



REPUBLIC OF KENYA



**In re the Estate of the Late Joseck Thuo Ngeta (Deceased) (Succession Cause E076 of 2022) [2024] KEHC 9790 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9790 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAKURU  
SUCCESSION CAUSE E076 OF 2022**

**HM NYAGA, J**

**JULY 29, 2024**

**IN THE MATTER OF THE ESTATE OF THE LATE JOSECK THUO NGETA (DECEASED)**

**BETWEEN**

**NAHASHON MAHUGU KABIRI ..... 1<sup>ST</sup> PETITIONER**

**WAIHARO HARRISON NGETA ..... 2<sup>ND</sup> PETITIONER**

**AND**

**SUSAN WANJIRU THUO ..... 1<sup>ST</sup> OBJECTOR**

**MAUREEN JUDY MUKAMI THUO ..... 2<sup>ND</sup> OBJECTOR**

**RULING**

1. Vide an Application dated 14<sup>th</sup> June, 2024, brought under Rules 49, 63 & 73 of the Probate and Administration Rules, Sections 47, 50 and 11 of the *Law of Succession Act*, Sections 1A, 1B, 3, 3A, 63(e), 66 and 75 of the *Civil Procedure Act* and Article 159 of *the Constitution*, the Applicants seek for Orders :-
  - a. Spent
  - b. That pending the hearing and determination of this Application inter-partes, this Honourable Court be pleased ex debito justitiae to stay any further proceedings in this matter pending the hearing and determination of an intended appeal lodged against the impugned ruling and order issued on 17<sup>th</sup> April, 2024 vide a notice of appeal lodged in the superior court on 19<sup>th</sup> April, 2024.
  - c. That this Honourable Court be pleased to grant leave to appeal to the objectors/Applicants herein with respect to its ruling dated and delivered on 17<sup>th</sup> April, 2024.



- d. That upon grant of prayer (c) above, this Honourable Court be pleased to deem the already filed Notice of Appeal lodged in the superior court on 19<sup>th</sup> April, 2024 without leave of this Court as properly filed.
  - e. That this Honourable Court be pleased to stay its proceedings and in particular the objection proceedings and/or mark the matter as stood over generally until the intended appeal lodged against the impugned ruling and order issued on 17<sup>th</sup> April,2024 vide a notice of appeal lodged in the superior court on 19<sup>th</sup> April,2024 is finally heard and determined.
  - f. That costs be in the cause.
2. The Application is premised on grounds on its face and supported by an affidavit of Susan Wanjiru Thuo and Nixon Kariuki Thuo sworn on the even date.
  3. They aver that they inadvertently failed to seek for leave to appeal the decision of this court delivered on 17<sup>th</sup> April, 2024 as required under Section 50 of the Law of Succession Act and being aggrieved by said decision they have already lodged an appeal against the same without seeking leave of court as required.
  4. They further deponed that they have already filed and served a notice of Appeal in the superior court on 19<sup>th</sup> April, 2024, filed and served a letter bespeaking proceedings and are in the process of preparing a record of Appeal as per Rule 82 of the Court of Appeal Rules, 2022.
  5. It is their deposition that their right to appeal shall be tampered upon if these proceedings were to proceed since the finding of the court vide the impugned ruling shall remain in force and binding on this court and the Applicants herein, and their intended shall be rendered nugatory and a mere academic exercise since this Honourable Court shall proceed to make final determination on the objection proceedings by the Applicants in reliance of the contested will and which is the subject of the intended appeal.
  6. They assert that this Honourable Court has inherent jurisdiction to stay further proceedings in this cause awaiting the final determination of the intended appeal.
  7. They depose that their earlier application dated 23<sup>rd</sup> April, 2024 was rendered useless for failure to seek leave to appeal and dismissed for such failure vide a ruling delivered on 12<sup>th</sup> June, 2024, and that this Honourable Court in the said ruling granted them liberty to file another application to rectify their inadvertence of failing to seek leave to appeal as mandatorily required under the law.
  8. They contend that the application is not prejudicial to the interests and rights of the petitioners/ respondents and hence ought to be allowed.
  9. The Petitioners, Waiharo Harrison Ngeta and Nahashon Mahugu Kabiri opposed the application through their replying affidavit sworn on 21<sup>st</sup> June, 2024.
  10. They believe the Application herein is intended to unnecessarily delay and to defeat the expeditious determination of this matter.
  11. It is their averment that the Applicants ought to have lodged this application within 14 days after the subject decision and have failed to seek for extension of time to file an application out of time and as such this application is incompetent and bad in law.
  12. It is their contention that the instant application seeks to validate the Applicants' incompetent Notice of Appeal filed outside the statutory provided timelines of 14 days lacks merit, is an afterthought and flies in the face attendant to the filing of the Appeals.



