



REPUBLIC OF KENYA



**KENYA LAW**  
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**Karama & 2 others v Awadh (Civil Appeal E013 of 2024)  
[2024] KEHC 14781 (KLR) (19 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14781 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL APPEAL E013 OF 2024**

**G MUTAI, J**

**NOVEMBER 19, 2024**

**BETWEEN**

**SUBEHE KARAMA ..... 1<sup>ST</sup> APPLICANT**

**MOHAMED SWALEH ..... 2<sup>ND</sup> APPLICANT**

**ANWAR SWALEH ..... 3<sup>RD</sup> APPLICANT**

**AND**

**OMAR AHMED AWADH ..... RESPONDENT**

**RULING**

1. The trial court heard the application dated 9<sup>th</sup> August 2023, vide which the Petitioner before the Kadhi's Court, who is the respondent in the appeal, sought an order of eviction to issue against Subehe Karama, Mohamed Swaleh and Anwar Swaleh, the Appellants/Applicants, "from the house belonging to the estate of the late Ahmed Awadh Breik aka Breik Awadh Soda", and for the court to provide for costs.
2. Upon considering the submissions of the parties, the Hon. Habib Salim Vumbi, PK, delivered a ruling on the 25<sup>th</sup> day of January 2024, in which he found as follows:-

"Notably, the judgment of this honourable court delivered on the 22nd day of June 2023 was neither reviewed nor set aside or overturned by a superior court. My understanding is that the orders were valid and the Petitioners /Applicants, together with other heirs, are entitled to the house without land and have a right to enjoy the fruit of the judgment. I agree with the position of the Petitioner/Applicant that the Respondents are strangers non-beneficiaries; thus, they don't have any business remaining in occupation of the said house and, particularly when they are not authorised by the heirs and tenants paying rent. Based



on the foregoing, I do hereby allow the Notice of Motion dated 9<sup>th</sup> August 2023 and proceed to make the following orders:-

1. That this honourable court is hereby pleased to issue an eviction order against Subehe Karama, Mohamed Swaleh and Anwar Swaleh from the house belonging to the estate of the late Ahmed Awadh Breik, aka Breik Awadh Soda, within 90 days from the date of his ruling;
2. That each party to bear its own costs.”
3. Being aggrieved by the said decision, the Appellants /Applicants filed an appeal. The Memorandum of Appeal raises five grounds of appeal. At this point, the court may not consider the merits of the appeal. Suffice it to say that the Appellants /Applicants seek in their appeal that ”the appeal be allowed and ruling delivered on 25<sup>th</sup> January 2024 by the Principal Kadhi, Habib Salim Vumbi, be set aside and all consequential orders thereto.”
4. Desiring to stay the execution of the ruling aforesaid, the Appellant /Applicants filed the instant application, dated 17<sup>th</sup> April 2024, vide which the following four orders were sought:-
  - a. Spent;
  - b. Spent;
  - c. That this honourable court be pleased to order stay of execution of (the) ruling delivered on 25<sup>th</sup> January 2024 and all other consequential orders pending the hearing and determination of the appeal filed herein; and
  - d. That the costs of the application be provided.
5. The Appellant/Applicants averred that they are occupying the house without land, which was adjudged as belonging to the estate vide a judgment delivered on 22<sup>nd</sup> June 2023. The Respondent, pursuant to the judgment, sought to have them evicted. The application was allowed. Being aggrieved by the said decision, they filed the instant appeal. To preserve the substratum of their appeal, they sought stay so that their appeal could not be rendered nugatory. It was urged that the Respondent would not be prejudiced if the orders sought were granted and that the application be filed without inordinate delay.
6. The respondent filed Grounds of Opposition dated 2<sup>nd</sup> May 2024, in which he faulted the procedure used by the Appellant /Applicants. He urged that they should, under Order 42 Rule 6(1) of the Civil Procedure Rules, have sought a stay from the trial court first. Secondly, they hadn't satisfied the requirements under Order 42 Rule 6 (2) of the said Rules for a grant for stay of execution pending appeal. It was also urged that the Appellant/Applicants aren't beneficiaries of the estate of the deceased, and the application had no merit, was a waste of time and was meant to delay the conclusion of the matter. The Respondents also filed a replying affidavit sworn on 2<sup>nd</sup> May 2024.
7. The application canvassed by way of written submissions. The submissions of the Appellants / applicants are dated 22<sup>nd</sup> July 2024.
8. Counsel for the Appellant /Applicants argued that the Appellants/Applicants are beneficiaries of the deceased's estate. It was urged that the application has merit in so far as it was filed without delay.
9. Regarding substantial loss, it was urged that the Appellant/Applicants had lived in the house since the 1970s. Counsel submitted that the 1<sup>st</sup> Appellant/Applicant is an octogenarian with deteriorating health. It was submitted that since the Respondent lives in Tanzania, he would not be prejudiced if a



