



REPUBLIC OF KENYA



KENYA LAW
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**In re Estate of SNS (Deceased) (Succession Cause 1769 of 1999)
[2023] KEHC 2485 (KLR) (Family) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2485 (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 October 5, 2020 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 and 58 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 this Honorable Court be pleased to stay the execution of the judgement delivered on September 28, 2020 and any further proceedings in this matter; pending the hearing and determination of an appeal filed by the applicant to the Court of Appeal.
 - d. Costs of the Application be in the Cause.
3. On October 5, 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 October 5, 2020 (subject of this ruling), June 30, 2022, July 4, 2022 and September 21, 2022. The parties opted to file consolidated submissions. For good order I will render separate rulings.

Applicants' Submissions

4. The Applicant is aggrieved by the decision of the Court delivered on September 28, 2020, the Application dated October 5, 2020 is supported by his affidavit sworn on the same date.
5. The Applicant avers that his appeal will be rendered nugatory if the stay of execution is not granted as the Applicants are impecunious and will not be able to refund him the money if the appeal is successful.
6. Further he contends that he has satisfied the conditions for both grant of stay of execution pending appeal and stay of proceedings as provided for under Order 42 rule 1 of the *Civil procedure rules*.
7. He is willing to offer security as determined by the Court. He contends that the Applicants will suffer no prejudice as they have lodged a caveat against the property on Wangapala Road

Respondent's Submissions

8. The Respondents contend that the Application is not merited and rely on the Affidavit of the 1st Respondent sworn on behalf of all the Respondents.
9. It is submitted that the Applicant has not met the conditions for the grant of the orders sought
10. The Respondents in particular are concerned that the matter has been in abeyance since 1999 and they have not been able to access the benefits due them from the estate.
11. The Respondents aver that if the Court is inclined to grant the stay then it should impose conditions as set out in paragraph 12 of the Affidavit of the 1st Respondent

Analysis And Determination

12. Having considered the pleadings, submissions and authorities cited by the parties, I derive the following issue for determination:

a. Whether the applicant has met the threshold for the grant of the orders sought.

13. In arriving at my decision, I am guided by the decision in *Butt v Rent Restriction Tribunal* [1982] KLR 417 where the Court of Appeal held that

- “ 1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.



3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
 4. The court in exercising its discretion whether to grant (or) refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
 5. The court in exercising its powers under Order XLI rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse.”
14. Further the Court of Appeal in *RWW v EKW* [2019] eKLR addressed itself on this as hereunder: -
- “Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”
15. Upon reviewing the Draft memorandum of appeal, I am satisfied that the intended Appeal raises triable issues. The Applicant avers that he will suffer substantial prejudice if proceedings are not stayed.
16. I am also mindful of the interests of the Respondents, who are keen to have their interest safeguarded and be assured of easy access to the amount awarded in the event the appeal fails.
17. The Court is duty bound to examine how it can ensure that the interests of the Applicants are protected in the circumstances of this case. In this case it is a matter of concern that the Respondent is yet to file accounts as required under Section 83 (e) of the *Law of Succession Act*.
18. *In Re Estate of the Late Mwaura Makuro (Deceased)* [2021] eKLR Ogola J stated:
- "[32]. The production of accounts is a key component of the administration process of a deceased person’s estate. From the moment a grant is issued to a personal representative of a deceased person, the grant holder becomes responsible to the Court in the carrying out of the duties of administrator. Accounts are an accountability tool that will tell the Court whether the administrator has been faithful to the role entrusted to him or her. When an administrator fails to file accounts as required, questions as to the integrity of the process are bound to arise as in the present case. The law has empowered the Court on either of its own motion or on the application of any interested party in the estate, to order an administrator to produce a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account."
19. This position was reiterated by Odunga J (as he then was) *In Re Estate of Reuben Mutuku Kiva (Deceased)* [2021] eKLR where he stated;
- "62. It is therefore clear that the administrators are under legal obligation to, within six months from the date of the grant, produce to the court a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate



account of all dealings therewith up to the date of the account. This is an automatic legal requirement that does not require either an application or an order from the court. However, they are also obliged in any other case to produce to the court, if required by the court, either of its own motion or on the application of any interested party in the estate, a full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith up to the date of the account. In either case, the catch phrase is full and accurate inventory of the assets and liabilities of the deceased and a full and accurate account of all dealings therewith. Any inventory or accounts that is not full and accurate cannot therefore be said to be in compliance with the law."

20. The presentation of accounts is a statutory and mandatory obligation on the part of the Respondent. This Court is vested with power to call for accounts in suitable cases.
21. I find that the presentation of this accounts will assuage the concerns of the Respondents as to the safeguarding of their interest pending the hearing and determination of the Appeal.
22. I also note that in the draft memorandum of Appeal the Applicant is not challenging the order that he supplies the court with audited accounts.
23. In exercise of my discretion, I therefore grant stay on the following conditions:
 - a. That the sum of Kenya Shillings Five Hundred Eighty- Eight Thousand (Kshs 588000) as awarded to Yasmin Isa Haji in the Judgment of September 28, 2020 be deposited in a joint interest earning account held in the joint names of the Applicant/ Executor and Advocates for the respondents within 30 days from the date of this ruling
 - b. The Applicant shall within 30 days file audited accounts of the income of the estate from the time he took over as Executor to date.
24. Each party to bear their own costs.

It is so ordered

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

.....

P M NYAUNDI

HIGH COURT JUDGE

In the presence of:

.....**Advocate for Applicant**

.....**Respondent**

Karani Court Assistant

