



REPUBLIC OF KENYA



**KENYA LAW**  
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**Rotich & another v Mibei (Civil Appeal E044 of 2021)  
[2023] KEHC 19242 (KLR) (29 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19242 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E044 OF 2021**

**RL KORIR, J  
JUNE 29, 2023**

**BETWEEN**

**JULIUS ROTICH ..... 1<sup>ST</sup> APPELLANT**

**BENARD KIPKOECH ROTICH ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOHNSTONE KIMUTAI MIBEI ..... RESPONDENT**

**RULING**

1. The appellants filed a notice of motion application dated May 12, 2022 which sought the following orders:
  - i. Spent.
  - ii. Spent.
  - iii. That there be a stay of proceedings in ELC Suit No 11 of 2021 before the Senior Resident Magistrate's Court at Sotik pending the disposal of the appeal.
  - iv. That there be a stay of orders in succession cause No 48 of 2019 issued by the Senior Resident Magistrate's Court at Sotik pending the disposal of the appeal.
  - v. That this honourable court grant any other relief it deems fit and just in the matter.
  - vi. Costs for the application be in the cause.
2. The application was brought under order 42 rule 6(1) & (2), order 51 of the *Civil Procedure Rules* & sections 1A, 1B and 3A of the *Civil Procedure Act*. It was premised on the grounds on the face of the application and further by the joint supporting affidavit sworn by Julius Rotich and Benard Kipkoech Rotich on May 16, 2022.



### **The Applicants' Case.**

3. It was the applicants' case that the Magistrate's Court gave a ruling in succession cause No 48 of 2019 on November 16, 2021 and that ruling gave the respondent herein *locus standi* to institute ELC Suit No 11 of 2021 to the detriment of the estate of the deceased in succession cause No 48 of 2019.
4. The applicants stated that they were dissatisfied with the said ruling and had since filed a memorandum of appeal before this court. The applicants further stated that should the proceedings in ELC Suit No 11 of 2021 proceed and the appeal herein allowed, their rights would be highly compromised and a lot of judicial time would have been lost. That it would be in the interest of justice that the said proceedings be stayed pending the outcome of the appeal.
5. The applicants opined that should the proceedings in ELC Suit No 11 of 2021 not be stayed, then the subject of the appeal would be rendered nugatory. It was the applicants' case that the appeal had been brought timeously and without delay.
6. There was a replying affidavit on record sworn by the respondent on November 18, 2022. Though filed out of time and without the leave of the court, I will consider it on merit. I have gone through the replying affidavit and I have noted its averments address the appeal and not the present application.
7. On September 29, 2022, I directed that the application be heard by way of written submissions.

### **Applicants' Submissions.**

8. The applicants submitted that they were dissatisfied with the ruling of the Magistrate's Court and that they had a right to appeal. That they had an arguable appeal which was filed without delay. They relied on *UAP Insurance Company Limited v Michael John Beckett* (2004) eKLR and *Housing Finance Company of Kenya v Sharok Kber Mohamed Ali Hirji & another* (2015) eKLR.
9. It was the applicants' submission that in the interests of proper administration of justice, the proceedings in the Magistrate's Court be stayed pending the outcome of the appeal. They relied on *Port Florence Community Health Centre Care v Crown Health Care Limited* (2022) eKLR, *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited* (2019) eKLR and order 42 rule 6 (1).
10. The applicants submitted that this court exercise its discretion so as to protect the substratum of the appeal against the ruling dated November 16, 2021 and the present application.
11. The respondent filed his submissions dated March 13, 2023 on March 15, 2023. However, the submissions wrongly addressed the appeal and not the present application.
12. I have gone through and considered the notice of motion application dated May 12, 2022 and the applicants' written submissions dated November 25, 2022, and the only issue for my determination is whether the applicants should be granted the order for stay of proceedings in ELC Suit No 11 of 2021 pending the outcome of the appeal.
13. The law on stay of proceedings and stay of execution is provided for under order 42 rule 6(1) which provides that:-

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

14. In the case of *Turbo Highway Eldoret Ltd v Muniu* (civil appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (ruling), Ngugi J. (as he then was) held that:-

“All these factors must be considered, in a given case, in the spirit concisely expressed in *Halsbury’s Laws of England*, 4th Edition, Vol 37 at p 330:

The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.

