



**P Girls Secondary School & another v ACY (Suing through her Mother and Next Friend GT) (Civil Application E023 of 2022) [2023] KECA 29 (KLR) (26 January 2023) (Ruling)**

Neutral citation: [2023] KECA 29 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT ELDORET  
CIVIL APPLICATION E023 OF 2022  
F SICHALE, LA ACHODE & WK KORIR, JJA  
JANUARY 26, 2023**

**BETWEEN**

**P GIRLS SECONDARY SCHOOL ..... 1<sup>ST</sup> APPLICANT**

**SAMWEL CHEPCHIENG ..... 2<sup>ND</sup> APPLICANT**

**AND**

**ACY (SUING THROUGH HER MOTHER AND NEXT FRIEND  
GT) ..... RESPONDENT**

*(Application for stay of execution of the judgment and decree of the Chief Magistrate's Court at Eldoret dated 24th May, 2019 in ELDORET CMCC No. 733 of 2016)*

**RULING**

1. Before this court is a notice of motion dated November 21, 2022 brought pursuant to articles 156(4) & (6), 159(2), and 164(3) of the Constitution, Sections 3A and 38 of the Appellate Jurisdiction Act, and rules 5(2)(b) and 47 of the Court of Appeal Rules, 2010. In the application, the 1<sup>st</sup> applicant, P Girls Secondary School, and the 2<sup>nd</sup> applicant, Samwel Chepchieng, mainly seek to stay the execution of the judgment of the Chief Magistrate's Court in Eldoret CMCC No 733 of 2016 delivered on May 24, 2019 pending the hearing and determination of their intended appeal. The application is opposed by the respondent, ACY (Suing through her mother and next friend Getruth Toroitich).
2. The application is premised on the grounds enumerated in the application and the affidavit of Lona Jemutai Tanui sworn on November 21, 2022. It is the applicants' case that by virtue of rule 5(2)(b) of the Court of Appeal Rules, this court is endowed with unfettered discretion to entertain this application and stay execution of the impugned judgment pending the hearing of their intended appeal. It is their assertion that the intended appeal is arguable and with high chances of success. They further argue that unless the orders sought are granted, there is a high likelihood that the properties of the 1<sup>st</sup> applicant



will be auctioned. To support this averment, they state that the accounts of the 1<sup>st</sup> applicant have been frozen and they are apprehensive that the respondent has instituted garnishee proceedings in a bid to realize the judgment debt.

3. Additionally, it is the applicants' case that the 1<sup>st</sup> applicant is a public school and has students from all over the country who are set to sit for their KCSE examination running from October 21, 2022 to December 23, 2022 hence if the school property is seized the programme for the examination period will be greatly hampered. It is therefore the applicants' case that in the circumstances the intended appeal may be rendered nugatory if the orders sought are not granted.
4. In the affidavit of Lona Jemutai Tanui, the applicants additionally depose that the appeal to this court is against the order of Nyakundi, J dated November 3, 2022 dismissing the application dated July 27, 2022 which sought to reinstate the orders of Sewe, J and to have Eldoret High Court Appeal No E072 of 2021 deemed to have been filed within time. They contend that their appeal is arguable because Nyakundi, J failed to appreciate that the delay in filing the appeal in the High Court was occasioned by the failure of the trial court to provide typed proceedings. It is also deposed that although Nyakundi, J dismissed the application on the ground that the same was *res judicata*, the issue of the extension of time for filing an appeal had not been determined by Sewe, J. Further, that the order striking out their appeal was granted *ex parte* during the pendency of an application seeking leave to appeal out of time.
5. This application was opposed through the replying affidavit sworn by the respondent on December 5, 2022. It is the respondent's case that the application is based on the revoked [Court of Appeal Rules, 2010](#) and is therefore fatally defective for being based on a non-existing law. She also deposes that no notice of appeal has been filed hence this court lacks jurisdiction to entertain the application. The respondent denies having instructed any auctioneer to execute the judgment and avers that no property of the applicants has been attached. It is therefore the respondent's conclusion that this application is vexatious.
6. The respondent also filed a notice of preliminary objection raising grounds of opposition similar to those in the replying affidavit.
7. When this matter came up for hearing on December 19, 2022, Ms Cheruiyot appeared for the applicants while dr Chebii represented the respondent. They highlighted their written submissions. Since counsel largely adhered to their written scripts, we will not veer off the written submissions.
8. The applicants filed submissions dated December 1, 2022. On whether they will suffer loss should their application be declined, they submitted that the 1<sup>st</sup> applicant is a public school with students sitting for national examinations and that it has been denied access to its various bank accounts rendering it incapable of accessing funds run its programmes. According to them, the 1<sup>st</sup> applicant had suffered extreme difficulties and disruption as a result of the respondent's actions. While acknowledging that execution is a lawful process, the applicants argued that their aim was to have their appeal heard on merit before the High Court hence the need to have the appeal reinstated. The applicants also submitted that if the decretal sum is realized, there is no guarantee that it would be paid back to them were their appeal to succeed.
9. As to whether their appeal will be rendered nugatory, the applicants submitted that their appeal will be rendered nugatory as the recovery of the decretal sum from the respondent is not guaranteed. The applicants further submitted that the sum of Kshs 28,000,000 claimed by the respondent is not available in the 1<sup>st</sup> applicant's accounts and sale of its property will lead to disruption of school activities. According to the applicants, such a disruption cannot be compensated by way of damages. They also argued that it is in the interest of justice to keep the learning intuition afloat so as to allow



