



REPUBLIC OF KENYA



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Lusuru v Yalwala & another (Suing as the legal representatives of the Estate of Erick Ndeda - Deceased) (Civil Appeal E019 of 2024) [2024] KEHC 11482 (KLR) (30 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11482 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VIHIGA
CIVIL APPEAL E019 OF 2024
JN KAMAU, J
SEPTEMBER 30, 2024**

BETWEEN

AGGREY LUSURU APPELLANT

AND

MARGARET YALWALA 1ST RESPONDENT

ANTONY YALWALA SAGALA 2ND RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF ERICK
NDEDA - DECEASED**

RULING

Introduction

1. The Appellant herein filed a Notice of Motion application dated 2nd May 2024 on 16th May 2024 in which he had sought a stay of the orders of Hon R. Ndombi in Vihiga SPMCC No 112 of 2021 that were granted on 11th April 2024.
2. He filed an Amended Notice of Motion application dated 17th July 2024 on 18th July 2024 in which he prayed that he be granted leave to appeal against the said orders and that his Memorandum of Appeal dated 22nd April 2024 be admitted and be deemed to be properly on record. He also sought that the aforesaid orders be stayed pending the hearing and determination of the Appeal herein.
3. Vivian Shibanda, his advocate swore an Affidavit on 17th July 2024 in support of the said application and on his behalf.
4. On 14th June 2024, Geoffrey Okoth, the Respondents' advocate swore a Replying Affidavit in opposition to the said application on their behalf.



5. When the matter came up for hearing on 13th May 2024, the Appellant's counsel was absent and the Respondents indicated that they would be relying on their Replying Affidavit evidence only. As neither party filed any Written Submissions herein, the Ruling is therefore based on the parties' affidavit evidence only.

Legal Analysis

6. The Appellant stated that he was the biological father of the deceased whereas the 1st and 2nd Respondents were the grandparents of the deceased. He averred that he educated the deceased up to University level where he obtained a degree. He pointed out that the deceased was involved in a road traffic accident on or about the 9th of May 2020 and sustained fatal injuries.
7. He contended that the 1st Respondent obtained a Grant Ad Litem in Vihiga Cause No 56/57 of 2021 and filed a suit being Vihiga CMCC No 112 of 2021 seeking for general damages arising out of the said fatal road traffic accident. He further averred that he also obtained a Grant Ad Litem in Kakamega Succession Cause No 33 of 2020 in his capacity as the deceased's father and filed a similar suit being Vihiga CMCC No 73 of 2021.
8. It was his contention that he was not aware that the Respondents had also filed a suit and that both cases proceeded concurrently and Judgments were entered in favour of the deceased in both instances.
9. He asserted that the Defendant in his suit Vihiga CMCC No 73 of 2021 did not pay the decretal sum whereupon he filed a declaratory suit being Vihiga CMCC No 158 of 2022 against the insurer of the subject motor vehicle. He discovered that there was a similar suit which had been concluded and was pending payment when the insurer filed a defence stating that there was another suit arising from the same cause of action.
10. He asserted that he filed an application to be enjoined in the Respondents' suit and the proceeds be deposited in court pending the determination of the rightful heir inter alia whereby the said orders were granted. He pointed out that he also filed an application challenging the Grant of Letters of Administration Ad Litem that was issued to the 1st Respondent and seeking to have the same nullified. He also sought for orders that decretal amount be paid to him through his advocates on record, which prayers were granted.
11. He stated that he entered into an agreement and/or consent with the Defendant therein to the effect that the two (2) suits being Vihiga CMCC No 73 of 2021 and Vihiga CMCC No 158 of 2022 would be withdrawn and the matters be settled at Kshs 3,000,000/= . He pointed out that the said sum was paid to his Advocates on 22nd December 2022 for onward transmission to him. He acknowledged receipt of the decretal sum.
12. He pointed out that the 1st Respondent filed several applications on 1st February 2023 and 13th March 2023 seeking for orders that the Grant of Letters of Administration Ad Litem be reinstated and that his advocate be ordered to deposit the said amount in a joint interest earning account of both counsel, which application was allowed. He asserted that on 11th April 2024, the Trial Court ordered that his advocate deposit the decretal amount being Kshs 2,327,396/= plus assessed costs of Kshs 192,500/= within thirty (30) days, which amounts he claimed had been already paid out to his advocate and transmitted to him in December 2022 before the said orders were given.
13. He was categorical that the said impugned orders were the subject of his intended appeal herein and that the same had high chances of success. He pointed out that when the impugned Ruling was delivered, the Trial Learned Magistrate was on transfer and that he was not served with a Ruling Notice.



