



REPUBLIC OF KENYA



KENYA LAW
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In re Estate of John Ezekiel Kiboit alias John Kigen (Deceased) (Succession Cause 585 of 2016) [2021] KEHC 9749 (KLR) (19 May 2021) (Ruling)

Neutral citation: [2021] KEHC 9749 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
SUCCESSION CAUSE 585 OF 2016**

JM NGUGI, J

MAY 19, 2021

BETWEEN

EVALINE CHERUTICH KUMIN PETITIONER

AND

SOLOMON BOIT OBJECTOR

RULING

1. The Applicant filed an application dated 27/11/2019, in which he sought to set aside a Consent Order dated 10/06/2019. I dismissed the application in my ruling of 17/09/2020. Tom Kipkosgei Boit then filed the Application dated 05/11/2020 for revocation of the grant issued to the Petitioner. I directed that the application be heard by way of written submissions but when the matter came up on 25/01/2021 to take a ruling date for that application, Serah Wangari Cheronon informed the Court that she had filed an Affidavit of Protest. The matter was then referred to mediation with the condition that if there was no progress by 15/04/2021 then the matter would proceed in Court.
2. The next time the matter came up was on 18/05/2021 when it became apparent that mediation had failed. Accordingly, I directed parties to file any documents on the issue of distribution. It was in the intervening period that the Applicant filed the instant application dated 24/11/2021, seeking the following orders:
 1. This Honourable Court be pleased to stay further proceedings in this suit pending hearing and determination of the Appeal by the Court of Appeal in Nakuru Court of Appeal Civil Appeal No. E101 of 2021 Solomon Boit v Evaline Cherotich Kumin.
 2. The costs of this application be borne by the Petitioner
3. The application is supported by the grounds on the face of it and the affidavit of Solomon Boit dated 24/11/2021. The Applicant depones that having been dissatisfied with the Court's ruling of



- 17/09/2020 he instructed his advocates who filed and served a Notice of Appeal dated 29/09/2020. They also sought certified copies of proceedings and ruling for purposes of lodging the appeal.
4. The Applicant says that he has since lodged the Appeal at the Court of Appeal having obtained the certified copies of proceedings and ruling as well as a Certificate of Delay on or around 09/11/2021.
 5. He contends that he has an arguable appeal with good chances of success and that unless the proceedings in this court are stayed, the appeal will be rendered nugatory and useless.
 6. He also contends that that it is in the interest of justice that the instant Application is allowed and that no prejudice will be suffered by the Petitioner if the proceedings in this suit are stayed pending the hearing and determination of the appeal by the Court of Appeal.
 7. The Application is opposed through the Petitioner's Grounds of Opposition dated 02/12/2021. The Petitioner has listed seven grounds as follows:
 1. That the jurisdiction of the court has not been properly invoked
 2. That the intended Appeal is a total abuse of the process of the processes (sic) of this court as it creates duplicity of suits due to the existence of pending summons for Revocation of Grant dated 5th November 2020 and filed 9th November, 2020 by Tom Boit.
 3. That the application is premature as there is no proper appeal before the Court of Appeal to warrant a grant of stay of proceedings.
 4. That the application has fallen short of mandatory requirements of order 42 Rule 6 of the [*Civil Procedure Rules*](#)
 5. That the application has formal defects in that it has not been made by way of summons as provided for under Rule 49 of the [*Probate and Administration Rules*](#).
 6. That the application is incompetent, fatally defective in form and in substance, is frivolous, vexatious and meant to embarrass and delay determination of this matter.
 7. That the Applicant has no cause of action left and the Application should be dismissed with costs.
 8. The Application was argued by way of written submissions. The Applicant's submissions are dated 21/01/2022. The Applicant submits that he lodged a Notice of Appeal upon the dismissal of his application in accordance with Rule 75(1) of the Court of Appeal Rules and subsequently lodged the Record of Appeal. He disagrees with the Petitioner's assertion that he -the Applicant, never obtained leave to appeal. He submits that there is no mandatory requirement under the [*Law of Succession Act*](#) for a party to obtain leave to appeal to the Court of Appeal. He contends that the Act is silent on the question of appeals from the High Court to the Court of Appeal, particularly those made in exercise of the High Court's original jurisdiction. He argues that the only requirement to seek leave that which is found under Section 50 of the [*Law of Succession Act*](#), relating to appeals to the High Court and appeals to the Court of Appeal from decisions emanating from the Kadhi's Court on matters of Muslim Law.
 9. The Applicant argues further that Section 3 of the [*Appellate Jurisdiction Act*](#) and Article 164(3) of [*the Constitution*](#) give the Court of Appeal the jurisdiction to hear appeals from the High Court and that in the absence of provisions in the cited law, the Applicant enjoys a right of appeal. The Applicant relies on the cases of [*Julius Kamau Kithaka v Waruguru Kithaka Nyaga & 3 others*](#) [2013] eKLR and [*Peter Wabome Kimotho v Josephine Mwiyeria Mwanu*](#) [2014] eKLR in support of his argument that there is a proper appeal before the Court of Appeal.



