



**Mamo v Mamo (Civil Appeal E009 of 2025)
[2025] KEHC 14288 (KLR) (14 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14288 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MARSABIT
CIVIL APPEAL E009 OF 2025**

FR OLEL, J

OCTOBER 14, 2025

BETWEEN

QURESHO HASSAN MAMO APPLICANT

AND

ADAN HASSAN MAMO RESPONDENT

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 9th September 2025 brought pursuant to provisions of Article 50 of *the Constitution*, 2010, Section 1A & 1B, 3 & 3A 79G of the *Civil Procedure Act*, Order 42 Rule 6(1), (2), & Order 51 rule 1 of the Civil Procedure Rules, and all other enabling provision of law. The applicant seeks for prayers that;
 - a. Spent.
 - b. Spent.
 - c. That this honourable court be pleased to issue an order of stay of execution of the judgment entered and delivered herein against the Applicants on 11th August 2025 and subsequent decree in Moyale Kadhi's court succession cause No E009 of 2023 pending the hearing and determination of the Appeal
 - d. That costs of this Application abide the outcome of the Appeal.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of the appellant Quresho Hassan Mamo dated 9th September 2025, and the same was oppose by the respondent, who filed his lengthy replying affidavit dated 17th September 2025.



B. Pleadings

3. The applicant averred that she was a daughter of the deceased, from the second house and that as a family they were primarily dissatisfied by the findings of the Honorable Kadhi, who determined that Plot 131 Moyale town was no longer estate property as it had been sold to the respondent by the estate beneficiaries. This finding was also paradoxical as the purported sale was made without any valuation being done and was particularly unfair as her mother had been disinherited from receiving her rightful share therein, which was against substantive tenets of Islamic law.
4. The applicant further averred that that the respondent had imitated the process of transferring the suit property to his name, to the exclusion of other beneficiaries and had engaged the services of casual labourers and masons with intent of destroying part of the rental structures and rebuilding the same thus exercising sole control over the same.
5. Based on the foregoing the appellant urged the court to find that she had a strong and arguable appeal, which had tremendous chances of success and prayed that the orders sought be granted to preserve the estate pending determination of the appeal filed.
6. The respondent opposed this Application through his comprehensive replying affidavit dated 17th September 2025 and averred that the judgment of the Kadhi was read on 8th August 2025 and not on 11th August 2025 as alleged by the applicant and thus her appeal had been filed out of time and without leave. The applicant was thus undeserving of the orders sought as she did not have any valid appeal filed.
7. He further averred that the applicant mother did receive her lawful share of the said property in 1997 and willingly moved out therefrom and the applicant could thus not be heard to complain that her mother was forcefully chased away from the said property. The applicant too, had not led evidence to show that the said property at time of sale had been undervalued and her assertions to that effect remained unsubstantiated.
8. The respondent also denied demolishing and/or reconstructing the suit property and stated that those averments were made in bad faith to mislead the court to grant interim order sought. The applicant had also not demonstrated the substantial loss she was likely to suffer if the orders sought were not granted nor had she proposed to provide security for due performance of the decree as mandatorily required under the law.
9. The respondent thus urged this court to find that the appeal filed was incompetent and proceed to dismiss the application under consideration.

C. Analysis & Determination

10. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit, and filed. The only issues which arises for determination is; whether the applicant filed their appeal out of time and without leave of the court and secondly if the applicant has satisfied the conditions set under Order 42 Rule 6 of the civil procedure Rules to allow the court exercise discretion in her favour to grant an order of stay of execution of the Judgement/decree issued in Moyale Kadhi Succession Cause No E009 of 2023.
11. Section 79G of the *Civil Procedure Act* provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and



delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

12. The Appellant filed her appeal and application for stay of execution on 9th September, 2025 against the judgment of the Honourable Kadhi delivered on 11th August, 2025 in Moyale Kadhi' Succession cause No E009 of 2023. The respondent on the other hand faulted the applicant for filing her appeal out of time and without leave of the court, insisting that the said judgment was delivered on 8th August 2025.
13. While this is a poignant issue, which has to be primarily determined, unfortunately at this preliminary point of writing this ruling the primary file has not been forwarded to this court and therefore the court does not have the benefit of perusing it to independently establish, when the said judgment was delivered. It then, would be safer to err in the side of caution and presume that the appeal was filed on time.
14. On the issue of stay of execution, Rule 63 of the probate and administration rules specifically categorized the specific provisions of the Civil procedure rules which apply mutatis mutatis in succession matters and the provisions of Order 42 Rule 6 of the Civil Procedure Rules is not amongst the said provisions, though its principles may be considered where relevant.
15. The court then falls back on the provisions of Section 47 of the *Law of Succession Act*, and Rule 73 of the Probate and administration Rules which provide that; Section 47 of the succession Act, Cap 160, which provides that;

“The high court shall have jurisdiction to entertain any Application and determine any dispute under this Act and to pronounce such decrees and make such orders therein as may be expedient.”
16. Further Rule 73 of the probate and Administration Rules provides further cushion to the court to expeditiously deal with its proceedings and the said rules provides that;

“Nothing in these rules shall limit or otherwise affect the inherent powers of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
17. Thus in considering an application for stay of execution, the court ought to weigh the likely consequences of granting the order of stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.
18. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice. See *Suleiman vs. Amboseli Resort Limited* [2004] 2 KLR 589.
19. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited vs. Guardian Bank Limited Nairobi (Milimani)* HCCC 795 of 1997 where he expressed himself as hereunder:

“Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the Court should not put unnecessary



hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant...For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions.”

20. The appeal filed definitely raises a triable issues , which is the validity of the sale of the suit property to one of the estate beneficiaries , whether the same was effected with approval of all family members and if the said sale was effected, if it was done as guided by Islamic succession law principles.
21. If stay of execution is not grant, it is obvious that the respondent will proceed to lay exclusive claim to the suit property and collect all rents therefrom to the detriment of the appellant, and their family. The balance of convenience thus titles in their favour .

Dispostion

22. The upshot and in order not to render the intended appeal illusory, I do grant the following orders;
 - a. That an order of stay of execution of the judgment/decreed issued in Moyale Kadhi's Succession cause No E009 of 2023 be and is hereby issued pending the hearing and determination of this Appeal
 - b. The costs of this Application will Abide the Appeal
23. It is so ordered.

READ, SIGNED AND DELIVERED VIRTUALLY AT MARSABIT ON THIS DAY OF OCTOBER, 2025.

FRANCIS RAYOLA OLEL

JUDGE



Delivered on the virtual platform, Team this 14th day of OCTOBER, 2025.

In the presence of: -

.....Appellant

..... Respondent

..... Court Assistant

