

**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
(FAMILY DIVISION)**

HCFA NO. E064 OF 2025

**AMINA AKBAR MOHAMED.....1ST APPELLANT/APPLICANT
ASIF AKBAR MOHAMED2ND APPELLANT/APPLICANT**

AND

HAMIDA BANO.....RESPONDENT

RULING

Introduction

1. The Kadhi's Court delivered a ruling on **23rd October 2025**, vide which he dismissed the Notice of Motion applications dated **29th November 2024** and **14th February 2025** filed by the appellants.

2. Being aggrieved by the said decision, the appellants filed an appeal. The appellants also filed a Notice of Motion application dated **18th November 2025** vide which they sought, as far as is relevant, *inter alia*, the following order:-

“That this honourable Court be pleased to issue an order of stay of execution of the orders issued on 6th April 2023 and all subsequent orders, including the warrants of arrest and committal to civil jail dated 20th September 2024, as confirmed by the ruling delivered by the Honourable Kadhi in Mombasa Kadhi Succession Cause No E076 of 2021; In the Matter of the Estate of the late Mohamed Haji Ali, on 23rd October 2025 and all the consequential orders arising therefrom, pending the hearing and determination of the applicants' appeal.”

3. When the application was filed, this Court certified the matter urgent and fixed it for hearing on **21st November 2025**. The appellants/applicants were ordered to serve the respondent for a hearing on **21st November 2025**.
4. The appellant's counsel filed an affidavit of service, sworn on 20th November 2025, vide which he averred that he effected service on the firm of **Khalid Salim & Co Advocates**, vide their email address **info@ksadvocates.co.ke**, and to the respondent in person, through her phone number +447359015319 via WhatsApp. Being satisfied that service was effected, this Court issued temporary orders on **21st November 2025** and fixed the application for hearing interpartes on **18th December 2025**.
5. The application is opposed. The respondent filed a replying affidavit sworn on **15th December 2025** before a Notary Public in London in which she contended that whereas the appeal is against a decision of the Kadhi's Court delivered on **23rd October 2025**, the appellant was seeking to stay the execution of the orders issued on **6th April 2023**, and all the subsequent orders including the warrants of arrest and committal to civil jail dated **20th September 2024** as confirmed by the Hon Kadhi in **Kadhi Succession Cause No E076 of 2021; re Estate of the late Abkar Mohamed Haji Ali**.
6. It was contended that the Notice of Motion now before the Court was similar to the one filed in Mombasa HCFA No E011 of 2025; *Amina Akbar Mohamed & Asif Akbar Mohamed v Hamida Bano*, which this Court dismissed on **30th May 2025**. For that reason, she contended that the application before the Court was *res judicata*.

7. The respondent stated that the ruling delivered on **23rd October 2025** merely declined to allow the Notice of Motion dated **14th February 2025** and that the resultant order was in essence a negative order incapable of being stayed. Regarding the specific orders sought, it was urged that investigation of crimes is the province of the Directorate of Criminal Investigations and that this Court should not interfere with it. On the administrator's duties in respect of the estate of a deceased person, Hamida deposed that an administrator has a duty at law to provide statements of account and therefore that this Court should not intervene. She further deposed that, as the appellants had not complied with the Court's orders, the Hon Kadhi was right to punish Amina for contempt of Court.
8. The Respondent further averred that the orders sought to be stayed were issued on **6th April 2023**. There had been an unreasonable delay, which had not been explained. She stated that if the orders were issued, she would be greatly prejudiced. Further, the application had not offered security for the performance of the decree of order. For the foregoing reasons, she prayed that the application be dismissed with costs.
9. The respondent filed an application dated **15th day of December 2025**, vide which she applied to have the orders issued on **21st November 2025** vacated and for the appellant to attend Court on **18th December 2025**.
10. The respondent's application is opposed. **Asif Akbar Mohamed** deposed to a replying affidavit sworn on **18th December 2025**, opposing the said application.

