



SJC v Republic (Civil Case E009 of 2022) [2024] KEHC 7016 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7016 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE E009 OF 2022
RN NYAKUNDI, J
JUNE 13, 2024**

BETWEEN

SJC APPLICANT

AND

REPUBLIC RESPONDENT

RULING

1. I have been called to determine an application dated 5th February, 2024. The applicant is seeking the following orders from this court:
 - a. Spent
 - b. That there be stay of proceedings in Eldoret Chief Magistrate Children Case No. E161 of 2021 pending the hearing and determination of this application.
 - c. That the honorable court do call for Eldoret Chief Magistrate Children Case No. E 161 of 2021 and Divorce Cause N. E130 of 2021 for purposes of giving directions
 - d. That this court be pleased to allow the Respondent’s Application dated 20th July, 2022 in terms of prayer number (4) to wit: -

“A mutual real estate agent be appointed to collect rent and manage all the rental income emanating from L.R. No. Uasin Gishu/Kimumu Settlement Scheme/4xx4 the said fund once collected be deposited in an interest earning account in the joint names of counsels on record pending the hearing of the main suit.”
 - e. That upon the grant of prayer (d) above, the court be pleased to order that the payment of the minors’ school fees related needs be paid from the aforesaid account pending the hearing and determination of this cause.
 - f. That the costs of this application be provided for.



2. The application was premised on eighteen (18) grounds together with an affidavit in support sworn by MB, the applicant. The said grounds are as hereunder:
- i. That the Plaintiff/Respondent filed three simultaneous suits against the Applicant/Defendant being Eldoret Chief Magistrate's Children Case No. E161 of 2021, Divorce Cause No. E130 of 2021 and the current suit.
 - ii. That in the Divorce cause, she obtained *ex parte* restraining order restraining the Applicant/Defendant from accessing his matrimonial home.
 - iii. That the Plaintiff/respondent vide Eldoret Chief Magistrate's Cort Children Case No. E161 of 2021 obtained an order requiring Applicant/Defendant to pay school fees for the minors and other school related items.
 - iv. That the Plaintiff/Respondent in the current suit filed an application dated 20th July, 2022 which she sought among other prayers that the Defendant/Applicant be restrained from interfering with the quiet use and enjoyment of the rental premises constructed on L.R. No. Uasin Gishu/Kimumu Settlement Scheme/4xx4 and that in the alternative a mutual real estate agent be appointed to collect rent and manage all the rental income emanating therefrom and the said funds once collected be deposited in an interest earning account in joint names of the parties herein and/or their counsels pending the hearing and determination of the main suit.
 - v. That when the Plaintiff/Respondent's application dated 20th July, 2022 came up for hearing, this court gave an order on 13th December, 2022 that the Deputy Registrar to visit L.R. No. Uasin Gishu/Kimumu Settlement Scheme/4xx4 and LR NO. 779/5X1 and prepare a report to confirm the status of the property, identify the landlord and if there are tenants, they confirm as to where rent is payable.
 - vi. That the Deputy registrar visited the aforesaid properties on 7th September, 2023 in the presence of both counsels and the parties and prepared the report dated 7th September, 2023.
 - vii. That the Plaintiff and defendant are joint landlords of the property known as L.R. No. Uasin Gishu/Kimumu Settlement Scheme/4xx4 which comprises of fifty two (52) bedsitter at a rent of Kshs. 5,000/= per bedsitter hence Kshs. 260,000/= per month.
 - viii. That before the current dispute all the rental income was being deposited in Co-operative Bank of Kenya account number 0114XXXXXXXX400 in the joint names of the Plaintiff and the Defendant/Applicant.
 - ix. That currently the Plaintiff/Respondent is forcefully collecting the rental proceeds of Kshs. 260,000/= per month from the defendant's premises.
 - x. That without disclosing all these facts in Children's case No. E161 of 2021 the Plaintiff obtained Notice to show cause against the Defendant/Applicant for payment of first term's fees of Kshs. 160,096/= in respect of the minors therein yet she is collecting rent from the defendant's premises worth Kshs. 260,000/= per month.
 - xi. That the property known as L.R. No. Uasin Gishu/Kimumu Settlement Scheme/4xx4 is registered in the name of the Defendant/Applicant and the Plaintiff/Respondent despite the same having acquired and developed by the defendant/applicant during his active days as an athlete.



