



In re Estate of of Liwali Sheikh Salim Bin Khalfan (Deceased) (Succession Cause 94 of 2011) [2024] KEHC 14186 (KLR) (12 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14186 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 94 OF 2011
G MUTAI, J
NOVEMBER 12, 2024
IN THE MATTER OF THE ESTATE OF LIWALI
SHEIKH SALIM BIN KHALFAN (DECEASED)**

BETWEEN

RAMADHAN IDDI RAMADHAN 1ST PETITIONER

BAKARI OMAR 2ND PETITIONER

AND

THELMA ANDREW LYALL 1ST APPLICANT

SEIF SAID SEIF 2ND APPLICANT

SULEIMAN MOHAMED SAID 3RD APPLICANT

TWAHIR SALIM SOUD 4TH APPLICANT

ABBAS SOUD ALI 5TH APPLICANT

RULING

1. Vide a ruling delivered by this court on 10th June 2024, the grant issued to Ramadhan Iddi Ramadhan and Bakari Omari on 31st August 2012, and confirmed on 11th September 2012 was revoked.
2. The Petitioner/Applicants were aggrieved by the decision and filed a Notice of Appeal on 12th June 2024. They also sought a copy of the typed ruling and typed and certified copies of the proceedings. Vide a Notice of Motion dated 8th July 2024, the Petitioners/Applicants sought three orders, to wit:
 - a. Spent;
 - b. There be a stay of compliance with and or execution of the orders contained in the ruling dated 10th June 2023, pending the hearing and determination of the intended appeal;



- c. Costs of this application be costs in the cause.
3. The ground upon which the application is based was set out in the body of the motion and was restated in the supporting affidavit sworn by Mr Bakari Omar on 8th July 2024. He deposed that he and Ramadhan Idd Ramadhan represented many other shareholders and that there are other cases involving them over the suit property, Plot No. 30, Malindi in which they claim to be entitled to the land by way of adverse possession, to wit ELC Case No. 65 of 2019, ELC Case No 72 of 2019, ELC Case No. 06 of 2021, ELC Case No. 07 of 2021, ELC Case No 15 of 2022 and ELC Case No. 06 2023, which he averred depended on the outcome of this case.
 4. It was urged that the subject matter of the proceedings has a history that dates back several decades and that it would be appropriate if they are given an opportunity to pursue the appeal, so as to vent their concerns at the Court of Appeal.
 5. Mr Omar deposed that the appeal was filed timeously, without undue delay, and that it would be in the interest of justice if the application were allowed.
 6. The application is opposed. The Objector/Respondent filed grounds of opposition dated 31st July 2024, in which it was urged that the application was misconceived, devoid of merit, and an abuse of the court process. Further, having committed fraud, the Petitioners /Applicants could not seek the exercise of discretion by the court, and that it was irreverent that there was other pending litigation.
 7. The petition was canvassed by way of written submissions. Both parties filed written submissions. I shall briefly set out the contents of the parties' written submissions.
 8. The Petitioners/Applicants' submissions are dated 12th September 2024. The counsel for the said parties identified the sole issue coming up for determination as being whether they should be granted the reliefs they seek from the court through their Notice of Motion dated 8th July 2024.
 9. The Petitioners/Applicants' counsel, Mr Gitonga Muriuki, submitted that the test applicable when determining whether to grant a stay pending appeal is set out in Order 42 Rule 6 of the Civil Procedure Rules. Counsel relied on the Court of Appeal decision in Trust Bank Ltd & another v Investech Bank Ltd & 3 others [2000]eKLR and Kenya Revenue Authority v Akaba Investment Ltd [2020]eKLR in support of his contention that where there is an arguable point the court should grant a stay pending appeal.
 10. Counsel also relied on the decisions of the court in RWW v EKW [2019] eKLR and Total Kenya Ltd v Kenya Revenue Authority [2013]KLR for the proposition that the subject matter of an appeal ought to be preserved so that a successful party on appeal is protected from suffering an injustice.
 11. Mr Gitonga Muriuki submitted that his clients would suffer substantial loss if the prayers sought were not granted. The Applicants/Respondents would be free to intermeddle, alienate, dispose or waste Plot No 39, Malindi. If this were to happen, the appeal would be rendered nugatory and an academic exercise.
 12. He urged that since the matter was non-monetary, the provision of security as a condition precedent to the grant of stay did not arise.
 13. Counsel further submitted that the appeal was arguable and that his clients ought not to be denied the opportunity to ventilate their concerns before the Court of Appeal, more so as there are issues of historical injustices. He submitted that his clients wish to pursue justice to the bitter end in line with the maxim fiat Justitia ruat caelum.



