



**Karama v Mohamed (Family Appeal E036 of 2024)
[2024] KEHC 14230 (KLR) (25 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 14230 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E036 OF 2024
G MUTAI, J
OCTOBER 25, 2024**

BETWEEN

ALI MOHAMED KARAMA APPELLANT

AND

AMINA SHEIKH MOHAMED RESPONDENT

RULING

1. Before me is a notice of motion dated 21st June 2024. Vide the said motion, the appellant/applicant seeks the following orders:-
 1. Spent;
 2. Spent;
 3. That upon the hearing of the application interpartes on a date to be ordered, the Hon Court be pleased to order a stay of the execution of the ruling and orders given in Kadhi's Court in a Notice of Motion application dated 31st March 2021 and delivered on 2nd May 2024 and any further proceedings by the Kadhi's Court pending the hearing and determination of this appeal filed by the appellant/applicant against the ruling and orders given by the primary Court on 2nd May 2024;
 4. That any other order the Court deems just and fit to grant; and
 5. That the costs of this application be provided for.
2. The appellant/applicant (hereafter "Mr Karama") stated in the grounds and the supporting affidavit that the appeal was filed timeously and was pending hearing and determination. The said appeal, it was urged, has a high chance of success. Mr Karama deposed that he would suffer a substantial loss as the court was functus officio when it delivered the ruling and that there were six beneficiaries who were not involved in the proceedings before the court below. Further, the Court lacked jurisdiction



- to determine the matter. He stated that there was a pending judgment at the Environment and Land Court whose outcome would have a substantial impact on the estate.
3. Mr Karama attached a copy of the ruling of the Court below, dated 2nd May 2024.
 4. The application for a stay of execution and a stay of proceeding is opposed. The respondent filed a replying affidavit sworn on 11th July 2024 in which she, Amina Sheikh Mohamed (hereafter “Amina”), deposed that the Appellant/Applicant had not demonstrated that he would suffer substantial loss if the application were denied. She averred that Mr Karama failed to fully disclose all the matters in issue. She accused him of being an impediment to the distribution of the estate for no good reason.
 5. The application was canvassed by way of written submissions.
 6. The written submissions of the appellant/applicant are dated 10th September 2024.
 7. Mr Karama’s counsel submitted that there was only 1 issue for determination which is whether a case for a stay of execution of proceedings had been made. Relying on the decision of the Court of Appeal in *Butt vs Rent Restriction Tribunal (1982) KLR 417* his counsel urged this Court to stay the execution of the lower Court order.
 8. Counsel submitted that when considering applications for stay of execution, the Court considers whether sufficient cause has been shown, if the applicant will suffer a substantial loss if the application is denied, whether the application was filed without undue delay, and if security for the performance of orders that may ultimately be binding has been given.
 9. Regarding whether there is sufficient cause to stay the execution, it was urged that the Kadhi Court had no jurisdiction to order partial distribution of the deceased’s estate. Mr Asige, learned counsel for the appellant/applicant, submitted that if no stay is granted, the estate would be distributed to the detriment of the six beneficiaries not named in the application.
 10. On whether there would be a substantial loss, Mr Asige submitted that Mr Karama would suffer a substantial loss as the Court that made the decision was *functus officio*, the estate of the deceased would be tampered and meddled with, and the rights of beneficiaries under the law violated, and that the Court that made the impugned decision lacked jurisdiction to consider the partial distribution of the estate. He submitted that the policy of the law is to protect the right of an appellant pending the hearing and determination of the appeal. Further, he urged that the appeal would be rendered nugatory if the stay was not granted.
 11. Mr Karama’s counsel submitted that the application was filed without undue delay. Regarding the provision of security, he submitted that Mr Karama would abide by any order made by the court when granting orders of stay.
 12. Based on the foregoing it was urged that this Court ought to be guided by a greater sense of justice and allow the application.
 13. The submissions of the Respondent are dated 2nd September 2024. The Respondent’s counsels, Sachdeva, Nabhan & Swaleh Advocates, urged that the application had no merit and ought to be dismissed as it does not satisfy the conditions for granting a stay under Order 42 Rule 6 of the Civil Procedure Rules.
 14. It was urged that Mr Karama had not demonstrated that he would suffer substantial loss beyond claiming that he would. Relying on the case of *Samvir Trustees Ltd vs Guardian Bank Limited [2000]eKLR* Amina’s counsel submitted that Mr Karama ought to have provided empirical or documentary evidence, without which his statements were mere assertions or allegations with little



probative value and that in the circumstances the court ought to “...exercise discretion in favour of the Respondent and dismiss the claim with costs.”