10. On whether a stay of proceedings should be granted, the Applicant submits that he has met the conditions under Order 42 Rule 6 of the *Civil Procedure Rules*. He has cited the case of *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited* [2019] eKLR where it was stated that the jurisdiction to stay proceedings pending appeal is meant to avoid waste of judicial time and duplication of efforts.
11. The Applicant contends that being that the Summons for Confirmation of Grant is pending hearing, he should be granted the chance to have his appeal heard on merits - by granting a stay of proceedings in the present matter. The Applicant has also cited the case of *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR. He submits that it would be a waste of time to have parallel proceedings where the outcome of the appeal would have an impact on the instant matter. He relies on the case of *Lucy Muingo Kusewa & Another v The Embassy of Sweden, Nairobi* [2019] eKLR.
12. The Petitioner's submissions are dated 17/02/2022. The Petitioner submits that the jurisdiction of this Court has not been properly invoked. She contends that there is no proper appeal before the Court of Appeal to warrant a stay of proceedings. This is because, the Petitioner argues, the Applicant did not seek leave of this Court. The Petitioner relies on the case of *Makhangu v Kibwana* [1995-1998] 1EA 175 and the provisions of Section 75 of the *Civil Procedure Act*, which the Petitioner argues gives instances when an appeal lies as a matter of right. She argues that any other appeal not contemplated under Section 75 of the *Civil Procedure Act* and Order 43 of the *Civil Procedure Rules* requires leave of either the court appealed from, or the Court appealed to. The Petitioner relies on the cases of *Yunes Kerubo Oruta & another v George Kombo Oruta & another* [2021] eKLR, *Isaak Aliaza v Samuel KIsiavuki* [2021] eKLR and *Esther Kabon Rokochi & another v Kobilo Chepkien & another* [2021] eKLR.
13. The Petitioner also argues that given the pendency of the Summons for Revocation dated 05/11/2020 filed by Tom Boit, there are multiple suits before different courts. This, the Petitioner contends amounts to abuse of the court process. The Petitioner relies on the meaning abuse the court process given in the case of *Satya Bhama Gandhi v Director of Public Prosecutions & 3 others* [2018] eKLR.
14. She submits that the prayer of stay of proceedings is not merited for three reasons being: that there is no proper appeal, there is a pending issue of administration before the Court and that the best option in the interest of justice is to hear the Summons for Confirmation. The Petitioner relies on *In re Estate of the Late James Nganga Mwangi* (Deceased) [2021] eKLR.
15. She invites the Court to consider the criteria given *in Re Estate of Leah Nyawira Njenga (Deceased)* [2021] eKLR and contends that the instant application does not meet those criteria. First, the Petitioner argues that the Applicant does not have an arguable appeal as the appeal emanates from a Consent Order. Second, the Petitioner argues that the prayers sought in the appeal can still be gained from pending summons. Third, the Petitioner argues that the Applicant has not met the conditions of stay under Order 42 Rule 6 and that it is not in the interest of justice to stay the proceedings. The Petitioner also relies on the case of *Re Estate of Kanyari Matongu (Deceased)* [2021] eKLR. Accordingly, the Petitioner submits that the only way to compel the Applicant to fast track the Appeal is if he is compelled to furnish security of costs. She proposes a tenth of the value of the estate.
16. Lastly, the Petitioner submits that the application ought to have been made by way of Summons in accordance with Rule 49 of the Probate and Administration Rules and prays that the Application be dismissed. I will dismiss this objection outright: it cannot see the light of day in view of Article 159 of *the Constitution*. To determine the substantive issues raised in the Application merely on the basis of the question whether the form of the Application was the technically correct one would be the apotheosis of form and the fetishization of technicality that Article 159 seeks to free us from.



