



REPUBLIC OF KENYA



**KENYA LAW**  
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**AAD v AAO (Civil Appeal E014 of 2023) [2023] KEHC 2409 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2409 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT MERU**  
**CIVIL APPEAL E014 OF 2023**  
**TW CHERERE, J**  
**MARCH 23, 2023**

**BETWEEN**

**AAD ..... APPELLANT**

**AND**

**AAO ..... RESPONDENT**

*(Being an Appeal from the Judgment and Decree in Isiolo Kadbi Misc.  
Cause No 25 of 2023 by Hon. AJ Ishaq Hussein on 03rd January, 2023)*

**RULING**

1. By Original Summons dated 20<sup>th</sup> July, 2022, the Respondent moved the court to revoke a Power of Attorney granted to the Appellant on 27<sup>th</sup> June, 2013 by EAO (a person of unsound mind) on the ground that it was fraudulent. Respondent additionally sought an order that he be appointed as guardian of EAO.
2. By a judgment dated 03<sup>rd</sup> January, 2023, the court revoked the Power of Attorney and appointed Respondent as guardian of EAO.
3. By notice of motion dated 17<sup>th</sup> January, 2023, Applicant/Appellant which is supported by Applicant's affidavit sworn on even date, Applicant seeks leave to appeal and stay of execution of the judgment dated 03<sup>rd</sup> January, 2023. The application is based on grounds among others that Applicant has an arguable appeal and stands to suffer substantial loss if the judgment is not stayed.
4. By his replying affidavit sworn on 21<sup>st</sup> February, 2023, Respondent argues that the delay in filing the appeal has not been executed, that Applicant does not require leave to appeal and further that the orders cannot be stayed because they have already been executed.
5. It has been submitted for the Applicant has an arguable appeal and is likely to suffer substantial loss if Appellant is not granted an opportunity to ventilate it Reliance was placed on *Kamlesh Mansukhalal Damji Pattni v Director of Public Prosecutions & 3 others* [2015] eKLR where the Court of Appeal



stated that courts exist for the purpose of dispensing justice and it is incumbent upon the Court in exercising its judicial authority to ensure dispensation of justice as this is what lives up to the constitutional expectation and enhances public confidence in the system of justice.

6. Concerning stay of execution, it was submitted that the court has discretion under Order 42 rule 6(1) of the *Civil Procedure Rules* 2010 to grant stay of execution so that an appeal is not rendered nugatory. In support of this proposition, reliance was placed on *Butt v Rent Restriction Tribunal* 1979 eKLR, where the Court of Appeal held that it is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution.
7. It was argued for the Appellant that the execution of the impugned judgment has the effect of hindering Appellant from transaction as duly appointed Attorney of EAO (the subject herein) in favour of and in the best interest of EAO and his dependents thus defeating this appeal. The Appellant further argues that the judgment has the effect of appointing Respondent as guardian to EAO without following due procedure and processes of the law of application for Guardianship/Wardship of persons of unsound mind.
8. Respondent filed incomplete submission but from the brief submissions, it was argued that Applicant had not demonstrated that she was entitled to orders sought. Respondent urged the court to consider its interest as the successful litigant.

### **Analysis and Determination**

9. This being the first appellate court, its duty is to reevaluate the evidence and come up with its own conclusions but also bear in mind that it should not interfere with the findings of the trial court unless the same were based on no evidence or on misapprehension of the evidence or the trial court applied the wrong principles in reaching its findings. See *Peters v Sunday Post Limited* (1958) EA at Pg. 424).
10. I have considered the notice of motion in the light of the affidavits on record and submissions filed on behalf of both parties and the cited authorities.
11. The *Mental Health Act* (Chapter 248 of the Laws of Kenya) (the “Act”) governs the custody and guardianship of patients who are considered mentally incapacitated. The Act gives the Courts powers to grant the following orders for the management of the estate of any person suffering from mental disorder; and where the patient is unable to take care of himself, Orders for the guardianship of that person by any near relative or by any other suitable person which orders are sought by way of a Petition. The Act gives details of document that ought to accompany the Petition.
12. From the foregoing, it is apparent that Appellant’s argument that the judgment has the effect of appointing Respondent as guardian to EAO without following due procedure and processes of the law of application for Guardianship/Wardship of persons of unsound mind is arguable.
13. From the foregoing, I find that Appellant has demonstrated that she has an arguable appeal. This court therefore finds that it would be in the interest of justice to stay execution of the impugned judgment so that Appellant’s appeal is not rendered nugatory.
14. For the reasons given on the foregoing analysis, I have come to the conclusion that the notice of motion dated 17<sup>th</sup> January, 2023 has merit and it allowed in the following terms:
  1. There shall be a stay of execution of Judgment and Decree in Isiolo Kadhi Misc. Cause No 25 of 2023 pending the hearing and determination of this appeal
  2. The record of appeal shall be filed and served within 45 days from today’s date



3. The appeal shall be disposed off by way of written submission
4. Mention on 13<sup>th</sup> July, 2023 to confirm compliance and for further orders
5. Costs shall abide the outcome of the intended appeal

**DATED AT MERU THIS 23RD DAY OF MARCH 2023**

**WAMAE. T. W. CHERERE**

**JUDGE**

Appearances

Court Assistant - Morris Kinoti

For Appellant/Applicant - Ms. Nelima for Chaudhri & Associates

For Respondent - Mr. Jarso for Wario Minishi & Co. Advocates

