



**Ogolla v Otieno (Family Appeal E008 of 2024)
[2024] KEHC 15696 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15696 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
FAMILY APPEAL E008 OF 2024
RE ABURILI, J
DECEMBER 9, 2024**

BETWEEN

SYDNEY OGOLLA APPELLANT

AND

JACOB OCHIENG OTIENO RESPONDENT

RULING

1. This ruling determines the application dated October 11, 2024 seeking for orders of stay of execution of the ruling of the lower court in Kisumu CM Succession cause No. 137 of 2019 wherein the appellant/ applicant was cited for contempt of Court for disobeying the Court order directing him to release motor vehicle Registration Number KCB 154 W which was alleged to be part of the assets of the estate of the deceased Peter Odada Sumba in what was described as intermeddling with the deceased’s estate since the motor vehicle was registered in his name.
2. The application is supported by the affidavit sworn by the applicant/ appellant herein on 11th October, 2024 and the grounds on the face thereof. The affidavit gives the background to the matter wherein on 30/5/2024, the applicant was restrained by the Succession Court from intermeddling with the estate of the deceased more specifically, motor vehicle registration Number KCB 154 W, on the application dated 12/7/2024 and that the applicant herein filed a replying affidavit dated 23/7/2024 informing the court that he had already surrendered the suit motor vehicle to its owner, Mr. Kazura James back in 2022 before the orders of 30/5/2024 were issued.
3. The applicant deposes that upon receipt of the orders allegedly disobeyed, he forwarded the same to the said owner of the motor vehicle Mr. Kazura who informed the applicant that he had already moved the court in a civil suit to restrain the respondent administrator of the deceased’s estate from taking possession of the suit motor vehicle.



4. That the said Kazura was not made a party to the succession proceedings and neither was the applicant a party to the succession proceedings for him to execute the orders issued since he was merely a driver for Mr. James Kazura and had already surrendered the vehicle to him.
5. That having been cited to be in contempt of the said orders of restraint, which orders of contempt are likely to be executed against the applicant, he filed this appeal and the application seeking to stay implementation of the said orders until this appeal is heard and determined on its merit. That the appeal shall be rendered nugatory unless the orders sought are granted as the applicant risks being arrested and detained in prison.
6. Opposing the application, the respondent filed an affidavit in reply asserting that there is no dispute as to who owns the motor vehicle and that when the court ordered for surrender of the motor vehicle by the applicant, it was not privy to the employment of the applicant by Kazura. That no leave to appeal was sought to file this appeal as required under Order 43 of the Civil Procedure Rules and that the conditions for stay are not fulfilled by the applicant. That the issue of whether Kazura could own the deceased's motor vehicle was pending a ruling on a preliminary objection raised in the lower court.
7. The parties argued the application orally, reiterating the depositions in their respective affidavits. Mr. Odeny for the applicant added that the issue of contempt for intermeddling with the suit vehicle was handled by a different court from that which was hearing the civil suit. That James Kazura owned the vehicle by sending money to the deceased to buy the vehicle for him because he was foreigner although the vehicle is registered in the deceased's name. On leave to appeal, it was submitted that this was not necessary under the *Law of Succession Act*.

Determination

8. I have considered the application and the response and the oral arguments by both parties' counsel on record.
9. The issues for determination are whether the application is merited. Before determining on the merits, the question is whether the appeal is competent having been filed without first obtaining leave of the trial court to appeal to this court.
10. As a rule, in proceedings under the *Law of Succession Act*, provisions of the *Civil Procedure Act* and Civil Procedure Rules do not apply as the *Law of Succession Act* is sui generis with its own unique and special procedures which regulate proceedings in probate matters.
11. However, Rule 63 of the Probate and Administration Act provides for specific provisions of the Civil Procedure Rules which are to apply to succession proceedings. These are Orders dealing with service of summons, interrogatories, discoveries, inspection, consolidation of suits, summoning and attendance of witnesses, affidavits, review and computation of time.
12. That being the case, the provisions of section 75 of the *Civil procedure Act* as read with Order 43 of the Civil procedure Rules do not apply to succession matters. That said, under section 47 of the *Law of Succession Act*, this Court has jurisdiction to entertain any application and determine any dispute under the Act and to pronounce such decrees and make such orders therein as may be expedient.
13. Additionally, Rule 73 of the Probate and Administrative Rules preserves the inherent jurisdiction of this Court while dealing with matters succession.
14. It follows that no leave was required to appeal from the contempt of court orders arising from Succession proceedings. However, as far as stay of execution of decree or orders is concerned, as there is no specific procedure on appeals from succession proceedings, I find that Order Order 42 of the



