



REPUBLIC OF KENYA



**Nyenje & 2 others v Jefa & 3 others (Civil Appeal E034 of 2024)
[2025] KEHC 2394 (KLR) (27 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 2394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E034 OF 2024**

G MUTAI, J

FEBRUARY 27, 2025

BETWEEN

RUWA MANGALE NYENJE 1ST APPELLANT

SUBIRA SAID KANWA 2ND APPELLANT

ISMAIL (IMAM DARUL GHURABAH) 3RD APPELLANT

AND

MOSE ALI JEFA 1ST RESPONDENT

MWANAMTOTO MOHAMED NASSORO 2ND RESPONDENT

FATUMA TUNA SAID 3RD RESPONDENT

UMMUSALAMA TUNU SAID 4TH RESPONDENT

RULING

1. Before the court is a notice of motion dated 12th June 2024 by the appellants /applicants vide which the following orders are sought:-
 - a. Spent;
 - b. Spent;
 - c. That pending the hearing and determination of the appeal this honourable court be pleased to stay proceedings in the Kadhi's court at Mombasa in Kadhi's Court Petition No. E002 of 2023; Mose Ali Jefa & 3 others versus Ruwa Mangale Nyenje & 2 others;
 - d. That the costs of this application be provided for.
2. The grounds upon which the application is based is that the court below dismissed the appellants/ applicants' preliminary objection to the jurisdiction of the Kadhi's Court. It was stated that unless



a stay is granted, the hearing before the Kadhi may proceed and that the appellants /applicants will thereby suffer substantial loss and damage. The appeal raised serious questions of law and fact, has a high chance of success, and was filed without undue delay.

3. The application was supported by the affidavit of Ruwa Mangale Nyenje sworn on 12th June 2024. The deponent averred that the Kadhi's Court has no jurisdiction over any matter relating to the administration, breach, and all other questions arising from a charitable trust of a religious nature. He further stated that section 29 of the Waqf Act contravenes Article 170 (5) of *the Constitution* and was, for that reason, unconstitutional as the Waqf deed trust in question in these proceedings amounted to a public charitable, religious trust and was not, therefore, a matter within the definition of "personal status" over which the Kadhi's Courts have jurisdiction.
4. The said notice of motion was opposed by Mose Ali Jefa. Ms Mose swore an affidavit on 19th July 2024 in which she stated that under Section 62 of the *Civil Procedure Act* consent of the Attorney General was required before one could institute a suit at the High Court in respect of a charitable trust of a religious nature.
5. The deponent stated that under section 29 of the Waqf Act, the Kadhi's Court had jurisdiction to hear and determine the matter. In her view, the issues under contestation were of personal status. She stated that Section 29 of the Kadhi's Court had not been declared unconstitutional while the Kadhi's Court itself was a creature of the 2020 constitution. She further said that the appeal was res sub judice Mombasa ELC NO E015 of 2023; Ruwa Mangale Nyenje and 3 others vs Mose Ali Jefa and 2 others.
6. The respondents accused the appellants/applicants of mismanaging the waqf by collecting the rent from the commercial shops and leaving the waqf properties in a dilapidated state contrary to the Waaqif's wishes. In support of the said assertion, she annexed photographs allegedly showing the state of the waqf's properties.
7. The said deponent prayed that the appellants /applicants be stopped from collecting rent from the waqf properties and that the rent proceeds be deposited in court as ordered by the Hon Kadhi on 10th July 2024 and that they be compelled to furnish the court with statements of account of all the rent collected from the waqf properties for accountability purposes.
8. The respondents filed a notice of motion application under a certificate of urgency dated 19th July 2024, vide which they sought five orders: -
 - a. Spent;
 - b. Spent;
 - c. That upon hearing this application interpartes this suit herein be stayed as the issues herein are directly and substantially the same those in ELC No. E015 of 2023; Ruwa Mangale Nyenje & 3 others Vs Mose Ali Jefa & 2 others that is still pending before Hon Justice L L Naikuni and hence the sub judice rule apply;
 - d. That in the alternative, the memorandum of appeal dated 24th May 2024 be struck out with costs for being otherwise an abuse of the court process, and this appeal herein be dismissed with costs.
9. The respondents based their application on the supposed fact that the matter herein is directly and substantially the same as that before the ELC Court and that the issue as to whether the Hon Kadhi has jurisdiction to deal with the matters of Wakf properties was still pending before the said court. Secondly section 6 of the *Civil Procedure Act* provides that cases that are sub judice be stayed and the preference



be given to the cases that were filed first. Thirdly, suits which are an abuse of the court process ought to be struck out under Order 2 Rule 15(1) (d) of the Civil Procedure Rules.

