



**HB International FZE v Jarso & another (Commercial Suit E507 of 2020)
[2024] KEHC 15872 (KLR) (Commercial and Tax) (18 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15872 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL SUIT E507 OF 2020
H NAMISI, J
DECEMBER 18, 2024**

BETWEEN

HB INTERNATIONAL FZE PLAINTIFF

AND

ISMAIL DUBA JARSO 1ST DEFENDANT

DULI ENTERPRISES LTD 2ND DEFENDANT

RULING

1. Before the Court is a Notice of Motion dated 28 February 2024 seeking the following orders:
 - i. (spent)
 - ii. That leave be granted to extend time for filing the intended appeal in relating to the Ruling delivered on 30 January 2024 at the High Court of Kenya at Milimani HCCCOMM/E507/2020; HB International FZE -vs- Ismail Duba Jarso & Duli Enterprises ltd;
 - iii. That pending hearing and determination of this Application and the intended Appeal the Court be pleased to stay proceedings in HCCCOMM/e507/2020; HB International FZE -vs- Ismail Duba Jarso & Duli Enterprises ltd;
 - iv. That the draft Memorandum of Appeal be deemed to have been duly filed;
 - v. That the cost of the application be provided for.
2. The Application is supported by the Affidavit of Ismail Duba Jarso, the 1st Applicant, and premised on the following grounds:



- i. The Deputy Registrar delivered her Ruling on relation to the Applicant's application for review based on the Court's earlier ruling on the issue of security of court. The court in its Ruling on 22 March 2022 directed that the Plaintiff/Respondent deposit a sum of Kshs 500,000/= into a joint interest earning account to be opened by the Advocates of both the Plaintiff/Respondent and the Defendants/Applicants without paying keen attention to the evidence adduced by the Defendants/Applicants. The said Ruling resulted to the making an application for review;
 - ii. That on 30 October 2023, the application for review was placed before the Hon. Mary Osoro who directed that the file be forwarded to Hon. Tanui for directions since she is the one who had made the earlier Ruling;
 - iii. That on 28 November 2023, the parties herein appeared in court where a Ruling date was give. When the parties appeared on 22 Jan 2024, the Ruling was pushed to 29 January 2024, and further pushed to 30 January 2024. On 30 January 2024, the Honourable Deputy Registrar in her ruling stated, "I have dismissed the application, I will give my reasons later." And went out to give a date for pre-trial conference on the 29 February 2024;
 - iv. That despite numerous writing to the court to provide the reasoned Ruling, the Applicants are yet to know the reasoning of the court in dismissing the application;
 - v. That the Civil Procedure Rules provide that an appeal from a decision of the Registrar under the orders referred in to in sub rule 1 which includes security of costs shall be to a Judge in chambers and the time frame given is seven days. that despite the above provisions, the Applicants are yet to be supplied with a copy of the decisions hence making this very application to extend time to be justified;
 - vi. That the sum of Kshs 500,000/= ordered to be paid as security for costs is not sufficient and does not commensurate to the amount being sought by the Plaintiff/Respondent;
 - vii. That the Defendants/ Applicants will suffer huge losses if the orders granted by the Honourable Court in its Ruling dated 30 January 2024 are granted in the event they win against the Plaintiff who is a foreign entity registered outside the commonwealth countries;
 - viii. That the Applicants/Defendants aver that it is in the interest of justice that this application be allowed;
 - ix. That the Defendants/Applicants aver that the intended Appeal raises an arguable case with very high chances of success and failure to grant the orders sought shall render the Application and intended appeal nugatory.
3. In response thereto, the Plaintiff filed a Replying Affidavit dated 28 March 2024. The Plaintiff/ Respondent avers that the Defendants/Applicant have not made a case as to why they are deserving of the orders sought and the same does not attain the criteria for grant of orders of stay of proceedings as set out in the case of Re Global Tours & Travel Ltd HCWC No.43 of 2000 which required that for grant of the said orders, the Court should look into factors such as (i) the need for expeditious disposal of case, (ii)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, (iii) the scarcity and optimum utilization of judicial time and (iv)whether the application has been brought expeditiously.
 4. The Plaintiff/Respondent made reference to two previous applications by the Defendants/Applicants dated 27 May 2022 filed herein and 22 August 2022 filed in the Court of Appeal, both seeking stay of proceedings.



5. The Application was canvassed by way of written submissions. In their submissions, the Defendants/Applicants argued that the Replying Affidavit ought to be struck out since the same was sworn by an Advocate and is tantamount to giving evidence at the bar. The Applicants relied on the case of East Africa Foundry Works (K) Ltd -vs- Kenya Commercial Bank Ltd [2002] eKLR.
6. It was the Applicants' contention that the presence of a compelling and arguable appeal underscores the critical need for a stay of proceedings. Denial of this stay would render the appeal nugatory, defeating the very purpose of justice. They submitted that granting a stay of proceedings is not only crucial but also aligns with the fundamental principles of fairness and equity.
7. On the issue of the Replying Affidavit, the Plaintiff/Respondent submitted that the facts averred to in the said Affidavit touch mainly on procedure, which the Plaintiff/Respondent's Advocate has full knowledge of. It was their contention that the Affidavit was deposed by an Affidavit in order to save the court's time since it would take considerable time to secure the services of a Notary Public.
8. Both parties relied on the case of Global Tours & Travel Ltd; Nairobi HC Winding up Cause No 43 of 2000, in which the Court stated thus:

“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 these 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.”