15. Counsels for the Respondent urged that Mr Karama did not fully disclose the facts in issues, particularly his attempts to defeat the distribution of the estate. Her counsel submitted that Mr Karama had come to Court with unclean hands. In the circumstances, he did not deserve to have the Court exercise its discretion in his favour. Reliance was placed in the decision of the Court in *MN vs TAN & Another* [2015]eKLR, where it was held that “the Court cannot exercise its discretion in favour of such a litigant who has no respect for the rule of law.”
16. The Respondent thus urged this Court to dismiss the application with costs.
17. I have considered the application, the supporting affidavit and annexures, the replying affidavit, and the parties’ submissions. I must now determine if a stay ought to be issued.
18. Stay of execution is issued under Order 42 Rule 6 of the Civil Procedure Rules, 2010. Subrule (1) and (2) of the Rule provides 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 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.”
19. The party that seeks a stay of execution must therefore show that:-
 - i. It will suffer substantial loss if a stay is not granted;
 - ii. The stay application was filed without undue delay; and
 - iii. Give security for the due performance of any decree or order that may ultimately be found as being due from him.
20. A reading of the said Rule shows that the conditions given are in respect of a stay of execution only. The rules are silent as to what conditions apply in respect of the stay of proceedings.
21. Can this Court stay the execution of the ruling delivered on 2nd May 2024? The ruling was in respect of an oral preliminary objection raised by Mr Karama’s counsel vide which he urged that the Chief Kadhi ought to recuse himself as his Court lacked jurisdiction on the issue of the mode of distribution



of the estate. The learned Chief Kadhi, after considering the submissions of the parties dismissed the objection.

22. Dismissal of an objection would ordinarily be a negative order and thus incapable of execution. This is a well-settled law expounded in various decisions of the courts of record.

23. The Court of Appeal in *Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya)* [2015] eKLR held as follows:-

“An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with.”

24. A similar holding was made in *Raymond M Omboga vs. Austine Pyan Maranga Kisii HCCA No. 15 of 2010*. In the said case Makhandia, J (as he then was) held as follows:-

“The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order....The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

25. Having said so I note that the learned Chief Kadhi stated in paragraph 23 that:-

“In the interest of justice, the petitioner is granted another ten (10) days too put in his affidavit proposal on distribution of the undisputed properties. The matter shall be listed for mention for consideration of the same.”

26. In my view, paragraph 23 has positive orders that are capable of being stayed, to wit, the filing of the affidavit with proposals on distribution and the mention of the matter for purposes of consideration of the distribution proposal thus made.

27. Thus, I must now determine if a stay should be issued with respect to the contents of paragraph 23 of the ruling. To do this, I must ascertain if the conditions for the grant of stay of execution pending appeal have been satisfied.

28. Will the Appellant/Applicant suffer substantial loss? What amounts to substantial loss was considered in the case *James Wangalwa & Another vs Agnes Naliaka Cheseto* [2012]eKLR where the Court pronounced itself 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.”

29. Although Mr Karama’s counsel has urged that he will suffer a substantial loss, he has not provided empirical evidence demonstrating to the satisfaction of the court that that will be so, neither has he shown how partial distribution will alter the estate to the extent that his interests will be damaged beyond repair and recompense. Distribution of an estate of a deceased person is a lawful process, which we have seen above, but not, of itself, amount to substantial loss as to justify a stay of execution.
30. In the circumstances, I am unable to agree that he will suffer a substantial loss.
31. Although it is true that the application was filed without delay and that Mr Karama’s counsel has given an undertaking as to the security, the three conditions for the grant of stay of execution pending appeal must all be present. Where one condition is missing the application must be dismissed.
32. Having dismissed the prayer for a stay of execution pending appeal, I will next consider whether an order for a stay of proceedings can be issued.
33. It is settled law that a stay of proceedings is a grave remedy issued only in the clearest cases. This is so because staying proceedings delays justice.
34. In *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*, Ringera, J (as he then was) held as follows:-

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

35. The above holding was echoed by Gikonyo, J in *Kenya Wildlife Services vs James Mutembei [2019]eKLR*, where the learned judge held as follows:-

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

36. The matter before the Kadhi’s Court was filed in 2015. As at the time of this ruling 9 years have elapsed. Despite the passage of time there is no tangible progress from what I can discern. I have not seen any exceptional reason why a stay of proceedings ought to be issued in this matter
37. It would therefore appear to me that granting a stay of proceedings of the proceedings before the Kadhi’s Court, when no exceptional grounds have been given, would go against the provision of Article 159(2) (b) of *the Constitution* of Kenya, 2010, which calls on Courts to ensure that justice shall not be delayed.



38. In the circumstances of this matter, I find that the application for a stay of proceedings has no merit and must similarly fail.
39. As this is a family matter. I make no orders as to costs.
40. In the interests of justice, the appeal will be heard on a priority basis. I, therefore, direct the Appellant to file the Record of Appeal within 30 days of the date hereof. The matter will be mentioned on 27th November 2024 to confirm compliance and for directions on how the appeal will be canvassed.
41. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 25TH DAY OF OCTOBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr Asige, for the Appellant/Applicant;

Ms Awino, holding brief for Ms Faiz, for the Respondent; and

Arthur - Court Assistant.