14. The respondents opposed the application. Mr Kiarie Kariuki, learned counsel for the Applicants/ Respondents, submitted that the application was brought under the wrong provisions of the Rules, making it incompetent and devoid of merit as procedure is the handmaiden of substance
15. Counsel submitted that although the application was made without unremarkable delay, the Petitioners /Applicants hadn't shown what substantial loss they would suffer if their application were refused. He urged that what the court did was revoke the grant and that there was nothing to stay.
16. Counsel relied on the Court of Appeal decisions in the *Attorney General v James Hoseah Gitau Mwara* [2014]eKLR and *Mukama v Abuoga* (1980) KLR 645 to buttress his arguent that the Petitioners/ Applicants had the onus of demonstrating what substantial loss they would suffer if stay application were not granted.
17. It was urged that a stay of execution pending appeal is a discretionary remedy, which the court should exercise judiciously. Counsel submitted that this court should balance the competing interests of the litigants. Reliance was placed on the decision of the court in *Absalom Dove v Tarbo Transports* [2013]eKLR, where the court stated as follows:-

“The discretionary relief of stay of execution finding appeal is designed on the basis that no one would be worse off by virtue of an order of the court; as each order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights, the appellant to this appeal which includes the prospects that the appeal will not be rendered nugatory; and the decree holder to the decree which includes full benefits under the decree. The court, in balancing the 2 competing rights, focuses on reconciliation...”
18. Mr Kiarie Kariuki thus urged me to dismiss the application with cost to the respondents.
19. I have considered the application dated 8th July 2024, the grounds of opposition filed herein, as well as the written submissions of the parties. I must now determine if the application has merit and whether or not it should allow it.
20. The test applicable with respect to applications for stay pending appeal is given in Order 42 Rule 6(2), which provides as follows:-

“(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.”
21. From the said provision, it is incumbent on an applicant for a stay of execution pending appeal to show that:-
 - a. He will suffer substantial loss if stay is not granted;
 - b. The application was filed without undue delay; and



- c. Security for due performance of any order that may ultimately be binding on him has been given.
22. In *Butt v Rent Restriction Tribunal* (1979) eKLR, Madam JA, as he then was said as follows;
- “It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court, as a general rule, ought to exercise its best discretion in a way so as not to prevent the appeal, if successful, from being nugatory, per Brett, LJ in *Wilson v Church* (No 2) 12 Ch D (1879) 454 at p 459. In the same case, Cotton LJ said at p. 458:
- I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.”
23. What amounts to substantial loss was discussed in the case of *James Wangalwa & another v Agnes Cheseto* [2012]eKLR, where the court stated as follows:-
- “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.”
24. In *Century Oil Trading Company Ltd v Kenya Shell Limited*; Nairobi (Milimani) HCMCA No. 1561 of 2007, Kimaru, J (as he then was) stated as follows:-
- “The word “substantial” cannot mean the ordinary loss to which every judgement debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”
25. Although this court revoked the grant, the effect of that decision is that the Petitioners /Applicants' claim to Plot No. 39, Malindi, was defeated or weakened. If the Applicants/Respondents, as the successful party, alienates, sells or transfers the same, the possibility that the appeal would be rendered nugatory, is clear and present. In my view, therefore, the Petitioners/Applicants would suffer substantial loss. In any case, given the length of time, this matter has been in Court, parties would not



be too inconvenienced if they have to wait for one year or two for the Court of Appeal to render its decision on the merits of the appeal.

26. The Court notes that the Applicants/Respondents have admitted that the application was filed without undue delay. In the circumstance, I see no need to discuss the second requirement at length.
27. Should the Petitioners/Applicants provide security of costs? In my view, this being a succession matter, security for costs is inappropriate.
28. In any case the subject matter of these proceedings is Plot No. 39, Malindi. So long as the same is not alienated, it will be available to the parties that are ultimately successful once all the appeals are exhausted. Making additional requirements for security would be unduly burdensome and may impinge on the Petitioners/Applicants' right to access courts for the adjudication of their grievances.
29. From the foregoing, it is evident that I have found merit in the application. The same is allowed with no orders as to costs.
30. The orders that shall be issued, therefore, are the following:-
 - a. The execution of the ruling of this court dated 10th June 2024 is stayed pending the hearing and determination of the appeal filed at the Court of Appeal; and
 - b. Each of the parties shall bear their costs.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 12TH DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -

No appearance for the Petitioners/Applicants;

No appearance for the Applicants/Respondents; and

Arthur - Court assistant.

