

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ISIOLO
FAMILY APPEAL NO. 001 OF 2025

LILIAN AUMA.....
.....1ST APPLICANT

SARAH
GODANA.....2^N
D APPLICANT

FATUMA MOHAMED.....
.....3RD APPLICANT

HUSSEIN MOHAMED ABDINOOR....
.....4TH APPLICANT

ZULEKHA
MOHAMED.....5TH
APPLICANT

VERSUS

HALIMA GODANA.....
.....RESPONDENT

RULING

1. The Appellants/ Applicants' Notice of Motion dated the 2nd January 2025, seeks Orders as follows:-

1. Spent

2. Spent

3. That this court be pleased to stay execution of the ruling dated 5th day of December 2024 and the subsequent orders therein pending the hearing and determination of this of the Appeal.

4. (spent)

5. That this Honourable Court be pleased to stay the proceedings of the Kadhi's Court Matter in Succession Cause NO.E026 of 2024 pending the hearing and determination of the Appeal

6. Costs of this Application be provided for

2. The application is supported by the affidavit of Fatuma Mohamed, the 3rd Applicant.
3. The respondent filed suit in the lower court seeking for , among others, an order directing the 3rd Applicant to surrender documents of ownership in respect of the Assets of the estate of Mohamed Godana Jarso(Deceased). She told the court that she was the mother of the deceased and she wanted to preserve the Assets for the benefit of the deceased's dependants , some of whom were minors .
4. In response the Applicants, who include two wives of the deceased, raised a preliminary objection on grounds that the Respondent lacked the locus standi to bring the suit as she was not the Administrator of the estate. The Hon. Kadhi dismissed the Preliminary Objection, on the ground that it did not meet the threshold of a preliminary objection. Prior to this ruling, an *ex parte* order dated 9th September 2024 had been issued directed that the title documents to the deceased's estate be surrendered to the Respondent. The Applicants herein were aggrieved by the dismissal of the objection and moved to this court on Appeal. They also filed the present Application seeking stay of execution and stay of proceedings.
5. The Application proceeded by way of written submissions. The Respondent despite being served, did not file any response.

Applicants submissions

6. On whether stay of execution should be granted, the Applicants argue that they have met the

prerequisite conditions set out under **Order 42 Rule 6(2) of the Civil Procedure Rules**, namely; proof of substantial loss, undue delay, and provision of security.

7. On substantial loss, the Applicants submit that the Assets of deceased's estate are at risk of being wasted through intermeddling, unless the stay is granted. They argue that by allowing the respondent to retain ownership documents of the deceased's properties without having been appointed as the Administrator, the Respondent would be at liberty to deal with the Assets without any accountability. That the wastage of the estate will render the appeal nugatory
8. The Applicants further argue that by allowing her to retain documents without the mandate to administer the estate, the Court would be perpetuating an illegality. They have relied on the Court of Appeal decision in case of **Rajesh Pranjivan Chudasama v Sailesh Pranjivan Chudasama (2014) eKLR**, in which it was held that a litigant is clothed with locus standi upon obtaining letters of administration in cases of intestate succession, and an action brought before taking out letters of administration is incompetent as of the date of inception. That, further, as was held in the case of **Principal/Board of Directors Lirhanda Girls High School v Lutta t/a Sigma Telecoms (2024) KEHC 2650 (KLR)**, courts should not condone illegality by enforcing it.
9. It is further submitted that the application was filed without any undue delay as it was filed about a month after the delivery of the kadhi's ruling. They have further stated that they are willing to comply

with such orders on security as may be ordered by the court.

10. On stay of proceedings, the Applicant has relied on the case of **Ahmednassir, Abdikadir & Co Advocates vs National Bank of Kenya (2007) KEHC 691(KLR)** where the court held *inter alia* that the paramount question in an Application for stay of proceedings is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms should it be granted.

Analysis and Determination

11. I have considered the application, the affidavit in support and the submissions
12. The power of the court to stay execution pending Appeal or proceedings is discretionary. In the exercise of that power, the court considers the wider view of justice in determining whether there is sufficient cause to order stay of execution. The court also has to consider the established requirements set out under Order 46 Rule 2 of the Civil Procedure Rules. The said considerations are:
- i) *whether the application has been made without unreasonable delay;*
 - ii) *whether substantial loss would occur upon the applicant unless stay of execution is granted;*
and
 - iii) *the provision of security.*
13. It is also trite law that the Applicant must demonstrate that the Appeal has high chances of success.

14. On the first consideration the court is satisfied that there was no undue delay as the Application was filed about a month after the delivery of the ruling by the trial court.
15. On substantial loss, the Applicants' apprehension is the wastage of the estate. The import of the orders granted by the trial court are that the respondent will have a free hand to deal with the estate as she wishes, without the duty to be accountable. A legally appointed Administrator owes a duty to the heirs of the deceased as well as other beneficiaries, the court and other interested parties. The respondent herein has no mandate and hence no duty to account. Am satisfied that the Applicant has satisfied the second condition.
16. The requirement on security is that a party seeking stay must offer such security for the due performance of the orders as may ultimately be binding on the said Applicant. There are instances however that stay may be impracticable. The nature of the present case is that the only security that the court may order is one of costs. However the litigants herein are family members, and going by tradition, it is not appropriate to make an order on costs. In the circumstances the court is disinclined to make an order on security.
17. The last issue is on the chance of the Appeal succeeding. I have looked at the memorandum of Appeal. The main issue that has been raised is whether the respondent had the legal capacity file

suit or represent the deceased estate , and consequently whether the trial court erred in dismissing the preliminary objection.

18. The trial court's view was that the objection failed to meet the threshold of a preliminary objection. The imperative question therefore is; what is a preliminary objection?

19. The ***Black's law dictionary(9th Ed)***, defines a preliminary objection as the right to bring an action or to be heard in a given forum. In the case of ***Mukisa Biscuit manufacturing co. Ltd vs west end distributors Ltd 1969 E.A 696***, it was defined as consisting of:..... *a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit*". Also in ***Mumo Matemu vs trusted society of human rights alliance & others (2014)e K.L.R***, the Supreme Court stated that:

"The issue of locus standi raises a point of law that touches on the jurisdiction of the Court and it should be resolved at the earliest opportunity"

20. The court need not belabor the issue. The aforesaid definition on what constitutes a preliminary objection and caselaw, indicate that the Applicant's issues as raised in the memorandum of Appeal are triable issues with high chances of success. Further a person is not entitled to bring any action on behalf of the deceased's estate before taking out letters of administration; such an action, if it is brought would be incompetent as of the date of

inception. (see : **Otieno vs Ougo 1986-1989 E.A.L.R 486:**

21. On the question of stay of proceedings , am satisfied that considering that the issue being raised touches on the jurisdiction of the court to entertain a suit by a party who is allegedly disentitled to bring, then to allow for the continuation of proceedings is self- defeating. It is self - defeating because ,if the appellate court does find that the trial court was not possessed of the prerequisite jurisdiction, it is trite law that such a finding operates retrospectively.
22. In the end , the Application is merited. It is allowed in terms of prayer 3 and 5.
23. Each party to meet their own costs.

Dated ,signed and delivered virtually at Nairobi this 24th day of November 2025.

S.Chirchir
Judge.

In the presence of:

Roba Katelo- Court Assistant
Ms. Mohamed for the Applicants.
Mr. Jarso for the Respondent.