



REPUBLIC OF KENYA



**In re Estate of Yunis Ali (Deceased) (Succession Cause 1364 of 2006)
[2025] KEHC 14554 (KLR) (Family) (16 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14554 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY**

SUCCESSION CAUSE 1364 OF 2006

PM NYAUNDI, J

OCTOBER 16, 2025

IN THE MATTER OF THE ESTATE OF YUNIS ALI (DECEASED)

RULING

1. The Notice of Motion dated 10th July 2025 is presented under Order 2 Rule 15, 5 rule 1 and 51(1) of the Civil Procedure Rules and Section 44 of the Probate and Admiralty Act (Sic) and Rules 55 and 44 of the Probate and Admiralty rules (sic). Essentially the applicant seeks stay of execution and proceedings herein pending the hearing and determination of the appeal.
2. The applicants aver that it is in the interest of justice that the application be allowed.
3. The Respondent has filed grounds of opposition, in which it is argued that the Court is functus officio. and an abuse of the Court process. Reference is made to the decision in John Gilbert Ouma v Kenya Ferry Services Limited [2021] KEHC 7107 (KLR) and Mukirae Chege & Thairu Chege Vs Sospeter Nganga Nyamu [2024] KEELC 1558 (KLR) on the applicability of the doctrine of Sub judice.
4. It would appear that the respondent misconstrued the application before Court which is for stay of proceedings and execution pending the determination of appeal.
5. The power of the court to stay the execution of the judgement /decree pending the determination of the appeal, is guided by Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules which provides that:
 - (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



- (2) No order for stay of execution shall be made under sub rule (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.
6. In *Butt v Rent Restriction Tribunal* [1979] KECA 22 (KLR), the Court pronounced on the principles to guide a court in an application for stay of execution. Primarily the Court must guard against the intended appeal from being rendered nugatory. The Court had this to say while citing the decision 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.”
7. At the same time, the Court is obligated to safeguard the interests of the successful litigant who has a judgment at hand even as it considers the interests of the appellant. The decree-holder ought not to be precluded from enjoying the fruits of his/her judgment. This principle was aptly explained in the case of *RWW v EKW* [2019] eKLR, as follows:
- “the purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.”
8. Further, In the case of *Macharia t/a Macharia & Co Advocates v East African Standard*, No 2 (2002) KLR 63, the court observed that:-
- “To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the Court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court.”
9. It is submitted that unless proceedings are stayed this Court is inclined towards adopting the mode of distribution as presented by the Kadhi’s Court. The Appellant disputes that the estate should be distributed in accordance with Islamic Law. Under those circumstances unless stay is granted the appeal will be rendered nugatory, an academic exercise. On the flip side however, the respondent has a judgement in hand that he would like to enjoy the fruits of.
10. The applicant will be pursuing the appeal in the Court of Appeal, that Court is best placed to calibrate its order having regard to its docket so that interests of justice are met. Accordingly, I will grant



the applicant a stay of proceedings and execution of 21 days to enable them file and prosecute the application for stay of proceedings and execution before the appellate Court.

11. Costs of this application will abide the outcome of the appeal.

It is so ordered

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 16TH DAY OF OCTOBER, 2025.

P. M. NYAUNDI.

JUDGE.

In the presence of:

Fardosa Court Assistant

Obonyo for Petitioner

Ms. Said for 3rd & 4th Respondent

Mrs. Owino for the Applicant