10. The said application was supported by the annexed affidavit of Mose Ali Jefa sworn on 19th July 2024, in which it was averred that the appellants filed an Originating Summons before the Environment and Land Court over issues pertaining to the trusteeship and management of the instant waqf properties, “ upon being served the respondent disputed the jurisdiction of the said court on the ground that section 29 of the Wakf Act granted the Kadhi’s Court jurisdiction and that section 62 of the Civil Procedure Act wasn’t complied with. It was urged that since the ELC matter was pending, this appeal ought to be stayed or, in the alternative, dismissed.
11. The said application was opposed. The appellants/respondents, through the 1st appellant, filed a replaying affidavit in which she deposed that the case before the Environment and Land Court was filed first before that before the Kadhi. They filed a preliminary objection regarding the filing of the case before the Kadhi, which objection was dismissed on 9th May 2024, culminating in the appeal.
12. It was urged that the matter before this court was not sub judice as different prayers were sought in each matter.
13. Before this matter could be heard, the counsel for the respondents submitted that they had abandoned their application. That being the case, there is only one application before me, which is for a stay of proceedings pending appeal.
14. The parties did not file written submissions. They also did not submit orally before me. I shall, therefore, consider on the basis of the affidavits and annexures before me whether this court ought to stay proceedings pending before the Kadhi or not.
15. Order 42 rule 6(1) provides that;

“6.

- (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside. “

16. Although the foregoing provision mentions a stay of proceedings, the rule does not provide the test that the court ought to apply when deciding whether to stay proceedings. The gap in the rules notwithstanding, there is ample case law on the subject.
17. While discussing the issue of stay of proceedings pending appeal, Ringera, J (as he then was) had these to say in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*:-

“ As I understand the law, whether or not to grant a stay of proceedings or further proceedings on a decree or order appealed from is a matter of judicial discretion to be exercised in the



interest of Justice.....the sole question is whether it is in the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of cases, the prima facie merits of the intended appeal, in the sense of not whether it will probably succeed or not but whether it is an arguable one, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

18. While agreeing with the above decision Gikonyo, J expressed himself as follows in Kenya Wildlife Service v James Mutembei [2019] KEHC 10478 (KLR)

“(5) I have carefully considered the instant application and the rival submissions by the parties. This is essentially an application for stay of proceedings in Maua CMCC 46 of 2017 James Mutembei v Kenya Wildlife Service pending the hearing and determination of this appeal. Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

19. From the foregoing, it is evident that a stay of proceedings is a very drastic remedy that should be granted sparingly. I agree that the said remedy if granted, the said prayer impedes quick resolution of disputes, enhances the possibility that the appellate court may be made to hear a multiplicity of appeals on routine decisions of the court and be a real fetter on the parties' right to a fair trial under Article 50 of *the Constitution* and be against the judicial principle in Article 159 (2) (b) that justice shall not be delayed.
20. Although the appellants have raised arguable grounds of appeal, I do not see how they will be harmed if the matter before the Kadhi is heard. As trustees, they bear no personal loss or gain in the trust property. On the other hand, the community will benefit if the matters in court are concluded quickly through a process that makes good use of the scarce judicial time and resources.
21. In the circumstances, I dismiss the application for a stay of proceedings pending appeal.
22. I order that the record of appeal be filed within 30 days of the date hereof so that the appeal can be fast-tracked.
23. I further order that this matter be mentioned on 27th March 2025 to confirm compliance and for further directions.
24. I make no order as to costs.
25. Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF FEBRUARY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of: -



No appearance for the Appellants/Applicants;
No appearance for the Respondent; and
Arthur – Court Assistant.