9. I have considered the application, the response thereto and the rival submissions by parties. There are three issues for determination herein:
 - i. Whether to strike out the Replying Affidavit sworn by counsel for the Respondent;
 - ii. Whether to extend time to file the appeal;
 - iii. Whether to grant stay of proceedings herein pending the intended appeal
10. With regard to the first issue, the general rule is that advocates should not swear affidavits in contested matters. In the case of Ibrahim & another v Muhsin & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR), the Court of Appeal stated thus:

“Where the client is available to swear to the disputed facts, the depositions in the affidavit of the advocate, may amount to hearsay unless their sources and grounds for belief are disclosed. More importantly, an advocate who swear an affidavit in contested matters potentially of exposes himself to playing the role of both advocate and witness should they be called upon to take the witness stand in order to be cross-examined on the said affidavits.”



11. However, in the case of *Hakika Transporters Services Ltd v Albert Chulah Wamimitaire* [2016] eKLR, citing its decision in *Salama Beach Ltd v Mario Rossi*, CA. No. 10 of 2015, the Court of Appeal explained that:

“As regards the appellant’s objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross examination (See *Pattni v. Ali & 2 Others*, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters.”

12. In *Pattni v Ali and Others* [2005] 1 EA 339; [2005] 1 KLR 269, the Court held that:

“Whereas it is right that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so as this accords with the spirit of the best evidence rule and in view of the provisions of Order 18 rule 2, with common sense and it would be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one to become a witness, there is otherwise no express prohibition against an advocate who on his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot find his client but has information, the sources of which he can disclose and state the grounds for believing the information.”

13. Rule 9 of the Advocates (Practice) Rules states:

“No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:

Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non-contentious matter of fact in any matter in which he acts or appears.”

14. In the present case, the affidavit sworn by Counsel for the Respondent gives a factual background of the proceedings herein, which is verifiable from the court record. These are facts within his own knowledge as opposed to those of his client. I, therefore, find nothing wrong with the Affidavit and decline the invitation to expunge the same.

15. On the issue of extension of time to appeal, the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* {2014} eKLR set out the considerations to guide the court in exercising its discretion in cases of this nature. It stated: -

- “i. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court;
- ii. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court



- iii. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case-to-case basis;
- iv. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;
- v. Whether there will be any prejudice suffered by the respondents if the extension is granted;
- vi. Whether the application has been brought without undue delay; and
- vii. Whether in certain cases, like election petitions, public interest should be a consideration for extending time."

16. Similarly, in the case of Paul Musili Wambua vs Attorney General & 2 Others [2015] eKLR, the Court of Appeal in considering an application for extension of time and leave to file the Notice of Appeal out of time stated the following:-

“.....it is now settled by a long line of authorities by this court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whim or caprice. In general the matters which a court takes into account in deciding whether or not to grant an extension of time are; the length of delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted.”

17. The impugned Ruling that the Applicant seeks to appeal was delivered on 30 January 2024. The present application was filed on 28 February 2024, about one month later. The Applicants have attributed the delay to the inability to obtain the reasoned Ruling from the Court, though no evidence of correspondence to the Court has been attached. It is my considered view that the delay is not inordinate. Further, the Respondent will not be prejudiced if the Application is allowed.

18. On the issue of stay of proceedings, in the case of Kenya Wildlife Service –vs- James Mutembei [2019] eKLR, the court held that:

“...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. For the Court to grant stay of proceedings, the Applicants ought to have shown that they have an arguable appeal with high chances of success, such that if stay of proceedings is not granted, the Appeal will be rendered nugatory. I have read through the proceedings herein. By their own application, the Defendants/Applicants sought to have the Plaintiff/Respondent deposit security for costs, citing a possibility of being frustrated by the Plaintiff in the execution of the judgement. Notably, in their counterclaim, the Defendants/Applicants prayed for general damages for breach of contract. The same was not quantified. In their application for costs, the specific prayer was “an order be issued directing the Plaintiff/Respondent to deposit a sum of USD 1,050,000 or any other amount as the court may determine into a joint interest earning account to be opened by the Advocates of the respective parties as security for costs of the Defendants/Applicants within 30 days of the order.” (emphasis mine)



- 20. The Court, in its discretion, made a ruling on 22 March 2022 directing that the Plaintiff/Respondent deposit a sum of Kshs 500,000/= into a joint-interest earning account. Despite the demonstrated efforts by the Plaintiff/Respondent, the Defendants/Applicants did not co-operate in opening the said account. No reason has been advanced for this by the Defendants/Applicants.
- 21. The stay of proceedings sought herein is seemingly a delay tactic. There is no reason why the Defendants/Applicants did not open the joint account, even whilst pursuing a review of the order. Instead, they filed application upon application, until finally settling on the application for review dated 26 October 2022, which was eventually dismissed by the court.
- 22. It is my finding that it would be unfair for the Applicants to be granted orders to stay proceedings herein. The provisions of Article 159(2)(a)(b)(c) and (d) of *the Constitution* of Kenya as read with sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties. It is my considered view that it would not be in the interest of justice to exercise this court’s discretion and grant stay of proceedings as the same will only serve to delay the hearing of the suit.
- 23. In the premise, I allow the Notice of Motion in terms of prayers 2, 4 and 5 and make the following orders:
 - i. The Defendants/Applicants are hereby granted leave to file their intended appeal from the Ruling delivered on 30 January 2024 by Hon. E. Tanui in HCCCOMM/E507/2020;
 - ii. The draft Memorandum of Appeal is hereby deemed as duly filed;
 - iii. Costs in the cause.

DATED AND DELIVERED AT NAIROBI THIS 18 DAY OF DECEMBER 2024

HELENE R. NAMISI
JUDGE OF THE HIGH COURT

Delivered on virtual platform in the presence of:
for the Defendants/Applicants
for the Plaintiff/ Respondent