13. They aver that this Honourable court has no jurisdiction to validate a Notice of Appeal that was filed without leave of court and the said Notice of Appeal has no legal effect.
14. They aver that it is only the Court of Appeal that can extend time for the Applicants to lodge a fresh Notice of Appeal out of time or deem a Notice of Appeal filed out of time or without leave as validly filed.
15. It is their averment that lack of a valid Notice of Appeal on record, the Applicants' prayers for stay of execution pending appeal lacks a viable foundation and the same cannot be granted, and if the same is granted, it would amount to propagation of a grave illegality that ought not to be condoned and/or entertained.
16. They depone that the Applicants' contention that they will suffer irreparable harm and damage unless the Application herein is allowed is false and calculated to hood-wink this Honourable Court to granting the said orders since the substance of the intended appeal is to impugn the decision of this court dated 17.04.2024 that any objections relating to the validity of the will would best be canvassed in the main cause where the Applicants will have the option to object to the validity of the will after the same is propounded and not in the instant application.
17. The Petitioners'/Respondents' counsel, Daniel Kisilah Gor, swore a supplementary Affidavit on 2<sup>nd</sup> July, 2024 wherein he mainly reiterated the averments by the Petitioners/Respondents.
18. He deposes that the filing and service of the Amended summons is an attempt to steal a march on the petitioners and circumvent the due process of law requiring application for leave for extension of time for filing appeals to be filed within 14 days after the subject matter has been made, and as such the Applicants are barred from amending their earlier filed summons to request for an extension of time.
19. He avers that the amended summons is a gross abuse of the process of this Honourable Court and antithetical to the dictates of the Oxygen Principle that contemplates a speedy resolution of disputes in the country.
20. He deposes that it is imperative that this Honourable Court eschews itself from capitulating to the whims of the Applicants to derail the court process and delay the onward probate of the will for their nefarious aims to continue illegally deriving benefits from the property making up the estate of the deceased to the detriment of the would be beneficiaries by dismissing the subject application and the amended summons dated 28<sup>th</sup> June, 2024.
21. The Application was canvassed through written submissions.

### **Applicants' Submissions\*\*** \_\_\_

22. The applicants' submissions were in reference to an application dated 28<sup>th</sup> June 2024 but to my recollection, the application that I am dealing with is the one dated 14<sup>th</sup> June 2024.
23. I have noted that in the CTS, there is an amended summons dated 28<sup>th</sup> June 2024, which has additional prayers, but this has not been placed before me for determination. Therefore, I will restrict myself to the submissions made in respect to the earlier application.
24. The Applicants framed three issues for determination. Namely:-
  - a. Whether leave to appeal to the Court of Appeal ought to issue.
  - b. Whether the Applicants have made out a case to warrant the grant of orders for stay of proceedings pending appeal.



