



**Tuwei & another v Maritim & 2 others (Family Appeal E003 of 2023)  
[2025] KEHC 2015 (KLR) (21 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2015 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
FAMILY APPEAL E003 OF 2023  
JRA WANANDA, J  
FEBRUARY 21, 2025**

**BETWEEN**

**SUBETA TUWEI ..... 1<sup>ST</sup> APPELLANT**

**MARITIM KASSIM ..... 2<sup>ND</sup> APPELLANT**

**AND**

**IDI AGUI MARITIM ..... 1<sup>ST</sup> RESPONDENT**

**ABDUL TUWEI ..... 2<sup>ND</sup> RESPONDENT**

**MOHAMED KIPKEMEI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Application before this Court is the Notice of Motion dated 7/12/2023 filed by the Appellants through Messrs Nyekwei & Co. Advocates. The orders sought are as follows:
  - a. [.....] Spent
  - b. [.....] Spent
  - c. There be stay of proceedings and or further actions by the Respondents in Eldoret KC Succ Cause No. E006 of 2022 pending and determination of the Appeal herein.
  - d. Costs be provided for.
2. The Application is based on the grounds set out on the face thereof and is supported by the Affidavit sworn by the 1<sup>st</sup> Appellant, Subeta Tuwei.
3. In the Affidavit, the 1<sup>st</sup> Appellant deponed that the Appellants lodged the Application dated 23/11/2022 in Eldoret Kadhi's Court Succession Cause No. E006 of 2022 seeking orders, inter-alia, that the Eldoret Principal Kadhi Hon. Khamis Ramadhani recuses himself from handing the matter on



the ground of conflict of interest and the same be placed before another Kadhi, that the Grant of Letters of Administration Intestate in the Estate of the late Asadi Kiberenge Tuwei issued on 12/10/2022 to the Respondents, and confirmed on 17/10/2022, be revoked and or nullified, and that consequential actions or steps, if any, undertaken by the Respondents be declared a nullity. He deponed that the issue of recusal of the Hon. Kadhi was dealt with as a Preliminary issue on 28/02/2023, upon which the Hon. Kadhi declined to recuse himself, and that aggrieved by the refusal of the Hon. Kadhi to recuse himself, they lodged this Appeal, which is pending.

4. She deponed further that despite this pendency of the Appeal, the Respondents lodged before the Hon. Kadhi, the Application dated 17/03/2023, under Certificate of Urgency, which the Hon. Kadhi proceeded to grant ex-parte without waiting for inter-partes hearing, and directed the Application to be served for inter-partes hearing after having already granted the orders sought by the Respondents, that there is now nothing left to be heard inter-partes on the Application as the Hon. Kadhi had already granted the orders. She deponed that, nonetheless, the Appellants' filed a response to the Application as a mere formality, and that the Respondents have continued to prosecute further proceedings and/or actions in the said Cause before the Hon. Kadhi despite pendency of the instant Appeal. She contended further that the Appellants are apprehensive that any further proceedings and/or actions by the Respondents before the Hon. Kadhi will be prejudicial to their appeal unless an order of stay of proceedings is granted, that the appeal will be rendered nugatory, and that the Respondents are hell-bent on undertaking actions meant to defeat the essence of the appeal. She urged that no prejudice will be suffered by the Respondents if the order is granted.

