



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KERUGOYA

HIGH COURT CIVIL APPEAL NO. 10 OF 2017

EDWARD MUCHIRI ITUMA..... APPELLANT

V E R S U S

BEATRICE WANGIGI & 9 OTHERS.....RESPONDENT

RULING

1. The applicant Edward Muchiri Ituma filed an application dated 5/4/2017 seeking orders '*inter alia*' that:-

1. Spent

2. That the Court be pleased to stay proceedings in Civil case No. 124/2015 pending the hearing and determination of this application.

3. That the Court be pleased to stay the proceedings in Civil Case No. 124/2015 pending the hearing and determination of the appeal.

4. That costs be provided.

2. The application is based on the following grounds:

a) That the defendant/Applicant herein has filed an appeal raising good and arguable grounds for success.

b) That the Civil Case No. 124 of 2015 is set for mention on the 12th April 2015.(sic)

c) That if the case proceeds and the appeal eventually succeed the appeal shall be rendered nugatory.

d) That the Plaintiffs/respondents shall not suffer any prejudice if the proceedings are stayed.

e) That it is in the interest of justice that the proceedings in Civil Case No. 124 of 2015 be stayed.

3. The application is also supported by the affidavit of the applicant Edward Muchiri Ituma sworn on 6/4/17. He contends that the respondents filed Civil Suit No. 124/2015 at Baricho Court and he filed a defence which raised a pre-liminary objection. The respondent filed an application dated 29/2/18 seeking orders that his Advocate do cease acting for him. The Preliminary Objection and the application were heard simultaneously and the ruling of the Magistrate dismissed the Preliminary Objection but allowed the application for his Advocate to cease acting. He was dissatisfied with the ruling and filed this appeal.

4. In response, the respondent stated that the application is only meant to delay the hearing and determination of **Baricho Civil Case No. 124 of 2015** since he has not taken steps to set down the application for hearing since he was granted interim orders on 05/04/2017. That they filed **Baricho Civil Case No. 124 of 2015** as dependants of Michael Ituma Rubitu (deceased) claiming share of decretal sum paid in **Baricho Civil Case No. 24 of 2006**. In that suit, the appellant instituted the suit as legal representative of Michael Ituma Rubitu (deceased) and was represented by Mugambi Njeru & Company Advocates which also was on record on her behalf as the dependant. That the decretal sum was issued to the appellant and the firm of Mugambi Njeru & Company Advocates has information pertaining to the said sum.

5. The court ordered a stay of proceedings pending the hearing and determination of this application. The parties agreed to proceed by way of Written Submissions. For the applicant it was submitted that the trial Magistrate dismissed the preliminary objection which had stated that the suit was bad in law and fatally defective. That the suit did not disclose a cause of action and the plaintiffs did not have locus standi as they had not taken out Letters of Administration in the estate of Michael Ituma Rubilu to enable them deal with his estate. That this offends

Section 45 of the Law of Succession Act.

6. It is further submitted that under **Article 50 of the Constitution** a litigant has right to a fair trial which includes the right to chose and to be represented by an Advocate. He relies on the Court of Appeal decision in **Delphis Bank Limited –v- Channan Singh & Six Others C. A 136 of 2015** where it was stated:-

“to reiterate, that most valued constitutional right to a litigant; the right to a legal representative or Advocate of his own choice”

7. It is also submitted that the counsel for the appellant is obliged to follow the provisions of **Section 134 of the Evidence Act** which prohibits disclosure by an Advocate of any confidential information of his client. Reliance was had on **King Woolen Mills –v- Kaplan & Statton Advocates** Nairobi Civil Appeal No. 55/1993, C. A where it was stated:-

“..... the fiduciary relationship created by the retainer between client and advocate demands that knowledge acquired by the Advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without the clients consent. The fiduciary relationship exists even after conclusion of the matter for which the retainer was created.....”

8. The applicant submits that he has filed an appeal which has raised good grounds with probability of success. That the applicant will be prejudiced if stay is not ordered as he will not have an advocate on record. It is also contended that the appeal will be rendered nugatory. That he will suffer irreparable loss as he will not be able to hire another Advocate. He prays that the application be allowed.

9. For the respondents it is submitted that the application is under **Order 42 rule 6 Civil Procedure Rules** which requires an applicant to prove that he is likely to suffer substantial loss if stay is not ordered and the application has been brought without unreasonable delay. That the applicant must show that he is willing to offer such security as may be ordered by the court. That the provisions does not apply to stay of proceedings and the proceedings are under a wrong provision of the law. They rely on **Global Tours & Travels Limited Nairobi H.C Cause No. 43/2000** where it was stated whether or not to order stay of proceedings in a matter of judicial discretion to be exercised in the interests of justice.