stay was granted. Counsel relied on the decisions of the court in the case of Antone Ndiaye vs African Virtual University [2015]eKLR, James Wangalwa & another Vs Agnes Naliaka Cheseto [2012]e KLR and RWW vs EKW [2019]eKLR.

10. On security for costs, it was urged that the impending execution is not in respect of money decree. Hence an order as to security for the due performance of any order that may ultimately be binding was unnecessary. On costs, it was urged that costs should be in the cause.
11. The submissions of the Respondent are dated 2<sup>nd</sup> August 2024. Mr. Oddiaga, learned counsel for the respondent, argued that there is a judgment of the Kadhi's Court in which the respondent is mentioned as an heir. In contrast, the Appellants/Applicants are not mentioned as beneficiaries.
12. Counsel urged that the Appellants/Applicants, where in occupation of the suit premises contrary to the orders of the Kadhi's court and were therefore in breach of the equitable maxim that he who comes to equity must do so with clean hands.
13. Counsel submitted that the application was defective as it sought to prevent an eviction without first having the decision that identified the heirs and declared the suit property as belonging to the estate set aside. The court was, therefore, urged to dismiss the application.
14. This being an application for a stay pending appeal, the court must have regard to the requirements of Order 42 Rule 6 (2) of the Civil Procedure Rules. The said rule 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.”
15. It follows that an applicant seeking a stay of execution pending appeal must show that:-
  - a. That he will suffer substantial loss;
  - b. That the application was filed without undue delay; and
  - c. Provide security for due performance of the orders that may ultimately be found as binding.
16. These requirements are conjunctive, and the applicant must satisfy all three requirements for the court to exercise its discretion in his favour. As it is often stated, a court must exercise its discretion judiciously and not whimsically or capriciously.
17. Will the Appellants Applicants suffer substantial loss? To ascertain whether the Applicants will suffer substantial loss, the Court must first determine what amounts to “substantial loss.” The term has been defined in a number of decisions of the High Court.
18. In the case of James Wangalwa & another vs Agnes Naliaka Cheseto [2012]eKLR where it was 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.”

19. In *Century Oil Trading Company Ltd vs 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.”

20. In this case, the Appellants/Applicants are appealing against the decision that permitted their eviction. They have not appealed against the judgment of the Court that identified the heirs of the deceased and recognized the suit property as belonging to the estate.
21. At this stage, the Court has to do a delicate balancing act between parties that may succeed on appeal and ought not to have their appeal made nugatory and a Respondent who ought to benefit from a judgment in his favour.
22. Although eviction is traumatic, especially to an elderly person, this court notes that without an appeal against the trial court's judgment, the Appellants' claim is tenuous, at best. In my view, for a substantial loss to exist, the appeal must have a reasonable chance of success. In this case, once the trial court's judgment determined that the Appellants/Applicants were not heirs of the deceased and that the house without land belonged to the deceased, they lost the right to remain in occupation, unless some other ground to remain in occupation, which this court is unaware of at the moment, exists.
23. I cannot see how the Appellant /Applicant will suffer substantial loss in this case.
24. Although the Appellants/Applicants filed the application without undue delay, they cannot succeed in their application as the first requirement is missing. For the same reason, I see no need to consider the third requirement. In the circumstances, the application must fail.
25. In the circumstance, I find and hold that the application has no merit. The same is thus dismissed with no orders as to costs.
26. Orders accordingly.

**DATED AND SIGNED AT MOMBASA THIS 19<sup>TH</sup> DAY OF NOVEMBER 2024. DELIVERED VIRTUALLY VIA MICROSOFT TEAMS.**

**GREGORY MUTAI**



## **JUDGE**

In the presence of:

Ms Malombo, holding brief for Mr Malombo, for the Appellants/Applicants;

Mr Oddiaga, for the Respondent; and

Arthur – Court Assistant.