#### **Replying Affidavit**

5. The Application is opposed by the Respondents vide the Replying Affidavit sworn by the 1<sup>st</sup> Respondent on 25/1/2024, and filed through Messrs Muhatia Pala & Associaes Advocates.
6. In the Affidavit, the 1<sup>st</sup> Respondent deponed that their late father, Asadi Kiberenge Tuwei (deceased), who professed the Islamic faith died intestate on 4/04/2022 leaving behind 4 widows, including the 1<sup>st</sup> Appellant, Subeta Tuwei, together with 14 daughters and 12 sons, that soon after the death and burial of the deceased, a family meeting was held at the family home where all family members were in attendance save for the 1<sup>st</sup> Appellant, Subeta Tuwei, and her 7 children, that in the family meeting, it was unanimously agreed that Abdul Tuwei, Mohammed Kipkemei and Idi Agui Maritim, be appointed as the Administrators of the estate of the deceased. He deponed that pursuant thereto, the personal representatives of the deceased moved the Kadhi's Court and were granted Letters of Administration to the estate and which was later confirmed. He added that the Administrators filed a schedule of distribution of the estate based on the doctrines, dogma and teachings of Islamic faith, in the schedule, all the widows were allocated equal shares of land, the daughters were also allocated equal shares, and so were the sons, in accordance to the Islamic faith, teachings, practices, doctrines and dogma. He urged that at no time did the Kadhi use the purported Will to sub-divide the estate but only adopted the schedule filed, and that the distribution was just, equitable and all beneficiaries were contented, save for the 1<sup>st</sup> Applicant, Subeta Tuwei and her children.
7. He deponed further that indeed the 1<sup>st</sup> Appellant filed an application before the Kadhi's Court objecting to the mode of distribution of the estate citing bias and conflict of interest on the part of the Kadhi and prayed for the Kadhi's recusal, but that despite the Appellant having filed the Objection in the Kadhi's Court and an appeal in this Court, she has not shown any good faith by stating or pointing out the unfairness in the distribution, and neither has she demonstrated how she would like the estate to be distributed amongst the heirs and whether she wants to be an Administrator. According to the Respondents, the Objection is opaque and vague, the allegations by the Appellants of having been



excluded and/or not being served are untrue and blatant lies since they outrightly refused to participate in the family meeting referred to above, and consequently attended all Kadhi's Court sessions save for the last session of 15/05/2023 where they walked out although their Advocate sat throughout the proceedings.

8. He also deponed that the estate mainly consists of two parcels of land, namely, Soy/Kipsangui Plot 5 measuring approximately 70 acres, and Kiplombe/Kuinet Block 2 measuring approximately 30 acres, that the land parcel number Soy/Kipsangui Plot 5 is the homestead of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> widows with their off springs while Kiplombe/Kuinet Block 2 has been home to the Appellant and her children. According to her, the purpose and intent of the Objection filed at the Kadhi's Court and this appeal is that the 1<sup>st</sup> Appellant, wants to inherit the entire Kiplombe/Kuinet Block 2 parcel for herself and her children while disinheriting other heirs of this parcel of land which is extremely prime unlike the Soy/Kipsangui Plot 5.
9. He deponed that the market value per acre for Soy/Kipsangui Plot 5 and for Kiplombe/Kuinet Block 2 is approximately Kshs 1,400,000/- and Kshs 8,000,000/-, respectively, that the 1<sup>st</sup> Appellant's intent is to therefore inherit property valued at approximately Kshs 250,000,000/- for herself and her children while the 3 widows and their children, totalling 20 children, inherit property whose value is Kshs 98,000/-. According to him, the mode of distribution was that all widows and sons were to get a piece of both properties, all the daughters were to get a piece of Kiplombe/Kuinet Block 2, in equal shares, and that the Administrators are not opposed to any alteration to the mode of distribution as long as it conforms to the teachings and beliefs of Muslim faith. He deponed that the distribution was done in justly and equitably where all widows and children have been factored in, all beneficiaries are satisfied and contented with the distribution, save for the 1<sup>st</sup> Appellant and her children for reasons best known to themselves, and that the Application is brought in bad faith, is bereft of any cause of action and its purpose is to delay the beneficiaries from enjoying their inheritance, and for the Appellants to continue enjoying the fruits, benefits and profits emanating from the use of the 30 acres parcel of land.

### **Hearing of the Application**

10. It was then agreed, and directed, that the Application be canvassed of by way of written Submissions. Pursuant thereto, the Appellants filed their Submissions dated 2/11/2024, while the Respondents filed the Submissions dated 11/12/2024.

