Wambua v Wambua (Sued as Legal Representative of the Estate of Patrick Ndunda Wambua Deceased) & 4 others (Civil Application E022 of 2023) [2023] KECA 1180 (KLR) (6 October 2023) (Ruling)

Neutral citation: [2023] KECA 1180 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E022 OF 2023

HM OKWENGU, K M'INOTI & JM MATIVO, JJA

OCTOBER 6, 2023

BETWEEN

ALPHONCE NGUNGI WAMBUA ..... APPLICANT

AND

JANE NDILA WAMBUA (SUED AS LEGAL REPRESENTATIVE OF THE ESTATE OF PATRICK NDUNDA WAMBUA DECEASED) ..... 1ST RESPONDENT

JOSEPH MASAKU MBITHI ..... 2ND RESPONDENT

MUENDO MAWEU ..... 3RD RESPONDENT

LAND REGISTRAR, MAKUENI COUNTY ..... 4TH RESPONDENT

COUNTY SURVEYOR, MAKUENI ..... 5TH RESPONDENT

(Appeal from the judgment of the Environment and Land Court, Makueni (C. Mbogo, J.) dated on 20th May 2020 in ELC No. 34 of 2017 consolidated with ELC No. 22 of 2018))

RULING

1. Alphonce Ngungi Wambua (the applicant) in his application dated 24th June 2022 seeks the following orders:

    a. stay of execution of the order and decree issued on 20th May 2020 in Makueni ELC Case No. 34 of 2017 consolidated with Makueni ELC Case No. 22 of 2018;

    b. leave to file the intended appeal out of time;

    c. the annexed memorandum of appeal be deemed duly filed and served upon payment of the requisite court fees; and

d. costs of the application be in the cause.

2. The application is founded on a raft of provisions of the *Court of Appeal Rules*, 2010 (repealed), namely, Rule 4 (extension of time), Rule 5 (2) (b) (stay of execution), Rule 31 (general powers of the Court), Rule 78 (death of respondent before service of notice) and Rule 85 (death of party to intended appeal).

3. Briefly, the core ground cited in support of the application is that the 1st respondent died on May 9, 2020 before delivery of the impugned judgment. Because substitution of the deceased had not been done, it was impossible for the appellant to serve both the Memorandum of Appeal and the Record of Appeal. Further, it was only on March 25, 2022 that the applicant learnt that the deceased's wife Jane Ndila Wambua had obtained letters of administration. Further, the administrator has applied for eviction before the trial court, hence there is a risk of the applicant being evicted from the suit premises being Ukia/Kilala/672 in absence of stay.

4. We will first address the propriety or otherwise of the applicant's decision to combine a raft of prayers in one application. A close look at the general scheme of this Court's rules, particularly part 11 of the Court of Appeal Rules, 2010, (Rules 38 to 49) (now part 11 of the Court of Appeal Rules, 2022, Rules 40 to 49), shows that each rule, as and where relevant, refers to an application. In our view, it would have been prudent for the applicant to fashion the prayers either under Rule 55(1) to be heard by a single Judge or Rule 55(2) to be heard by a full bench.

5. None of the rules talks of applications It is no wonder that Rule 42 of the 2010 Rules (now Rule 44) prescribes the manner in which a formal application is presented to the court.

6. This is because the rules prescribe clear considerations for the different applications. For example, under the rules, an application for extension of time is provided under Rule 4 while an application for stay is provided under Rule 5 (2) (b).

7. The considerations for determining an application under Rule 4 and Rule 5 (2) (b) are very different. Equally important, under the two provisions, the exercise of the court's jurisdiction is different. An application under Rule 4 is the exclusive domain of a single Judge. The rules provide a clear procedure, which is, an applicant aggrieved by a decision of a single Judge can only seek redress by filing a reference to a full bench.

