



**Kilonzo v Mathila (Miscellaneous Application E004 of 2023)
[2023] KEHC 1668 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1668 (KLR)

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

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

BETWEEN

PURITH BETH KILONZO APPLICANT

AND

MWENDE MATHILA RESPONDENT

RULING

1. This Court delivered its ruling on the February 24, 2023 vide which it dismissed the Respondent/Applicant's Preliminary Objection. Being aggrieved with the said decision the Respondent/Applicant filed a Notice of Appeal dated the February 28, 2023, and vide a letter of March 1, 2023, sought certified copies of the proceedings, ruling and Order thereof.
2. At the time the ruling was delivered the Respondent/Applicant sought stay of proceedings to enable her to canvass the appeal she intended to lodge at the Court of Appeal. This Court declined to do so and directed her to file a formal instead and to serve the Applicant /Respondent so that the same could be canvassed interpartes.
3. The application seeks 4 Orders. The first two orders are spent. The two germane orders are as follows: -
 - a. That this honourable court be pleased to order stay of all proceedings in the Application herein pending hearing and determination of the Appeal to the Court of Appeal against the honourable court's ruling, decision and orders made on the February 24, 2023; and
 - b. That costs of this application be provided for.
4. In her grounds the Respondent/Applicant avers that she has filed an appeal against the decision of this court and that unless the order sought are granted the appeal would be rendered nugatory in the event that she is successful. She avers that she filed the instant application timeously and without delay.



- She further avers that she is willing to abide with any such conditions that this honourable court may require within the confines of these proceedings.
5. The Application is opposed by the Applicant/Respondent. She filed a Replying Affidavit dated March 2, 2023. In the said affidavit she set out the difficulties she and the minor “JBK” were facing and stated that stay of proceedings herein would unduly delay the determination of the subject Motion in contravention of the best interest of the child. She thus urged that the Respondent/Applicant’s application be dismissed with costs.
 6. It is important to set out in brief the facts of this matter: -
 - a. On the January 26, 2023 the Applicant/Respondent filed an application vide which she sought to have the court appropriate and forward the sums of Kes 43,000.00 and Kes 47,887.00 to certain named beneficiaries for the benefit of the minor “JBK” a freshly admitted student at Kauma Boys Secondary School, in Kitui County;
 - b. That said monies, it was prayed, would be deducted from bank account No 0181400005, Credit Bank, Nkurumah Branch, in the name of “Muriithi & Masore and Tindika and Co”, which account it was stated was in credit in the sum Kes 7,633,875.70 as at 14th November, 2022 (now past);
 - c. The Respondent /Applicant argues that since JBK isn’t a biological child of Juma Kasanga Ngio (deceased) he isn’t a beneficiary thereof and should not benefit in any way from the said estate;
 - d. The application dated January 26, 2023 was due to be heard on January 30, 2023. It wasn’t heard on the said date as the Hon DW Mburu declined to grant the orders sought and fixed the case for interpartes hearing on February 13, 2023 before the Hon Nabibya;
 - e. The Applicant /Respondent was aggrieved by the decision of the Hon DW Mburu. Consequently this Miscellaneous Cause was filed through which this court was request to exercise its powers under Article 165 (6) and (7) to call for and examine the record of Mombasa Magistrates succession Cause No 154 of 2019; Re Juma Kasanga Ngio (deceased) for the purposes of satisfying itself as to its legality, correctness or propriety of the orders of Hon DW Mburu, SPM issued on January 30, 2023;
 - f. It was urged that upon calling for and examining the record I be pleased to allow the said summons;
 - g. I haven’t heard the said summon for the Respondent/Applicant filed a Preliminary Objection vide which she contested my jurisdiction under Article 165 (6) and (7). Her argument was that I could not exercise my supervisory powers over a matter that was then before the lower court and was pending resolution.
 - h. I delivered my ruling on February 24, 2023. In my said ruling I dismissed the Preliminary Objection for lacking merit. I ordered that the Miscellaneous Cause does proceed before me on March 1, 2023.
 7. The application as urged before me on March 3, 2023. I have already adverted to the arguments of the parties, above. I shall not rehash the same below. The question before me is whether this application meets the test for grant of orders of stay of proceedings pending appeal.
 8. The test to be applied by a court when making a determination as to whether there should be stay of proceedings was authoritatively laid down by a 5 Judge bench of the High Court in *William*



Odhiambo Ramogi & 2 Others v the Hon Attorney General & 3 Other [2019] eKLR. The court laid down 6 principles to with that there should be: -