Civil Procedure Rules, though not one of those Orders imported by Rule 63(1) of the Probate and Administration Rules, this Court has jurisdiction to grant orders of stay of execution while invoking its inherent powers under Rule 73 and make any such orders in the interest of justice.

15. Therefore, is the prayer for stay of execution of the ruling of 30/5/2024 merited? The general rule of law is that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for this Court to order stay of execution are provided for under Order 42 rule 6(2) Civil Procedure Rules. Under the said provision, an applicant must satisfy the court that:
- a. substantial loss may result to the applicant unless the order is made
 - b. the application has been made without unreasonable delay; and
 - c. the applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

16. In *Halai and Another –vs- Thornton & Turpin (1963) Ltd [1990] KLR*, the Court of Appeal in considering the conditions for stay of execution pending appeal held that;

“The High Court’s discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely;- Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.

In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo...Vs...Straman EA Ltd (2013)* as follows:-

“In addition, the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory.”

These twin principles go hand in hand and failure to prove one dislodges the other” [emphasis added]

17. These conditions must be satisfied by an applicant who wishes this Court to grant him stay of execution pending appeal. The question is whether the applicants have satisfied the above conditions.
18. On the likelihood to suffer substantial loss if the stay is not granted, the applicant deposed that if the orders of stay are not granted, he will be arrested and detained in prison yet he was a mere driver of one Kazura and that he had surrendered the vehicle to the said Kazura when the restraining orders were issued, with Kazura not being a party to the proceedings and that he could not go and take possession of the vehicle from Kazura hence, he will be greatly prejudiced. That his appeal has high chances of success as the restraining orders were in conflict with orders obtained in the civil suit by Kazura, restraining the respondent from taking possession of the suit vehicle.

19. In *James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR* the court held that:

“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.”[emphasis added]



20. In my view, loss of liberty in civil proceedings which are challenged is substantial and cannot be adequately compensated by damages.
21. On whether the application had been made without unreasonable delay, the impugned orders were made on 8/10/2024 while the appeal and the application subject of this ruling was filed in this Court on 22/10/2024 which was within 13 days of the impugned ruling hence the application was filed timeously.
22. on what security for due performance of decree is to be deposited, the Rule gives this Court the power to orders for such security even if the applicant does not offer any such security for the due performance of decree.
23. Is there any other sufficient reason for the grant of the orders sought? The answer is yes. The applicant has prima facie deposed that he was the driver of Kazura and had surrendered the suit motor vehicle to Kazura prior to the impugned Orders being issued. That the vehicle belongs to Kazura who is not party to the succession proceedings and that the said Kazura already obtained orders staying the taking possession of the suit motor vehicle by the respondent.
24. These and others are matters which require in-depth examination on appeal and therefore is stay is not granted and the applicant is sent to prison, when there are two courts making conflicting orders, the applicant will suffer irreparably and the appeal if successful, will be rendered nugatory.
25. For the above reasons, I find the application dated October 18, 2024 merited. I grant the order of stay of enforcement of the order of 8/10/2024 pending hearing and determination of this appeal.
26. Costs shall be in the appeal which shall be fast tracked.
27. The lower court file to be availed to this Court expeditiously for admission and directions.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 9TH DAY OF DECEMBER, 2024

R.E. ABURILI

JUDGE

