



**In re Estate of SNS (Deceased) (Succession Cause 1769 of 1999)
[2023] KEHC 2482 (KLR) (Family) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE 1769 OF 1999
PM NYAUNDI, J
MARCH 10, 2023
IN THE MATTER OF THE ESTATE OF THE LATE SNS (DECEASED)
AND
IN THE MATTER OF PRESERVATION OF THE DECEASED’S ESTATE**

BETWEEN

**SSNS 1ST APPLICANT
MS 2ND APPLICANT
RS 3RD APPLICANT**

AND

SKHS EXECUTOR

RULING

1. The Application dated 4th July 2022 is presented by the Applicant (Executor) under Articles 27 and 159 of the Constitution of Kenya, Sections 38, 47,66,76 a, b, c and d 83,87,94 and 95 of the Law of Succession Act, Cap 160 and Rules 43,44, 58 and 78 of the Probate and Administration Rules, Order 51 Rule 1 of the Civil Procedure Rules and any other enabling provisions of the Laws of Kenya.
2. The Applicant seeks orders that:
 - a. Spent
 - b. Spent



- c. That there be ordered a stay of all proceedings in this matter and stay of execution of the decision made herein on the 29th of June 2022 pending the hearing and determination of the Executor's intended Appeal to the Court of Appeal
 - d. That this Application be heard and consolidated and heard together with the Executor's earlier application dated 5th October 2020.
 - e. That the presiding Judge of the Family Division be pleased to place this file before a judge of the family division other than the honourable Lady Justice Lydia Achode
 - f. That costs be provided for
3. The Application is opposed by the Respondents who have filed Grounds of Opposition dated 15th July 2022.
 4. On 5th October 2022, the Court observing that there were 4 applications pending directed, with the consent of the parties, that the same be canvassed by way of written submissions. The 4 Applications are those dated 5th October 2020, 30th June 2022, 4th July 2022 (subject of this ruling) and 21st September 2022. The parties opted to file consolidated submissions. For good order I will render separate rulings.

Applicants' Submissions

5. The Applicant is aggrieved by the decision of the Court delivered on 29th June 2022 and is proceeding to appeal against the same as evidenced by notice of Appeal filed in Court and dated 29th June 2022. The Applicant has also requested for certified copy of proceedings by letter dated 29th June 2022.
6. The Applicant avers that he will suffer substantial prejudice if proceedings are not stayed.
7. The Applicant contends that all proceedings in this matter be stayed pending the hearing and determination of his application dated 5th October 2020.
8. The Applicant asserts that unless the orders he seeks are granted he will suffer a substantial miscarriage of justice.
9. The Court is urged to note that the Applicant has moved without delay in presenting this application.
10. The Applicant further avers that the Respondents will be unable to refund the amounts awarded to them in the event the Appeal is successful.
11. The Applicant contends that the Appeal will be rendered nugatory unless a stay of execution is granted.
12. The Applicant states that the Respondent will suffer no prejudice if the orders are not granted as this has been the status quo for the last 23 years.
13. The Applicant confirms that he is prepared to abide by reasonable conditions in terms of security that the court may provide.
14. The Applicant in his submissions avers that the Application is not spent as proposed by the Respondents as the Application is seeking live prayers including
 - i. Stay of further proceedings in the file
 - ii. Stay of execution pending hearing and determination of the Executor's Appeal to the Court of Appeal



- iii. Consolidation and expedited hearing together with the Application dated 5th October 2020.

Respondents' Submissions

15. In grounds of Opposition filed on 15th July 2022, the Respondents maintain that the Application is incompetent and misconceived.
16. It is submitted further that the Application must fail as the Applicant has failed to attach a memorandum of Appeal which is a mandatory requirement.
17. The Respondents contend that the Application is spent as it has been overtaken by events following the elevation of Hon. Lady Justice Achode to the Court of Appeal.
18. The Respondents are of the view that the only matter pending with regard to the Application are costs awarded to the Respondents and no basis has been laid to delay this.
19. The Respondent maintains that the Applicant has not satisfied the requirements for the grant of orders under Order 42 Rule 6(2) of the Civil procedure rules 2010 and relies on the authority of *G.N. Muema P/A (sic) Mt. View Maternity & Nursing Home v Miriam Maalim Bisbar & another* [2018] eKLR. Which are that an applicant seeking a stay of execution pending appeal must demonstrate:
- a. Substantial loss may result to the applicant unless the order was made.
 - b. Th Application was made without unreasonable delay and
 - c. Such security as the court orders for the due performance of the decree or order as may ultimately be binding on him was given by the Applicant.
20. The Respondents further challenge the merits of the intended appeal against the judgment delivered on 28th September 2020.
21. It is posited by the Respondents that the Applicant is yet to file his memorandum of appeal as required by Rule 82 of the *Court of Appeal rules*.
22. It is further submitted that in the current application the Applicant has failed to demonstrate that he will suffer substantial loss. It is submitted that it is the respondents who will suffer loss if the stay is granted.
23. The Respondents state that if the Court is inclined to grant stay it should do so on conditions that safeguard the interest of the Respondents, including deposit of the sum of Kshs 588000.00 awarded to widow of the deceased in a joint interest earning account between the Executor and the Applicant's Advocates. The Appointment of an independent and registered estate agent be appointed to collect and account for all the rentals from the state and especially on Land Reference Number 209/3369 Wangapala road.

