



**In re Estate of Abdulkarim Chatur Popat also known as Abdulkarim Chaturbhai (Deceased)
(Succession Cause 346 of 2013) [2024] KEHC 1245 (KLR) (2 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 346 OF 2013**

G MUTAI, J

FEBRUARY 2, 2024

**IN THE MATTER OF THE ESTATE OF ABDULKARIM CHATUR
POPAT ALSO KNOWN AS ABDULKARIM CHATURBHAI (DECEASED)**

BETWEEN

AZIM ABDULKARIM CHATUR POPAT APPLICANT

AND

ADIL ABDULKARIM CHATUR POPAT 1ST RESPONDENT

GULZAR ABDULKARIM CHATUR POPAT 2ND RESPONDENT

KARIM SAIFUDDIN ANJARWALLA 3RD RESPONDENT

AND

ALNASHIR ABDULKARIM CHATUR POPAT BENEFICIARY

RULING

1. The application before me is the Notice of Motion dated 20th November 2023. The same was filed by the 4th Co-Executor/Applicant, Azim Abdulkarim Chatur Popat (hereafter to as “Azim”). It is brought under order 51 of the *Civil Procedure Rules*, Section 3A of the *Civil Procedure Act* and Articles 48 and 50 of the *Constitution* of Kenya. *Vide* the said application, Azim seeks the following orders:-
 1. That this honourable court be pleased to stay the proceedings herein pending the hearing and determination of the Appeal filed by the Applicant herein; and
 2. That the costs of this application be provided for;
2. The grounds upon which the application is based are set out in the body of the Motion. The application is supported by the Supporting Affidavit sworn by Azim on 17th November 2023 in Vernacular, British Colombia, Canada. Azim contends that this Court’s ruling of 27th October 2023



dismissing his application dated 21st September 2023 for reasonable provision and provision accounts will lead to a violation of his rights under Articles 48 and 50(1) of the Constitution of Kenya. Being so aggrieved, he intends to file an appeal against the said decision and has filed a Notice of Appeal.

3. In Azim's view, this Court's finding, in the impugned ruling, *inter alia*, that the previous application was settled when the parties entered into a consent which fully and finally resolved whatever disputes the parties had against each other, operates to bar him from participating in the subsequent proceedings in this case, contrary to Article 50(1) of the Constitution of Kenya. He averred that, as this Court proceeded to fix the summons for Confirmation of Grant for hearing on 24th November 2023, he would, on balance of equity, be certain to suffer irreparable harm should the hearing be proposed without his participation. He thus urged that it would be in the interest of justice if the application was allowed as prayed.
4. Azim took umbrage with paragraph 35 of my said ruling. In the said ruling, I stated:-

“The previous application was settled when the parties entered into a consent. That consent fully and finally resolved whatever disputes the parties had against each other.”
5. He contended that the consent referred to was procured through coercion and duress. He averred that he cannot be heard by the London Court of International Arbitration (LCIA) as contemplated by the settlement Deed adopted by the Court, as he cannot afford the costs imposed on him by LCIA “as a direct consequence of actions of Adil to ensure I have no access to funds”. He was apprehensive that if the grant of probate was confirmed, the estate would be distributed without his having been afforded a fair trial, and even if his appeal succeeded at the Court of Appeal, the decision would have been rendered “nugatory, moot and academic”.
6. The application is opposed by Alnashir Abdulkarim Chatur Popat (hereafter “Alnashir”), the Beneficiary/4th Respondent. Alnashir, through his counsels, filed the Grounds of Opposition dated 28th November 2023, in which he averred that allowing the application would impinge on the Respondent's rights to access justice, to be heard without delay and to a fair trial. It was stated that the application had no merit and should be disallowed.
7. Alnashir Abdulkarim Chatur Popat deposed an affidavit sworn on 28th November, 2023. In the main, Alnashir deposed that Azim had not met the threshold for the grant of the orders he was seeking.
8. The 1st, 2nd and 3rd Co-Executors/Respondents opposed the application by filing Grounds of Opposition dated 29th November, 2023. In the said grounds, they urged firstly that a stay of proceedings be sparingly granted as it seriously interferes with the right to access justice as well as the right to administrative action that is fair and expeditious. Secondly, that stay of proceedings being an equitable remedy, the conduct of the Applicant was relevant. In the circumstances of this matter, it was averred that 2 Courts had found the Applicant to have abused the process of Court. Thirdly, no exceptional circumstances had been demonstrated that would warrant the issuance of the orders sought. There was nothing barring the applicant from participating in subsequent proceedings. Fourthly Azim had not demonstrated that he would suffer substantial loss if stay of proceedings is not granted. Fifthly the application lacks merit and is a grave abuse of the Court's time and ought to be dismissed with costs to the Respondents.
9. The Notice of Motion dated 20th November 2023 was heard on 7th December 2023.



