

**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KAKAMEGA**

**SUCCESSION APPEAL NO. E007 OF 2024**

**IN THE MATTER OF THE ESTATE OF HAROUN MAJISU MAGALASIA -  
DECEASED**

**EVERLYNE KHADORO MAJISU.....  
RESPONDENT**

**VERSUS**

**ALLEN ALEGWA.....  
APPLICANT**

**RULING**

1. Before this Court for determination is the Applicant's summons dated 6th November 2025 brought under Section 47 of the Law of Succession Act, Rules 49, 59(1) and 73 of the Probate and Administration Rules, and Article 159(2)(d) of the Constitution of Kenya, 2010.
2. The Applicant seeks the following orders:
  - a. That this application be certified as urgent.
  - b. That pending the hearing and determination of the application, there be a stay of execution of the judgment delivered on 17th July 2025.
  - c. That pending the hearing and determination of the appeal filed in the Court of Appeal being Kisumu COACA No. E225 of 2025, there be a stay of execution of the judgment delivered on 17th July 2025 and a stay of proceedings.

- d. That the costs of the application be provided for.
3. The application is supported by the affidavit sworn by the Applicant, Allen Alegwa. The application is opposed through a replying affidavit sworn by the Respondent Everlyne Khadoro Majisu.

### **Applicant's Case**

4. The Applicant states that this Court delivered its judgment on 17th July 2025. He deposes that he was dissatisfied with the decision of the court and has since lodged an appeal before the Court of Appeal being Kisumu COACA No. E225 of 2025.
5. He avers that unless the orders of stay are granted, execution of the judgment may proceed thereby rendering the intended appeal nugatory.
6. The Applicant further states that the application has been filed within reasonable time and in good faith.

### **Respondent's Case**

7. The Respondent opposes the application and deposes that the same is misconceived and lacks merit.
8. She argues that the decision sought to be stayed is that of the High Court exercising appellate jurisdiction in succession matters and by virtue of Section 50(1) of the Law of Succession Act, such a decision is final and not appealable as of right.

9. The Respondent further contends that no valid Notice of Appeal was lodged or served within the timelines prescribed under Rules 77 and 79 of the Court of Appeal Rules. There is therefore no competent appeal capable of grounding an order of stay.
10. The respondent further avers that the application has been filed more than four months after delivery of judgment without any explanation, hence it is an afterthought.
11. The respondent also states that the Applicant has not demonstrated substantial loss he stands to suffer if the stay is not granted.
12. The respondent also stated that the Applicant is not a beneficiary of the estate but a purchaser who allegedly bought land belonging to the deceased before succession proceedings were concluded.
13. The Respondent further urges the court to dismiss the application with costs.

### **Issue for Determination**

14. Having considered the pleadings and affidavits filed, the issue for determination is:

- a. Whether the Applicant has satisfied the conditions for grant of stay of execution pending appeal.**

## Analysis and determination

15. The principles governing stay of execution pending appeal are well settled. Under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant must satisfy the court that:
- a. Substantial loss may result unless the order is granted.
  - b. The application has been made without unreasonable delay.
  - c. The applicant is willing to provide security for due performance of the decree.
16. This was further reiterated in the case of **Muoki V Nyamai(Civil Appeal E233 OF 2023)KEHC** by the high court in Machakos. The court also noted that the circumstances of each case must be considered.
17. Further, **in Butt v Rent Restriction Tribunal [1979] eKLR, the Court of Appeal held that the power to grant stay of execution is discretionary and should be exercised in such a manner that does not render an appeal nugatory.**
18. Similarly, **in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR, the court held that substantial loss is the cornerstone of the jurisdiction for granting stay and must be specifically demonstrated.**
19. This same position was reiterated in **Kenya Shell Ltd versus Benjamin Karuga Kibiru & Another**, the court of appeal emphasized

that substantial loss is the cornerstone of the jurisdiction of granting stay.

**a. Whether the Applicant has demonstrated substantial loss**

20. The requirement of demonstrating substantial loss is the most critical factor in determining whether stay of execution should be granted. The Applicant merely states that unless the orders sought are granted, the appeal will be rendered nugatory.

21. However, the Applicant has not demonstrated the specific the nature of loss he stands to suffer if execution proceeds.

22. The court ***in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR held that the mere fact that execution is likely to proceed does not amount to substantial loss since execution is a lawful process.***

23. The Applicant has not demonstrated that the subject matter of the dispute would be irretrievably lost or that the appeal, if successful would be rendered incapable of enforcement.

24. Accordingly, the court finds that substantial loss has not been demonstrated.

**b. Whether the application was filed without unreasonable delay.**

25. The impugned judgment was delivered on 17th July 2025. The present application was filed on 6th November 2025, approximately four months later.

26. The Applicant has not offered any explanation for this delay. Courts have consistently held that unexplained delay militates against the grant of stay orders.

27. In the absence of a satisfactory explanation, the court finds that the delay in bringing the present application is inordinate and unexplained.

#### **c. Whether security has been offered**

28. The Applicant has not proposed nor offered any form of security for due performance of the decree.

29. Provision of security is a mandatory requirement under Order 42 Rule 6(2) of the Civil Procedure Rules. The requirement for security is mandatory and serves to balance the interest of the parties by ensuring that the successful litigant is not prejudiced.

30. The applicant's failure to address this requirement further weakens the application.

#### **d. Competency of the Appeal**

31. The Respondent has also raised the issue that the decision sought to be appealed against was rendered by the High Court while

exercising appellate jurisdiction in succession matter and is therefore final under Section 50(1) of the Law of Succession Act.

32. While this court refrains from making a definitive determination on the competence of the intended appeal, as that is a matter within the jurisdiction of the court of appeal, the court cannot ignore the fact that the respondent has raised a legitimate concern regarding the existence of a competent appeal.

33. The respondent has also alleged that no valid Notice of Appeal was filed within the time prescribed by the court of Appeal Rules. Rule 77(2) of the Court of Appeal rules, 2022 states that a person who desires to appeal to the court of appeal of Kenya must lodge a Notice of Appeal within 14 days from the date of the decision or ruling intended to be appealed against.

34. If indeed no competent appeal exists, the foundation upon which the orders for stay of execution are sought becomes doubtful. In such circumstances, the absence of a valid appeal further weighs against the exercise of this court's discretion in favor of the applicant.

## **Conclusion**

35. Having considered the application, the affidavits on record and the applicable law, the court finds that the Applicant has failed to satisfy the threshold for grant of stay of execution pending appeal.

36. The Applicant has not demonstrated substantial loss, the application was filed after unreasonable delay, and no security has been offered.

37. Accordingly, the court makes the following orders:

1. The Applicant's summons dated 6th November 2025 is hereby dismissed.
2. The Respondent shall be at liberty to proceed with execution of the judgment delivered on 17th July 2025.
3. The Applicant shall bear the costs of the application.
4. Right of Appeal 30 days.

38. It is so ordered.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 17<sup>TH</sup> DAY OF MARCH, 2026.**

**S.N.MBUNGI**

**JUDGE**

**In the Presence of:-**

CA: Zilda/Velma

Mr. Nyikuli for the Respondent present.

Mr. Otsyeno for the Appellant present online but is not communicating.

Parties absent.