

**IN THE COURT OF
APPEAL AT
MOMBASA**

**(CORAM: MURGOR, LAIBUTA & NGENYE,
JJ.A.) CIVIL APPEAL (APPLICATION) NO. E140
OF 2024**

BETWEEN

JANE MUTHONI MWANGI.....APPLICANT

AND

HELLEN WANJIRU KAHIGA.....RESPONDENT

*(Being an application for stay of proceedings pending appeal
against the Ruling and Orders of the High Court of Kenya at Nairobi
(Mutai,
J.) dated 8th April*

2024 in

Misc. App. No. E056 of 2023)

RULING OF THE

COURT

1. From the scanty record as put to us, we gather from the impugned ruling (substantial parts of which are illegible) that the respondent, Helen Wanjiru Kahiga, petitioned for and obtained letters of administration *ad litem* to the estate of Silas Mwangi Kamau (deceased) on 7th February 2023 in the Chief Magistrate's

Court at Mombasa in Chief Magistrate's Succession Cause No.
E014 of 2023.

2. Subsequent thereto, but before hearing and determination of the succession cause aforesaid, the applicant, Jane Muthoni Mwangi, filed a Miscellaneous Application No. E056 of 2023 in the High Court of Kenya at Nairobi seeking transfer to Nairobi of the Mombasa Chief Magistrate's Succession Cause No. E014 of 2023 for hearing and determination.

3. While the applicant's Miscellaneous application aforesaid was pending determination, the respondent filed a miscellaneous application in the High Court of Kenya at Mombasa in High Court Misc. Application No. E018 of 2023 seeking orders to transfer Mombasa CM Succession Cause No. E014 of 2023 to the High Court of Kenya at Mombasa whereupon Mutai, J. issued *ex parte* orders dated 22nd May 2023 directing that the succession cause be transferred for hearing and determination in the High Court at Mombasa.

4. The *ex parte* orders of transfer aforesaid prompted the applicant to seek review vide a Notice of Motion dated 10th August 2023 on the grounds, *inter alia*, that she had not been served with the respondent's application; and that the respondent had misled the court by concealing crucial information so as to obtain *ex parte* orders in that regard. The applicant's Motion for review was dismissed by G. Mutai, J. vide a ruling dated 1st December 2023.

5. Consequently, Mombasa Chief Magistrate's Succession Cause No. E014 of 2023 was transferred to the High Court of Kenya at Mombasa and registered as P & A No. 67 of 2023 in which the applicant raised a preliminary objection dated 1st December 2023 challenging the court's jurisdiction to hear and determine the succession cause in view of the provision of section 18 of the Civil Procedure Act, Cap. 21. She urged the court to "strike out the suit with costs to the objector"; and that "... the suit ... be referred back to the Chief Magistrate's Court at Mombasa Family Division for hearing and determination". The applicant does not explain how the

petition would be struck out and still be remitted for determination by the subordinate court.

6. In its ruling dated 8th April 2024, the trial court (G. Mutai, J.) found no merit in the applicant's preliminary objection, which he dismissed. As the learned Judge observed:

"17. I agree with the Petitioner that once I delivered my decision on 1st December 2023, I became functus officio.

....

20. In my view, this Court made a final determination of jurisdiction on 1st December 2023. I therefore lack jurisdiction to rehear the same."

7. Dissatisfied by the learned Judge's decision, the applicant moved to this Court on appeal on 2 grounds set out in her memorandum of appeal dated 16th July 2024 faulting the trial court for "conferring jurisdiction *ex parte* to itself, where jurisdiction lacked *ab initio*"; and for dismissing the Notice of Preliminary Objection dated 1st September 2023 without any legal basis.

8. Pending hearing and determination of her appeal (the record

of which has already been filed), the applicant seeks stay of proceedings

vide her Notice of Motion dated 18th July 2024 on the grounds, *inter alia*: that the applicant is apprehensive that the respondent will proceed with the succession cause in Mombasa P & A No. 67 of 2023 thereby rendering the appeal nugatory; that no prejudice would be suffered by the respondent if the application is allowed; that the appeal has merit, is arguable, and that it is in the interest of justice that it should be heard and determined.

9. The applicant's Motion is supported by the annexed affidavit of her learned counsel, Ms. Luchemo Brenda Akhonya, sworn on 18th July 2024 essentially deposing to the foregoing factual background and the grounds on which the Motion is anchored.

10. In response, the respondent filed her replying affidavit sworn on 23rd May 2025 contending that the applicant's appeal is not arguable; that the appeal would only serve to delay determination of the Mombasa petition, which would adversely affect all the beneficiaries of the deceased's estate; that the applicant's conduct is an abuse of the court process; that the applicant stands to suffer no prejudice if

the P & A petition proceeds to hearing and determination by the High Court at Mombasa; that there are no special circumstances demonstrated by the applicant to warrant stay of proceedings; and that the applicant's Motion is a waste of precious judicial time, and that it should be dismissed with costs.