Submissions of Azim’s Counsel

10. Mr. Tom Macharia, learned counsel for the Applicant, submitted that the test applicable in respect of applications for a stay of proceedings is whether there is an arguable appeal, whether the appeal would be rendered nugatory if the stay is not granted and the balance of convenience.
11. Counsel submitted that the appeal was arguable. The Court erred when it found that all issues between the applicant and other beneficiaries had been fully and finally determined. He averred that his client had been consistent that the consent was obtained through coercion. His referral of the dispute to LCIA was struck off as he couldn’t afford the security for costs. He urged that the ruling of this Court had made it impossible for him to assert his rights, and as a result, his rights under Articles 48 and 50 of the Constitution had been infringed.
12. Mr. Macharia stated that the Court fixed a date for the hearing of the Summons for Confirmation of Grant. Once the grant was confirmed, the estate would be distributed. Distribution of the estate would be impossible to undo. He submitted that the grant in this case had been set aside twice over procedural grounds.
13. Counsel urged that the right to a fair trial was sacrosanct and superseded any inconvenience a party might suffer. He submitted that Alnashir had previously filed a similar application. In the words of his counsel, what was sauce for the gander is also sauce for the goose.
14. Counsel thus prayed for a stay of proceedings. He submitted that if the application was allowed he would ensure that the appeal was heard expeditiously.

Submissions of Alnashir’s Counsel

15. Mr. Regeeru, SC, counsel for Alnashir, submitted that there is an urgency in this matter. the matriarch of the family, Gulzar Abdulkarim Popat, is 91 years old. He urged that the application is frivolous and has no merit. Azim hadn’t demonstrated that he would suffer a substantial loss. The applicant had also taken too long to file the application. Counsel denied that paragraph 35 of the impugned ruling extinguished Azim’s right to a fair trial.
16. The Court was referred to the case of In Re Estate of Kevin John Ombajo (Deceased) (Succession Cause 555 of 2018) [2023] KEHC 18583 (KLR) (Family) (2 June 2023) (Ruling) for the proposition that a stay of proceedings is a grave interruption of trial that should be exercised sparingly.
17. Senior counsel submitted that there was no pending application before this Court barring the confirmation of Grant. He, therefore, urged that I dismiss the application with costs.

Submissions of the 1st, 2nd and 3rd Co-Executors/Respondents

18. Mr. Mohamed Karega, learned counsel for the 1st, 2nd and 3rd Co-Executors/Respondents also opposed the application. Counsel submitted that whether or not there had been coercion was not an arguable point. Such an issue would, as M. Thande, J ruled, only be raised at LCIA. Regarding the proceedings before the LCIA, Mr. Karega that same was not also arguable. Section 10 of the Arbitration Act limited the court’s interference in arbitral proceedings.
19. Mr. Karega also referred to Court of Appeal decisions in Meta Platforms, Inc & another v Motaung & another; Kenya National Humans Rights Equality Commission & 9 others (Interested Parties) (Civil Appeal (Application) E232 of 2023) [2023] KECA 996 (KLR) and Turbo Highway Eldoret Ltd versus



Dominic Njenga Muniu [2020]eKLR for the proposition that stay of proceedings is a discretionary remedy that Courts rarely grant.