17. From the foregoing, the issues for determination are as follows:
- I. Whether there is a proper appeal before the Court of Appeal.
 - II. Whether the Applicant has established a basis for stay of proceedings pending appeal.
18. Both parties submitted extensively on whether there is a proper appeal. While the Petitioner argues that there is no proper appeal because of failure to seek leave, the Applicant argues that there is no requirement to seek leave of the High Court before filing an appeal. The real question is whether the High Court can determine the aptness of an appeal that has been filed before the Court of Appeal. In my view, it cannot. This is because once the Appellant has already lodged an appeal at the Court of Appeal, issues relating to the competency of that appeal can only be dealt with by the Court of Appeal. This is the purpose of Rule 84 of the *Court of Appeal Rules*. Expectedly, the Julius Kamau Waithaka and the Peter Wahome Kimotho cases cited by the Applicant and *Makhangu v Kibwana*, *Yunes Kerubo*, *Isaak Aliaza* and *Esther Kabon Rokochu* cited by the Petitioner are all Court of Appeal cases. In a nutshell, the properness or lack of it of the appeal can not be determined by this Court.
19. Both parties cited the conditions set out under order 42 Rule 6 of the Civil Procedure Code. Although the Sub-rule 1 mentions both the stay of execution and stay proceedings, the conditions given under Sub-rule 2 apply solely to stay of execution pending appeal and not stay of proceedings.
20. In *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established 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: They laid down the following six principles:
- 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.



21. 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.

22. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000):

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 (emphasis added)

23. In the instant case, the Applicant argues that he should be allowed to prosecute the Appeal first as it is likely to have an impact on the current proceedings. First, there has been no explanation why the stay was not sought in the higher Court. Second, even if the Court of Appeal was to find that the Appeal was merited the outcome would be to set aside the Consent Order of 10/06/2019. The ultimate and final effect would be to reinstate the prayer for revocation of the Grant issued to the Petitioner. As pointed out earlier, there is already pending Summons for Revocation dated 05/11/2020 by Tom Kipkosgei Boit. The Applicant can still give voice to that application. In other words, there is no demonstration that the appeal will be rendered nugatory if the stay is not granted. Additionally, there is no demonstration of exceptional circumstances to warrant the grant of the radical relief sought in this case.
24. Finally, the outcome of the Appeal, would only have effect on the issue of the administrator. I had previously directed parties to file any documents on the issue of distribution. I do not see how the outcome of the appeal will have any effect on distribution. Overall, staying these proceedings would only serve the undesirable effect of unnecessarily delaying the winding up of the estate.
25. The upshot is that the Application dated 02/12/2021 lacks merit and is hereby dismissed.
26. Costs will be in the Cause.
27. Parties are hereby directed to file any documents on the issue of distribution within 21 days from the date of this Ruling.
28. Orders accordingly.

DATED AND DELIVERED AT NAKURU THIS 19TH DAY OF MAY, 2022



JOEL NGUGI
JUDGE