- c. Whether costs should be in the cause.
25. On the first issue, the applicants submitted that pursuant to Order 41 of the Court of Appeal Rules, 2022 they ought to have filed an application for leave to appeal against the subject ruling within 14 days and citing the case of Rhoda Wairimu Karanja & another vs Mary Wangui Karanja & another [2014] eKLR they prayed for extension of time to regularize that position.
  26. The Applicants also prayed that leave to appeal this court's ruling delivered on 17<sup>th</sup> April, 2024 be granted ex debito justitiae so that the issue of the authenticity of the will can be determined with finality. They posited that their intended appeal prima facie raises numerous grounds which merit serious judicial consideration and as such leave to appeal ought to be granted.
  27. They also prayed that their Notice of Appeal filed on 19<sup>th</sup> April, 2024 be deemed properly filed upon grant of leave to appeal.
  28. They submitted that they are interested in prosecuting their intended appeal and it is only fair that they be granted an opportunity to ventilate the same and that they should not be punished for their advocates inadvertence failure to seek leave to appeal the ruling in their earlier application dated 23<sup>rd</sup> April, 2024.
  29. With respect to the second issue, the Applicants submitted that this Honourable Court is clothed with Jurisdiction to stay the proceedings pending appeal and the same is discretionary. To support this proposition reliance was placed on the case of & Re Global Tours & Travel Ltd HCWC No. 43 of 2000
  30. The Applicants argued that the impugned ruling dismissed a pertinent issue that sought to deal with the authenticity of the collection of the wills or otherwise, which goes to the very root of the main proceedings and unless countermanded the ultimate outcome of the proceedings will foreseeably be unjust.
  31. In buttressing their submissions, the Applicants cited the case of Niazons (Kenya) Ltd. vs China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 for the proposition that stay of proceedings should be granted where the Appeal may have serious effects on the entire case.
  32. The Applicants also relied on the cases of Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664
  33. The Applicants further submitted that the spirit of the law as espoused in the *Judicature Act* ought not to be expediently relegated but be objectively upheld. They posited that the instant application has been brought in good faith. They cited the case of Butt vs Rent Restriction Tribunal (1982) KLR 417 where it was held that as a general rule, the court ought to exercise its best discretion in such a way as to prevent the appeal, if successful from being rendered nugatory.
  34. Regarding the averment by the Respondents that they should wait for the proceedings to end then appeal the eventual judgment, the applicants submitted that these averments are made in hindsight of abusing court processes and aimed at misleading this Honourable Court. To bolster their submissions, reliance was placed on the case of Mark Omollo Agencies & 2 Others vs Daniel Kioko Kaindi & Another [2004] eKLR where the court opined that if the hearing was to proceed on the basis of an amended pleadings would render an appeal nugatory and the fact that an appeal against the ultimate judgement could still be filed would not make any difference to the intended appeal being nugatory because the Court of Appeal Rules require the institution of an appeal against each order or decree and there is no clear provision for consolidation, and additionally proceeding with the hearing while an appeal is pending would constitute an abuse of the court process.



35. The Applicants argued that the instant application has been filed timeously since the same was filed on 14<sup>th</sup> June, 2024, less than two days after delivery of the ruling of 12<sup>th</sup> June, 2024 in accordance with the oxygen principles and to the very expectation provided in the case of *Re Global Tours & Travel Ltd* (supra).
36. Citing the case of *Cabinet Secretary Ministry of Health vs Aura & 13 others (Civil Application E583 of 2023)*; [2024] KECA 2 (KLR) on the definition of an arguable appeal, the Applicants submitted that their intended appeal is arguable and ought to be given a chance to be heard on merits in the superior court.
37. They prayed for costs to be in the cause or in the alternative the same to abide the outcome of the intended Appeal.

#### **Petitioners'/Respondents' Submissions \_\_\*\***

38. With regard to whether or not the Honourable Court has jurisdiction to entertain this application, the petitioners argued that this court is divested of the requisite jurisdiction to canvass the instant application and that the said application is incompetent and ought to be struck out.
39. The Petitioners posited that under Order 43 of the Civil Procedure Rules, 2010, the Applicants were required to lodge an application for leave from this Honourable Court within 14 days after the subject decision sought to be appealed against has been entered but they did not so.
40. They argued that only the Court of Appeal can extend time for the Applicants to lodge a fresh Notice of Appeal out of time and or deem the said notice as validly filed. To buttress their submissions, the Petitioners placed reliance on the cases of *Mbaya vs Kamau & another (Civil Appeal E012 of 2023)* [2023] KEHC 24945 (KLR) & for the proposition that application for leave to appeal should be made within 14 days from the date of the order sought to be appealed & *Zipporah Njoki Kangara vs Rock and Pure Limited & 3 others* [2021] eKLR on the importance of jurisdiction.
41. With regard to whether the subject Application is merited, the petitioners submitted that in the negative. They posited that it would not be in the interest of justice for the Honourable Court to exercise its discretion and grant stay of proceedings as it will only serve the purpose of delaying the conclusion of the proceedings herein. To this end the petitioners referred this court to Articles 50 & 159(2) (b) of *the Constitution* and the case of *Global Tours & Travels Limited Nairobi H.C Cause No. 43/2000* where it was stated whether or not to order stay of proceedings in a matter of judicial discretion to be exercised in the interests of justice.