Response by Azim's Counsel

20. Mr Macharia submitted that there was no requirement for a Memorandum of Appeal to be filed before a party could apply for a stay of proceedings.
21. Counsel submitted that the delay in filing the application was not inordinate, and was caused by the delay in obtaining the physical copy of the Court's impugned ruling.
22. Mr Macharia submitted that it would be prudent for the Court to take its time with the matter as the grant had been revoked 2 times.
23. Counsel urged that the rights under Articles 48 and 50 of the *Constitution* superseded the provisions of Section 10 of the *Arbitration Act*. He submitted that the right to a fair trial was one of the few rights in the Bills of Rights, which could not be derogated from.
24. The counsel thus beseeched this Court to allow the application.

Analysis and Determination

25. It is now settled that a stay of proceedings is a discretionary remedy that causes serious, grave and fundamental interruption of the conduct of proceedings by parties. That being so, Courts should exercise the said discretion sparingly and only in exceptional circumstances so as to avoid delays in the disposal of Court cases.
26. Stay proceedings will not be granted if the proceedings are shown to be vexatious, frivolous or manifestly groundless. The Applicant must demonstrate that he will suffer substantial loss unless a stay is granted.
27. In *William Odhiambo Ramogi & 2 Others versus the Attorney General & 3 Others* [2019]eKLR, it was held that for an applicant to be granted a stay of proceedings, the following factors be demonstrated:-
 1. There is an appeal pending before the higher court;
 2. Where 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 allowing for such an application, the applicant should explain why stay has not been sought in the higher court;
 3. The appeal raises substantial questions to be determined or is otherwise arguable;
 4. The appeal would be rendered nugatory if the stay of proceedings is not granted;
 5. There are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up in a single appeal; and
 6. The application for stay was filed expeditiously.
28. The issues in this matter have been extensively litigated. In particular, the settlement Deed has been the subject of several decisions. In the circumstances, this Court is not convinced that an appeal founded on the Settlement Deed is arguable.
29. In the view of this Court, Azim misapprehended the ruling delivered on 27th October 2023. This is evident from the ruling, in particular the part where the Court found that the issues of accounts was sub judice as the sermons for confirmation of Grant was due for hearing.



30. Given that the matter was due for confirmation of Grant, which would settle the matter once and for all, I do not think that it would be prudent to allow the application. Allowing the application would clog up to the Court of Appeal with a multiplicity of interlocutory appeals. It would be better, in my view, to proceed with the Summons for Confirmation of Grant so that any party aggrieved can appeal, in one appeal, that can be taken up once by the Court of Appeal and determined with finality. That would, in my view, be the best use of judicial time.

31. Joel Ngugi, J (as he then was) in *Turbo Highway Eldoret Ltd versus Dominic Njenga Muniu* [2020]eKLR stated as follows:-

“... hence the propriety of granting stay of proceedings pending an appeal over an interlocutory matter is decided on the facts of each case and with due regard to the salutary general rule that appeals are not entertained piecemeal.”

32. Applying the above principles, I am not persuaded that the application has met the threshold for a grant of stay pending appeal. The application dated 20th November 2023 is dismissed with no orders as to costs.

Orders accordingly.

DATED AND SIGNED THIS 2ND DAY OF FEBRUARY 2024 AT MOMBASA VIA MICROSOFT TEAMS.

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GREGORY MUTAI

JUDGE

In the presence of: -

Ms. Akinyi holding brief for Mr. Macharia for Mr. Azim Popat;

Mr. Mohamed Karega for the 1st, 2nd and 3rd Co-Executor/Respondent; and

Mr. Regeru, SC, and Ms. Amuka for Alnashir Popat.