8. Our above finding is fortified by numerous decisions of this Court.

The Supreme Court in *Aviation & Allied Workers Union Kenya v Kenya Airways Limited & 3 Others* [2015] eKLR stated as follows:

> "[20] We have noted that the applicant has cited Sections of the *Supreme Court Act* and Rules which are applicable when one seeks leave, and grant of certification. In *Hermanus Phillipus Steyn v. Giovanni Gnecchi Ruscone*, Sup. Ct. Application 2 of 2012, this Court stated [paragraph 23]:
>
> > " ... It is trite law that a Court of law has to be moved under the correct provisions of the law."
> >
> > A party who moves the Court, has to cite the specific provision(s) of the law that clothes the Court with the jurisdiction invoked. It is improper for a party in its pleadings, to make 'omnibus' applications, with ambiguous prayers, hoping that the Court will grant at least some."

9. This Court (M'Inoti, J.A sitting as a single Judge) in *Riccardo Fanelli & 2 Others v Frigrieri Graziano*, [2015] eKLR eloquently decried the practice of filing omnibus applications as follows:

> "Before me is yet another ominous motion on notice in which the applicants are seeking in the same application, reliefs which can only be granted by a single judge, as well as other reliefs which must be sought before the full court. This undesirable practice that is fast taking root in Malindi and Mombasa has no basis in the rules of procedure, encourages wastage of time in the form of unnecessary objections and is otherwise a devise for avoiding payment of the prescribed court fees for applications before a single judge, and those before the full court. We have previously decried the practice in *Christopher Iddi Moto & 15 Others v. Chiriba Nyambu Barua & Another*, Ca No. 43 of 2014 (UR 38/14) and *Feisal Mohamed Ali v. Republic*, Cr Ap.no. 2 Of 2015 (UR1/15) and hope that it shall ceases (sic) forthwith. For the record applications for extension of time under Rule 4 of the Court of Appeal Rules are, by (sic)virtual of the provisions of rule 53 (1) to be heard and determined in the first instance by a single judge. Such an application comes to the full court under rule 55 only by way of reference from the decision of the single judge. On the other hand, an application for stay of execution, injunction or stay of proceedings under rule 5 (2) (b) must be made to the full court. These are two separate and distinct applications that should be filed and prosecuted as such.
>
> In the application before me, Ms. Otieno, learned counsel for the respondent, has rightly taken objection to the omnibus nature of the application. While I agree with Ms. Otieno that the applicants ought to have separated the two applications, the default is technical in nature and curable under Article 159 of the *Constitution* and the overriding objective in section 3A and 3B of the *Appellate Jurisdiction Act*. I will accordingly treat the application before me as a single judge application. Should the applicant's desire any relief from the full court, they must file a separate application in that regard, for it is not the practice of the Court to hear and determine applications piecemeal and in bits and pieces."

10. In the same vein, Ouko, JA. (as he then was) in *Sharath Ismail Ibrahim & Another v Hafza Khama Ismail* [2019] eKLR loathed and warned litigants against the practice of seeking omnibus reliefs within applications made under Rule 4 which may only be granted by a single Judge, along with those that are for a full bench.

11. This Court's jurisdiction under Rule 5(2) (b) is only invoked if a notice of appeal or an appeal has been filed. The applicant has not filed a notice of appeal in accordance with Rule 75. Further, the applicant prays that his appeal be deemed to be properly filed and the memorandum of appeal be deemed as served. This prayer is a clear admission that there is no competent appeal before us, just like there is no competent notice of appeal before us. It follows that there is no basis upon which this Court can assume jurisdiction under Rule 5 (2) (b). The power of this Court under Rule 5(2) (b) to order a stay of execution, an injunction or a stay of further proceedings is only exercisable where a notice of appeal has been lodged in accordance with this Court's rules. (See *Nguruman Limited v Shompole Group Ranch & Another* [2014] eKLR and *Githunguri v Jimba Credit Corporation Limited* [1988] KLR 838).

12. In view of our discussion and conclusions arrived at above, we find and hold that the application dated June 24, 2022 is incompetent because it is omnibus in nature. We accordingly strike it out with no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 6TH DAY OF OCTOBER, 2023.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

K. M'INOTI

.....

JUDGE OF APPEAL

J. MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR