



Gituma Otieno & Company Advocates v Nderito (Sued as the Adminstratix of the Estate of the Late Elizabeth Wariara Nderito (Deceased)) (Miscellaneous Case E124 of 2023) [2024] KEHC 11636 (KLR) (Family) (20 September 2024) (Ruling)

Neutral citation: [2024] KEHC 11636 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
FAMILY
MISCELLANEOUS CASE E124 OF 2023
PM NYAUNDI, J
SEPTEMBER 20, 2024**

BETWEEN

GITUMA OTIENO & COMPANY ADVOCATES APPLICANT

AND

**ANGELA WAMBUI NDERITO RESPONDENT
SUED AS THE ADMINSTRATIX OF THE ESTATE OF THE LATE ELIZABETH
WARIARA NDERITO (DECEASED)**

RULING

1. This ruling relates to Summons dated 13th December 2023 presented under Rule 73 of the Probate and Administration Rules, in which the Applicant (Angela Wambui Nderito) sought the following orders
 1. Spent
 2. Spent
 3. Spent
 4. Pending the hearing and determination of the Respondent's intended appeal, there be a stay of proceedings in Misc. Application No. *E109 of 2023* Gituma Otieno & Co Advocates v Angela Wambui Nderito. For the avoidance of doubt the taxation of the applicant's bill of costs dated 26th January 2023 be stayed pending the hearing and determination of the respondent's intended appeal.
 5. The costs of this application be provided for.



2. The application is based on the Grounds as set out on the face of the application. and supported by the Affidavit of the Applicant sworn on even date,
3. The Application is opposed by Counsel who has filed a preliminary Objection, Grounds of Opposition and Replying affidavit.
4. The Court directed that the Preliminary Objection and application be heard contemporaneously and directed that parties file their respective submissions.
5. Vide Notice of Preliminary Objection dated 15th January 2024, the Respondent contends that
 1. The Court lacks jurisdiction to entertain the respondent's certificate of urgency dated 15th January 2024, for contravening Order 45, rule 6 of the Civil Procedure Rules, 2020
 2. No substantive orders can issue on a certificate.
6. The Applicant submits that the impugned certificate of urgency dated 15th January 2024 was infact a review of the orders of Hon. Chemitei J who had declined to grant the applicant interim stay of proceeding on 13th December 2023 and instead directed that the matter be placed before this Court for directions. It is the Applicants view that the Court's orders issued on 13th December 2023 could only be varied by a formal application for review presented under Order 45 rule 6 of the Civil Procedure Rules.
7. The Applicant cites the decisions in Owners of the Motor Vessel 'Lillian' v Caltex oil (Kenya) Ltd (1989) and Court of Appeal No. 244of 2010- Phenix of E. A. Assurance Company Limited v S.M. Thiga t/a Newspaper Service [2019] eKLR along with Macfoy v United Africa Co. Ltd [1961] 3AllER, 1169; and argues that in the absence of jurisdiction a court must lay its tools down.
8. It is the Respondents submissions that this Court when considering the impugned certificate sat on appeal on the orders of the Hon. Chemitei J issued on 14th December 2023. Reliance is placed on the decision of the Court of Appeal at Kisumu Civil Appeal No. 281 of 2011 Richard Omari Nyamatura v Daniel Ombachi Mogeni [2015] eKLR and Environment and Land Court of Kenya at Nakuru ELC No. 29 of 2019, Jacqueline Mach Damon & Another v High George Cholmondeley 5th Baron & 5 Others [2022] eKLR
9. It is argued that the error cannot be saved by Rule 73 of the Probate and Administration Rules as the actions of the Court contravened the respondent's rights to a fair trial as articulated under Article 50 (1) of the Constitution of Kenya.
10. The respondent contends that in any event the application dated 13th December 2023 is without merit and should be dismissed as the applicant has not met the threshold for the issuance of an order of stay of proceedings pending appeal. Reference is made to the decisions in Kenya Power and Lighting Company Limited vs Esther Wanjiru Wokabi [2014] eKLR and Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000.
11. The Respondent further argues that there is no basis upon which to grant the orders sought and relies on the decisions in Devani & 4 others V. Joseph Ngindari & 3 Others CA No. NAI 136 of 2004 and John Mbuu Muthoni & another Vs Ruth Muthoni Kariuki [2017] eKLR.
12. It is the respondent's submission that granting of stay of proceedings has the effect reviving the applicant's case, further ordering a matter for retaxation is not an order capable of execution and thirdly the court is seating on an appeal on its decision. It is further submitted that the application does not meet the threshold as the applicant has not demonstrated that they have an arguable appeal and further



there was delay in presenting the application. It is also submitted that it is not in the interests of justice to grant the orders sought.