- a. Pendency of an appeal before a High Court;
 - b. Explanation as to why the application for stay of proceedings wasn't done in the court appealed to;
 - c. Demonstration that the appeal proffered raises substantial questions to be determined by the Court appealed to or is otherwise arguable;
 - d. Demonstration that the appeal would be rendered nugatory if stay of proceedings was not granted;
 - e. Presence of exceptional circumstances which make stay of proceedings warranted as opposed to having the case conducted and all arising grievances taken up on a single appeal; and
 - f. The applicant must demonstrate that the application was filed timeously and without a delay.
9. In my opinion all these principles must be demonstrated for the court to allow the application.
10. In support of her case the Respondent/Applicant's advocate relied on the case of *Ezekiel Mule Musambi v H Young & Co (EA) Ltd* [2018]eKLR for the proposition that the court should ensure that the object of the application is not rendered nugatory, *Benjamin Momanyi v Joash Nyakaru Mayieka & Samuel Dick Maiyeka (suing as the Legal Representatives of the Estate of Benesensia Nyangweso Ondieki)* [2020]eKLR, for the proposition that due consideration must always be made to the optimum utilisation of the judicial time, *MN v DNMK & 13 Others* [2017]eKLR, for the proposition that determination of a lawful beneficiary of the estate of the deceased can only be done by the trial court and *in Re Estate of Dorothy Awuor Bollo (Deceased)* [2021]eKLR for the proposition that the Court must satisfy itself that the beneficiaries are the legitimate beneficiaries of the estate before distribution.
11. The Applicant/Respondent, in opposition, relied on *Turbo Highway Eldoret Ltd v Dominic Njenga* [2022] KEHC 10197 (KLR), for the proposition that and applicant must show exceptional circumstances which make stay of proceedings warranted as opposed to having the case conducted and all arising grievances taken up on on a single appeal, *DRA v EM* [2021]eKLR, for the proposition that stay of proceedings in matters concerning welfare of the child would be against the best interest of the child, *Javan Lewa Muye v Shiva Enterprises Ltd & 3 Others and Mbeyu Mwandaza Mwangoni (Interested Party)* [2019]eKLR, for the proposition that where a Preliminary Objection is dismissed that constitutes a negative order incapable of stay, *Shade Manufactures and Hotels Ltd v Sarah Mweru Mutu & 2 Others* [2015] eKLR, for the proposition that the issue of substantial loss or an appeal being rendered nugatory does not arise when the Applicant's Preliminary Objection is dismissed and Canon Assurance Co. Ltd vs Peter Mulei Sammy [2021]eKLR for the proposition that no prejudice is suffered by a litigant who seeks to file an interlocutory appeal if proceedings are not stayed.
12. Has the Respondent/Applicant met the test in William Odhiambo Ramogi Case (Supra)? Are all the principles listed in the said case present in this application? Is the Respondent/Applicant's application one that should be allowed? I shall look at each principle in turn.

Is there a pending appeal?

13. The Respondent/Applicant has filed a Notice of Appeal. The same is attached to the application as exhibit "RMT-1". Under Order 42 Rule 6(4) of the Civil Procedure Rules, 2010 an appeal to the Court



of Appeal is deemed to have been filed “when under the rules of that court Notice of Appeal has been given”. There is thus an appeal in this matter.

Has an explanation been given for why a stay of proceedings applicant wasn't sought at the Court of Appeal?

14. The Respondent/Applicant did not provide an explanation for his choice of forum. The importance of this principle is that stay of proceedings applications have the potential of delaying trial. Such applications should therefore be filed at the higher court, because it is the court to which the appeal is preferred that knows its docket and is therefore in a position to calibrate any order it gives accordingly.

Does the appeal raise substantial questions or is it otherwise arguable?

15. The Court's Ruling, the subject of the appeal filed by the Respondent/ Applicant, was limited to the court's jurisdiction under Article 165 (6) and (7) of *the Constitution* of Kenya, 2010 to supervise subordinate courts. *The Constitution* appears to me to be clear as to that the jurisdiction of the court is. I do not see how and Appellant Court would rule otherwise. In my opinion the intended appeal is not one that can be described as arguable. It appears to me to be a ruse to ensure that the Applicant/ Respondent's application is not canvassed on its merit.

Will the appeal be rendered nugatory if stay is not granted?

16. If the application dated 26th January, 2023 were to be heard by this court and the orders sought therein are allowed, a very speculative occurrence at this point, the worst that may happen (to the Respondent/ Applicant) is that Kes.90,887.00 may be paid from the joint account in the name of parties advocates, which account presently has a balance exceeding Kes.7,000,000.00. I do not see how a possible loss of Kes.90,887.00 can be said to be of such magnitude as to render the appeal nugatory and or academic. Whatever amount is lost can be recovered from the Applicant/Respondent's share of the estate in any case. I therefore do not agree with the argument that the appeal would be rendered nugatory if stay of proceedings is not ordered.

Is there an exceptional circumstance warranting stay of proceedings?

17. Respondent/Applicant argues that the JBK is not the biological child of the deceased. With respect I do not see that as an argument that can amount to an exceptional circumstance to warrant granting of stay.

Was the application filed expeditiously?

The application was indeed filed expeditiously. This principle was thus satisfied in this respect.

18. I am in agreement with what J Ngugi, J (as he then was) said in Turbo Highway Eldoret Limited case (Supra): -

“In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J in Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000): 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 (emphasis added)”.

19. Stay of proceedings application is an exceptional remedy which will be granted sparingly and only in rare and exceptional cases. That should not be granted in interlocutory matters unless exceptional grounds exist to avoid a situation where appeals are entertained piecemeal.

20. And as J. Ngugi, J held further in the aforementioned case: -

“I am not persuaded, however, that the appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given. A judgment given is capable of being stayed. Whether the fact that a party had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the Trial Court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek stay of proceedings in the Trial Court.”

I agree fully with these sentiments.

21. The upshot of this is that I find that the Respondent/Applicant’s application dated 28th January, 2023 is without merit. I hereby dismiss I with costs.

22. Orders accordingly

Dated, delivered and signed at Mombasa this 10th day of March, 2023

.....

Gregory Mutai

Judge

In the presence of:

Winnie – Court Assistant

Mr Tindika for the Respondent/Applicant

Mr Masore for Applicant/Respondent

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