### **Appellants' Submissions**

11. Counsel for the Appellants submitted that the order of stay of proceedings pending Appeal is merited, and that this Court is clothed with inherent jurisdiction and wide powers to stay proceedings when the ends of justice require. He cited the case of Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000. He submitted that it is in the interest of justice for the stay to be granted since the Appeal is against the refusal of the Kadhi to recuse himself due to matters that raise a conflict of interest, that the pros of granting the orders outweigh any cons raised by the Respondents, and that a cursory glance at the Replying Affidavit does not show any cons. According to Counsel, it is patently clear from the Replying Affidavit that other than the history of the matter covering almost the entire Affidavit, there is no serious opposition to the orders sought, and there are no tangible reasons provided by the Respondents as to why the stay should not be granted. He submitted further that the intended appeal is prima facie merited as it is arguable. He cited the case of Stanley Kinyajui v Tony Ketter & 5 Others [2013] eKLR and also the case of University of Nairobi V Ricatti Business of East Africa [2020] eKLR. According to him, the grounds raised in the Appeal raise bona-fide grounds and the appeal should not therefore be rendered nugatory.



## Respondents' Submissions

12. On his part, Counsel for the Respondents submitted that the issue of stay of proceedings in Eldoret Kadhi Court Succession Cause No. E006 of 2022 should not arise since the Succession was finally concluded and a Certificate of Grant dated 14/10/2022 issued, thus the Kadhi's Court became functus officio. He cited the case of *Moyale Liner Bus Services v Gachu Ibrahim* [2021] eKLR, and also the case of *Telkom Kenya Limited v John Ochanda* (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR. According to Counsel, the Application is a waste of the Court's precious time and a delaying tactic since the proceedings in the Kadhi's Court were finalized and that what should now be handled is the main appeal as there are no grounds provided by the Appellants to demonstrate that the appeal will be rendered nugatory.

## Determination

13. The issue for determination herein is "whether this Court should grant an order of stay of the Kadhi's Court proceedings pending the hearing and determination of this appeal."
14. When determining an Application seeking stay of proceedings, the Court is required to exercise its discretion but after due consideration of the merits of the case and the likely effect on the ends of justice. Needless to state, exercise of discretion must be grounded on judicious principles. On this issue, Ringera J in the case of *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000* (supra) held 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 so, 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."

15. Further, the principles to be applied when considering an Application to stay proceedings was reiterated by Hon. F. Gikonyo J in the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited* (2015) eKLR as follows:

"..... 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..."

16. Similarly, *Halsbury's Law of England*, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332 gives guidelines on the threshold to be met in Applications for stay of proceedings as follows:

"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 all 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 appellant for a stay on this ground must show 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 the case.”

17. Further, in the case of *Kenya Wildlife Services v Jane Mutembi* (2019) eKLR, again, F. Gikonyo J, held that:

“stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”

18. In line with the foregoing guidelines, it is generally agreed that in an Application for grant of stay of proceedings, the matters that the Court must satisfy itself upon are the following:

- a. That the applicant has established a prima facie arguable case;
- b. That the application was filed expeditiously; and
- c. That the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

19. On whether the Appellants have established a prima facie arguable case, it is settled that in Applications of this nature, an “arguable appeal” need only raise a single bona fide point worthy of consideration by the Appellate Court and that it need not be one that must necessarily succeed. This was restated by the Court of Appeal in the case of *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015] eKLR). Similarly, in the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR, the Court of Appeal observed that an “arguable” appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court.

20. I have keenly perused the Memorandum of Appeal filed by the Appellants. The Appellants have contended that the Hon. Kadhi ought to have allowed the Application to recuse himself because there was an issue of conflict of interest, as he had witnessed a Will/Declaration whose contents were in consideration in the same matter placed before him for determination, and which he indeed determined, or which at least had some bearing on the issue of distribution of the estate. This, to me, appears to be an arguable point. Further, although it has not been expressly also raised in the Memorandum of Appeal, there also appears to be some merit, prima facie, on the Appellants’ contention that they were left out in the proceedings leading to the distribution of the estate and were never served or notified to participate. There could therefore indeed be a question of possible violation of the Appellants’ right to be heard enshrined under Article 50(1) of *the Constitution*.