“..... and in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

42. The petitioners prayed that the orders sought be declined and the costs of the application be awarded to them.

#### **Analysis & Determination\*\* \_\_**

43. I have duly considered the Application, the affidavit in support and in opposition to the Application as well as the parties' rival submissions. In my view, the questions that crystalize for determination are:-



- a. Whether this court has jurisdiction to entertain the application for leave to appeal to the Court of Appeal.
  - b. Whether the Applicants have made out a case to warrant the grant of the orders for stay of proceedings pending appeal.
44. As I have stated earlier, although the application before me is seeking leave to appeal against the ruling in question, the applicants have in their submissions argued as if the application was that seeking to enlarge time within which to file an appeal against the decision of this court. I believe that it is for this reason that the respondents have raised the question of whether this court has jurisdiction to extend time to file the notice of appeal.
45. For the foregoing reasons then the first question that I have to answer is whether this court has the jurisdiction to grant the orders sought in the application dated 14<sup>th</sup> June 2024, that is to grant leave to appeal against this court's ruling delivered on 17<sup>th</sup> June 2024.
46. It goes without saying that a matter filed in a court devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself. Owners of the Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd. (1989):
- "Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."
47. In this case, there is no question of extension of time in respect to the filing of the notice of appeal, since the notice of appeal was filed on 19<sup>th</sup> April 2024, just two days after the ruling was delivered. What is in issue is the fact that the notice of appeal was filed without leave and leave was not sought within the time set by the rules.
48. It is also important to note that in my ruling delivered on 12<sup>th</sup> June 2024, I did point out that I could not grant the orders of stay of the proceedings since there was no competent appeal at that time, on account of want of leave. While declining to grant the orders sought, I noted that the applicants were at liberty to make an appropriate application which would be considered.
49. The respondents submit that the court has no jurisdiction to validate a notice of appeal filed without leave of the court.
50. So what is the status of the notice of appeal filed herein?
51. It must be stressed that in the ruling in question while I declined to grant the orders sought, I did not strike out the notice of appeal in question. Although I never went into the details over the issue, for reasons that I gave in the said ruling, I can now state why I refrained from doing so.
52. This is because it is well settled law that even where leave to appeal is required, a party may file the notice of appeal before such leave is obtained.



53. This was the position taken by the Court of Appeal in *TG Enterprises Limited vs China Gezhouba Group & another* [2024] KECA 596 (KLR) where it held that;

“..section 75 (1) (h) of the *Civil Procedure Act* provides that an appeal shall lie as of right from any order made under the rules from which an appeal is expressly allowed by rules. Order 43, rule 1 (1) of those Rules expressly sets out several orders and rules contemplated by section 75 (1) (h) of the Act. At rule 1 (2) of order 43, an appeal shall lie with leave of the court from any other order made under these Rules. Such an application shall be made orally or in writing but within 14 days from the date of the impugned order at the court being appealed from.

It is our understanding of the above provisions that where no appeal lies as of right and only as of leave, a party must obtain leave to file the appeal. However, order 43, rule 1 (3) contemplates a scenario where a party files an appeal but seeks leave to file that appeal after filing that appeal. This is because the said provision allows a party to, within 14 days from the date of the impugned order, seek leave to appeal. It does not couch in mandatory terms, that leave must be sought first before an appeal is filed. Be that as it may, the applicant readily conceded that the application for leave was filed within 14 days and that is pending ruling before the trial court.

It is on the strength of that reasoning that rule 77 (4) of this court’s rules provides that “when an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal.” (underline ours)

54. A similar holding was made in *Kurji vs Shalimar Ltd and the Judicial Commission of Inquiry into the Goldenberg Affair* (2003) KLR 243 where the same court held that;

“But the position must be different where an appeal can only be brought with leave. Rule 74(4) deals exactly with such a situation; that rule states:

‘when an appeal lies only with leave or on a certificate that a point of law of general public importance is involved, it shall not be necessary to obtain such leave or certificate before lodging the notice of appeal’ (emphasis mine)

This rule clearly deals with two situations, namely:

- (i) Where leave to appeal is necessary; or
- (ii) Where a certificate that a point of law of general public importance is involved.