- xii. That the Applicant/Defendant solely developed the property known as Uasin Gishu/Kimumu Settlement Scheme/4xx4.
- xiii. That the Applicant/Defendant received the occupation permit in respect in respect of the aforesaid property on 15/6/2015 in his name and the Applicant/Defendant also applied for water from ELDOWAS in his name.
4. In response to the application, the Respondent filed a replying affidavit on 13th February, 2024. The affidavit was sworn by Sharon Jemutai Cherop, the Respondent.
5. She stated that the present application is unfounded, lacks merit, is misconceived, frivolous and vexatious and should be struck out and/or dismissed with costs. According to the respondent, the proceedings the applicant seeks to stay in Children’s case No. E161 of 2021 relates to the fundamental rights of the children which takes precedence as to the proprietary rights of the parties herein.
6. She argued that the application herein intends to frustrate the rights of the children as provided in section 4(3) of the *Children’s Act* and Article 53(2) of the *Constitution* by intertwining the proprietary rights of the parties herein with the interest of the minors.
7. That the applicant herein is calculatedly intending to defeat the orders issued by the children’s court on 18th March, 2022 which ordered the Applicant to pay fees for the 3 minors. That the applicant has never paid fees since 2022 as ordered by the children’s court and thus seeking to delay or frustrate the Notice to show cause issued against him by the Respondent.
8. She deponed that the current suit is a matrimonial cause between the Applicant and herself independent of their children and the Applicant should therefore not intertwine the same.
9. It was further averred by the Respondent that the prayer regarding L.R. No. Uasin Gishu/Kimumu Settlement Scheme/4xx4 forms substantial part of the matrimonial cause and any orders regarding the same shall be premature as parties need to be heard as to determine ownership and the contribution of the said property and the developments thereto.
9. The parties filed rival submissions, which I have considered in coming up to determination.
10. It was submitted for the Applicant that the amount collected from their rental properties in L.R. No. Uasin Gishu/Kimumu Settlement Scheme/4xx4 should be deposited in a joint account in the names of both advocates on record and that the school fees be paid from that account pending determination of this cause.
11. The respondent on the other hand made her submissions in three limbs. First, as to whether the application to stay relates to the fundamental rights and the best interests of the children, it was counsel’s submission that staying Children case No. E161/2021 is a clear violation of the minors’ basic rights and as such the application should be dismissed.
11. Secondly, it was the respondent’s submission that the current suit is a matrimonial one between the parties independent of the minors and intertwining the proprietary rights and the children rights is improper as it is against the principles in consideration of the best interest of the child. The respondent submitted that the rights of the children should take precedence as to the proprietary rights of the parties.
12. Finally, it was submitted for the respondent that the current application is a clear delay tactic that the applicant seeks to defeat the orders issued by the children’s court. The Respondent therefore prayed that the application be dismissed.



The Law, Analysis & Determination

13. Having considered the application and the rival submissions, I am of the considered view that the main issue for determination is whether this court can stay the proceedings in Eldoret Children Case No. E161 of 2021.

14. The *Halsbury's Law of England* 4th Edition Vol. 37 pages 330 and 332 states that;

“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 proceeding 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 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 the case.”

15. In the case of *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR, 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 proceeding is high and stringent”.

16. Further, in the persuasive authority in *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: -

“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”.

17. I am at a loss as to why the proceedings in a children’s matter should be stayed. In any event, such a prayer in my view should be granted by the trial court in the said cause.



18. The matter the applicant wishes to stay concerns children. The Court is mindful of the provisions of {the Constitution of Kenya, 2010 and of the Children Act which require the Court to give paramount importance to the best interest of the child. Article 53(2) of {the Constitution provides:

“ A child’s best interests are of paramount importance in every matter concerning the child.”

19. The Children Act on the other hand provides at Section 4(3) that:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

20. The focus therefore should be on the interests of a child. The effect of staying the proceedings is that the matter will not be determined expeditiously and therefore infringe on the rights of the children. In my opinion, the applicant herein will not be prejudiced if the proceedings in the children cause are not stayed.

21. In the end, and in advancing the interests of the children herein, the application dated 5th February, 2024 is allowed in terms of prayer (d) and (e). The prayer for stay of Eldoret Chief Magistrate Children Case No. E161 of 2021 is hereby denied.

22. The costs shall be in the cause.

SIGNED, DATED AND DELIVERED AT ELDORET THIS 13TH DAY OF JUNE 2024.

In the Presence of

Mengich for the Plaintiff

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R. NYAKUNDI

JUDGE

