



REPUBLIC OF KENYA



**In re Estate of Bakari Ali Mwajambiya (Deceased) (Family Appeal
E002 of 2023) [2024] KEHC 967 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 967 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KWALE
FAMILY APPEAL E002 OF 2023
G MUTAI, J
JANUARY 31, 2024
IN THE MATTER OF THE ESTATE OF BAKARI ALI MWAJAMBIYA(DECEASED)**

BETWEEN

KIBWANA ATHUMANI MUHALA APPELLANT

AND

SALIM BAKARI MWAJAMBIA 1ST RESPONDENT

MOHAMED MATANO 2ND RESPONDENT

RULING

Introduction

1. The Appellant/Applicant is aggrieved by the decision of the Hon. Jamal I. Opacha, Senior Resident Kadhi, delivered on 30th November 2023, in which he found in paragraphs 4, 5 and 6 as follows:-

“ 4. That the late Mwanajuma Ali Bakari was survived by three heirs, namely:-

- a. Mariam Juma;
- b. Aziza Mohamed; and
- c. Kibwana Athman.

Each daughter is entitled to ½, 50%.

5. That the parcels of land plot No. Kwale/Tiwi/1230 and Kwale/Sabharwal/8 be vested upon the following heirs as trustees:-

- a. Mohamed Matano Ali ID No 10959184;
- b. Salim Bakari Mwajambia ID No 23582113;



c. Aziza Mohamed Omari ID No 4597986.

6. That the County Land Registrar of Kwale to effect the orders as directed by this Court”.

2. On 18th December 2023 the Appellant/Applicant filed the Memorandum of Appeal together with a Notice of Motion under a Certificate of Urgency dated 14th December 2023 vide which he sought the following orders:-

“ 1. Spent;

2. Spent;

3. That this honorable Court be pleased to stay execution of the order/decreed and judgment in succession cause No E213 of 2023; In the Matter of the Estate of Bakari Ali Mwajambiya (deceased) – Salim Bakari Mwajambia and Mohamed Matano pending the hearing and determination of the appeal herein’

4. That the costs of this application abide the outcome of the intended appeal”

3. The grounds of the application were that the Appellant/Applicant is the grandson of the deceased, being the son of Mwanajuma Ali Bakari (deceased). He professes the Christian faith. In his view, the fact that he is a Christian ousted the jurisdiction of the Kadhi’s Court, and the said court should not, therefore, have heard and determined the succession proceedings. The foregoing notwithstanding the learned Kadhi made a determination in which he was excluded from the list of beneficiaries and denied him his rightful share. Being aggrieved, he had filed an appeal against the said decision to this Court. He was apprehensive that distribution of the estate may proceed to his detriment. In such an event, the estate would be dissipated, and he would thereby suffer irreparable loss.

4. The application is opposed. The 1st Respondent filed a Replying Affidavit on 11th January 2024. In the said affidavit, he deposed that the Appellant/Applicant is the grandson of Mwanajuma Ali Bakari (deceased), the daughter of Bakari Ali Mwajambiya. The Appellant/Applicant was born and raised Muslim and therefore knew the Islamic Sharia law on the issue of inheritance “and the consequences of converting to other faiths but on his own full knowledge as an adult chose to convert to Christianity”. He deposed that upon becoming a Christian, the Appellant/Applicant ceased to be a beneficiary of the estate of the late Bakari Ali Mwajambia (deceased); therefore, the Kadhi’s Court had jurisdiction to hear and determine the matter.

5. The 1st Respondent further deposed the Hon. Kadhi was right to make the determination he made as it was based on the Islamic Sharia Law. He contended that as the deceased did not leave a Written Will, the only course of action available to the Appellant/Application was to seek sympathy from his sister, who got a 50% share each of the parts of the estate that was due to Mwanajuma Ali Bakar “and be given as a gift but not as share of the beneficiary of the deceased’s estate”.