In either case, it is not required that before one files a notice of appeal, one must have obtained the leave or the certificate. One can file the notice of appeal and thereafter obtain the leave or the certificate as the case may be.(emphasis mine) Mr. Nowrojee did not show us any authority from this Court or from anywhere else where it has been decided that the obtaining of leave or a certificate is a condition precedent to the filing of a notice of appeal. We are not ourselves aware of any such authority and we would be surprised if there were to be one for such a decision would be clearly contrary to the plain meaning of the words in rule 74(4) of the rules. But as we shall show in a moment, we do not think that leave to appeal is required in order to appeal from an *ex parte* order granting or refusing leave to apply for



any of the prerogative orders set out in Order 53. We are satisfied that the obtaining of leave is not a condition precedent to the filing of a notice of appeal”.

55. I do not need to add anything to these authorities which are self-explanatory and binding on this court. It suffices to state that the filing of the notice of appeal herein before leave was obtained was not improper, as leave could be sought thereafter.
56. The issue that the court has to grapple with, then, is that even though the notice of appeal had been filed on time, no leave was sought within 14 days of delivery of the ruling or decision. In that respect Order 43 (3) of the Civil Procedure Rules 2010 provides:

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the Court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order”
57. So where is such an application for leave to appeal filed out of time to be made?
58. The respondents’ view is that this court is not seized of the jurisdiction to entertain the application and have stated their reasons.
59. Section 7 of the Appellant Jurisdiction Act provides that :

“The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired.”
60. It is my understanding that the said section grants the High Court jurisdiction to extend time for an aggrieved party to seek leave to appeal against its decision to the Court of Appeal even when time for doing so has expired.
61. I think that the above discourse now settles the question of jurisdiction on which court is seized of jurisdiction to grant leave to appeal.
62. I will now move to the next issue, whether leave should be granted as sought by the applicants.
63. It is trite law that the discretion to extend time should be exercised judiciously and sparingly, and the onus is on the Applicant to explain the lapse and the reason for the delay, if any, in seeking leave to Appeal.
64. In the instant case, the applicant explains that the failure to seek leave was due to inadvertence on their part, even though they filed the notice of appeal on time.
65. The time honoured principle is that the mistake of counsel ought not to visit upon a party. Thus the error in not seeking leave to appeal should not shut out the applicants from exercising their right to appeal against the decision in question. I am keenly aware that the issue that is subject of the appeal was fiercely contested and it is only fair that the applicants be allowed to pursue the intended appeal.
66. Having considered the matter, I find that the applicants have made out a case for the grant of leave to appeal and I so grant the same.
67. The applicants have also sought that this court stays further proceedings pending the determination of the intended appeal.



68. Having granted leave to appeal, and there being a notice of appeal, then it follows that there is now a proper appeal or notice thereof. So the question that arises then is whether this court still retains jurisdiction to grant a stay as sought.
69. This particular prayer was also opposed by the respondents on account of jurisdiction.
70. The Court of Appeal in the case of Trimborn Agricultural Engineering Limited v David Njoroge Kabaiko & another [2000] eKLR, discussed the issue. Shah, JA stated:

“The powers of the superior court to enlarge the time for lodging a notice of appeal out of time have been well defined by now. This Court in a recent decision delivered in the case of Peter Njoroge Mairo vs Francis Gicharu Kariri & another, Civil Appeal (Application) No 186 of 1999, (unreported), said:

“In our view section 7, above, should be given a construction which would obviate ridiculous result. The intention of the Legislature in enacting section 7, above, clearly appears to us to be that it can only be used and more specifically the very first time the intending appellant manifests his intention to appeal. It is for this reason that we agree with the remarks of Bosire Ag, JA (as he then was) in the case of Edward Allan Robinson & 2 others vs Philip Gikaria Muthami, (Civil Application No Nai 187 of 1997) (unreported), where he remarked, in pertinent part, thus:

‘Section 7, above was not, in my view, intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above, presupposes that an intending appellant has not taken any other steps in pursuance of that appeal.’

