



**Sewe v Nabega & another (Suing as legal representative of the Estate of Salim Anjimbi (Deceased) (Civil Appeal 2 of 2022) [2023] KEHC 18297 (KLR) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18297 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT VIHIGA  
CIVIL APPEAL 2 OF 2022  
WM MUSYOKA, J  
JUNE 2, 2023**

**BETWEEN**

**DOROTHY ADHIAMBO SEWE ..... APPELLANT**

**AND**

**ABDUL AZIZ ANJIMBI NABEGA ..... 1<sup>ST</sup> RESPONDENT**

**SYLVIA REHEMA OTIENO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS LEGAL REPRESENTATIVE OF THE ESTATE OF SALIM ANJIMBI  
(DECEASED)**

*(Appeal from judgment and decree of Hon. Mary Makena, Resident  
Magistrate, RM, in Vibiga PMCCC No. 81 of 2020, of 23rd February 2022)*

**RULING**

1. The appeal herein arises from a ruling that Hon. Makena, RM, allegedly delivered on February 23, 2022, in Vihiga PMCCC No 81 of 2020. 3 grounds of appeal are listed in the memorandum of appeal, dated 28<sup>th</sup> February 2022. It is averred that the trial court was in error in declaring the defence as closed, and that the matter was on last adjournment, despite the reasons given by the Advocate; the trial court was in error in holding that another Advocate would have handled the matter on behalf of the Advocate currently in conduct of the matter, yet the Advocate seized of the matter was the one who took it over and was currently handling all Vihiga matters as per office arrangements; and the court erred in holding that the firm of Kimondo Gachoka & Company, Advocates, should have ensured that the matters at the Vihiga court did not stall, when the Advocate handling the matter was absent on unavoidable grounds, yet the said firm handles several matters in various court stations, which matters are listed daily.
2. The memorandum of appeal was presented in court contemporaneously with a Motion, dated March 1, 2022, under certificate of urgency, seeking stay of proceedings, setting aside of proceedings that had been conducted on February 23, 2022, reopening of the defence case, and recall of witnesses for the



plaintiff. That Motion was placed before me on March 7, 2023, and I declined to certify the same urgent, on grounds that the same was vague, as it did not refer to or specify or indicate the proceedings that it sought orders of the court to stay and set aside. I allocated the matter a date for inter partes hearing on April 20, 2022.

3. Rather than address the anomaly in the Motion, the appellant lodged another certificate of urgency herein on March 16, 2022, and a further affidavit in support, sworn on March 9, 2022, by her Advocate, Ms. Maureen Tesot, basically indicating that the proceedings sought to be stayed and set aside were in Vihiga PMCCC No 81 of 2020. The certificate of urgency, of March 9, 2022, was placed before me on March 17, 2022. I again declined to certify the Motion, of March 1, 2022, as urgent, on grounds that the anomaly, that had led me to decline to certify the matter on March 7, 2022, had not been addressed, for the Motion itself had not been amended to indicate the specific proceedings that the appellant sought to have stayed. I pointed out that a court acts on the prayers sought, and that the prayers sought are set out in the application, and not in the certificate of urgency or the affidavit in support.
4. Following my orders of March 17, 2022, the appellant opted to withdraw the application, dated March 1, 2022, and replace it with another Motion, dated March 23, 2022, seeking the same orders as those sought in the Motion of March 1, 2022, but this time indicating that the proceedings sought to be stayed, and the orders sought to be set aside, were in respect of Vihiga PMCCC No 81 of 2020. The Motion, of March 23, 2022, was placed before me on April 1, 2022. I directed service of the Motion on the other side, and granted interim stay of proceedings, pending inter partes hearing.
5. On June 22, 2022, I directed that the Motion of March 23, 2022 be disposed of by way of written submissions. Both sides have complied, and have placed on record detailed written submissions, supported by relevant caselaw, and other authorities. I have read through the same, and noted the arguments made.
6. I will start by stating, in the outset, that the Motion, of March 23, 2022, is interlocutory, in terms of being filed within an appeal. The appeal challenges orders that the trial court allegedly made on February 23, 2022. A copy of the alleged ruling of February 23, 2022, or even an extract of the orders from that alleged ruling, has not been exhibited in the application before me, and the original trial court records have not been made available. I have no idea, then, regarding what transpired before the trial court. An appellate court is entitled to have some idea of what it is dealing with, in terms of seeing material from the trial court, so as to get an inkling into how the said court handled what was before it.
7. The prayers sought in the memorandum of appeal are for stay of proceedings in Vihiga PMCCC No 81 of 2020, stay of delivery of judgment in Vihiga PMCCC No 81 of 2020, reopening of the defence case and recall of witnesses. Of those 4, the substantive prayers, that the appellate court can deal with on appeal, are the 2 relating to ordering the reopening of the defence case and the recall of witnesses. The other 2, relating to stay of proceedings and stay of judgment, cannot possibly be determined on appeal. They ought to be dealt with through an interlocutory application. Ordering stay of proceedings and stay of judgment in the final appeal judgment would mean that Vihiga PMCCC No 81 of 2020 would be stayed forever, and no judgment would ever be delivered in it. An order for stay of proceedings and judgment cannot sit, at all, in an appeal judgment, together with an order for reopening of a defence case and recall of witnesses. How would the reopened defence case proceed and the recalled witnesses heard, if the appellate court orders, at the same time, stay of proceedings and judgment in the same matter. The 2 prayers for stay of proceedings and stay of judgment ought not have been made in the memorandum of appeal.
8. Further to that, the Motion, of March 23, 2022, seeks the same prayers as those sought in the memorandum of appeal. Should the court decide the Motion, of March 23, 2022, in favour of the



