



**WMM v EWG (Civil Application E416 of 2021)
[2022] KECA 1237 (KLR) (4 November 2022) (Ruling)**

Neutral citation: [2022] KECA 1237 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E416 OF 2021
K M'INOTI, HA OMONDI & KI LAIBUTA, JJA
NOVEMBER 4, 2022**

BETWEEN

WMM APPLICANT

AND

EWG RESPONDENT

(Being an application for stay of proceedings pending an intended appeal against the Ruling and Order of the High Court of Kenya at Nairobi (A. O. Muchelule, J.) delivered on 30th April 2020 In HCCC No. 1 of 2019 (OS)

RULING

1. The respondent, Elizabeth Wangari Gichuki, took out an originating summons dated January 16, 2019 in the High Court of Kenya at Nairobi Civil Suit No 1 of 2019 (OS) seeking multiple declarations and orders to which we will shortly return. Suffice it for the moment to observe that the record before us does not contain the original summons or affidavit previously filed in support thereof.
2. By a notice of motion dated and filed on October 4, 2019, the respondent applied for leave to amend her originating summons in terms of the undated amended originating summons supported by an undated and unsworn affidavit, both of which were annexed to her motion. In addition to the supporting affidavit, the amended summons was taken out on the grounds set out on its face, but which we need not replicate here.
3. In her amended summons, the respondent sought 11 prayers, including: injunctive relief to restrain the applicant from interfering with various properties listed on the face of the summons pending the hearing and determination of the summons; a declaration that the listed properties were matrimonial property; a declaration that the specified matrimonial properties and the developments thereon were acquired by means of funds contributed by the applicant and the respondent during their marriage; an order for valuation, sale and distribution of the proceeds of the specified properties; an order directing



the applicant to disclose all properties, shares and bank accounts held by him locally and abroad, and the same be shared equally between the applicant and the respondent; a declaration that the business in the name and style of Tent Ventures constituted family business within the meaning of the *Matrimonial Property Act*; the applicant and the respondent be presumed as having been married between the year 2008 and 2018; an order to decree dissolution of their marriage; and that the costs of the summons be provided for.

4. The applicant opposed the respondent's motion for leave to amend her summons and filed a replying affidavit, which is also not contained in the record before us, but whose substantive contentions are discernible from the impugned ruling.
5. From our reading of the impugned ruling, the applicant contended that the proposed amendment to the respondent's summons sought to introduce a new cause of action; and that the proposed amendments oust the jurisdiction of the High Court to hear and determine the summons as amended.
6. Having heard the respondent's motion, the learned judge delivered his ruling on April 30, 2020 allowing the respondent's application to amend her summons as prayed. According to the learned judge, there was no difficulty in allowing the amendments because the court would provide an opportunity to the applicant herein to appropriately defend the summons and, therefore, no prejudice would be occasioned by the proposed amendment.
7. With regard to the applicant's objection to the respondent's application, the learned judge had this to say:

' For the purposes of this application, I consider that, although it is desirable that a party seeking the dissolution of a marriage goes to the subordinate court, this court is under article 165(2)(a) of the *Constitution* clothed with unlimited original jurisdiction in criminal and civil cases. Under section 17(2) (b) of the *Matrimonial Property Act*, an application or a declaration of rights to any property that is contested between spouses may be made as part of a petition in a matrimonial cause. And now that the applicant seeks, as part of her prayers, the selling of the property and the equal sharing of the proceeds of such sale, and therefore bringing herself under section 7 of the *Matrimonial Property Act*, I consider it appropriate and effectual that all these matters be dealt with in this court.'