11. The two applications were canvassed together on **19th December 2025**. As a run-of-the-mill stay-of-execution application, I will not regurgitate the parties' submissions, as they are an exposition of the positions I have already set out.

12. I note at the outset that the appellants' application is similar to that dated **20th February 2025** in **HCFA No E011 of 2025** between the same parties.

Prayer C of the latter application sought: -

“That pending the hearing and determination of this appeal, the Court be pleased to issue an order of stay of execution of the orders issued on 6th April 2023 and subsequent orders of arrest issued on 20th September 2024 in Mombasa Kadhi’s Court Succession Cause No E076 of 2021; In the Matter of Estate of the late Akbar Mohamed Haji Ali.”

13. In determining the previous application, I stated at paragraph 22 as follows:

“The appeal is against the orders issued o 18th February 2025 committing the applicants to civil jail. It isn’t against the orders issued on 6th April 2023 and 20th September 2024. What the Court sought to do on 18th February 2024 was to implement the earlier orders. As long as those earlier orders stand, I do not see how the instant application can succeed.”

14. The orders issued on **6th April 2023** and **20th September 2024** have not been vacated, dismissed, or set aside. The said orders are, to borrow the hackneyed phrase, foundational to this matter; as long as they stand, application of the type the appellants have filed cannot stand.

15. That is enough to determine this matter. Having said so, I must make further observations. The impugned decisions, as rightly pointed out by Mr. Mugambi, are incapable of being stayed; they merely dismissed the application filed by the appellants. In my view, the Court issued no order capable of being implemented. The Court declined to do what it had been asked to do. In popular parlance, the Court issued a negative order. I am firmly of the view that negative orders are, as a general rule, incapable of being stayed. There are, in fact, plenty of authorities that back up the said position.

16. The Court of Appeal, in the case of **Cooperative Bank of Kenya Ltd v Banking Insurance & Finance Union [2015]eKLR**, held as follows:-

“An order for stay of executions (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of judgment. The delay of performance presupposes the existence of a situation to stay called a positive order, either an order that has not been complied with or has partly been complied with.”

17. Similarly, in **Kenya Commercial Bank Ltd v Tamarind Meadows Ltd & 7 others [2016] eKLR**, the Court of Appeal stated as follows: -

“In Kanwal Sarjit Singh Dhiman vs Keshavji Juvraj Shah [2008] eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows: -The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely

dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything, or refrain from doing anything, or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only. The same reasoning was applied in the case of *Raymond M. Omboga vs Austine Pyan Maranga (supra)* that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter: -The order dismissing the application is in the nature of a negative order and is incapable of stay of execution, save perhaps, for costs, and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is incapable of execution, there can be no stay of execution of such an order ... The applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing the applicant has lost. The refusal simply means that the applicant stays in the situation he was in before coming to court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

18. There is nothing in the decision delivered on **23rd October 2025** that I can stay. I cannot, in the due performance of my judicial duties, stay execution of the orders issued on **6th April 2023** while considering an application arising out of a different decision.

19. Even if it weren't a negative order, it is my view that the applicant has not met the threshold for the grant of a stay pending appeal. I say so because the

appellants have not made out a case showing that they would suffer substantial loss unless orders were granted.

20. Further, the orders sought to be stayed were issued more than 2 years prior to the filing of the application; the delay is simply inordinate. Lastly, there has been no offer for security for the due performance of the orders that may ultimately be binding. In the circumstances, I would not have allowed the application in any case.
21. What flows from the foregoing is that the application dated **18th November 2025** has no merit; the same is dismissed. For avoidance of doubt, the existing orders are hereby vacated. As this matter involves family members, I make no orders regarding costs.
22. Having dismissed the appellants' application, it follows that the application filed by the respondent is moot.
23. It is so ordered.

Dated and signed this **16th** day of **January 2026**. Delivered virtually through
Microsoft TEAMS.

Gregory Mutai
JUDGE

In the presence of: -

Mr Mwangi Chege, for the Appellants;

Mr Mugambi, for the Respondent;
Esther – Court Assistant.

Original