“..... 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.”

10. It is further submitted that the applicant will not suffer any prejudice. It is submitted that the Advocate of the applicant had represented him in Civil Case No. 24/2006 which gave rise to the present case and the Advocate is a potential witness.

11. It is also submitted that the respondents will suffer prejudice as the case before Baricho will be delayed. That there was inordinate delay in filing the application as the ruling was delivered on 8/3/17 and application filed on 7/4/2017. They pray that the application be dismissed with costs.

12. In response the applicant submits if the application is brought under wrong provisions, the Court to consider **Article 159 (2) (d) of the Constitution** and determine the application on merits.

13. I have considered the application and the submissions. The issue for determination is whether the court should order stay of proceedings. Stay of execution or of proceedings is provided for under **Order 42 rule 6(1) of the Civil Procedure Rules**. There is an appeal against the ruling or order of the trial Magistrate. What is before this court is an appeal against orders. The application is therefore brought under the correct provision. The provisions deals with stay of proceedings as well as decrees or orders, it states – **“stay of execution or proceedings”**. The court has to consider whether the applicant will suffer substantial loss, and whether the application has been brought without unreasonable delays. The court has to also consider security as the Court may order for the due performance of the decree or order.

Order 42 Rule 6 (1) & (2) of the Civil Procedure Rules 2010 provides as follows:-

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

2. No order of stay shall be made under sub rule (1) unless-

a. The court is satisfied that substantial loss may result to the applicant unless the order is made and the application has been made without unreasonable delay; and

b. Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

In the **Kenya Power & Lighting Company Limited –v- Esther Wanjiru Wokabi [2014] eKLR**

The Court stated;

Having analysed the provisions of Order 42 rule 6 of the Rules, it is clear to me that the said provisions only apply to applications for stay of execution of a decree or order issued by a court pending hearing of an appeal but the same do not apply to applications for stay of proceedings such as the application now before me.....

Having made that finding, it is obvious that Order 42 rule 6(2) cannot come to the aid of the applicant. The court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations?

In answering this question, I wish to borrow from the wisdom of Ringera J (as he then was) when he stated the following when confronted by a similar application in the case of 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)

To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- a) Whether the applicant has established that he/she has a prima facie arguable case.**
- b) Whether the application was filed expeditiously and**
- c) Whether the appeal would be rendered nugatory.**

14. In my view the provision of **Order 42 rule 6** provides for both stay of execution and proceedings. The interest of Justice on the other hand demands that the court deals with the issue in dispute rather than on procedural technicalities. **Article 159 (2) (d)** gives Court this mandate. It provides –

“In exercising Judicial authority, courts and tribunal shall be guided by the following principles:

- Justice shall be administered without undue regard to procedural technicalities.”*

15. So where a party comes under a wrong provision, it is in the interest of justice that the court determines the dispute and disregard procedural lapses.

16. The applicant has shown that he is likely to suffer substantial loss.

17. The memorandum of appeal herein was filed on 07/04/2017 about a month after the judgment was delivered on 08/03/2017 therefore the same was filed in good time. The appellant has raised the issue of the respondents lacking the locus standi to institute Baricho Civil Case No. 24 of 2006 since they have not taken out letters of administration in the estate of Michael Ituma Rubitu. I am therefore of the view that this is an arguable appeal with chances of success.

18. A party has a right of appeal against orders from the Magistrate’s court. Considering the persuasive decision by Ringera J which I have cited above the Court has to weigh the pros and cons. These are whether the applicant has made out a prima facie case on the grounds of appeal which is arguable and whether the appeal has been brought without unreasonable delay.

19. The applicant has no doubt come to court expeditiously. The appeal has raised a substantive issue on the locus standi of the respondents to Institute the suit against the applicant. The respondents will not suffer prejudice. It is in the interests of justice that the appeal be heard and determined before the case is heard to save on judicial time and to resolve the issue in dispute. I conclude that this is a proper case where stay of proceedings should be ordered. I make the following orders.

- There will be stay of proceedings in Baricho Civil Case No. 124/2015 pending the hearing and determination of the appeal filed herein.
- Costs to the applicant.
- The order be served on the trial Court.
- I make no orders for the applicant to provide security in view of the nature of the appeal.

Dated at Kerugoya this 15th day of February 2019.

L. W. GITARI

JUDGE