8. Dissatisfied by the ruling of A Muchelule, J delivered on April 30, 2020, the applicant intends to appeal and, towards that end, has filed a notice of appeal. He comes to this court by way of a notice of motion dated November 25, 2021 seeking: stay of proceedings in the High Court Civil Suit No 1 of 2019 (OS) pending hearing and determination of the intended appeal; and that the costs of the application be in the cause. The applicant's motion is supported by his annexed affidavit sworn on November 25, 2019, and to which his undated draft memorandum of appeal is annexed.
9. In summary, the grounds on which the applicant intended appeal is anchored are that the learned judge erred in law and in fact by: allowing the respondent's application and, by so doing, assumed and usurped the jurisdiction of the Resident Magistrate's Court in dissolving marriages as expressly conferred by section 2 of the *Marriage Act*, 2014; entertaining the summons pursuant to the *Matrimonial Property Act*, 2013 despite the fact that no divorce proceedings have been initiated or concluded; and by declaring that the court is clothed with jurisdiction under article 165(2) (a) of the *Constitution* to determine divorce proceedings notwithstanding that a statute has plainly ousted that jurisdiction and granted it to the Resident Magistrate's Courts.
10. Having considered the applicant's notice of motion, the affidavit in support thereof, the applicant's written submissions, and in the absence of a replying affidavit or submissions by the respondent, we



form the view that the applicants' motion stands or falls on two main grounds: firstly, whether the appeal is arguable, which is to say, it is not frivolous; and, secondly, whether the appeal, if successful, would be rendered nugatory if stay of proceedings is not granted.

11. The principles that apply in applications under rule 5(2) (b) of the *Court of Appeal Rules* for stay of execution or of further proceedings pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings arising from the impugned judgment, decree or order were not stayed. These principles have been enunciated in various judicial pronouncements of this court.
12. On the first limb of these twin principles, 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.
13. On our reading of the grounds on which the applicant's motion is founded, the draft memorandum of appeal, the affidavit in support thereof, and the written and oral submissions made to us, we are of the considered view that the question as to whether the applicant has an arguable appeal turns on our finding on a single question: whether the High Court has jurisdiction to hear and determine the respondent's summons relating to their marital dispute and matrimonial property.
14. For good reason, we are not persuaded that the applicant has an arguable appeal. Article 165(3) (a) of the *Constitution* confers on the High Court '... unlimited original jurisdiction in criminal and civil matters,' including matrimonial causes.
15. Article 165(3) (a) and (5) read:
 - ' (3) Subject to clause (5), the High Court shall have—
 - (a) unlimited original jurisdiction in criminal and civil matters; ...
 - (5) The High Court shall not have jurisdiction in respect of matters—
 - (a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or
 - (b) falling within the jurisdiction of the courts contemplated in article 162 (2).'
16. John Beecroft Saunders in 'Words and Phrases Legally Defined', Volume 3 at Page 113 defines court jurisdiction as follows:

' By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics.'



17. To our mind, the High Court's unlimited original jurisdiction in civil and criminal matters as conferred by article 165(3) (a) is only subject to clause (5). To that extent, section 66(2) of the Marriage Act, 2014 does not override or oust the unlimited original jurisdiction of the High Court to hear and determine matters relating to dissolution of marriages. In effect, the provision of article 165(3) of the Constitution supersedes section 66(2) of the Marriage Act.
18. To the extent that the value of the matrimonial property in issue is claimed as exceeding the pecuniary jurisdiction of the magistrates' courts, which is set at Kshs 20,000,000 in the case of Chief Magistrate's Courts, and coupled with the unlimited jurisdiction of the High Court, we reach the inescapable conclusion that the applicant has no arguable appeal with a probability of success.
19. In view of the foregoing, we need not consider the second limb of the twin principle – whether the appeal, if successful, would be rendered nugatory in the event that stay of proceedings in the High Court is not granted. Accordingly, the applicant's motion fails. The same lacks merit and is hereby dismissed with costs to the respondent.

DATED AND DELIVERED AT NAIROBI THIS 4TH DAY OF NOVEMBER, 2022.

K. M'INOTI

.....

JUDGE OF APPEAL

H. A. OMONDI

.....

JUDGE OF APPEAL

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR

