Achachi v Richu ((Sued as the administrator of the Onchwati)) (Civil Application E344 of 2024) [2025] KECA 306 (KLR) (21 February 2025) (Ruling)

Neutral citation: [2025] KECA 306 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E344 OF 2024

SG KAIRU, AO MUCHELULE & WK KORIR, JJA

FEBRUARY 21, 2025

BETWEEN

DINAH MORAA ACHACHI ..... APPLICANT

AND

MARY NYAMBURA RICHU ..... RESPONDENT

(SUED AS THE ADMINISTRATOR OF THE ONCHWATI)

(An application for stay of execution pending the hearing of an appeal from the judgment of the High Court of Kenya at Nairobi (K. Magare, J.) delivered on 27th May 2024 in HCC. No. E715 of 2021)

RULING

1. The background of the application is that in 2014, the applicant, Dinah Moraa Achachi, filed a suit before a Magistrate's Court against the respondent, Mary Nyambura Richu who was sued in her capacity as the administratrix of the estate of the deceased Simon Momanyi Onchwati. An interlocutory judgment was entered in her favour on 23rd October 2015. The respondent later filed an application dated 22nd November 2018 before the trial court seeking to set aside the interlocutory judgment which application was dismissed in a ruling delivered on 14th February 2020. On 6th October 2021, the trial court dismissed another application by the respondent where she had sought a review of the ruling of 14th February 2020. Through a memorandum of appeal dated 22nd October 2021 in Nairobi High Court Civil Appeal No. E715 of 2024, the respondent sought to appeal the interlocutory judgment of 23rd October 2015, as well as the rulings delivered of 14th February 2020 and 6th October 2021. In a judgment delivered on 27th May 2024, the High Court allowed the appeal with costs.

2. It is the execution of the judgment of the High Court which the applicant now seeks to stay through the notice of motion dated 28th June 2024 brought pursuant to sections 3A and 3B of the *Appellate*

Jurisdiction Act and rules 5 (2) (b), 31 (1) (b), 44 and 49 of the Court of Appeal Rules. The application is premised on the grounds on its face and the depositions of the applicant in the affidavit sworn 28th June 2024 in support of the application.

3. As per the exhibited memorandum of appeal, one of the grounds of appeal is the applicant's contention that the intended appeal is arguable because the High Court lacked jurisdiction to entertain the appeal out of time and without leave. It is the applicant's averment that the intended appeal will be rendered nugatory if the orders of stay are not granted. She therefore prays that the orders sought be granted in the interest of justice.

4. The application was opposed through the replying affidavit sworn on 19th July 2024 by the respondent, who averred that she was the widow of the late Simon Momanyi Onchwati and administratrix of the deceased's estate. She agrees with the applicant on the history of the dispute save for asserting that the High Court rightly considered her appeal. She avers that the present application offends the overriding objectives of just and expeditious resolution of disputes and that it is in the interest of justice and equity that disputes should come to an end. It is her case that allowing the application will infringe on her right to a fair and expeditious trial in contravention of Article 159 of the *Constitution*. The respondent deposed that her late husband was never served in the original suit and that she only became aware of the suit when the applicant sought to be enjoined in Nairobi Succession Cause No. 706 of 2016, which application was declined. She therefore urged for the dismissal of the application with costs asserting that it is vexatious.

5. When the application came up for hearing, learned counsel, Ms. Nyaguthie appeared for the applicant and sought to rely on her written submissions. She also made brief oral highlight of the written submissions. On his part, learned counsel, Mr. Evans Ondieki who appeared for the respondent made oral submissions in opposition to the application.

6. In the submissions dated 2nd August 2024, learned counsel for the applicant referred to Cieni Plains Company Ltd & 2 Others vs. Ecobank Kenya Ltd [2018] eKLR to urge that a single bona fide arguable ground of appeal is sufficient to establish the arguability of an appeal. Counsel referred to the memorandum of appeal and submitted that the intended appeal is arguable because the appeal before the High Court was filed out of time. Turning to the question as to whether the intended appeal would be rendered nugatory should the order sought be declined, counsel urged that it would be because the respondent will proceed to execute the aspect of the judgment awarding exorbitant costs. Counsel further argued that if the orders of stay are not granted, the Magistrate's Court will proceed to hear and determine the matter thereby rendering the intended appeal futile. Counsel consequently urged that the application be allowed as prayed.