14. He urged the court to admit his appeal and that the same be deemed as properly filed. He was emphatic that he had brought this application promptly and in good time and that the matter was settled and the Respondents had not challenged that order.
15. On their part, the Respondents averred that they were aware that the Trial Court allowed their Notice of Motion application dated 1st February 2024 on 11th April 2024 in the following terms:-

“That the firm of V.A Shibanda & Co Advocates is directed to deposit the entire decretal sum being Kshs 2,327,396/= plus the party and party costs assessed at Kshs 192,500.34/= plus accrued interest into court within 30 days and the same shall only be released by an order of the court pending the outcome of the Vihiga SPMCC Succession Cause No 32 of 2024.”
16. They asserted that the said succession cause was a petition for a full grant for the proceeds of the estate of the deceased. They further added that the Appellant and his advocate had failed to comply with the said order.
17. They stated that the Appellant’s application herein was bad in law, lacked merit and was fatally defective on the grounds that it was premised on non-existent orders sought to be stayed as the Trial Court issued no orders on 14th April 2024 as the same were issued on 11th April 2024.
18. They further asserted that the Appellant had not demonstrated the kind of loss he would suffer if the orders sought were not granted as the monies were meant to be deposited and held in trust on behalf of the estate of the deceased and not to be distributed to the Appellant.
19. It was their contention that the Application herein was unheard of, frivolous, vexatious and an abuse of the process of the court and that granting the same would set a bad precedent as it would encourage parties who were not properly enjoined in a suit as parties to seek orders from court without being properly on record.
20. They asserted that the Appellant did not seek leave to appeal the impugned Ruling as the appeal herein did not lie as of right as per Order 43 Rule 1 of the Civil Procedure Rules, 2010.
21. They added that the Appellant did not oppose their application in the Trial Court despite having being served and granted an opportunity to file a response and/or grounds of opposition if at all he was not in agreement.
22. They pointed out that the Appellant’s application seeking to annul the Grant Ad Litem issued to them was dismissed by the Trial Court on 14th March 2024 and the said grant was reinstated. They added that they proved through their affidavit evidence that they were the grandparents of the deceased who until his death pursuant to the road traffic accident on 9th May 2020, had been under their care since his childhood as he was born on 26th May 1989 to their daughter namely Caroline Aluda Yalwala when she was sixteen (16) years old and that the Appellant being the father denied taking responsibility.
23. They were emphatic that they assumed parental responsibility for their grandson from childhood through school, university and up until his death without the help of the Appellant. They added that it was the deceased’s mother who gave them the consent to file and pursue the suit for the reason that they had raised him and catered for all his needs including burial expenses after his death. They pointed out that they obtained a Chief’s letter dated 5th February 2021 which indicated clearly that they were the grandparents of the deceased.
24. They further averred that they obtained a Grant of Letters of Administration Ad Litem that was issued on 16th February 2021 for purposes of filing a suit as administrators of the estate of the deceased. They



- asserted that the deceased's mother's name was Caroline Aluda Yalwala, their daughter, and not Doris Sifuma Khaemba, the Appellant's wife and hence the said Grant of Administration Ad Litem that was issued to the Appellant in Kakamega Succession Cause No E033 of 2020 was obtained by fraud and non-disclosure of material facts.
25. They asserted that after obtaining the requisite documents, they pursued the suit Vihiga SPMCC No 112 of 2021 and the court delivered its Judgment on 30th June 2022 in the sum of Kshs 2,327,396/= plus costs of the suit assessed on 27th October 2022 in the sum of Kshs 192,500/= thus a total of Kshs 2,519,896/= plus interest due to be paid to the estate of the deceased.
 26. They were emphatic that the Appellant was a stranger in this suit as his application that he be enjoined as a third party was dismissed by the Trial Court. They added that the order issued on the Appellant's application dated 26th September 2022 that sought the annulment and/or revocation of the Limited Grant of Letters of Administration Ad Litem issued to them were overturned by the Ruling delivered on 14th March 2024 which reinstated the Limited Grant of Letters of Administration Ad Litem issued to them.
 27. They were emphatic that the consent entered between the Appellant and the Defendant's counsel in the primary suit being Vihiga SPMCC No 112 of 2021 did not bind them as decree holders in the primary suit as they did not append their signatures thereto and as such, they could not be held responsible for the same.
 28. They were categorical that Grant of Letters of Administration Ad Litem was a special purpose vehicle whose sole purpose was to enable the administrators file a suit on behalf of the deceased's estate without powers of distribution which could only be done vide a full grant of letters of administration wherein arguments could be advanced and evidence taken as who was the legitimate beneficiary of the deceased's estate as provided for in Section 55 of the *Law of Succession Act*.
 29. They argued that the monies that were paid to the Appellant's Advocate's firm were not meant to be distributed. They pointed out that they had filed Vihiga SPMCC Succession Cause No 32 of 2024 for the estate to be distributed to the rightful owners.
 30. It was their contention that the decretal sum, costs and accrued interests had been paid to the wrong advocates and therefore the Trial Court was right to order that the said advocate deposit the said sum in court pending the outcome of the succession cause.
 31. They asserted that when the said Advocate decided to distribute the said monies without a confirmed grant, knowing well that there were other claimants who were the decree holders of the monies paid to her then she did so in ignorance of the law which was no defence.
 32. They argued that the Appellant had not met threshold for granting an order of stay of execution as provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. They urged the court to dismiss the application herein with costs but asserted that in the event it was inclined to allow the same, then prayer No (3) of the Appellant's application should be allowed on condition that Appellant through the firm of V. A. Shibanda & Company Advocates be ordered to deposit the entire decretal sum of Kshs 2,327,396/= plus costs of the suit assessed at Kshs 192,500/= plus accrued interests thus a total of Kshs 3,000,000/= plus the interest which had accrued from the date the money was paid to said Advocate, to court as was ordered by the Trial Court within thirty (30) days from the date of such order, failure to which execution to issue for the whole decretal amount plus assessed costs owed to the Respondent.
 33. Right from the onset, this court noted that the Appellant's locus standi to file this appeal was in question. The issue of locus standi was so cardinal in a civil matter since it ran through to the heart