11. In their submissions dated 26th July 2024, counsel for the applicant, M/s. Mbai Waweru Advocates, cited the case of

Owners of

the Motor Vessel 'Lillian S' v Caltex Oil (Kenya) Ltd [1989] KLR

1, which is of no particular relevance to applications under rule 5(2)

(b) of this Court's Rules, but which touches on the contested issues of jurisdiction and the merits of the appeal on which we cannot pronounce ourselves at this stage in the proceedings. Counsel urged us to allow the Motion.

12. On their part, learned counsel for the respondent, M/s. Muturi Gakuo & Kibara, filed written submissions and a case digest dated 23rd May 2025 citing 4 judicial authorities, including

the cases of **David Morton Silverstein v Atsango Chesoni**

[2002] eKLR; and

Port Florence Community Health Care v Crown Health Care

Limited [2002] eKLR in which the Court set out the twin principles

for grant of orders under rule 5(2) (b) of the Court of Appeal Rules;

Kivanga Estates Limited v National Bank of Kenya Limited

[2017] eKLR, highlighting the principle that this Court has the duty to protect the administration of justice from abuse of court process. They urged us to dismiss the application.

13. Whether or not to grant orders sought by the applicant pursuant to rule 5(2) (b) of the Rules of this Court pending appeal, the Court must be satisfied that the applicant has an arguable appeal, and that the appeal, if successful, would be rendered nugatory if stay of proceedings in Mombasa P & A No. 67 of 2023 is not granted.

14. The principles that apply in applications under **Rule 5(2) (b)** of this Court's Rules for stay of execution or of further proceedings, or for injunctive relief pending appeal have long

been settled. To be successful, an applicant must first show that the appeal is arguable,

and not merely frivolous. Secondly, the applicant must show that the appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed.

13. These principles were enunciated in, among others, the following judicial pronouncements of this Court and to which we now turn. On the first limb of this twin principle, this Court held in

Anne

Wanjiku Kibeh v Clement Kungu Waibara and IEBC [2020] eKLR

that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also **Kenya**

Tea Growers

Association and Another v Kenya Planters Agricultural Workers

Union [2012] eKLR; and **Ahmed Musa Ismail v Kumba Ole Ntamorua and 4 Others** [2014] eKLR).

14. We also take to mind what this Court has often stated that

even one ground of appeal is sufficient to satisfy the first limb of the twin principle as was held in **University of Nairobi v Ricatti Business**

of East Africa [2020] eKLR. In effect, the applicant's appeal is

arguable. Be that as it may, stay of proceedings is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. As stated by this Court in **David**

Morton

Silverstein v Atsango Chesoni (supra) -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts....”

15. The High Court at Meru (Gikonyo, J.) in **Kenya Wildlife**

Service v James Mutembe [2019] eKLR correctly held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. 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”

16. Halsbury's Laws of England, 4th Edition. Vol. 37 page 330

and 332

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court’s general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.”

17. As the learned Judge continued to observe, this is ***“... a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases”***. For instance, ***“... it will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless, or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case”*** (see: **Kenya Wildlife Service v James Mutembei** (supra)).

18. In our considered view, the instant case is not one that could be termed frivolous, vexatious or harassing or manifestly groundless. Having been persuaded that the applicant's appeal is arguable, it is not for us to judge whether it will succeed. Next, we need to consider whether the applicant has demonstrated that the intended appeal would be rendered nugatory absent stay of proceedings in Mombasa P & A No. 67 of 2023. To our mind, the appeal against the ruling dismissing the applicant's Motion for review of the decision to dismiss her preliminary objection in the backdrop of *ex parte* orders transferring the petition amid contentions of want of jurisdiction *ab initio* would effectively render the appeal worthless and a mere academic exercise. Put differently, the appeal would be rendered nugatory.

19. In view of the foregoing, we find that, the applicant having satisfied the twin principle for grant of orders under rule 5(2) (b), the Notice of Motion dated 18th July 2024 succeeds and is hereby allowed. Consequently -

(a) the proceedings in Mombasa P & A No. 67 of 2023 are hereby stayed pending appeal; and

(b) the costs of the application shall abide the outcome of the appeal.

Orders accordingly.

Dated and delivered at Mombasa this 5th day of December 2025.

A. K. MURGOR

.....
JUDGE OF APPEAL

DR. K. I. LAIBUTA CARb, FCIArb.

.....
JUDGE OF APPEAL

G. W. NGENYE-MACHARIA

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed
DEPUTY REGISTRAR