the learners to enjoy the right to education. Further, that public interest ought to override the interests of the respondent. In conclusion, the applicants urged this court to find that the application meets the threshold and proceed to grant the orders sought.

10. On her part, the respondent relied on submissions dated December 5, 2022. On her averment that the application is defective, the respondent submitted that the application was premised on the *Court of Appeal Rules*, 2010 which were revoked *vide* Legal Notice No 40 of 2022 on July 8, 2022. According to the respondent, this court cannot be moved on the basis of a repealed law. In support of this argument, counsel referred us to the Supreme Court decision in *Michael Mungai v Housing Finance Company of Kenya Ltd & 5 others* [2017] eKLR and the definition of the term “repealed” under section 3 of the *Interpretation and General Provisions Act*, cap 2.
11. As to whether the application satisfies the conditions for grant of stay pending appeal under rule 5(2) (b) of the *Court of Appeal Rules*, 2022, the respondent argued that stay pending appeal can only be granted once an appeal has been filed and since no appeal has been filed in this case, this court lacks jurisdiction to entertain the application. The respondent supported her argument by relying on the decisions in *Nairobi City Council v Resley* [2002] 2 EA 493 and *Nguruman Ltd v Shompole Group Ranch & Another* [2013] eKLR.
12. According to the respondent, this appeal is unnecessary considering that the applicants have conceded paying Kshs 3,000,000 in settlement of the decretal sum. The respondent consequently prayed for the dismissal of the application with costs.
13. We have carefully gone through the pleadings of the parties and their submissions. In our view, an application like the one before us would ordinarily be confined to the two pre-requisites under rule 5(2)(b) of the *Court of Appeal Rules*, 2022 namely whether the appeal is arguable and whether it would be rendered nugatory if stay is not granted. However, in the present instance, the respondent has raised jurisdictional issues which we must first consider.
14. Although the first jurisdictional issue raised by the respondent concerns the validity of the application before us, we find that it is the second issue, as to whether there is a notice of appeal, that strikes at the core of the jurisdiction of this court. It is therefore necessary that we first address the issue of the existence or otherwise of a notice of appeal.
15. It is important to point out from the outset that under rule 77 as read with rule 5(2)(b) of the *Court of Appeal Rules*, 2022, the jurisdiction of this court can only be invoked by the lodging of a notice of appeal or the filing of an appeal. This position has been reiterated by this court in numerous decisions. For instance, in *Safaricom Limited v Ocean View Beach Hotel Limited & 2 others* [2010] eKLR, RSC Omollo, JA stated that:

“It is clear from all the provisions of rule 5 that their basic aim is to provide an interim relief where the superior court has determined a matter and the party against whom the determination is made has either appealed or intends to appeal. If there is no appeal or no intention to appeal, this court would have no jurisdiction to meddle in a decision made by the superior court...

At the stage of determining an application under rule 5 (2) (b) there may or there may be no actual appeal. Where there is no actual appeal already lodged there nevertheless must be an intention to appeal which is manifested by lodging a notice of appeal. If there is no notice of appeal lodged, one cannot get an order under rule 5 (2) (b) because as I have already pointed out the jurisdiction of the Court of Appeal is limited to hearing appeals from the High Court and if there is no appeal or no intention to appeal as manifested by lodgment of



the notice of appeal, the Court of Appeal would have no business to meddle in the decision of the High Court.”

16. The authorities cited by the respondent speak the same language. The decision in *Nairobi City Council v Resley* [2002] EA 493 is, as shall shortly be seen, very relevant to the circumstances of this case. In that case, this court held that:

“It is trite law that without a notice of appeal against particular orders, we would have no jurisdiction to grant a stay of those orders and we cannot, therefore, accept Mr Oduol’s argument to the effect that the notice of appeal against the ruling of 11 April 2002, entitles him to apply for stay of execution of orders made on 11 March 2002. That argument is fallacious.”