71. Joel Ngugi, J.( as he then was) was of a similar view and in the case of Sammy Kuria Ndung’u vs Samuel Mbugua Ikumbu [2021] eKLR the learned Judge stated:

“Once a party has filed a Notice of Appeal, the authority to strike it out, extend time, deem it regular or any other action related to it lies with the Court of Appeal not the High Court. This is not a mere formalistic fetish which can be cured by an appeal to Article 159(2)(d) of *the Constitution* which admonishes Courts to eschew undue regard to technicalities in dispensing justice. It makes sense that once a Notice of Appeal has been lodged, any further applications related to the appeal should be filed at the Court of Appeal which is then seized of the matter. This prevents the ugly spectacle or contretemps of a litigant litigating the same issue in two different layers of our Courts. It provides for a predictable docket management system. For example, a party who brings an application in the High Court in such circumstances and whose application is declined on its merits might approach the Court of Appeal with the same application hence getting two bites at the cherry. This is because in such a situation, the Court of Appeal would not be exercising its appellate powers over a decision of the High Court but an original jurisdiction. Even where a party whose such application is denied at the High Court chooses not to pursue a similar application



at the Court of Appeal, he is still left with a comatose Notice of Appeal at the Court of Appeal. This often leads to increased numbers of inactive files which have to be cleaned up frequently.”

72. My understanding of the above cases is that where a notice of appeal has been filed before the Court of Appeal, the High Court lacks jurisdiction to deal with any further matters regarding the appeal, unless expressly stated by law.
73. Of course there are instances where the rules specifically grant the High Court powers to act, as in stay of execution, but this is not the case here. This application seeks stay of the proceedings herein.
74. In *William Odhiambo Ramogi & 3 others vs Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR a five judge bench dealt with the issue of stay of proceedings pending appeal on an interlocutory matter. It held that;

“A scan of our decisional law reveals that our Courts have established the following principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

The second factor the Court needs to consider is whether a reasonable explanation has been provided why the Applicant has approached this Court for a stay rather than file the application in the Court of Appeal or the Supreme Court. The Honourable Attorney General gave no explanation why he chose to file the application in this Court. We cannot think of any reason either. It is optimal for such application to be filed at the higher Court to which the Appeal is preferred because one of the factors to be considered in deciding



whether to grant stay of proceedings is the time it might take to conclude the application. The higher Court, aware of its docket, would be best placed to make appropriate orders on such an application.”

75. In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*(supra), the court held as follows;

“As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the interest of justice ..... the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

76. As can be seen one of the factors to be considered are the merits of the intended appeal. This court cannot purport to decide this issue as it would be tantamount to sitting to interrogate its own decision.

77. Further, once the appeal is filed, if this court purported to stay the proceedings, how will it control the determination of the same? I believe that this is why the applicants need to move the appellate court as only it can factor all these issues.

78. The applicants had sought to rely on, among others, the decision in *Niazons (Kenya) Ltd. vs China Road & Bridge Corporation (Kenya) Ltd.* (supra) to support their case. If I got the decision of the court in that matter correctly, the issue stemmed from the application of the *Arbitration Act* which has specific provisions for stay of proceedings. Thus it may not be applicable herein.

79. In *Wachira Waruru & Another vs Francis Oyatsi*(supra) the decision was made by the Court of Appeal which seized of the appeal. This buttresses my point that it is the appellate court that can order the stay of the proceedings.

80. Guided by the above authorities, I opine that the Jurisdiction of this court has been ousted once the Applicants filed a Notice of Appeal before the Court of Appeal and leave has been granted as above. That jurisdiction is now vested with the Court of Appeal.

81. For the foregoing reasons, I find that this court lacks the jurisdiction to stay the proceedings.

82. In conclusion, the court makes the following findings;

- a. The applicants are granted leave to appeal against this court’s ruling delivered on 23<sup>rd</sup> April, 2024.
- b. The prayer for stay of proceedings is declined.
- c. The applicants were only partly successful and in any case this being a family matter, I order that each party bear its own costs.

83. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAKURU 29<sup>TH</sup> DAY OF JULY, 2024.**

**H. M. NYAGA,**



**JUDGE.**

**In the presence of;**

Court Assistant Jeniffer

Mr. Kisilah for petitioners

Mr. Kibet for Karanja for objectors/applicants

Mr. Owino for intended applicant

