



**Hiribae v Ahmed & another (Miscellaneous Application
E037 of 2024) [2025] KEHC 1567 (KLR) (17 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1567 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS APPLICATION E037 OF 2024**

G MUTAI, J

FEBRUARY 17, 2025

BETWEEN

AMINA MISUMO HIRIBAE APPELLANT

AND

HASSAN ABDALLA AHMED 1ST RESPONDENT

SALAMA ABDALLA AHMED 2ND RESPONDENT

RULING

1. Before the court is a notice of motion application dated 9th October 2024 vide which an applicant seeks the following orders: -
 - a. Spent;
 - b. That there be a stay of proceedings in the Kadhi's Court at Mombasa in Succession Cause No E032 of 2024 pending the hearing and determination of this application interpartes;
 - c. Leave be granted to the applicant to file an appeal out of time against the ruling and order of Hon Kadhi Mr Abdulaziz on 24th August 2024;
 - d. Costs be in the cause.
2. The application is supported by the annexed affidavit of the applicant sworn on 9th October 2024. She averred that vide a decision delivered on 24th August 2024, the Honourable Kadhi dismissed her preliminary objection dated 1st August 2024. She deposed that the ruling had actually been slated for 3rd October 2024 and that its delivery before the due date denied her a chance to be present during the ruling. In her view, the delay in filing the appeal was, therefore, occasioned by factors beyond her control.



3. She deposed that unless the proceedings before the court below were stayed, she would suffer irreparable harm and injury as her appeal would be rendered nugatory. The applicant averred that her appeal was arguable. In support of her contention to that effect she annexed the draft memorandum of appeal.
4. The application was opposed by the respondents through their counsel, A A Mazrui and Co. Advocates. The respondents filed grounds of opposition vide which they stated that the applicant had failed to provide a reason for the delay in filing the notice of appeal. It was urged that although the ruling is dated 24th August 2024, it was actually delivered on 25th September 2024 and was uploaded into the CTS platform on the same day. This was explained to the applicant on 3rd October 2024 when the matter was mentioned. It was urged that allowing the application would prejudice other beneficiaries of the estate. Further, allowing the application for a stay of proceedings would permit the applicant to continue intermeddling with the estate of the deceased. Lastly, the respondents averred that the applicant had no arguable appeal.
5. The application was canvassed by way of written submissions as per the orders of this court dated 5th November 2024.
6. The submissions of the applicant are dated 20th December 2024. The applicant identified four issues coming up for determination as being: -
 - a. Whether the proceedings before the Kadhi's Court should be stayed;
 - b. Whether the applicant would suffer irreparable harm if the stay of proceedings was not granted;
 - c. Whether the applicant should be denied leave to appeal out of time; and
 - d. Whether the application is arguable.
7. Regarding the first question, it was submitted that if the Hon Kadhi proceeded with the hearing of the matter before him, there would be "duplicated orders, potential conflict in decision and waste of judicial resources and time."
8. On the second question, it was urged that the applicant would suffer irreparable harm if the hearing proceeded as she had not submitted to the jurisdiction of Kadhi's court.
9. In support of the latter 2 issues, it was urged that the appeal is arguable and raises very triable issues. The delay was not ordinate, nor deliberate, nor was it caused by the applicant, and she acted promptly upon being made aware. Counsel submitted that the ruling was delivered in her absence.
10. Counsel, therefore, prayed that the application be allowed.
11. The respondents opposed the application. Their submissions are dated 26th January 2025.
12. The respondents submitted that application for stay pending appeal made pursuant to Order 42 Rule 6 of the Civil Procedure Rules, and for a party to succeed, certain tests must be met.
13. It was submitted that an order for stay of proceedings was an exceptional remedy that could only be granted in the clearest of cases. To support this contention counsel relied on the decision of J Ngugi, J (as he then was) in Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR).
14. It was urged that what the applicant was doing was forum shopping for a court that would rule favourably to her and that the said kind of conduct ought to be nipped in the bud.



15. Counsel for the respondents submitted that no explanation had been given for the delay in filing the appeal.
16. It was, therefore, prayed that the application be dismissed.
17. I have considered the application, the supporting affidavit, the annexures thereto, the grounds of opposition as well as the written submissions of the parties.
18. I have considered the prayers sought by the applicant in her application. It is clear to me that prayers 1 and 2 of the said application are temporary in nature and were spent the moment this matter was heard interpartes. The prayer for a stay of proceedings is, in fact, expressed as being for a stay of proceedings... pending the hearing and determination of this application interpartes.
19. It is clear to me that once the court heard the application there was nothing more for it to do in regard to those two prayers. There is no prayer for stay pending appeal. That being the case, I am unable to grant the applicant what she didn't ask for. Parties are bound by their pleadings and or applications.
20. My understanding of the remedy of a stay of proceedings is that it is an exceptional remedy that should be sparingly granted. Stay of proceedings delays hearing and conclusion of cases, is a cog in the wheels of justice and creates backlogs. This is worse where the trigger for the stay of proceedings application is an interlocutory decision of the court below. Courts ought as much as possible to have all issues heard in a single appeal rather than several atomized appeals arising from the same matter. I agree with what J Ngugi J stated in *Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR)* to wit that: -

“As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate’s Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), “grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.”

21. Ringera, J (as he then was) was of a similar view In his holding in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*. In the said matter he stated 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.”

22. On the prayer for leave to appeal, I note that the ruling at the Honourable Kadhi was uploaded to the CTS platform on 25th September 2024. It has been stated by the counsel for the respondents that the



decision was delivered on 24th September 2024 and that the court explained the circumstances under which it was delivered on 3rd October 2024.

23. Section 79G of the *Civil Procedure Act* states 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, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

24. The test applicable when a court is determining whether or not to grant leave to appeal out of time has been the subject of many decisions of our courts. In the case of *Paul Musili Wambua v Attorney General & 2 Others* [2015]eKLR, the Court of Appeal stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

25. My understanding of the foregoing provision of statute and decided cases is that the applicant must explain to the court the reasons for the delay so as to convince it that it would be fair and just to grant leave. As that been done in this case?

26. I am persuaded that the respondents' explanation of the events is reasonable. At the time the instant application was filed there was still time for the applicant to file the appeal. Since, however, the applicant was labouring under an innocent misapprehension of facts, it is my view that the prayer for leave to appeal out of time ought to be issued since the time within which an appeal may be filed against the impugned decision of the Kadhi has lapsed.

27. The application has, therefore, succeeded in part and also failed in part.

28. Under the circumstances, the orders that commend themselves to me and which are hereby issued are the following: -

- a. Stay of proceedings of the court below is denied;
- b. Leave to appeal out of time is granted. The applicant to file and serve the appeal within 14 days of the date hereof failing which the leave hereby granted shall lapse.

29. As this case arose out of a dispute between family members, each party shall bear his/her/their own costs.

30. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 17TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-



No appearance for the Applicant;
Mr Salim, for the Respondent; and
Arthur – Court Assistant.

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