



**In re estate of Juma Kasanga Ngio (Deceased) (Miscellaneous Civil Application
E004 of 2023) [2023] KEHC 2029 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2029 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
MISCELLANEOUS CIVIL APPLICATION E004 OF 2023**

**G MUTAI, J
MARCH 10, 2023**

BETWEEN

PBK ADMINISTRATRIX

AND

MM RESPONDENT

RULING

RULING - APPLICATION DATED 30TH JANUARY, 2023

1. The applicant filed an application January 26, 2023 before the subordinate court *vide* which she sought to have a total sum of Kes 90,887/- appropriated from a joint account in the names of “Muriithi & Masore and Tindika & Co” held at Credit Bank, Nkurumah Branch, Mombasa and paid, partly to “[Particulara Withheld] Secondary School”, as payment of school fees, and partly to “PBK”, for purchase of personal effects and school uniform. Both of these expenses were for the benefit of “JBK”, the son of the applicant herein.
2. The status of “JBK” as a beneficiary of the Estate of Juma Kasanga Ngio (deceased) is disputed. The respondent avers that he was not the biological son of the deceased and thus not a lawful dependant of his estate. The applicant, on the other hand, avers Juma Kasanga Ngio (deceased) exercised parental responsibility over “JBK” in all spheres of life.
3. The application was initially placed before the Hon D. O Mbeja who certified the same urgent and ordered it to be heard interpartes on January 30, 2023. When the matter came up on the said date the Hon D. O Mbeja was not sitting as he had other official engagements.
4. The file was thus placed before the Hon D. W. Mburu. Hon Mburu declined to grant orders sought, at that time, and instead directed that the application be heard on February 13, 2023.



5. The applicant was aggrieved by the decision of the court. Firstly, because the trial court that was to hear the matter on February 13, 2023 was to be away on leave until the February 27, 2023, with the likely result that the application would not be canvassed on the date set by the court. Secondly, as the delay in paying school fees and school related expenses was likely to affect “JBK’s education.
6. The applicant thus chose to file the instant application vide which she sought the following orders: -
 1. Spent;
 2. Pending the hearing and determination of the instant motion the honourable superior court be pleaded to call for and examine the record of Mombasa Magistrate’s court succession cause No 154 of 2019; Re Juma Kasanga Ngio, for purposes of satisfying itself as to the legality, correctness or propriety of the order of the Hon D. W Mburu, SPM, issued on January 30, 2023; and
 3. Upon calling for and examining the record, the honourable court be pleased to allow the general summons evenly dated and filed on January 26, 2023 filed by the administratrix/applicant in Mombasa Magistrate’s Court succession cause No 154 of 2019; Re Juma Kasanga Ngio.
7. On the January 31, 2012 the application was placed before the Honourable Mr Justice Onyiego, then of the Family Court. He certified the application urgent and directed that it be heard *intepartes* before the trial court on February 9, 2023.
8. The applicant did not appear before the trial court on the said date. Her counsel appeared before me on February 9, 2023 instead. I was informed that it would not have been reasonable for the applicant to appear before the trial court as it was her misgivings with the trial court that led to the application before the court. Upon considering the matter I opted to list the matter for *interpartes* hearing before me on February 13, 2023. On February 13, 2023 an argument arose between parties’ counsel as to which one between the preliminary objection, dated and filed on the February 10, 2023, and this application, would heard first.
9. The preliminary objection raised by the respondent was in the regard to my jurisdiction to hear and determine the instant application. I therefore directed that the primary objection be heard first. My decision was grounded on the *ratio decidendi* of the following cases, “the *Owners of the Motor Vessel ‘Lilian’s’ v Caltex Oil (Kenya) Ltd* [1989]eKLR and *Mukisa Biscuit Manufacturing Co Ltd v West End Distributors* [1969] EA 696.
10. I heard the preliminary objection on the February 16, 2023 and reserved my ruling for February 24, 2023. Vide the ruling I delivered on the said date I dismissed the preliminary objection. I held that the High Court has the power under the clear and unambiguous terms of article 165 (6) and (7) of the *Constitution* of Kenya, 2010 to supervise the subordinate courts. I said that: -

“This court has power to ensure that the proceedings before the subordinate courts are rational, fair and just”.

I also added that: -

“Where that is the case this court may not interfere. If, however the subordinate court acts whimsically, capriciously or in flagrant disregard of the rules of natural justice this court must step in to ensure that justice is done by exercising its supervisory jurisdiction”.