In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances”.

15. The principles to be considered when granting an order for stay of execution were discussed by Ringera J. (as he then was) in *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 where he stated:-

“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”.

16. In an application to stay proceedings, the court was required to exercise judicial discretion in the interest of justice. In the case of *Christopher Ndolo Mutuku & another v Cfc Stanbic Bank Limited* (2015) EKLR Gikonyo J. observed that:-

“What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice”

17. The applicants contended that they had appealed against the ruling by Sotik Magistrate’s Court in succession cause No 48 of 2019 dated November 16, 2021. The ruling dismissed the applicants (Julius



Kiprotich and Benard Kipkoech Mibei) application in which they sought to set aside or revoke the grant of letters of administration *ad litem* issued to the respondent (Johnstone Kimutai Mibei). It was on that basis that the respondent had initiated ELC suit No 11 of 2021 before the Senior Resident Magistrate’s Court at Sotik.

18. A look at the subject matter being whether or not the respondent was entitled to be granted the *ad litem* grant to initiate ELC Suit No 11 of 2021 and in the converse whether or not the applicants would suffer prejudice sets out the circumstances which in the mind of the court warrants stay of proceedings, all in the interest of justice.
19. On the question as to whether the applicants had an arguable appeal, the position of the law was that whether an appeal had merits or not was not an issue to be determined by the court when dealing with an application of this nature. The Court of Appeal in *Kiu & another v Khaemba & 3 others* (civil appeal (application) E270 of 2021) [2021] KECA 318 (KLR) (17 December 2021) (Ruling) held that:-

“In law, an arguable appeal/intended appeal is one that need not succeed but one that warrants the court’s interrogation on the one hand and the courts invitation to the opposite party to respond thereto.”
20. Similarly in *Kenya Industrial Estate Limited & another v Matilda Tenge Mwachia* (2021) eKLR, the Court of Appeal held that:-

“As stated earlier, an arguable appeal is one that is not frivolous but raises a bona fide issue deserving determination by a court and a single bona fide issue would suffice”.
21. The applicants filed a memorandum of appeal dated December 10, 2021 in which they listed seven (7) grounds of appeal. I have gone through it carefully and I am satisfied that the grounds therein raised weighty issues that require the interrogation and determination by the court. It is my finding therefore that the applicants have an arguable appeal.
22. The outcome of the applicant’s appeal goes to the very heart of the proceedings in ELC Suit No 11 of 2021. The appeal challenged the *locus standi* of the respondent and his ability to commence and prosecute the ELC Suit No 11 of 2021. If the suit in the Magistrate’s Court is allowed to proceed, it would make the hearing of the appeal an academic exercise and it would therefore make it nugatory. In the case of *Niazsons (K) Ltd v China Road & Bridge Corporation (Kenya)* (2001) eKLR, Onyango-Otieno, J (as he then was) held that:-

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”
23. Further in the persuasive case of *Port Florence Community Health Care v Crown Health Care Limited* (2022) eKLR, Kamau J. held that:-

“The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.”
24. In my view, the best course of action would be to stay the proceedings in the Magistrate’s Court pending the hearing and determination of the appeal. The respondent failed to respond to the



application thereby failed to show what prejudice he would suffer if the proceedings in the Magistrate's Court were stayed.

25. I am however conscious that the present application was brought five months after the filing of the memorandum of appeal and that delay had not been explained satisfactorily. I excuse the delay to which both parties seem to have acquiesced to. I observe further that both the applicants and the respondent submitted extensively on the merits of the appeal and further that the court inadvertently reserved a judgment instead of a ruling. What was before this court however was an application for stay of proceedings pending appeal.
26. In the end, the notice of motion application dated May 12, 2022 has merit and it is successful in terms of prayers 3 and 4.
27. The applicants shall file and serve their record of appeal strictly within 30 days from the date of this ruling.

Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED THIS 29<sup>TH</sup> DAY OF JUNE, 2023.**

.....

**R. LAGAT-KORIR**

**JUDGE**

Ruling delivered in the presence of Mr. Kurgat for the Applicant, Mr. Miruka for the Respondent and Siele (Court Assistant)