of the case. A party without locus standi in a civil suit lacked the right to institute and/or maintain that suit even where a valid cause of action subsisted. Locus standi related to the legal capacity of a party. The import of a party in a suit without locus standi could be equated to a court acting without jurisdiction thereby voiding proceedings.

34. On the first issue, the Respondents had argued that the Appellant failed to seek leave to file this appeal as the same did not lie as of right as per Order 43 Rule 1 of the Civil Procedure Rules, 2010. The said Order 43 of the Civil Procedure Rules was the procedural order for Section 75 of the [Civil Procedure Act](#) Cap 21 (Laws of Kenya).
35. Several orders from which an appeal lay as a matter of right were enumerated under Order 43 of the Civil Procedure Rules. The said Order 43 of the Civil Procedure Rules states that:-
 1. An appeal shall lie with as of right from the following orders and rules under the provisions of section 75 (1)(h) of the Act:
 - a. Order 1 (parties to suits);
 - b. Order 2 (pleadings generally);
 - c. Order 3 (frame and institution of suit);
 - d. Order 4, rule 9 (return of plaint);
 - e. Order 7, rule 12 (exclusion of counterclaim);
 - f. Order 8 (amendment of pleadings);
 - g. Order 10, rule 11 (setting aside judgment in default of appearance).
 - h. Order 12, rule 7 (setting aside judgment or dismissal for non-attendance);
 - i. Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases);
 - j. Order 19 (affidavits);
 - k. Order 22, rules 25, 57, 61(3) and 73 (orders in execution);
 - l. Order 23, rule 7 (trial of claim of third person in attachment of debts);
 - m. Order 24, rules 5, 6 and 7 (legal representatives);
 - n. Order 25, rule 5 (compromise of a suit);
 - o. Order 26, rules 1 and 5(2) (security for costs);
 - p. Order 27, rules 3 and 10 (payment into court and tender)
 - q. Order 28, rule 4 (orders in proceedings against the Government);
 - r. Order 34 (interpleader);
 - s. Order 36, rules 5, 7 and 10 (summary procedure);
 - t. Order 39, rules 2, 4 and 6 (furnishing security)
 - u. Order 40, rules 1, 2, 3, 7 and 11 (temporary injunctions);
 - v. Order 41, rules 1 and 4 (receivers)



