



REPUBLIC OF KENYA



KENYA LAW
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**Gitundu v Wathuku (Civil Application E024 of 2021)
[2022] KECA 959 (KLR) (26 August 2022) (Ruling)**

Neutral citation: [2022] KECA 959 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NYERI
CIVIL APPLICATION E024 OF 2021
W KARANJA, AK MURGOR & A MBOGHOLI-MSAGHA, JJA
AUGUST 26, 2022**

BETWEEN

CHARLES MWANGI GITUNDU APPELLANT

AND

CHARLES WANJOHI WATHUKU RESPONDENT

(An application for stay of execution pending an appeal from the Ruling and Orders of the High Court of Kenya at Nyeri (F. Muchemi, J.) dated 11th March, 2021 in HCCA No. 19 of 2020)

RULING

1. Charles Mwangi Gitundu (the applicant) is the appellant in High Court Civil Appeal No. 19 of 2020 which is still pending before that court. His appeal before the High Court was against a decree made against him in favour of the respondent herein on 18th May, 2020 requiring him to pay Kshs. 2,511,04.50/= to the respondent.
2. In a bid to halt execution of that decree, the applicant filed an application seeking to stay execution of the decree before the Chief Magistrate's Court which application was heard and dismissed. Undeterred, the applicant moved to the High Court where he filed a similar application seeking to stay execution of the impugned judgment and decree of the Chief Magistrate.

The application which was heard by way of written submissions was struck out for being res judicata on 11th March, 2021. It is that Ruling that the applicant is challenging before this Court principally on the ground that the learned Judge fell into error when she determined that the application before her was res judicata. It is important to note that the appeal before the High Court is yet to be heard.
3. In the application before us, which is predicated on Rule 5(2) (b) of the Rules of this Court, the applicant seeks "stay of execution of the decree which is the subject of Nyeri High Court Civil Appeal No. 19 of 2020 pending hearing and determination of the appeal which has already been filed". As stated in the grounds on the face of the application and the depositions in the affidavit in support dated



18th March, 2021, the gist of the applicant's grievance is that the application before the learned Judge was not actually res judicata and the same therefore ought to have been heard and determined on merit.

4. The application is opposed vide the respondent's affidavit dated 25th October, 2021. The respondent urges that the appellant does not have an arguable appeal, and further discloses that the applicant has two applications similar to the present application dated 29th June, 2021 and 25th June, 2021.
5. The applicant has filed submissions dated 30th September, 2021 in which he urges that he has an arguable appeal and further that if the orders sought are not granted, the appeal will be rendered nugatory. No submissions were received from learned counsel for the respondent. Both learned counsel, Mr. Amuga and Mr. Mwenesi for the applicant and respondent respectively, made brief oral submissions in support of their rival positions. We have considered the application along with the rival affidavits and submissions by counsel.
6. In his oral submissions, Mr. Amuga brought to the fore the recent development in this matter whereby this Court has in Civil Appeal Nos. 259 of 2002 and 337 of 2002 determined that the respondent was not a son of the deceased and that the Grant of Letters of Administration, which gave the respondent the locus standi to file the suit giving rise to the present application has been revoked, and the respondent is, therefore, bereft of the requisite locus standi to defend the application before Court or to execute the impugned decree.
7. We have considered all the material placed before us. On the change of circumstances as explained by Mr. Amuga, the Court is aware of the decision in question which was delivered recently. However, we remind ourselves that the purpose of applications brought before this Court under Rule 5(2) (b) of this Court's Rules is to issue interlocutory orders geared towards preserving the subject matter of the appeal and not to give any dispositive orders that might render the substantive appeal otiose.
8. With that in mind, we are reluctant to hold that the respondent herein lacks the capacity to enforce any orders issued during the subsistence of his former status as the administrator of the Estate giving rise to these proceedings. We shall therefore eschew making any such determinative issues lest we embarrass the court that may eventually be seized of the substantive appeal. (See *Central Bank of Kenya Deposit Protection Fund Board v. Uhuru Highway Development Ltd & Others*, CA No. 95 of 1999).
9. That said, we come to the merits of the application as filed before us. We start with the important issue of the jurisdiction of this Court to stay the orders and decree of the Chief Magistrate as invited to do by learned counsel, Mr. Amuga. This Court draws its jurisdiction to entertain an application under Rule 5 (2) (b) from a Notice of Appeal duly filed pursuant to Rule 75 of the Rules of this Court. (See *Safaricom Ltd vs Ocean View Beach Hotel Ltd & 2 Others* [2010] eKLR). Such Notice must be in respect to the impugned decision appealed from. In this case the Notice of appeal is against the learned Judge's decision striking out the applicant's application on grounds that it was res judicata. There is no Notice of Appeal before us with regard to the Chief magistrate's decree. We do not, therefore have jurisdiction to grant the orders sought in the application.
10. Additionally, even if we had the requisite jurisdiction, this Court has said time without number that stay orders cannot issue in respect of negative orders, where the court has not ordered any of the parties to perform any task. See *Western College of Arts and Applied Sciences vs EP Oranga & 3 Others* [1976] eKLR. In this case, the learned Judge merely struck out the applicant's application. The Court cannot stay that striking out. Contrary to Mr. Amuga's submission, this Court lacks jurisdiction to stay the decree from the Chief Magistrate's Court whose fate is yet to be determined before the High Court.

Accordingly, for the foregoing reasons, we find this application devoid of merit and same is hereby dismissed with no order as to costs.



DATED AND DELIVERED AT NAIROBI THIS 26TH DAY OF AUGUST, 2022.

W. KARANJA

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JUDGE OF APPEAL

A. K. MURGOR

.....

JUDGE OF APPEAL

A. MBOGHOLI MSAGHA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