7. In opposition to the application, Mr. Ondiek submitted that the interlocutory judgment entered in favour of the applicant by the trial court was invalid. Counsel submitted that there was no evidence that the respondent was ever served because he was sick and admitted in the hospital at the material time. According to counsel, the trial court violated the principles enshrined in Articles 25(c), 50 and 159(2) (e) of the *Constitution*. Mr. Ondiek stressed that the learned Judge cannot be faulted for ordering a retrial of the suit. He submitted that the intended appeal is not arguable and declining stay will not render it nugatory. According to counsel, the process of recovering the awarded costs had not even been initiated. Further, that the applicant would suffer no prejudice should the matter proceed as directed by the High Court. In conclusion, Mr. Ondiek urged that the interest of justice was in favour of dismissing the application and allowing the trial court to proceed with hearing the suit on merit.

8. An applicant desirous of enjoying the Court's discretionary powers under rule 5(2)(b) of the Court of Appeal Rules must demonstrate that the appeal or intended appeal is arguable and not frivolous,

and that should it eventually succeed, it will be rendered nugatory if the stay orders are not granted. Thus, in Chris Munga N. Bichage vs. Richard Nyagaka Tongi, Independent Electoral & Boundaries Commission & Robert K. Ngeny [2013] KECA 141 (KLR) it was held that:

> " The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated."

9. The applicant annexed to her application a draft memorandum outlining 13 grounds of appeal. We have considered the grounds therein and some of them challenge the jurisdiction of the High Court to admit and determine the appeal out of time and without leave. Reading the memorandum of appeal against the impugned judgment, it is apparent and we are indeed satisfied, that the intended appeal is arguable and consequently deserving of a hearing by the Court on merit.

10. The other thing an applicant is required to do is to demonstrate that without the stay orders, the intended appeal will be rendered nugatory. It is not enough for an applicant to state that the appeal will be rendered nugatory. Instead, an applicant is required to demonstrate that should stay not be granted, the appeal or intended appeal, should it eventually succeed, will be rendered worthless. The manner of determining whether an appeal will be rendered nugatory was expressed in Stanley Kangethe Kinyanjui vs. Tony Ketter & 5 Others [2013] KECA 378 (KLR) as follows:

> " Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."

11. The applicant contends that if the orders of stay are not granted, the respondent will execute for the costs awarded by the High Court. She also argued that without orders of stay, the trial court will re-hear the matter, which may result in another judgment, rendering the intended appeal nugatory. The respondent did not make any averment as to why she thinks the intended appeal will not be rendered nugatory were the appeal to succeed after a judgment has been rendered by the Magistrate's Court in the fresh trial. However, during the hearing of the motion, her counsel only stated that the respondent was not keen on executing for costs. On our part, we are satisfied that the intended appeal will be rendered nugatory should the execution of the High Court judgment not be stayed. In saying so, we note that allowing the matter to proceed for re-hearing while the intended appeal is pending may render the intended appeal useless. To prevent judicial absurdity, an order of stay of execution ought to be granted. This will protect the sanctity of the judicial processes and preserve the position of the parties pending the hearing and determination of the intended appeal.

12. We also do not find any serious prejudice that the respondent will suffer if the orders sought are granted. The only foreseeable challenge is that the respondent may have to wait a little longer to know the fate of what she terms as her matrimonial home. It is noteworthy that counsel for the applicant indicated to the Court that the main appeal would be filed within a week from the date the application was heard. Perhaps, for the sake of the respondent's peace of mind, it is imperative to mention that even with the stay orders in place, neither party will be at liberty to execute anything. Therefore, there is no fear of her losing the property in question during the pendency of the intended appeal.

13. Flowing from the foregoing analysis, it is apparent that the applicant has satisfied the twin limbs and deserves the grant of the orders sought. As regards the costs of the application, the appropriate order is that costs should abide the outcome of the intended appeal.

14. In conclusion, the notice of motion dated 28th June 2024 is hereby allowed on the following terms:

    i. An order be and is hereby issued staying the execution of the decree arising from the judgment delivered by the High Court on 27th May 2024 in Nairobi High Court Civil Appeal No. E715 of 2021, pending the hearing and determination of the intended appeal;

    ii. Costs of this application to abide the outcome of the intended appeal.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF FEBRUARY 2025.

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

A. O. MUCHELULE

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

I certify that this is a True copy of the original

Signed

DEPUTY REGISTRAR