



**In re Estate of Daniel Bernard Hefti (Deceased) (Succession Cause 26 of 2020) [2023] KEHC 19155 (KLR) (21 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19155 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
SUCCESSION CAUSE 26 OF 2020**

**G MUTAI, J  
JUNE 21, 2023**

**BETWEEN**

**DANIEL BERNARD REINHARD ..... 1<sup>ST</sup> ADMINISTRATOR**

**ELISBETH HEFTI REINHARD ..... 2<sup>ND</sup> ADMINISTRATOR**

**AND**

**JOYCE REINHARD ALIAS JOYCE JEPLETING REINHARD .... INTERESTED PARTY**

**AND**

**DAMARIS NTHENYA ..... 1<sup>ST</sup> RESPONDENT**

**MAURIZIO MARINO ..... 2<sup>ND</sup> RESPONDENT**

**ALFRED KELLER ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

- 1) The application before this court is a Notice of Motion dated January 26, 2023. It's supported by the affidavit of the interested party sworn on the same date. The application seeks the following orders;
  - (a) Spent
  - (b) That this honourable court be pleased to stay of proceedings and/or further proceedings and/or hearing and/or any action in this suit pending the hearing and determination of the appeal lodged in the Court of Appeal at Mombasa being Mombasa Civil Appeal E.006 of 2023; Joyce Jepleting Reinhard versus Damaris Nthenya & 4 Others;
  - (c) That this court be pleased to grant such other and further orders as is just and proper; and
  - (d) That costs of this application be provided for.



2. The applicant's case is that on September 29, 2021 this honourable court granted the Administrators 14 days leave to file Supplementary Affidavit to introduce a will alleged to have been left by the deceased. Rather than comply as ordered the Administrators filed a supplementary list of documents dated November 2, 2022 introducing the alleged will. Being dissatisfied with the Administrators' actions the Applicant filed a Notice of Motion application dated November 8, 2021 seeking to expunge the said Supplementary List of Documents and to have the copy of the will submitted to the Director of Criminal Investigation to examine the same for authenticity. The court in its ruling delivered on November 23, 2022 dismissed the application and directed the matter to proceed. Aggrieved by the orders of the court the Applicant lodged a Notice of Appeal on December 5, 2022.
3. The Applicant's case is that the appeal is ongoing and if stay of proceedings pending hearing and determination of the appeal is not granted then the appeal will be rendered nugatory and an injustice will thereby be meted on the applicant. She argues that her appeal raises arguable points of law and has high chances of success and if this court proceeds with this matter then the decision of the Court of Appeal will have been academic.
4. The applicant thus urges the court to allow the application.
5. The applicant filed a supplementary affidavit sworn on March 9, 2023 and filed on March 10, 2023 and reiterated her position in the supporting affidavit.
6. In response the 3<sup>rd</sup> respondent filed grounds of opposition seeking to have the application dismissed with costs on the grounds that the applicant will have the opportunity to participate in proceedings or petition relating to the said last will and testament of the deceased; the court has not pronounced itself on the validity of the will; no prejudice will be suffered if stay is not granted; stay of proceedings will be a violation of article 25(c) on the right to fair trial, article 48 on access to justice, article 50 (1) on the right to a fair hearing and article 159 that justice shall not be delayed; the application is a gross abuse of court process, is incompetent and frivolous and that the Applicant is not and has never been the Administrator or beneficiary of the estate of the deceased with or without will.
7. The application came up for hearing on May 8, 2023.
8. Mr. Songok counsel for the applicant reiterated the applicant's position in her affidavits and submitted that they were relying on the supporting affidavit and supplementary affidavit of the applicant.
9. Mr. Kinyua counsel for the 3<sup>rd</sup> respondent on the other hand reiterated the respondent's position in his grounds of opposition and submitted that stay, if granted, would delay the hearing and determination of the matter before this court. He urged the court to dismiss the application.
10. Mr. Ngombo counsel for administrators submitted that he was relying on the grounds of opposition filed by Mr. Kinyua, counsel for the 3<sup>rd</sup> respondent. He submitted that the will is yet to be admitted and or to be produced as an exhibit. He urged the court to dismiss the application with costs.
11. In rejoinder Mr. Songok submitted that stay of proceedings pending the decision of the Court of Appeal would be fair and just in the circumstances of this case. He also submitted that the Applicant would be prejudiced if the orders sought were not granted. That if the appeal succeeds and the proceedings herein proceed the appeal will be rendered nugatory. He urged the court to allow the application.
12. Have considered the application, the response and rival submissions by the counsel for parties and the issue that emerges for determination is whether an order for stay of proceedings should issue.



13. The court in the case of *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR in discussing stay of proceedings stated:-

“Notably, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified...The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory.”

14. Further the court in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR stated: -

“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. See Ringera J in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus: -

“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)”

15. The parties in this case have submitted on various issues touching on this matter. I will only delve into the issue of stay of proceedings which is the main issue in the application. The applicant in this case has submitted that the appeal has high chances of success and if the application is not allowed the appeal will be rendered nugatory. On the other hand, the respondent submitted that the application is an abuse of the court, incompetent and frivolous. Further it’s a violation of the right to fair trial and the right to be heard without delay. They have also argued that the application is meant to delay justice.

16. I have considered the Memorandum of Appeal annexed as “JJR-3”. It is my view that the applicant has an arguable appeal and that it is in the interest of justice that stay of proceedings is issued. I am guided by the case of *Maryanne Camene Ojiambo v Samuel Muchoki* [2021] eKLR where the court stated: -

“Plainly therefore, the appeal is arguable, bearing in mind that an arguable appeal is not necessarily an appeal that must ultimately succeed. In *Kenya Tea Growers Association & another v Kenya Planters & Agricultural Workers Union (supra)*, the Court of Appeal made this clear when it held that:

“He (the applicant) need not show that such an appeal is likely to succeed. It is enough for him to show that there is at least one issue upon which the court should pronounce its decision.”



17. The upshot of the above is that the application herein has merit and the same is hereby allowed in terms of Prayer No. 2 of the said application. Costs shall be in the cause. For avoidance of doubt orders currently subsisting shall remain in force.

**Dated, signed and delivered at Mombasa this 21ST day of JUNE 2023 via Microsoft TEAMS**

**GREGORY MUTAI**

**JUDGE**

**In the presence of:-**

**Mr. Songok for the Interested Party/Applicant**

**Mr. Ng'ombo for the Administrators/Respondents**

**Arthur – Court Assistant**

