



REPUBLIC OF KENYA



**In re Estate of Mackenzie Majanja Shivachi (Deceased) (Succession Cause 375B of 2018) [2024] KEHC 8682 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 8682 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KAKAMEGA  
SUCCESSION CAUSE 375B OF 2018**

**S MBUNGI, J**

**JULY 11, 2024**

**IN THE MATTER OF THE ESTATE OF MACKENZIE MAJANJA SHIVACHI (DECEASED)**

**BETWEEN**

**EDWIN NGAIRA MACKENZIE ..... PETITIONER**

**AND**

**MONICAH K. MACKENZIE ..... 1<sup>ST</sup> APPLICANT**

**HILDAH MACKENZIE ..... 2<sup>ND</sup> APPLICANT**

**RULING**

**Introduction**

1. The Appellant/Applicant is aggrieved by the decision of the Hon. P. J. Otieno, Judge, delivered on 30<sup>th</sup> April, 2024 in which he found in paragraphs 1, and 26 as follows: -“1. That the late Mackenzie Majanja Shivachi was survived by one widow, three sons and eight daughters named:
  - a. Rebecca Inyanya Ngaira-widow(deceased)
  - b. Henry Shivachi-son(deceased)-survived by Betty Njambi Gitau-wife and five children.
  - c. Phylis Munai -(Daughter)
  - d. Pamela Adema Angalika-(Daughter)
  - e. Isabella Khavwajila Majanja-(Daughter)
  - f. Christine Mmnone Majanja-(Daughter)
  - g. Edwin Ngaira Mackenzie-(Son)
  - h. Hilda Makhungu Mackenzie-(Daughter)



i. Monicah Khalani Mackenzie-(Daughter)

“26. That the estate be distributed as proposed in the summons for confirmation of grant save that the exact acreage of parcel number Iguhu/1077 Be established by survey to confirm what area constitutes the homestead and tea plantation. on a similar issue parcel number Iguhu 982 was also to be surveyed to establish what remains after one(1) acre is hived off for the benefit of the daughters. The said reports were to be filed in court after which the certificate for confirmation of grant is issued.

2. On 15<sup>th</sup> May 2024 Appellant/Applicant filed the Memorandum of Appeal together with a Certificate of Urgency and Notice of Motion dated 15<sup>th</sup> May 2024 which he sought the following orders:

1. Spent;
  2. Spent;
  3. Spent
  4. Spent
  5. That this honorable Court be pleased to stay execution of the order/decreed and judgment in succession cause No 375B OF 2018; In the Matter of the Estate of Mackenzie Masanga Shivachi(deceased) – pending hearing and determination of the appeal.
  6. That the costs of this application abide the outcome of the intended appeal.
3. The applicant, Monica K. Mackenzie, vide a supporting affidavit dated 15<sup>th</sup> May 2024, stated was greatly aggrieved by the judgment delivered by this honorable court on the 30/04/2024. A beneficiary to the estate one Harison Masheti Shivachi was excluded in the summons for confirmation of grant by the respondent/petitioner, which summons were granted by the court. That the said Harison Masheti Shivachi has suffered substantial loss by dint of the judgement.
4. The application is opposed. The respondent filed the grounds of opposition dated 5/7/2024 in which they stated that the trial court rightly upheld the summons for confirmation of grant and that the present application is only meant to delay the respondents their right to enjoy the fruit of the judgment.
5. Both parties agreed to canvass the application by way of Written submissions but at the time of writing the ruling the respondents had not filed and if he filed, the same was not placed in the court file. Therefore, the ruling was written without the benefit of the respondent's submission.

#### **Submissions by the applicant.**

6. In his submissions, the applicant relied on Order 42 Rule 6 of the *Civil Procedure Rules* and stated that the application satisfies the requirements for granting of the order for stay of execution. That she will suffer substantial loss if the orders are not granted, if the respondent proceeds to distribute the estate in accordance with the confirmed grant. That his appeal has high chances of success. He urged the court to order that status quo be maintained until after determination of the appeal.

#### **Issues for determination**

7. Whether stay of judgment issued on 30/04/2024 and proceedings herein should be granted pending hearing and determination of the appeal.



## The applicable law

8. The principles upon which the court may grant stay of execution pending appeal are well-settled. These are captured in Order 42 Rule 6 of the Civil Procedure Rules which requires an applicant seeking a stay of execution pending appeal to demonstrate that -
- (a) Substantial loss may result to the applicant unless the order was made;
  - (b) The application was made without unreasonable delay; and
  - (c) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him as been given by the applicant.

## Analysis and Determination

### a. Was the application made without unreasonable delay?

9. The first consideration is whether the application was filed timeously. The judgment of the High Court was delivered on 30<sup>th</sup> May 2024 and the notice of appeal filed with the court on 7<sup>th</sup> May 2024. The memorandum of appeal was filed on the 15<sup>th</sup> May 2024. In my view, the appeal was filed without unreasonable delay.

### b. Will Substantial Loss result to the applicant unless the orders are made?

10. It is the duty of the applicant in an application for stay of execution to establish that he/she will suffer substantial loss if the orders sought are not granted. In *Machira t/a Machira & Co. Advocates v East African Standard (No 2) (2002) KLR 63* the Court of appeal considered as to what amounts to substantial loss and held 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.”

11. I have looked at the orders/judgment complained of, if the orders are effected, it is likely that the beneficiaries may dispose of the estate for there will be nothing barring them from doing so. If that happens the appellant/applicant shall in my view suffer substantial loss for in event the appeal succeeds there will be no estate to distribute/transmit or it will be very expensive and cumbersome to reinstate the estate back.
12. A stay of execution order serves a very important purpose as it preserves the subject matter of the appeal. This ensures that the successful appellant gets the benefit of the judgment.
13. The Court in *RWW versus EKW* [2019]eKLR stated as follows:-“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an



applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

**c. Security for Due Performance of the Decree**

14. The Appellant/Applicant offered no security for the due performance of the order that may ultimately be binding in him, I take note that this is a dispute over inheritance. The court of Appeal however, in the exercise of its discretion, can issue conditions that would ensure that the matter is heard and concluded as soon as possible so that the administration of the estate can be completed.

**Conclusion**

15. I have considered the sentiments of both parties in the pleadings and the applicant’s submissions and the relevant laws and find that the application has merit. I allow the same. Consequently, I order that:  
-1. The decree and the judgment in Succession cause No 375B of 2006;In the Matter of the Estate the late Mackenzie Majanja shivachi be and is hereby stayed pending the hearing and determination of the appeal; and
16. Cost to abide the outcome of the intended appeal.
17. Right of appeal of 14 days explained.

**SIGNED, DATED AND DELIVERED ON THE 11<sup>TH</sup> DAY OF JULY 2024 AT KAKAMEGA**

.....

**HON JUSTICE S.MBUNGI.**

In the presence of

- 1. Advocate- Andaki for Applicant - Present
- 2. Respondent /Advocate- Absent
- 3. Court Assistant- Elizabeth Angong’a