appellant, it would mean that the entire appeal would be disposed of at the interlocutory stage. In other words, determination of the Motion, of March 23, 2022, would mean that there would be nothing left to be determined on appeal. What the appellant should have done should have been to identify and isolate what she should have sought in the appeal through the memorandum of appeal, and what she should have sought through her Motion of March 23, 2022. The Motion, of March 23, 2022, is, therefore, inviting me to resolve the appeal by way of interlocutory procedure, which is not provided for in law.

9. Of the 4 substantive prayers in the said Motion, only 1 can be dealt with at the interim stage, the stay of proceedings. The other 3, for setting aside of the proceedings, reopening of the defence case and recall of witnesses, are issues that can only be dealt with at the hearing of the appeal itself. Can I then consider the prayer for stay of proceedings, at this stage? The question that I ask myself is whether there is any background or basis for me to make that consideration. The alleged proceedings, that I am being invited to stay, have not been placed before me. I only have the case number for the matter that is before the trial court, Vihiga PMCCC No 81 of 2020. The appellant has not attached a copy of the proceedings that she is impugning. So, how do I assess whether to stay the proceedings when the said proceedings have not been placed before me? It is the appellant seeking the stay order, and it was incumbent upon her to place those proceedings before me for consideration.
10. These appellate proceedings are about the proceedings that the trial court allegedly conducted in Vihiga PMCCC No 81 of 2020, culminating in the alleged ruling or orders of February 23, 2022. Consequently, if the appellant desired that the appellate court makes the orders that she seeks in her Motion, she ought to have placed the alleged proceedings before the court for assessment or evaluation. A court of law does not act blindly. It will not move merely because it is alleged that some proceedings exist somewhere. A record of the actual proceedings, whether the original or a certified copy of it, must be placed before the court. It must be demonstrated that the proceedings, referred to, in fact exist, and any impugned order or orders must also be shown to exist. As it is, I do not know whether proceedings in Vihiga PMCCC No 81 of 2020 exist, and whether Hon. Makena, RM, made orders in the alleged proceedings, on February 23, 2022.
11. The Motion, dated March 23, 2022, is very poorly conceived and very badly drafted, for the reasons that I have given above. I find no basis for granting the orders sought in it, and I hereby dismiss it, with costs. Let the file be placed before the Deputy Registrar, for progression of the appeal, in the usual way. Orders accordingly.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 2<sup>ND</sup> DAY OF JUNE 2023**

**W MUSYOKA**

**JUDGE**

Mr. Erick Zalo, Court Assistant.

**Appearances**

Ms. Tesot, instructed by Kimondo Gachoka & Company, Advocates for the appellant.

Mr. Okoth, instructed by George O. Okoth & Company, Advocates for the respondent.

