

REPUBLIC OF KENYA
IN THE HIGH COURT AT KAKAMEGA
SUCCESSION APPEAL NO. E022 OF 2025

PATRICK EHENZO KIOMBE
APPELLANT/APPLICANT
VERSUS
FREDRICK MASIA KIOMBE RESPONDENT

RULING

1. This ruling concerns the Notice of Motion application dated 21st November 2025, brought by the Appellant/Applicant under Section 47 of the Law of Succession Act, the Civil Procedure Act and Rules, and Articles 40 and 50(1) of the Constitution of Kenya.
2. This appeal arises from proceedings before the trial court relating to the administration of the estate of the late Grace Makungu Mbarani (Deceased).
3. A dispute arose among family members regarding the ownership and management of Land Parcel No. Butso/Butso/Shikoti/3840, particularly in relation to the collection of rental income from developments erected on the said property.
4. In its ruling delivered on 16th June 2025, the trial court found that the suit property formed part of the estate of the deceased and granted the Respondent, as administrator of the estate, the mandate to collect rent and manage the property.
5. The trial court further issued orders requiring accountability in respect of rental income from the property.

6. Aggrieved by the said decision, the Applicant lodged the present appeal and subsequently filed the instant application seeking the following orders:
- a. THAT this application be certified urgent and be heard on a priority basis;
 - b. THAT this Honourable Court be pleased to issue an order for stay of execution of all the orders issued vide the trial court's ruling made on 16th June 2025 pending the hearing and determination of this application;
 - c. THAT this Honourable Court be pleased to issue an order for stay of execution of all the orders issued vide the trial court's ruling made on 16th June 2025 pending the hearing and determination of the appeal;
 - d. THAT the costs of this application be provided for.

Applicant's Case

7. The Applicant's case is set out in the grounds on the face of the application and in the supporting affidavit. He avers that he is dissatisfied with the ruling of the trial court delivered on 16th June 2025 and has since lodged an appeal against the said decision.
8. He contends that unless this Court grants an order for stay of execution, the intended appeal will be rendered nugatory.

9. The Applicant further depones that he is at risk of being cited for contempt of court arising from his inability to comply with some of the orders issued by the trial court, which he states are beyond his control.
10. In particular, he asserts that Land Parcel No. Butsotso/Shikoti/3840 does not form part of the estate of the late Grace Makungu Mbarani, but instead belongs to the estate of the late Ben Mbarani Abukira.
11. He explains that beneficiaries of the said estate have already instituted separate proceedings challenging ownership of the property and seeking rectification of the land register.
12. Additionally, the Applicant denies collecting any rent from the said property and maintains that the beneficiaries of the estate of the late Ben Mbarani Abukira are the ones who have been receiving rental income.
13. He argues that the trial court erred in ordering him to account for rent allegedly collected, which has caused him psychological distress and financial hardship.
14. He therefore contends that unless the orders sought are granted, he stands to suffer irreparable loss. He urges the Court to allow the application in the interest of justice pending the hearing and determination of the appeal.

Respondent's Case

15. The Respondent opposed the application through a replying affidavit and contends that the application is misleading, unmerited, and brought in bad faith.
16. He states that he is the lawful administrator of the estate of the late Grace Makungu Mbarani, having obtained a Grant of Letters of Administration Intestate.
17. He further avers that pursuant to the trial court's ruling delivered on 16th June 2025, he was authorized to collect rent from Land Parcel No. Butso/Shikoti/3840 on behalf of the estate.
18. The Respondent asserts that he has been acting within his lawful mandate and that the Applicant has instead interfered with tenants and encouraged them to disregard court orders.
19. He further disputes the existence of any legitimate competing claim over the suit property and maintains that the allegations concerning the estate of the late Ben Mbarani Abukira are unfounded. He therefore urges the Court to dismiss the application.

Issues for Determination

- a) The issue for determination is whether the Applicant has met the threshold for grant of an order for stay of execution pending appeal.

Analysis and Determination

20. The principles governing the grant of stay of execution pending appeal are well settled under Order 42 Rule 6 of the Civil Procedure Rules. An applicant must satisfy the court that:

- a) Substantial loss may occur unless the order is made;
- b) The application has been made without unreasonable delay;
- c) Such security as the court orders for the due performance of the decree has been given

21. In **Butt v Rent Restriction Tribunal [1982] KLR 417**, the Court of Appeal emphasized that the discretion to grant stay is wide but must be exercised judiciously so as not to render an appeal nugatory, while also ensuring that a successful litigant is not unjustly deprived of the fruits of judgment.

a) Substantial loss

22. Further, in **Kenya Shell Limited v Benjamin Karuga Kibiru & Another [1986] KLR 410**, the Court of Appeal underscored that

substantial loss is the cornerstone of an application for stay and must be specifically demonstrated.

23. On the issue of substantial loss, the Applicant contends that he will suffer prejudice as he may be cited for contempt and subjected to accounting obligations in respect of rent which he claims he did not collect. However, contempt proceedings arising from lawful court orders do not constitute substantial loss.

24. The court of Appeal in **National Industrial Credit Bank Ltd Versus Aquinas Francis Wasike & Another{2006}Eklr** reiterated that an ***'applicant must demonstrate tangible loss that cannot be compensated by way of damages or remedied on appeal.'***

25. The applicant has not demonstrated that that execution of the trial courts orders would occasion irreparable or irreversible harm. The court is therefore not persuaded that substantial loss has been established.

b) Unreasonable delay.

26. On the issue of unreasonable delay, the Court notes that the application was filed within a reasonable period after delivery of the impugned ruling. There is therefore no evidence of inordinate delay that would disentitle the Applicant from seeking equitable relief.

27. However, timeliness alone is not sufficient to warrant the grant of stay in the absence of the other mandatory requirements.

c) security for the due performance of the decree

28. Further, the Applicant has not addressed the requirement of security for the due performance of the decree under Order 42 Rule 6(2) which is mandatory and not discretionary.
29. The Court of Appeal in **Halai & Another v Thornton & Turpin Ltd [1990] KLR 365** held that '***An applicant must either offer or be willing to abide by such terms as to security as the Court may impose.***'
30. The Applicant has neither offered security nor expressed willingness to comply with such condition. This omission is fatal to the application.

Conclusion

31. The Court finds that the Applicant has failed to meet the threshold for grant of stay of execution pending appeal.
32. Accordingly, the court makes the following orders;
- i. The Notice of Motion dated 21st November 2025 is hereby dismissed;
 - ii. Any interim orders are hereby vacated;
 - iii. Costs of the application shall be in cause.
33. Mention 22.7.2020 for further directions on the Appeal.

34. Right of Appeal 30 days explained.

DATED, SIGNED and **DELIVERED** in open court at **KAKAMEGA** this 4TH
Day of MAY, 2026.

S.N MBUNGI

JUDGE

In the presence of:

CA: Angong'a/Velma

Patrick Kiombe present.

Fredrick Masia Kiombe present online.