



REPUBLIC OF KENYA



KENYA LAW
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**Madi & 3 others v Shosi (Family Appeal E011 of 2023)
[2024] KEHC 1901 (KLR) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1901 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
FAMILY APPEAL E011 OF 2023
G MUTAI, J
FEBRUARY 23, 2024**

BETWEEN

**MADI FAMAU MADI 1ST APPELLANT
MWANAISHA FAMAU MADI 2ND APPELLANT
MWANAHALIMA FAMAU MADI 3RD APPELLANT
UMI FAMAU MADI 4TH APPELLANT

AND
KASSIM FAMAU SHOSI RESPONDENT**

RULING

Introduction

1. The deceased, whose estate is the subject of this appeal, Famau Madi Shosi, died intestate on 12th July 2018. On 13th December, 2015 the Respondent filed the Lamu Kadhi Court Succession Cause No. 9 of 2018. Pursuant to the order of this Court made on 9th April 2019, the said cause was transferred to the Kadhi Court Mombasa for hearing and determination.
2. The matter before the Kadhi Court Mombasa wasn't heard as a preliminary objection was raised as to the paternity of the Respondent. After canvassing the preliminary objection, Hon Kadhi Abdalla Juma delivered a ruling dated 14th February 2020 dismissing the objection on the ground that it lacked merit. The 4th Appellant/Applicant filed an appeal against the said decision to this Court, contending that the learned Kadhi was wrong in his decision not to order the DNA testing of the Respondent.



3. After considering the parties' written submissions, this Court (per Onyiego J) dismissed the appeal. The learned judge stated in his judgment as follows:-

“24. It then follows that any contestation over the petitioner's paternity is factual issue which can only be resolved through adducing evidence. I do agree with the honourable Kadhi that the objection did not meet the conditions attendant for dismissing a suit on preliminary objection. I do not find any grounds to interfere with the ruling of Hon Kadhi.

25. The appeal herein is a nonstarter and indeed unnecessary with the sole intention of delaying the suit further. Accordingly, the appeal is dismissed with costs to the Respondent. Original file to be returned to the trial Court to fast track hearing of the suit on merit.”

4. The decision of this Court was delivered on 23rd September 2022.

5. Vide an application dated 13th October 2022, the Appellant/Applicants sought the following three orders:-

- a. That the application be certified urgent and its service be dispensed with in the first instance;
- b. That the Court be pleased to conduct the DNA test between the Petitioner/Respondent and any of the heirs of the estate to determine the relationship between the Petitioner and the rest of the other heirs of the estate; and
- c. That the costs of the application be provided for.

6. After hearing the parties, the Kadhi Court delivered a ruling dated 14th May 2023 and dismissed the application on the ground that it was res judicata.

7. The Appellants/Application were aggrieved by the said decision and filed this instant appeal. In the Memorandum of Appeal dated 15th May 2023, the Appellants/Applicants raised six grounds of Appeal to wit:-

1. That the learned Trial Kadhi failed in a point of law and fact in appreciating the reason for dismissal of Family Appeal No. 5 of 2020 on account of not meeting the threshold in the case of Mukisa Biscuit;
2. That the learned Court erred in law and fact in grossly misapprehending the operation of the principle of res judicata by holding that the refusal of the Honourable Kadhi of holding that the Notice of Preliminary Objection dated 5th February 2019 and the confirmation of the same by a ruling/judgment of Onyiego, J delivered on 23rd September 2022 constituted res judicata leading to miscarriage of justice;
3. That the learned trial Kadhi failed to appreciate the law and fact in the application and the Kadhi's Rules Court and Procedure (Procedure & Practice) pursuant to which he was subject to;
4. That the learned trial Kadhi erred in law and fact in failing to make a substantive ruling on the application dated 13th October 2022, which was before him and instead was comfortable with a mechanical application of a technicality which has no legal and or logical basis thus offending Article 159 of the *Constitution* of Kenya, 2010.



5. That the learned Kadhi's mind and soul were apparently captured by the whims and caprices of the Respondent and or counsel to the extent that he would ill afford to apply the statute and doctrine of res judicata; and
6. That the learned trial Kadhi erred in law and fact in failing to understand the nature of the application before him and giving a substantial ruling thereto.
8. Upon filing the appeal, the Appellants/Applicants filed an application for stay pending appeal before the Hon Kadhi dated 7th June 2023. The said application was dismissed. The Hon. Kadhi was emphatic that:-
 - “ 16. In this matter the main issue is the allegation by the Respondent that the Petitioner is not a legitimate child of the deceased. What they want is a paternity DNA test of which both the ruling of this honourable Court and the High Court, upon their appeal, directed it is a matter of evidence in the main suit.
 17. The upshot of the matter this honourable Court cannot be a party to the Applicants/Respondents scheme of delay based on grounds of technicality”
9. The Kadhi Court ordered that the main suit would be heard on 14th November, 2023.
10. It is after this ruling was delivered that the Appellants/Applicants filed the instant application. The application seeks the following 6 orders:-
 - a. Spent;
 - b. That the honorable Court be pleased to order stay of proceedings pending hearing and determination of the Application interpartes or pending hearing and determination of the appeal or further orders of the Court;
 - c. That the Court do grant any order or reliefs it deems fit and expedient to grant in the circumstances;
 - d. That the Court do grant any order or reliefs it deems fit and expedient to grant in the circumstances; and
 - e. That the costs of the application be provided for.
11. The application was opposed by the Respondent Kassim Famau Madi. Through his counsels on record he filed an affidavit dated 9th November 2023. In the said affidavit the Respondent referred to the history of this matter. He averred that this Court dismissed the previous appeal “on the basis that the same was only intended to unnecessary delay the hearing of the main suit.” and that “the issue of paternity and DNA is a factual issue, a matter of evidence in the main suit”
12. The Respondent averred that the application was intended to cause the delay of the hearing of the matter “which was filed way back in 2018”. He further averred that the Appellants/Applicants are in control of the estate and had refused to comply with the orders of the Kadhi Court of 20th March 2019, which orders directed that the estate be placed in the custody of the Court and that proceeds from rents to be submitted to the Court.
13. The Respondent thus urged that the instant application be struck out for being an abuse of the Court process, only meant to delay the ends of justice.



