



**Mwontubochiu v Ngorina (Miscellaneous Civil Application
E046 of 2024) [2024] KEHC 13093 (KLR) (31 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13093 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MERU
MISCELLANEOUS CIVIL APPLICATION E046 OF 2024
EM MURIITHI, J
OCTOBER 31, 2024**

BETWEEN

MAGDALINA MWONTUBOCHIU APPELLANT

AND

CHARITY MUTHONI NGORINA RESPONDENT

RULING

1. By a Notice of Motion under certificate of urgency dated 25/3/2024, brought under Order 42 Rule 6 & 51 of the [Civil Procedure Rules](#), Sections 1, 1A, 1B, 3 & 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law, the Applicant seeks that:
 1. Spent
 2. The honorable court be pleased to stay execution of ruling delivered 15th November 2023, by Hon. Ken Muchiri in Maua Chief Magistrate's Succession Cause E225 OF 2021 pending the hearing and determination of the application herein.
 3. The honorable court be pleased to stay execution of ruling delivered 15TH November 2023, by Hon. Ken Muchiri in Maua Chief Magistrate's Succession Cause E225 OF 2021 pending the hearing and determination of the intended appeal herein.
 4. Leave be granted to file an appeal out of time
 5. The annexed memorandum of appeal be deemed as duly filed.
 6. Any other orders this Honorable court may deem fit to grant.
2. The grounds upon which the application is premised are set out in the body of the application and supporting affidavit of Magdalina Mwontubochiu, the Applicant herein, sworn on even date. She avers that her application dated 8/8/2023 seeking a DNA to be done to ascertain the paternity of



Nick Muthuri and Faith Mwendu using samples from Moses Mudavadi was disallowed by the court. During the delivery of the ruling, she was hospitalized due to her diabetes hence she could not instruct her advocates to appeal against it in good time. The delay was thus occasioned by factors beyond her control, and she stands to suffer irreparably as her appeal, which has very high chances of success, will be rendered nugatory.

3. The Respondent has opposed the application *vide* her replying affidavit sworn on 23/4/2024. She avers that the application has been brought with inordinate delay which has not been explained. The trial court properly ruled that the birth certificates of the said Nick Muthuri and Faith Mwendu were sufficient evidence that they are children of the deceased, and the application is only meant to delay the conclusion of Maua CMCC Succession Cause No. E225/2021. She is suffering a lot of prejudice as the Applicant and her children control all the properties of the deceased, and she urges the court to dismiss the application.

Submissions

4. The Applicant urges that the principles governing leave to appeal out of time are settled, and cites the Court of Appeal case of *Thuita Mwangi v Kenya Airways* (2003) eKLR. She reiterates that the delay in filing the appeal within the prescribed time was occasioned by factors beyond her control, and implores the court to grant her an opportunity to air out her grievances, as this will enable the issues at hand to be resolved.
5. The Respondent did not file any submissions.

Analysis and Determination

6. The issues for determination are whether leave to appeal out of time and stay of execution should issue.

Leave to appeal out of time

7. In order to succeed in her application for extension of time to appeal out of time, the Applicant must prove to the satisfaction of the court that the delay is not inordinate, reasons for delay must be plausible, that the appeal is arguable and that the Respondent will not be unduly prejudiced if the order is granted. See *Nicholas Kiptoo Korir Arap Salt v Independent Electoral & Boundaries Commission & 7 others* (2014) eKLR.
8. This court notes the delay from the date of delivery of the impugned judgment on 15/11/2023 to 2/4/2024 when the instant application was filed. The delay is attributable to factors beyond the Applicant's control, to wit her inability to instruct her counsel in good time due to her sickness and subsequent hospitalization. The court finds that the delay of approximately 4 months albeit inordinate has been satisfactorily explained.
9. On the arguability or otherwise of the intended appeal, this court notes that the grounds of appeal raised in the memorandum of appeal faulting the trial court for failing inter alia to find that the parentage of Nick Muthuri and Faith Mwendu can only be ascertained by conducting a DNA, cannot be said to be frivolous.
10. This court thus grants leave to the Applicant to appeal out of time.



Stay of Execution

11. The law concerning applications for stay of execution of a Judgment and/or Ruling is well espoused in the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, as follows: -

“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.

No order for stay of execution shall be made under sub rule (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.
 - 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. The cornerstone consideration for granting stay is substantial loss, which has been espoused by the Court of Appeal (Platt, AG JA) in *Kenya Shell Limited v Kibiru Another* (1986) eKLR as follows:

“.....If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the Respondents should be kept out of their money.”

13. It is generally accepted that where there is no positive order capable of being executed, a stay of execution ought not to be issued. As this court espoused in *Trident Insurance Company v Dennis Mutwiri* [2021] eKLR :-

“There is in legal acceptance of the term nothing to stay in a negative order which does not compel or require the doing or the taking of any action.”

14. The Court of Appeal in *AG v James Hoseah Gitau Mwaru* [2014] eKLR remarked that in order for a Court to exercise its discretion to grant stay, it must ask itself the question whether there is anything capable of being stayed in the impugned ruling or decision.

15. In dismissing the Applicant’s application dated 8/8/2023, the trial court rendered thus;

“Lastly, I must say beside the birth certificates are sufficient evidence that Nick Muthuri and Faith Mwenda are the children of the deceased and apart from casting aspersions in the supporting affidavit and the supplementary affidavit the Applicant has not laid any basis and there is no iota of evidence that was tendered for this court to be in doubt that the birth certificates are erroneous or are misleading for the deceased to be indicated as the father of Nicki Muthuri and Faith Mwenda...This court now has to strike a balance between two



competing interests, that is, the right to privacy of Nick Muthuri and Faith Mwenda as against the interest of the Applicant in establishing whether the two are issues of the deceased and in this respect it is my view that the former must prevail. DNA tests in succession matters should not just be granted on a conveyor belt basis or on mere suspicion but the Applicant must lay a foundation that is formidable enough or establish existence of special circumstances for the court to order that a DNA test to be conducted. The upshot of the foregoing is that I find the application dated 8th August, 2023 devoid of merit and hereby dismiss it with no order as to costs.”

16. That is the decision sought to be stayed by the Applicant pending the hearing and determination of her intended appeal, which is said to be arguable with high chances of success.
17. This court finds that the order of the trial court was a negative one incapable of being executed and therefore there is nothing to stay.

Orders

18. Accordingly, for the reasons set out above, the Applicant’s application dated 25/3/2024 is allowed in the following terms:
 1. The Applicant is granted leave to appeal out of time.
 2. The prayer for stay of execution of the ruling delivered on 15/11/2023, by Hon. Ken Muchiri in Maua Chief Magistrate’s Succession Cause E225/2021 pending the hearing and determination of the intended appeal herein is declined.
 3. The annexed Memorandum of Appeal is deemed as duly filed upon payment of the requisite fees.
 4. The Record of Appeal to be filed within 60 days from the date hereof.
 5. In the event of default, the Appeal shall stand dismissed.
15. In terms of Order 50 rule 6 of the *Civil Procedure Rules* the costs of this application shall be paid by the Appellant/Applicant to the Respondent.

Order accordingly.

DATED AND DELIVERED THIS 31ST DAY OF OCTOBER, 2024.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Asuma for Mr. Mutembei for the Applicant.

Ms. Maore for Respondent.

