent will not suffer any prejudice or damage that cannot be compensated by way of costs if the application is allowed.

3. The Respondent has opposed the application vide her replying affidavit sworn on 26/1/2024. She avers all the properties contained in the application belonged to the deceased at the time of his death and the documents were in possession of the Applicant. The Applicant moved to change some of the ownership documents pending the distribution of the estate and, therefore, the court revoked the illegal and unlawful transfer and fraudulent acts of the Applicant. The alleged children namely Dallacha Adbullahi and Matto Abdullahi Dalach are all minors incapable of owning properties and the Applicant has always squandered the estate with the intention of wasting it before the same is distributed. The court rightly issued the revocation orders in the interest of the estate of the deceased and the beneficiaries and it is only fair that the application is dismissed with costs.

Submissions

4. The Applicant urges that the Kadhi’s court lacked jurisdiction to revoke ownership and title to land, and cites R.B & R.G.O v H.S.B & A.S.B (2014)eKLR, where this court held that, “It is clear from the textual provision of Article 170 (5) of *the Constitution* that the jurisdiction of the Kadhi’s Court is limited to questions relating to personal status, marriage, divorce or inheritance, in proceedings where all the parties profess Muslim religion and submit to the jurisdiction of the Court.” She further relies on Jibril Gollo Duba v Asli Gollo Duba (2021) eKLR where this court overturned the kadhis judgment for exceeding his jurisdiction and cancelling ownership of documents to land. She urges that the Environment and Land Court is the right forum to hear and determine disputes relating to the environment and use and occupation of, and title to land, and cites Joseph Kaberia Kumari v Tony Mwenda Muthaura (2021) eKLR. She urges that she has shown that she will suffer irreparably by loss of the parcels of land stated above, because if the properties are transferred to the Respondent, she may dispose them to her detriment and cites Absalom Dova v Tarbo Transporters (2013) eKLR. She urges that she is willing to deposit any security or meet any conditions set by the court for the orders of stay of execution to be issued.
5. The Respondent did not file any submissions.

Analysis and Determination

6. The issue for determination is whether stay is deserved.
7. The Appellant has questioned the jurisdiction of the Kadhi’s court to deal with ownership and title to land. That issue forms the substratum of the appeal, and in order not to render the appeal nugatory by pre-empting its outcome without the benefit of the full consideration of the evidence, this court will refrain from determining it.



Stay of Execution

8. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the Civil Procedure Rules, as follows: -
- “(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.
 - 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.”
9. This court notes that the application was filed timeously on 7/12/2023 while the decision sought to be appealed against was made on 12/10/2023.
10. Whereas the Appellant contends that her appeal, which has overwhelming chances of success, will be rendered nugatory if stay is denied, the Respondent feels that she and the other beneficiaries will suffer irreparable loss unless the application is dismissed.
11. The court notes from the grounds of appeal as raised in the Appellant’s Memorandum of Appeal, challenging inter alia the jurisdiction of the Kadhi’s Court over matters concerning distribution of some properties which did not belong to the deceased at the time, that the appeal is indeed arguable, which does not mean one which must necessarily succeed and it is for the court to go into the merits of the intended appeal.
12. The court finds that the fact that the Appellant may be completely deprived of her properties if her ownership documents thereto are revoked as decreed by the Kadhi’s court, is a substantial loss, that justifies the grant of the stay of execution pending appeal as sought.
13. By way of security the Court shall make an order for holding of the status quo on the suit property both on the physical ground and on the register of the property as sufficient security.

Orders

14. Accordingly, for the reasons set out above, the court allows the applicant’s application dated 6/12/2023 in the following terms:
1. An order for stay of execution of the judgment/decreed of the honourable Kadhi in Isiolo Kadhi’s Court Succession No. E019 of 2021 delivered on 12th October 2023 together



with all other orders/proceedings incidental thereto is hereby issued pending hearing and determination of this appeal.

2. The order for stay of execution herein is subject to an order of the Court for holding of the status quo on the suit property both on the physical ground and on the land register of the property.
3. The Record of Appeal to be filed within 60 days from the date hereof.
4. In the event of default of the aforementioned conditions, the stay of execution shall lapse and be of no effect.
5. The costs of the application shall abide the outcome of the Appeal.
6. Directions on the Appeal on 30/9/2024.

Order accordingly.

DATED AND DELIVERED ON THIS 25TH DAY OF JULY 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Maina for Mr. G. Mutuma for Appellant.

Mr. Jarso for the Respondent.

