



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**In re Estate of Benjamin Mwawuda Mwalenga (Deceased) (Family Appeal
E067 of 2024) [2025] KEHC 3075 (KLR) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 3075 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E067 OF 2024**

G MUTAI, J

FEBRUARY 28, 2025

IN THE MATTER OF THE ESTATE OF BENJAMIN MWAWUDA MWALENGA (DECEASED)

BETWEEN

MARIAMU WAWUDA MEJIRO 1ST APPELLANT

ALOICE BOLI MEJIRO 2ND APPELLANT

AND

LEONIDA NYAMGWESO MBUYA RESPONDENT

RULING

1. The application before me is dated 8th November 2023. Vide the said application the appellant/applicant seeks a stay of execution of the ruling that the honourable court below delivered on 5th November 2024, committing the appellant/applicant to civil jail for not paying the amount the parties hereto agreed by consent.
2. The appellant/applicant averred that the decision of the subordinate court was made without hearing her. She stated that her committal to civil jail would be injurious as she has young children who depend on her. The appellant /applicant accused the respondent of having engaged in fraud.
3. It was stated that the appellant/applicant was willing to abide by any conditions that the court may give while granting the orders. Counsel deposed that the respondent receives Kshs 11,000/- per month and had also received Kshs 265,700/-, which ought to have been reckoned.
4. The said application was opposed by the respondent.
5. The application was canvassed by way of written submissions.



6. Although submissions ought to have been in respect to the application parties, unprompted by the court, submitted on the merits of the appeal. I shall, therefore, consider the application and the responses and consider the submissions strictly to the extent that they are relevant.

7. The court can grant a stay pending hearing of an appeal pursuant to Order 42 Rule 6 (2) of the Civil Procedure Act, which provides that:-

- “(2) 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.”

8. It follows from the foregoing that an applicant must show that:-

- a. He will suffer substantial loss;
- b. The application was filed without undue delay; and
- c. Provide the security for the due performance of the orders that may be found to be ultimately binding.

9. The principles to be applied when considering whether to grant stay of execution have been considered in a number of decisions. In the case of James Wangalwa & another v Agnes Naliaka Cheseto [2012] eKLR, the court stated 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.”

10. In Century Oil Trading Company Ltd v Kenya Shell Limited Nairobi (Milimani) HCMCA No 1561 of 2007 Kimaru, J as he then was stated that:-

“The word “substantial” cannot mean the ordinary loss to which every judgment debtor is necessarily subjected when he loses his case and is deprived of his property in consequence. That is an element which must occur in every case and since the Code expressly prohibits stay of execution as an ordinary rule it is clear the words “substantial loss” must mean something in addition to all different from that...Where execution of a money decree is sought to be stayed, in considering whether the applicant will suffer substantial loss, the financial position of the applicant and that of the respondent becomes an issue. The court cannot shut its eyes where it appears the possibility is doubtful of the respondent refunding the decretal sum in the event that the applicant is successful in his appeal. The court has to balance the interest



of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgement.”

11. In this matter there is a consent entered into by the parties which the applicants have breached. I haven't seen a good reason why there has not been compliance. Instead, what the appellants/applicants have done is to provide excuses for their failure to comply.
12. In my view, being made to comply with one's obligations does not amount to a substantial loss. In any case, I do not see how payment to the respondent will create a factual situation that cannot be undone by the appellate court if the appellants/applicants are successful. Stay of execution, on the other hand, would be injurious to the respondent as she may become unable to take care of her children.
13. As the requirements under Order 42, rule 6 (2) of the *Civil Procedure Rules* are conjunctive. I will not consider whether the application was filed without undue delay or if security for costs has been provided.
14. I, therefore, dismiss the application dated 8th November 2024 and discharge the interim orders.
15. In my view, the application for a stay of execution filed herein is frivolous and vexatious. Under the circumstances, I depart from the practice of the Family Court and award the respondent the costs of the application.
16. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 28TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of: -

No appearance for the appellants/applicants;

No appearance for the respondent; and

Arthur – Court Assistant.