17. The same message on the necessity of a notice of appeal before the jurisdiction of an appellate court can be invoked permeates the decisions of the Supreme Court. We only need to cite the decision of *Anuar Loititip v Independent Electoral & Boundaries Commission & 2 others* [2019] eKLR where the court stressed the importance of a notice of appeal as follows:

“(78) We are of the view that the failure to launch an appeal against specific decision would deem that party having waived the right to challenge the decision. It is a conditional precedent to the existence of the appeal, and we emphasize that it is in the proper and timely filing of a notice of appeal, an absolute requirement, that invokes a court’s jurisdiction. It is a vital document and without it, there can be no appeal.”

18. We note that in the application before us, the applicants desire an order stopping the execution of a judgment delivered in 2019 by the Chief Magistrate’s Court at Eldoret. It is given that there is no notice of appeal filed against that judgment before this court for the obvious reason that this court’s jurisdiction does not extend to entertaining appeals from the Magistrates’ courts. Article 164 of the *Constitution* which is the establishing instrument of this court limits its jurisdiction to hearing of appeals from the High Court and any other court or tribunal as prescribed by an Act of Parliament. Therefore, this court can entertain appeals from the High Court by virtue of the jurisdiction expressly granted by the *Constitution*. Other courts whose decisions can be entertained by this court are the Environment and Land Court in accordance with the jurisdiction donated by section 16 of the *Environment and Land Court Act*, and the Employment and Labour Relations Court as per section 17(1) of the *Employment and Labour Relations Court Act*.

19. We are also alive to the fact that the applicants’ intended appeal to this court is said to be in respect of a decision of the High Court dismissing the applicants’ application for leave to file an appeal against the magistrate’s judgment out of time. The intended appeal is therefore not against the judgment of the magistrate which the applicants want us to stay. Even assuming that we can stay the decision of the magistrate, the notice of appeal against the decision of Nyakundi, J cannot be used to grant stay against the judgment of the magistrate. On this point we refer to the decision in the already cited case of *Nairobi City Council v Resley* [2002] EA 493. The decision of the High Court and that of the magistrate’s court are different and distinct. The grounds of appeal against those decisions cannot be the same. We also observe that the appeals against the decisions lie to different courts. An appeal against the judgment of the magistrate goes to the High Court while an appeal against the decision of a judge of the High Court comes to this court. It would be speculative of us to grant orders against the decision of the magistrate based on a proposed appeal that will be filed before another court and whose outcome is unknown.



- 20. The applicants may indeed have an arguable appeal against the decision of the High Court but that alone is not enough reason to warrant staying a judgment which, at the moment, has no subsisting appeal at the High Court. In short, the decision the applicants wish to stay is not the subject of an intended appeal or an appeal before this court. In view of what we have stated it would be an exercise in futility to discuss whether an intended appeal, which is yet to be filed, is arguable and whether such a non-existing appeal will be rendered nugatory if stay is not granted. Consequently, we find that this application is without merit and is for dismissal.
- 21. Having determined that there is no intended appeal or appeal before us which allows us to delve into the merits of the application for stay of execution, it follows that we should down out tools for lack of jurisdiction. In the circumstances we cannot go into the other grounds of opposition to the application raised by the respondent.
- 22. The remaining issue is the question of costs. We are cognizant of the general rule that costs follow the event and that award of costs is a discretionary matter. It is only in special circumstances that a court can, in exercise of its discretionary power, depart from the general principle on costs. In this case, we do not find any special circumstances to warrant deviation from the general rule on costs. Instead, the surrounding circumstances are in favour of an award of costs to the respondent. We say so based on the historical perspective of this matter as laid out by the parties. The applicants have filed a plethora of applications before the High Court without pursuing them to their logical conclusion. This has forced the respondent to incur costs in defending those applications. It is only fair for the respondent to recoup the costs spent on defending this application.
- 23. The logical conclusion to this matter is that the notice of motion dated November 21, 2022 is without merit and is dismissed. The applicants shall meet the respondent’s costs for the application.

**DATED AND DELIVERED AT ELDORET THIS 26<sup>TH</sup> DAY OF JANUARY, 2023**

**F. SICHALE**

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**JUDGE OF APPEAL**

**L. ACHODE**

.....

**JUDGE OF APPEAL**

**W. KORIR**

.....

**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

**DEPUTY REGISTRAR**

