



REPUBLIC OF KENYA



**Shige v Borde & 2 others (Civil Appeal E003 of 2023)  
[2024] KEHC 3588 (KLR) (19 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3588 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MARSABIT  
CIVIL APPEAL E003 OF 2023**

**JN NJAGI, J**

**MARCH 19, 2024**

**BETWEEN**

**HAWO HUSSEIN SHIGE ..... APPELLANT**

**AND**

**SHUKRI SHIGE BORDE ..... 1<sup>ST</sup> RESPONDENT**

**GIRO UMEMANE ..... 2<sup>ND</sup> RESPONDENT**

**ABDULFATTAH HESSEIN ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Appellant/Applicant has filed an application dated 20<sup>th</sup> November 2023 seeking for stay of execution of the judgment in Marsabit Kadhi's Court Succession Court No.E001 2023 pending the hearing and determination of the appeal herein.
2. The application is based on grounds on the face of the application and supported by the affidavit of the Appellant/Applicant. The grounds in support of the application are that on the 20<sup>th</sup> November 2023, the 1<sup>st</sup> respondent stormed the Applicant's matrimonial home and threatened to demolish her house so as to sub-divide the land in execution of the judgment of the Kadhi's Court. The Applicant averred that if the execution is allowed to proceed, the appeal herein will be rendered nugatory as the estate will be sub-divided to the detriment of the applicant and other beneficiaries. Therefore, that it is in the interest of justice for orders sought be granted pending the hearing and determination of the appeal.
3. The 1<sup>st</sup> respondent responded to the application by filing a Preliminary Objection which was dismissed by this court. He did not file any other response after the dismissal of the Preliminary Objection.
4. The application was made under section 79G of the *Civil Procedure Act* and under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. The latter provides as follows:



- (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.....
  - (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 Applicants 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 Applicants”.
5. An applicant for stay of execution pending appeal has to establish that the application was filed without unreasonable delay. The judgment that is being challenged in the appeal herein was delivered on the 31<sup>st</sup> October 2023. The instant application was filed on the 20<sup>th</sup> November 2023. The application was thus filed within 30 days stipulated by section 79G of filing appeals to the High Court. The application was thus filed without unreasonable delay.
6. The applicant is required to show that she will suffer substantial loss if the orders sought are not allowed. The applicant says that the 1<sup>st</sup> respondent went to her home and threatened to demolish her house so as to subdivide the land in execution of the decree of the Kadhi’s Court. It was her averment that if her house is demolished it will render the appeal nugatory and she will suffer substantial loss as a result of the demolition.
7. The 1<sup>st</sup> respondent has not denied that he went to the applicant’s home and threatened to demolish her house so as to subdivide the land in accordance with the decree of the Kadhi’s Court. I agree with the applicant that she will suffer substantial loss if her house is demolished before the pending appeal is heard and determined. In an application for stay of execution it is such loss that should be prevented pending the hearing and determination of the appeal. The applicant has therefore established that she will suffer substantial loss if the orders sought are not granted.
8. The applicant is required to deposit security for due performance of the decree as may be binding on her. The subject matter herein is land and the dispute involves family members. There is no need for the applicant to provide security in the matter.
9. In view of the foregoing, I find that the applicant has established that she is deserving of the orders sought for stay of execution pending appeal. I thereby grant the orders for stay of execution pending appeal as sought in the application dated 20<sup>th</sup> November 2023.

Costs of the application to be in the cause.

**DELIVERED, DATED AND SIGNED AT MARSABIT THIS 19<sup>TH</sup> MARCH, 2024**

**J. N. NJAGI**

**JUDGE**

In the presence of:

..... for Applicant



1<sup>st</sup> Respondent

2<sup>nd</sup> Respondent

3<sup>rd</sup> Respondent

Court Assistant – Jarso

