



In re Estate of Mridulla Kishor Makwana (Deceased) (Succession Cause E256 of 2023) [2025] KEHC 759 (KLR) (Family) (31 January 2025) (Ruling)

Neutral citation: [2025] KEHC 759 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
SUCCESSION CAUSE E256 OF 2023
PM NYAUNDI, J
JANUARY 31, 2025
IN THE MATTER OF THE ESTATE OF MRIDULLA KISHOR MAKWANA (DECEASED)**

RULING

1. *Vide* Notice of Motion dated 28th day of October 2024, the Applicant seeks the following orders-
 1. Spent
 2. That a stay of execution be and is hereby issued restraining the Respondents/ Executors, whether by themselves, agent or any person whomsoever from distributing, offering for sale, selling, charging, leasing, licensing, transferring or concluding transfer of the Estate of the deceased herein pending the hearing and determination of this application inter partes.
 3. That leave is and is hereby issued allowing the applicants to appeal the ruling of this Court dated 20th September 2024
 4. That costs to abide the outcome of the Appeal.
2. The application is presented under Order 51 rule 1 of the *Civil Procedure Rules*, Section 1A, 1B, 3A & 63 (e) of the *Civil Procedure Act*, Rules 5 (2) b, 39 (b), 47 (1) of the *Court of Appeal Rules*, Section 47 of the *Law of Succession Act*, Rule 73 of the *Probate and Administration Rules*, Article 158 (2)(a)(b) and (c) of the *Constitution* of Kenya, 2010 based on the grounds on the face of the Application.
3. Pursuant to the provisions of Article 48 of the *Constitution*, leave is hereby granted to the Applicant to appeal the ruling delivered on 20th September 2024. The Appeal to be lodged within 30 days.
4. The Applicant also seeks a stay of execution pending appeal. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided for under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides:
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.
5. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned: namely
- (a) that substantial loss may result to the applicant unless the order is made,
 - (b) that the application has been made without unreasonable delay, and
 - (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See *Antoine Ndiaye v African Virtual University* [2015] eKLR.
6. In *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, The Court observed that:
- No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.
7. The Court, in *RWW v EKW* [2019] eKLR, considered the purpose of a stay of execution order pending appeal, in the following words:
- “The purpose of an application for stay of execution pending an 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 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 also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
8. Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the respondent.
9. The deceased herein died testate, the intended appeal does not challenge the dismissal of the protest but rather confirming of grant in the absence of the consents signed by beneficiaries after a protest was heard and determined.
10. Having regard to the matter, I am not inclined to grant the stay of transmission of the estate. Notwithstanding that the no response was filed to the application, I find that it is not merited and accordingly decline to grant stay.
11. In conclusion, the final orders are that
- a. Leave is granted to file appeal within 30 days.



- b. Stay of execution pending appeal is denied
- 12. No order as to costs

It is so ordered

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS
31ST DAY OF JANUARY, 2025.**

P. NYAUNDI

JUDGE

In the presence of:

Noel Court Assistant

..... for the Applicant

..... for the Respondent

