



REPUBLIC OF KENYA



**Mohamed & another v Bano (Family Appeal E011 of 2025)
[2025] KEHC 9177 (KLR) (30 May 2025) (Ruling)**

Neutral citation: [2025] KEHC 9177 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E011 OF 2025**

**G MUTAI, J
MAY 30, 2025**

BETWEEN

AMINA AKBAR MOHAMED 1ST APPELLANT

ASIF AKBAR MOHAMED 2ND APPELLANT

AND

HAMIDA BANO RESPONDENT

RULING

1. Before this honourable court is a Notice of Motion application dated 20th February 2025 vide which the applicant seeks the following orders:-
 - a. Spent;
 - b. Spent;
 - c. 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 the 6th April 2023 and subsequent orders of arrest issued on the 20th September 2024 in the Mombasa Kadhi's Court Succession Cause No. E076 of 2021; In the Matter of the Estate of the Late Akbar Mohamed Haji Ali
 - d. That the costs of this application be provided for.
2. The application is premised on the grounds stated in the body of the motion and also on the supporting affidavit of Asif Akbar Mohamed, sworn on 20th February 2025. In the said affidavit he stated that a debt owed to him of sterling pounds eighty thousand only was left out and not considered by the Kadhi's Court in the judgment issued on 12th March 2021 in Kadhi's Court Case Number E076 OF 2021; In the Matter of the Estate of the late Akbar Mohamed Haji Ali (deceased). He averred that he applied for review of the said judgment so that he could be paid the debt owed by the estate of the



deceased. He thereafter withdrew the said application on 17th March 2023 due to delays in prosecuting it caused by the parties' absence or the file being missing.

3. He stated that to their surprise, through a newspaper dated 28th January 2025, they learnt of orders issued by the court for investigation of the said loan agreement and orders of arrest for the 1st appellant. They also learnt that the respondent had appointed another firm of advocates namely Khalid Salim & Company Advocates who without nor consent came on record and moved the court below on 28th March 2023 through an application which was heard ex parte. On 6th April 2023 the court gave its ruling in favour of the respondent without according them a fair hearing.
4. Further the court issued a warrants of arrest of the 1st appellant on 20th September 2024. The respondent wrongly effected service of the application for contempt by failing to serve the other parties and using a wrong number. It was urged that the appellants had sought stay of the orders issued on 6th April 2023 and 20th September 2024 which the learned Kadhi declined to grant. He stated that it would be in the interest of justice that the orders sought be allowed.
5. In response the respondent filed a replying affidavit sworn before a notary public at Blackburn, Lancashire, England on 25th April 2025.
6. She stated that there is no appeal against the orders issued on 6th April 2023 and 20th September 2024 by the Kadhi's Court and thus the said orders stand unchallenged. If an order is not appealed against, its execution cannot be stayed or challenged in an appeal against another order. She averred that it would be improper for the court to shield her co-administrator from rendering a statement of account, which is a requirement under the law. She further averred that the court should not bar valuation of the estate, as valuation would establish the correct value of the properties and ensure accountability and transparency in the estate's affairs. Ms Bano urged that the court orders are not made in vain and ought to be obeyed, something which the 1st appellant had failed to do.
7. She stated that the applicants had not demonstrated what loss, if any, they would suffer and that they had also not offered any security for the due performance of any order that may be ultimately binding on them. She therefore urged the court to dismiss the application.
8. The written submissions of the appellants/applicants are dated 6th May 2025. The appellants' counsel identified the issue for determination as whether the application met the threshold for granting a stay of execution pending appeal. Counsel averred that they had to demonstrate that their clients would suffer a substantial loss if a stay were denied, that the application was filed without delay, and that security for the due performance of any order that may become binding had been provided.
9. In respect of the first condition, it was urged that there was an imminent danger that the appellants/applicants would be arrested pursuant to orders which were made without affording the 2nd appellant/applicant an opportunity to be heard. If he were arrested, she would suffer substantial loss.
10. On the second limb, it was submitted that the application was filed without undue delay.
11. Regarding the third condition it was urged that the appellants/applicants would comply with whichever conditions the court gave.
12. The respondent, through her advocates, Mugambi & Company Advocates, filed written submissions dated 27th April 2025. Counsel submitted that the first limb of the order sought to be stayed pertains to investigations, which action falls within the jurisdiction of the National Police Service, specifically through the Directorate of Criminal Investigations. Therefore, this court should not interfere with this matter.