Analysis and Determination

24. Having regard to the parties' pleadings on record, submissions and authorities, I deduce that the following are the issues for determination
- a. Whether or not the Applicant has met the criteria for the orders sought, namely:
 - i. Whether this application should be consolidated with the Application dated 5th October 2020



- ii. Whether the Applicant is entitled to a stay of proceedings and stay of execution pending the hearing and determination of the Appeal from the decision rendered on 29th June 2022
- iii. Who should pay costs?

Whether this application should be consolidated with the Application dated 5th October 2020.

26. It is common ground that the Application herein seeks to stay the execution of the Ruling of 29th June 2022, in which the Hon. Justice Lydia Achode declined to recuse herself. Whilst the Application dated 5th October 2020 seeks a stay of execution with respect to the judgment of the Court delivered on 28th September 2020, in which the Applicant challenges orders making provision for the beneficiaries to the estate.
27. In *Law Society of Kenya v Center for Human Rights & Democracy & 12 others* [2014] eKLR, the Supreme Court of Kenya held: -

“The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never intended to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party who opposes it.”
28. In *Nyati Security Guards & Services Ltd v Municipal Council of Mombasa* [2000] eKLR, the court held: -

“The situations in which consolidation can be ordered include where there are two or more suits for matters pending in the same court where: -

 - a. Some common questions of law or fact arises in both or all of them.
 - b. The rights or reliefs claimed in them are in respect of the same transactions.
 - c. For some other reasons, it is desirable to make an order for consolidating them.”
29. The Applicant in his submissions has not provided the basis upon which he seeks the consolidation of these applications.
30. I find that the Applicant has not provide cogent reasons for the consolidation of the Applications.
31. Whereas both Applications seek Stay of Execution and proceedings, they each derive from a separate set of facts and different circumstances and therefore different considerations.
32. This limb of the Application fails.

Whether the Applicant is entitled to a stay of proceedings and stay of execution pending the hearing and determination of the Appeal from the decision rendered on 29th June 2022

34. The instances a court of law will grant a stay of Orders/Decree are well laid out and must be followed otherwise it would be akin to denying the successful litigant the fruits of judgment.
- Order 42 Rule 6 is succinct:

“(2) No order for stay of execution shall be made under sub rule (1) unless –



- a. the court is satisfied that substantial loss shall 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 order for the due performance of such decree or order as may ultimately be binding upon him has been given by the applicant.”
35. The Applicant has not shown the loss that he will suffer if the stay is not granted. In the grounds in support of the Notice of Motion the applicant simply states that unless the stay is granted the respondents will not be able to refund the amount paid to him and that he is bound to suffer prejudice if the matter is heard by the Hon. Judge Lydia Achode.
 36. The applicant’s affidavit in support of the motion attacks the decision of the Judge but does not make a case for a stay of execution of that decision.
 37. The applicant’s belief that the decision of the Judge was wrong, and he is dissatisfied with the ruling are not sufficient grounds to warrant a stay of execution.
 38. The grant of stay of execution and proceedings will only serve to delay the respondents from accessing the fruits of a decision in their favour. This is not acceptable.
 39. The only matter pending regarding this application is the taxation of the Respondent’s Bill of Costs, the prosecution of which will not prejudice the Applicants intended appeal against the judgment delivered on 28th September 2020.
 40. To show that there is indeed an arguable appeal or imminent loss is a vital prerequisite in such an application and the applicant has not done so. See generally, *I. T. Inamdar & 2 others v Postal Corporation of Kenya* Nairobi HCCC No 1629 of 2000 and *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (1982 -88) KAR 1018.
 41. It is not disputed that the Judge has since been elevated to the Court of Appeal. In pursuing this Appeal, the Applicant is pursuing an issue that is moot.
 42. The Applicant has not attached a draft memorandum of Appeal and therefore I am unable to gauge whether the appeal raises arguable issues.
 43. Regarding stay of proceedings, in the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 Ringera, J (as he then was) held that:

“...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 case, 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...”



44. For this court to grant stay of proceedings, the Applicants ought to have shown that it has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory.
45. As stated above in the absence of a memorandum of Appeal it is impossible to gauge the merits of the intended Appeal.
46. The court is simply not satisfied that the requirements for grant of a stay have been met.
47. I therefore dismiss this application.

Who should pay costs

48. Given the nature of the dispute and the parties involved, each party will bear their own costs.
49. The upshot of the foregoing is that the application is dismissed in its entirety and each party shall bear their costs.

SIGNED DATED AND DELIVERED IN VIRTUAL COURT THIS 10TH DAY OF MARCH, 2023.

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P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

..... Advocate for Applicant

.....Respondent

Karani Court Assistant