- w. Order 42, rules 3, 14, 21, 23 and 35 (appeals);
 - x. Order 45, rule 3 (application for review);
 - y. Order 50, rule 6 (enlargement of time);
 - z. Order 52, rules 4, 5, 6 and 7 (advocates);
 - aa. Order 53 (judicial review orders).
2. An appeal shall lie with the leave of the court from any other order made under these Rules.”
36. It therefore followed that if a party wished to appeal against an order that was not listed under Order 43 of the Civil Procedure Rules, that party had to first seek leave of court to appeal against the same.
37. Notably, the impugned Ruling dated 11th April 2024, the subject of this appeal, determined two (2) applications, the first one was dated 21st November 2022 and sought orders under Order 1 Rule 10(2) of the Civil Procedure Rules, 2010 while the second application was dated 1st February 2024 and sought orders under Order 51 Rules 1, 22 and Section 71 of the *Law of Succession Act*.
38. The Appellant did not therefore require leave to appeal against the Ruling of the first application which was brought under Order 1 of the Civil Procedure Rules. However, he ought to have sought leave to appeal the orders on the second application as the same were brought under Order 51 of the Civil Procedure Rules.
39. The impugned Ruling was delivered on 11th April 2024 while the Memorandum of Appeal herein was dated and filed on 22nd April 2024. Although the same had been filed within time in accordance with Section 79 (g) of the *Civil Procedure Act*, which provides that every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, the same had been filed without leave as per Order 43(1) of the Civil Procedure Rules.
40. This court had due regard to the case of *Circuit Business Systems Limited vs County Government of Siaya* [2020] eKLR where it was held that an appellant was obligated to demonstrate that he or she had obtained leave to file an appeal out of time.
41. Be that as it may, it was trite law that courts must exercise great caution from denying litigants their right to fair trial. It was against that backdrop that this court found itself not inclined to dismiss the Appellant’s appeal in the very first instance. This is because he was vigilant enough to have filed an amended application so as to correct his mistake.
42. On the issue that the Appellant was a stranger in the *Vihiga SPMCC No 112 of 2021* as his application to enjoin him as a third party had been dismissed and hence had no capacity to file this suit, this court noted that both parties neither annexed the said application by the Appellant seeking to be enjoined nor the orders allowing and/or dismissing the same thereof.
43. However, in its Rulings of 22nd November 2022 and 11th April 2024, the Trial Court had referred to the Appellant as the third party and directed that the decretal sum be paid to his advocates. This court was thus persuaded to find and hold that the Appellant had been enjoined as the third party in the suit *Vihiga SPMCC No 112 of 2021* and that having been aggrieved by the aforesaid decisions, he had a right to appeal and be heard on merit.
44. In the event, his application for enjoyment as a third party was dismissed, as the Respondents had contended, then the same was not proved and/or demonstrated by documentary evidence. It was this court’s finding that the Appellant herein had the *locus standi* to file the appeal herein.



45. Indeed, every party has a right to access any court or tribunal to have its dispute heard and determined in accordance with Article 50(1) of *the Constitution* of Kenya, 2010. Even where a party delayed in doing an act, there was always a provision that would give it reprieve to seek justice.
46. Notably, Order 50 Rule 6 of Civil Procedure Rules empowers the court to enlarge the time to do a particular act. It stipulates as follows:-
- “Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed:
- Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.”
47. This court perused the Memorandum of Appeal dated and filed 22nd April 2022. It did not, however, consider the merits or otherwise of the grounds of appeal that were set out therein as that was strictly under the purview of the appellate court. All that it was expected to do was to consider if the Appellant herein had demonstrated that they had arguable grounds of appeal. A reading of the same showed that the grounds were weighty issues that required to be canvassed on appeal.
48. This court also noted that although the present application was filed on 18th July 2024, which was about three (3) months and six (6) days since the Ruling was delivered, this could not be said to have been inordinate delay.
49. In considering whether or not to grant an order for extension to do any act, the court was also required to consider if the opposing side would suffer any prejudice if extension of time was granted. This court did not see any prejudice that the Respondents would suffer or was likely to suffer if the Appellant herein exercised his constitutional right of appeal. If there was any prejudice, then they did not demonstrate the same.
50. This was a matter involving family members of the deceased. Indeed, family matters were extremely emotive and had the potential of becoming very convoluted and causing unimaginable rifts amongst family members if disputes affecting them were not heard and determined decisively and conclusively.
51. This court thus took the view that it was in the interests of justice (emphasis court) that the Appellant herein be granted leave to appeal the decision of the lower court and that the appeal be heard on merit.
52. Indeed, the power to grant orders in the interest of justice and/or ends of justice (emphasis court) was well captured in Section 3A of the *Civil Procedure Act* that states that:
- “Nothing in the Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
53. Turning to the issue of orders for stay, this court noted that the Respondents submitted on stay of execution whereas the Appellant only prayed that the impugned orders of 11th April 2024 be stayed pending the appeal. Therefore, their arguments on the conditions to be met for an order of stay of execution to be granted thus fell on the wayside. Be that as it may, it was prudent that the said orders be stayed pending the determination of the Appeal herein.



Disposition

54. For the foregoing reasons, the upshot of this court's decision was that the Appellant's Notice of Motion application dated 17th July 2024 and filed on 18th July 2024 was merited and the same be and is hereby allowed in terms of Prayer Nos (1A), (1B) and (3) therein. Costs of the application will be in the cause.
55. Matter to be mentioned on 5th December 2024 for further orders and/or directions.
56. It is so ordered.

DATED AND DELIVERED AT VIHIGA THIS 30TH DAY OF SEPTEMBER 2024

J. KAMAU

JUDGE