13. Counsel further submitted that the second limb is on the production of a statement of account of the estate by the co-administrators, which is a duty imposed on a personal representative of an estate of the deceased under Section 83 of the Law of Succession Act. Therefore, it would be improper for the court to bar the same.
14. Counsel submitted that the third limb is on the valuation of the estate and that the court and beneficiaries are entitled to know the value of the deceased's estate to aid in its distribution. Counsel urged the court to dismiss the application with costs.
15. On 20th September 2024, Hon. Omar Swaleh, in his ruling, found that the 2nd co-administrator/1st appellant had failed to comply with court orders and issued a warrant of arrest against her to serve a two-month sentence in civil jail.
16. I have considered the application, the response thereto and the written submissions of the parties. I must now determine if the orders of stay ought to issue or not.
17. I note that the court below in its ruling of 6th April 2023 gave the following orders; the Directorate of Criminal Investigations to conclude its investigations on the alleged forged signature of the deceased on the memorandum of loan dated 8th July 2019; there be production of statement of account by the co-administrators; the valuation of the estate be done for distribution and that costs be borne from the estate and the applicants to pay costs of Kes.40,000/- as costs following the withdrawal of his said notice of motion.
18. On Stay of execution, the Civil Procedure Rules 2010 Order 42 rule 6 (1) and (2) provides;
 1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.
 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.
19. From the provision above, it is evident that in the issuance of stay of execution orders, the court has to consider three factors, namely: -
 - i. Substantial loss;
 - ii. The application has been made without unreasonable delay; and
 - iii. Security.



20. In discussing substantial loss, the court in the case of James Wangalwa & another v Agnes Naliaka Cheseto [2012] KEHC 1094 (KLR) stated: -

“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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein N. Chesoni [2002] 1KLR 867, and also in the case of Mukuma V Abuoga quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:

“...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.”

21. As stated in the foregoing decision, execution is a lawful process. The mere fact that execution is ongoing or about to start is not in itself sufficient to justify the issuance of the orders of stay. The appellants/applicants must show that execution of the orders will render the appeal an academic exercise. Is this the case here?
22. The appeal is against the orders issued on 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 2025 was to implement the earlier orders. As long as those earlier orders stand, I do not see how the instant application can succeed.
23. In any case, and as submitted by the counsel for the respondent, this court should not be in a haste to prevent the National Police Service from carrying out investigations. There is nothing wrong with the provision of accounts or the valuation of the estate, as these are statutory requirements, in respect of the former, and would aid the distribution of the estate, in respect of the latter. I am unable to see how the applicants will suffer substantial loss if this is done.
24. Given the foregoing, I am not persuaded that the applicants have demonstrated they would suffer a substantial loss, which is the key factor for consideration in the issuance of orders for a stay of execution.
25. The requirements in Order 42 Rule 6(2) of the Civil Procedure Rules are conjunctive, and not disjunctive. Since a substantial loss has not been demonstrated, I do not need to consider the other grounds. That said, the application was filed without unreasonable delay. Furthermore, the applicants expressed their readiness to comply with any conditions that this court may impose.
26. The upshot of the foregoing is that applicants have not met the threshold for the grant of the orders for stay of execution pending appeal. Therefore, the application dated 20th February 2025 must fail. The same is hereby dismissed.
27. As this is a succession matter, each party will bear their own costs.



28. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 30TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

Gregory Mutai

JUDGE

In the presence of: -

Mr Chege for the Appellants/Applicants;

Mr Mugambi for the Respondent; and

Arthur – Court Assistant.

