



REPUBLIC OF KENYA



**KENYA LAW**  
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**Madi & 3 others v Shoshi (Family Appeal E003 of 2025)  
[2025] KEHC 18217 (KLR) (5 December 2025) (Ruling)**

Neutral citation: [2025] KEHC 18217 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
FAMILY APPEAL E003 OF 2025  
G MUTAI, J  
DECEMBER 5, 2025**

**BETWEEN**

**MADI FAMAU MADI ..... 1<sup>ST</sup> APPELLANT  
MWANAISHA FAMAU MADI ..... 2<sup>ND</sup> APPELLANT  
MWANAHALIMA FAMAU MADI ..... 3<sup>RD</sup> APPELLANT  
UMI FAMAU MADI ..... 4<sup>TH</sup> APPELLANT**

**AND**

**KASSIM FAMAU SHOSHI ..... RESPONDENT**

**RULING**

1. The Hon Kadhi, Omar Swaleh, delivered a judgment on 19<sup>th</sup> December 2024 in which he declined to order a DNA test of the respondent herein. The appellants were aggrieved by the said decision and filed the instant appeal on 23<sup>rd</sup> January 2025.
2. The appellants filed an application dated 18<sup>th</sup> June 2025 in which they sought the stay of the judgment of the Court below, since, in their view, the respondent wished to execute it. They contended that the respondent was an alleged issue of Famau Madi Shoshi and was therefore not entitled to inherit the property of the estate, and that he had not undergone a DNA test.
3. The affidavit in support of the application was sworn by Umi Famau Madi on 19<sup>th</sup> June 2025.
4. The application is opposed. The respondent filed a replying affidavit sworn on 16<sup>th</sup> July 2025 in which he averred that the application was a ploy by the respondent to deny him the fruits of the judgment delivered by the learned Kadhi on 19<sup>th</sup> December 2024. He deposed that there was no evidence that the applicants would suffer substantial loss. He denied that he was the son of the deceased, stating that no contrary evidence had been produced. The respondent therefore prayed that the application be denied.



5. The application was canvassed by way of written submissions.
6. The submissions of the applicant are dated 25<sup>th</sup> July 2025. Counsel for the applicants submitted that they had satisfied the conditions stated in Order 42 Rule 6 of the Civil Procedure Rules in so far as they would suffer substantial loss if stay were not granted, the application was filed within 6 months of the judgment and lastly they are willing to deposit security if need be, although in their view, this being a succession matter, security was unnecessary.
7. The respondent, on his part, urged via submissions dated 29<sup>th</sup> July 2025 that the conditions for the grant of stay had not been met as no substantial loss likely to be suffered by the applicant had been shown. The respondent contended that the application was filed after undue delay. Lastly, he argued that security for costs ought to have been provided.
8. I have considered the application, the responses thereto, as well as the written submissions of the parties. Should this Court issue a stay? If so, on what terms?
9. To answer the foregoing questions, I must look at Order 42 Rule 6 of the Civil Procedure Rules. It states that: -

“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.”

10. The applicants must therefore show: -
  1. They will suffer substantial loss if a stay is not granted;
  2. There hasn't been an inordinate delay; and
  3. Provide security for the due performance of the decree.
11. RWW v EKW [2019]eKLR it was held that:-

“8. The purpose of an application for stay of execution pending 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 that 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 called upon to ensure that no party suffers prejudice that cannot be compensated by an award or costs.”

12. The right of the respondent to inherit the property of the deceased is disputed. The Hon Kadhi's decision not to call for a DNA test has been impugned. In my view, the devolution of the estate of the deceased at this point, before the paternity of the respondent is determined with finality, may cause the appellants/applicants substantial loss.
13. Although the time taken to file this application is about 6 months, the question as to whether this is inordinate or not depends on context. Given the nature of this matter, I find and hold that the time taken by the applicants/applicants isn't inordinate.



14. Since this is a succession dispute, I am of the view that the provision of security isn't appropriate.
15. The upshot of the foregoing is that I find merit in the application. I stay the execution of the judgment delivered on 19<sup>th</sup> December 2024 pending the hearing and determination of the appeal. As this is a family matter, the parties shall bear their own costs.
16. In the interest of justice, I order that the appeal be fast-tracked.
17. It is so ordered

**DATED AND SIGNED AT MOMBASA, THIS 5<sup>TH</sup> DAY OF DECEMBER 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.**

**GREGORY MUTAI**

**JUDGE**

In the presence of

Mr Gichana, for the Appellants/Applicants;

Mr Kassim Famau Shoshi (pro se litigant); and

Norah – Court Assistant.