13. The Respondent argues categorically that no basis has been laid for a stay pending appeal and refers to the decision of High Court at Malindi Miscellaneous Application *No. 14 of 2020* – *Sunsand Dunes Limited v. Raiya Construction Limited* [2021] eKLR and *Kenya Shell Ltd v Kibiru Anor C. A No 97 of 1986*
14. It is argued that this Court is *functus officio* post the Court granting leave to appeal and that the Applicant should seek any stay before the Court of Appeal and reliance of placed on the decision in *Akithii Ranching (Director Agricultural) Co. Ltd vs District Land Adjudication & Settlement Officer- Tigania District & 2 Others* [2014] eKLR and High Court of Kenya at Mombasa Civil Appeal No. 189 of 2019 Civil Appeal No. 189 of 2019 *John Gilbert Ouma v Kenya Ferry Services Limited* [2012] eKLR in which the Court cited the Supreme Court of Kenya decision in *Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others*[2013] eKLR.
15. Finally, the Respondent relies on the decision in *Richard Omari Nyamatura v Daniel Ombach Mogeni* [2015] eKLR for the proposition that the Applicant having moved to the Court of Appeal the doors of this Court are closed to him and that the Application is therefore for dismissal.
16. In response to the Preliminary Objection the Applicant submits that the same is based on a misapprehension on the part of the Respondent on the law and the proceedings before Court. It is submitted that on 15th January 2024 the Court was not sitting to review the orders granted on 13th December 2023 by Hon. Chemitei J. The applicant further argues that the orders of 15th January 2024 can only be vacated by an application to set aside the same and that at this stage the attempt to invalidate the same is overtaken by events.
17. It is submitted that the Court properly exercised its jurisdiction in the circumstances, which jurisdiction is vested by Rule 73 of the Probate and Administration rules. Reliance is placed on the decision in *Republic v Capital Markets Authority Ex parte Sheikh Ahmed* [2020] eKLR. It is submitted that Order 45 rule 6 of the Civil Procedure Rules is not applicable.
18. On the Summons dated 13th December 2023, it is the Applicants submissions that she has met the threshold for the grant of an order of stay of proceedings and reference is made to the decision in *Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri* [2015] eKLR.

Analysis and Determination

19. Having considered the pleadings herein along with the rival submissions, I discern the following as the issues for determination-
 1. Whether the Preliminary objection has merit
 2. And if the answer to 1) above is in the negative; Whether the Applicant has met the threshold for the grant of a stay of proceedings
20. A preliminary objection is a pure point of law which may dispose of a suit at the first instance. Sir Charles Newbold in the oft cited case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd* (1969) EA 696 defined the concept as follows;

“ A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are



correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion.”

21. As I understand it, the preliminary objection challenges the orders of stay granted on 15th January 2024 upon presentation of certificate of urgency. There are multiple challenges to the orders of 15th January 2024. The first is that there was no application be considered as the certificate was not accompanied by an application. The second is that the orders of 15th January 2024 in effect varied the orders of Hon. Chemitei J issued on 14th December 2023 thereby running afoul of Order 45 rule 6 of the Civil Procedure rules.
22. On both tangents I find the Preliminary objection has no merit. The record is clear that on 13th December 2023, Hon Chemitei J referred the matter to this court for directions. He did not consider the application, it is not factually correct therefore to state that there were orders to be varied. In directing that the matter be placed before this Court. Hon Chemitei J. did not give a date. The Applicant therefore correctly moved the Court via certificate of urgency for the hearing of the application dated 13th December 2024. In addition, those orders are now spent, it would be otiose for this court to vacate them as suggested by the Respondent.
23. Having dismissed the Preliminary Objection, I will now consider whether the Applicant has laid sufficient basis for stay of proceedings. Both parties have laid out in detail the legal and jurisprudential basis for an order of stay of proceedings.
24. In MRM aka *RLM v SMRM (Civil Appeal 124 of 2022)* [2024] KEHC 446 (KLR) (25 January 2024) (Ruling) the Court cited with approval the decision in 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.

25. The Court further relied on the decision 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.

26. The Applicant seeks to stay the taxation of the Counsel’s Bill before the taxing master pursuant to orders of this Court. The reason they seek to stay the proceedings is that they intend to lodge an appeal against the judgment and the said appeal is arguable and is likely to succeed. It is contended if the taxation proceeds the Applicant will suffer irreparable damage.



27. The Respondent on the other hand has vociferously challenged the application. The Counsel wishes to proceed with the taxation. It is argued that the Appellant will not suffer any prejudice as she has an opportunity to challenge the bill before the taxing master.
28. Having reminded myself that ‘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 courts 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’ (Halsbury’s Law of England, 4th Edition Vol. 37 page 330)
29. I am persuaded by the reasoning in *Lucy Waithera Kamanga & 2 Others v John Waiganjo Gichuri* (Supra), where the Court observed that, as a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The mere fact that an appeal is arguable alone does not fit the constitutional yardstick used to gauge whether a stay of proceedings should or should not issue. The authorities cited by both parties lay down the circumstances that determine whether stay of proceedings should or should not be imposed.’
30. Aburili J in the decision in *MRM aka RLM v SMRM* cited above, stated

I am persuaded by the above authorities which lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* (2002) eKLR: -“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

31. As in the decision cited above the Applicant seeks to stay proceedings separate and distinct from that which the instant appeal emanates. It is not clear how the appeal will be rendered nugatory if the taxation is allowed to proceed, assuming that the Applicant will move with haste to have his appeal prosecuted. In any event she can safeguard her interests by participating in the taxation. The scales of justice tilt in favour of allowing the respondent to proceed with the taxation of the Bill as there are avenues available to the applicant in the event that they are unhappy with the decision of the taxing master. At this stage it is not possible to predict the outcome of that decision.
32. On account of the foregoing, the Application dated 13th December 2024 is dismissed with no order as to costs.

It is so ordered

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 20TH DAY OF SEPTEMBER, 2024.

P. NYAUNDI

JUDGE

In the presence of:

Fardosa Court Assistant



No appearance for the Applicant

No appearance for the Respondent