21. Although no copy of the impugned Ruling has been attached, analyzing the above grounds, they cannot be referred to as frivolous or insignificant. Of course, whether or not the grounds, and by extension, the Appeal will be successful at the end of the day is not for me to determine at this stage. All I am saying is that the matters cited raise weighty and arguable grounds that merit to be heard on Appeal.



22. On whether the Application was filed expeditiously, although, as aforesaid, no copy of the impugned Ruling has been attached, I note that there is no dispute that the same was delivered on 28/02/2023. This Appeal was then filed on 21/03/2023, about 3 weeks later. For some reason, the Appellants did not immediately also file the Application for stay of proceedings. It was only after the Respondents took steps to implement the decision of the Hon. Kadhi that the Appellants appear to have “woken up from their slumber”. This therefore explains why it was not until 8/12/2023 that the instant Application was filed. While therefore on the face thereof, it may appear to be an inordinate delay for the Appellant to have filed the instant Application 10 months after the decision challenged had been delivered, the Appellants are saved by the fact that they had filed the Appeal 3 weeks after the decision.
23. For the above reason, the Appellants also successfully surmount, albeit by the “skin of their teeth”, the “expeditious” action” hurdle.
24. The third consideration is whether the Appellants have established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders.
25. The Respondents have argued that the Kadhi’s Court having distributed the estate, there is nothing left to stay in the proceedings. While this argument may sound attractive and maybe, perhaps, what the Appellants should have sought was stay of execution, it is relevant to note that, in my understanding, what is being challenged, vide this Appeal, is the Ruling on the Preliminary issue, before the prayer for Revocation of the Grant was heard and determined. My understanding therefore is that the prayer for Revocation of Grant is yet to be heard. I believe then, that this includes part of the proceedings still pending for hearing.
26. Upon holistic and careful consideration of the matter and applying the principles of law set out above, I am inclined to agree with the Appellants’ argument that implementation of the order of distribution of properties (transmission of the estate to the beneficiaries) whether through implementation at the Lands office or by any consequential orders by the Kadhi’s Court upon consequential proceedings, should not take place before determination of the Appeal pending before this Court is heard and determined. I agree that it is the outcome of the Appeal that would determine the discourse of the proceedings.
27. I do not find any prejudice, and the Respondents have not demonstrated any, in staying further proceedings before the Kadhi’s Court to avoid a scenario where if the Appeal is allowed after consequential orders are issued by the Kadhi’s Court, it may become burdensome, costly and cumbersome to undo that which will have already been implemented. Indeed, there is the allegation that the Kadhi’s Court has already subsequently dealt with one such consequential Application dated 17/03/2023 and granted it ex parte. I therefore find that it is safer to preserve the estate by suspending further proceedings before the Kadhi’s Court to await determination of the appeal.

### **Final Orders:**

28. In the end, the Appellant’s Notice of Motion dated 7/12/2023 is hereby allowed as follows:
  - i. An order of stay of further proceedings in Eldoret Kadhi’s Court Succession Cause No. E006 of 2022 is hereby granted, pending the hearing and determination of this Appeal.
  - ii. For purposes of preparing this Appeal for admission and for directions, I now refer this file to the High Court Deputy Registrar to follow up on the typing of the proceedings of the Kadhi’s Court file and subsequent forwarding of the file to this Court.
  - iii. Costs of this Application shall be in the Cause.



**DELIVERED, DATED AND SIGNED AT ELDORET THIS 21<sup>ST</sup> DAY OF FEBRUARY 2025**

**WANANDA J.R. ANURO**

**JUDGE**

Delivered in the presence of:

Mr. Esikuri for the Appellants

N/A for the Respondents

Court Assistant: Brian Kimathi