6. This Court issued interim reliefs on 22nd December 2022. The Court ordered that

“ pending the hearing interpartes of the Notice of Motion dated 14th December 2023 stay of execution of the decree/order and judgment in the Kwale Kadhi Court Succession Cause No. E213 of 2023; In the Matter of the Estate of Bakari Ali Mwajumbiya (deceased) delivered on 30th November 2023, is hereby ordered”

7. The matter was heard on 24th January 2024.



Submissions by the Parties

8. Ms. Mango, the learned counsel for the Appellant/Applicant, submitted that her client would suffer substantial loss unless the stay was granted, as shares which had already been identified would be distributed. That fact would dissipate the estate hence rendering the appeal nugatory. She urged that the Appellant/Applicant approached the Court in good time as he made the application within two weeks of the issuance of the impugned orders.
9. Counsel submitted that the Respondent hadn't directly opposed the application but had instead concentrated on the merits of the appeal. She, therefore, prayed that I allow the application.

Submissions by the Respondents

10. The 1st Respondent, Salim Bakari Mwajambia, submitted on his own behalf, as well as on behalf of the 2nd Respondent, that the Appellant/Applicant changed his faith, on his own volition, despite being aware of the applicable Muslim law and the ensuing consequences. He stated that Kibwana was named as a beneficiary in the application before the Kadhi but that the law did not favour him. In the circumstances he submitted, Kibwana ought to seek the compassion of his sisters. He, therefore, prayed that I dismiss the application.

The applicable law

11. Order 42 Rule 2 of the [Civil Procedures Rules](#), 2010 provides as follows:-

“(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.”

12. In considering the forgoing Rule I must have in mind Section 1A and 1B of the [Civil Procedure Act](#) provides as follows:-

“1A. Objective of [Act](#)

- (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the [Act](#). (2) The Court shall, in the exercise of its powers under this [Act](#) or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the [Act](#) and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B. Duty of Court



- (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.

Analysis and Determination

13. In my view, therefore, the Applicant has to satisfy the conditions set out in order 42 Rule 2 of the *Civil Procedure Rules* by showing that he will suffer substantial loss unless the stay order is made. Secondly, he must show that the application was made without unreasonable delay. Thirdly he must give a security. Has the Applicant satisfied those grounds? I will look at each of them in turns.

Substantial Loss

14. The Court, in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012]eKLR, expounded on what amounts to substantial loss. The Court stated that:-

“ 11. 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 v Chesoni* [2002] 1KLR 867, and also in the case of *Mukuma Versus 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.”

15. The Appellant/Applicant is aggrieved by the decision of the Senior Resident Kadhi, which found that by virtue of being a Christian, he had no right to inherit his grandfather’s estate. The learned Kadhi went ahead to order the County Land Registrar of Kwale to effect orders as directed by the Court. If these orders are effected, it is likely that the beneficiary will be able to dispose of the same as there will



be nothing barring them from doing so. If that happens, the Appellant/Applicant shall, in my view, suffer substantial loss.

16. I must point out that a stay of execution order serves a very important purpose as it preserves the subject matter of the appeal. This ensures that the successful appellant gets the benefit of the judgment. The Court in *RWW v EKW* [2019]eKLR stated as follows:-

“Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. Substantial loss is a relative term and more often than not can be assessed by the totality of the consequences which an applicant is likely to suffer if stay of execution is not granted and that applicant is therefore forced to pay the decretal sum.”

Unreasonable Delay

17. The appeal and the application were filed on 18th December 2023. In my view, the appeal was filed without unreasonable delay.

Security for Due Performance of the Decree

18. Although the Appellant/Applicant offered no security for the due performance of the order that may ultimately be binding in him, I take note that this is a dispute over inheritance. This Court, however, in the exercise of its discretion, can issue conditions that would ensure that the matter is heard and concluded as soon as possible so that the administration of the estate can be completed.

Determination

19. It is, therefore, my finding that the application has merit. I allow the same. Consequently, I order that:-
1. The decree and the judgment in Succession cause No E213 of 2023; In the Matter of the Estate of Bakari Ali Mwajambiya (deceased) be and is hereby stayed pending the hearing and determination of the appeal; and
 2. The Appellant/Applicant is to file the Record of Appeal within 30 days of the date of this ruling.
20. As this is a family matter, each party shall bear own costs.

Orders accordingly.

DELIVERED, DATED, AND SIGNED THIS 31ST DAY OF JANUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS.

.....

GREGORY MUTAI

JUDGE

In the presence of: -

1st and 2nd Respondents (in person);

No appearance for the Appellant/Applicant; and

Arthur – Court Assistant