14. The 4th Appellant/Applicant filed a Supplementary Affidavit vide which she contested the trial Kadhi's knowledge of re judicata and preliminary objection.

Submissions of the Parties

15. The application was canvassed by way of Written Submissions. Both parties filed their Written Submissions,

Submissions of the Appellants/Applicants

16. Counsel for the Appellants/Applicants urged that the applicable procedural rule is Order 42 Rule 6 of the *Civil Procedure Rules*. He referred the Court to the case of *Mbogo & Another versus Shah* (1968) EA 93 and *Butt versus Rent Restriction Tribunal* (1982) KLR 47. It was urged that unless there is an overwhelming hindrance, a stay must be granted so that the appeal may not be rendered nugatory. It was argued that stay should be exercised in such a way as not to prevent an appeal.
17. Counsel submitted that a stay ought to be granted where substantial loss may result unless the order is granted, the application has been made without undue delay and security for costs has been offered.
18. It was urged that Islamic law attached a lot of importance to legitimacy. The children must be born in an Islamic marriage. Counsel referred to the case of *CKR & Another (suing through their mother and next friend) (JWN) versus ANC* [2019]eKLR.

Submissions of the Respondent

19. The Respondent's counsel, Khalid Salim & Co. Advocates filed submissions in opposition to the application. The submissions are dated 5th December 2023. The said counsels identified sole issue coming up for determination as being whether the application for stay of proceedings has any merit and whether or not it should be allowed.
20. It was urged that for a stay to be granted:-
1. There should be an appeal with merits;
 2. It should be in the interest of justice to allow the application; and
 3. The application for a stay should have been filed expeditiously.
21. Counsel submitted that there was no prima facie appeal in this matter as the DNA issue had already been canvassed.
22. On whether it would be in the interest of justice to allow the application, the Respondent's counsel urged that it wasn't. Relying on the case of *Timothy Kisina Kithokoi versus Elijah Kitele & Another* [2022]eKLR and *Turbo Highway Eldoret Ltd versus Dominic Njenga Muniu* (Civil Appeal No E040 of 2025) (2022) KEHC 10197 (KLR) (30th June, 2022) (Ruling), it was submitted that I should dismiss the application as it is "a clear ploy by the Respondents to stall the hearing of the petition".
23. The parties highlighted their written submissions on 22nd January 2024.

Analysis and Determination

24. The application before me seeks a stay of proceedings before the Hon Kadhi pending the hearing and determination of the appeal. It is not an application for a stay of execution under order 42 Rule 6(2)



of the *Civil Procedure Rules, 2010*. Stay of proceedings and stay of execution are two distinct remedies that a party may seek.

25. Stay of proceedings is a grave remedy which seriously interferes with the right of a litigant to conduct his litigation timeously. The Court in *Re Global Tours & Travel Ltd* (Nairobi) HC Winding up Cause No. 43 of 2000 stated that:-

“it impinges on the right of access to justice, the right to be heard without delay and overall, the right to a fair trial. Therefore, the test for stay of proceedings is high and stringent.”

26. J. Ngugi, J (as he then was) held in *Turbo Highway Eldoret Ltd versus Dominic Njenga Munuu* (supra) as follows:-

“18. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

19. All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury’s Laws of England, 4th Edition, Vol. 37 at p. 330: The



stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.

21. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. 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 (emphasis added)
22. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy.
23. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate's Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below."
24. Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal." (Walhaus & Others v Additional Magistrate, Johannesburg & Another, 1959 (3) SA 113(A) at 120D; S. v Western Areas Ltd & Others 2005 (5) SA 214 (SCA) at 224D."



27. I have quoted the above decision in extenso as it encapsulates my thinking in this matter.
28. This matter has been pending in Court since 2018. It is now almost six years since the Succession Cause was filed in Lamu. The said period notwithstanding, the cause has not been heard on merit. It would appear to me that the Appellants/Applicants, for whatever reason, are not keen to ensure that a decision on merit is made.
29. The Appellants/Applicants have not demonstrated that there are exceptional reasons warranting the issuance of the orders they seek. Even if the matter before the trial court proceeded and was determined, the appellants could still appeal to this court.
30. Stay of proceedings in interlocutory applications should not be granted liberally. Litigants have a constitutional right to have their disputes heard expeditiously without undue delay. This right would be negated if parties, disinterested, for any reason, in quick resolution of matters, were permitted to delay justice by debt applications for stay of proceedings every time the trial court made decisions not to their liking.
31. It is clear from the foregoing that I have not found merit in the application before me. The same is dismissed. I, however, make no orders as to costs as this is a family matter.
32. Orders accordingly.

DATED AND SIGNED THIS 23RD DAY OF FEBRUARY 2024 AT MOMBASA.

GREGORY MUTAI

JUDGE

In the presence of: -

Mr. Mtana holding brief for Mr. Gichana for the Appellants/Applicants;

No appearance for the Respondent; and

Arthur - Court Assistant.