11. Having found that I have jurisdiction I directed that the instant application be heard before me on March 1, 2023. This was however not to be as the respondent herein, filed notice of appeal and an application for stay of proceedings pending the hearing and determination of the intended appeal the respondent proposed to file.
12. On March 3, 2023, I heard the applications, for stay of proceedings pending the hearing and determination of the appeal, and also this instant application. I did so to maximise the use of judicial time and after notifying the parties that I would determine the stay application first, and in the event that I found merit in the stay application, I would defer the determination of this instant application until the intended appeal was heard and concluded. If however I failed to find merit in the stay application I would make a determination on the instant application.
13. I have considered the application for stay of proceedings pending appeal. After applying the test the 5 judge bench in *William Odbiambo Ramogi & 2 others v The Hon The Attorney General & 3 others* [2019]eKLR enunciated I found and held that the stay application had no merit and dismissed it with costs. I held that: -

“stay of proceedings application is an exceptional remedy which will be granted sparingly and only in rare and exceptional cases. They should not be granted in interlocutory matters unless exceptional grounds are given to avoid a situation where appeals are entertained piecemeal”.
14. Having dismissed the application for stay of proceedings I then had to make a determination in respect of this application.
15. As earlier adverted to, the applicant was aggrieved by the decision of the Hon D. W Mburu not to hear and determine the application before the subordinate court when it came before him on January 30, 2023. The effect of the learned magistrate’s decision, and of the subsequent events, was and is, that the application dated January 26, 2023 hasn’t been heard to date. The said application was however given a hearing date for the February 13, 2023 before the Hon Nabibya who it is said was on leave.
16. What is the test that a High Court must apply when faced with an application to exercise of supervisory jurisdiction under article 165 (6) and (7) of the *Constitution* of Kenya, 2010? Was the decision of the lower court one that would call for the exercise by this court of its supervisory jurisdiction? To answer these questions as I must set out the said provision of the *Constitution* and consider it in light of the decisions of our courts of record.
17. Article 165 (6) & (7) of the *Constitution* of Kenya, 2010 provides that: -
 - “(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial functions, but not over a superior court;
 - (7) For the purposes of clause (6) the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice”.



18. In *Republic v The Chief Magistrate's Court at Milimani Law Courts, DPP & 2 others Ex parte Pravin Galot* [2020] eKLR Mativo, J (as he then was) said as follows:-

“There is a clear distinction between supervisory jurisdiction, judicial review and appellate jurisdiction. Supervisory jurisdiction refers to the power of superior courts of general superintendence over all subordinate courts. Through supervisory jurisdiction superior courts aim to keep subordinate courts within the prescribed sphere and prevent usurpation. In order to exercise such control, the power is conferred on superior courts to issue necessary and appropriate writs”.

19. He further went on the say: -

“This power of superintendence conferred by article 165 (6) of the *Constitution*, as pointed out by Harries, C.J in *Dalmia Jain Airways Ltd v Sukumar Mukberjee*, is to be exercised most sparingly and only in appropriate cases in order to keep the subordinate courts within the bounds of their authority and not for correcting mere errors. This power involves a duty on the High Court to keep the inferior courts and tribunals within the bounds of their authority and to see that they do what their duty requires and that they do it in a legal manner. But this power does not vest the High Court with any unlimited prerogative to correct all species of hardship or wrong decisions made within the limits of the jurisdiction of the court or Tribunal. It must be restricted to cases of grave dereliction of duty and flagrant abuse of fundamental principle of law or justice, where grave injustice would be done unless the High Court interferes. As the Supreme Court of India stated unless there was any grave miscarriage of justice or flagrant violation of law calling for intervention, it is not for the High Court under article 165 (6) of the *Constitution* to interfere”.

20. I wholeheartedly agree with leaned judge. I must now determine whether given the above test the applicant has satisfied me that the order she seeks should issue.

21. Her grievance is that the court did not issue the orders she wants on January 30, 2023. I am unable to find fault with what the learned magistrate did, let alone to determine that it was so grave that I must exercise my supervisory jurisdiction. What he was required to do was to exercise a discretion whether or not to hear the matter on the given date. He opted not to do so and gave an explanation for his decision. I cannot, in exercise of my supervisory powers, interfere with his discretion, even if I think I would have acted in a different manner had I been in his shoes.

22. In any case his action was not so whimsical capacious and against the rules of natural justice as to warrant the exercise by me of the said jurisdiction. Were I to find that adjournment of matters before subordinate courts warrant exercise of supervisory jurisdiction I would inadvertently open up floodgates for all manner of gimmicks by litigants keen to stymie or game-up litigation or to forum shop. The end result won't be just expeditious and responsive justice. To the contrary, there would be unimaginable chaos.

23. It was argued that as JBK is a child I must consider his best interests as required by article 53 of the *Constitution* of Kenya, 2010. I have done so in light of what was pleaded and also on the basis of what came to light during the hearing. JBK is presently studying at the school he was admitted in. In my view his best interest would be served by the timely hearing and determination of the case before the subordinate court. I do not think that this application would help in that regard.

24. For the foregoing reasons I find no merit in the applicant's application dated January 30, 2023. The same is hereby dismissed with costs to the respondent.



25. In the interest of justice, I direct that the lower court file be returned to the said court so that the applicants' application dated January 26, 2023 may be heard and determined by the said court on priority basis.

26. Orders accordingly

DATED, DELIVERED AND SIGNED AT MOMBASA THIS 10TH DAY OF MARCH, 2023

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GREGORY MUTAI

JUDGE

In the presence: -

Winnie – Court Assistant

Mr. Muriithi for the Applicant

Mr. Tindika for the Respondent

