



REPUBLIC OF KENYA



**Sahin v Gulbahar (Civil Appeal E087 of 2022) [2023] KEHC 129 (KLR)
(Commercial and Tax) (20 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 129 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E087 OF 2022
A MABEYA, J
JANUARY 20, 2023**

BETWEEN

EBUBEKIR SAHIN APPELLANT

AND

BULENT GULBAHAR RESPONDENT

RULING

1. Before Court is an application dated July 5, 2022. It was brought under section 3A of the *Civil Procedure Act*, and Orders 42 Rule 6(1) and Order 51(1) of the *Civil Procedure Rules*.
2. It sought a stay of proceedings of Civil Case No MCCCE/11232/2021 before the Chief Magistrate's Court pending the determination of the intended appeal against the ruling delivered on June 7, 2022.
3. The grounds for the application were set out on the face of it and on the Supporting Affidavit sworn by Atonga Silas Ochieng on July 5, 2022. It was the applicant's case that he had filed a preliminary objection dated February 25, 2022 on grounds that the suit was time barred. However, the same was dismissed vide the ruling of June 7, 2022. That he was aggrieved by that ruling and filed the instant intended appeal.
4. He was apprehensive that if the lower court proceedings were not stayed, the matter would proceed to conclusion during the pendency of this suit.
5. The respondent opposed the application vide the Grounds of Opposition dated July 20, 2021. He contended that the application did not meet the thresh-hold for the grant of the orders sought and that the intended appeal lacked merit.



6. The appellant filed written submissions dated August 28, 2022. This court has considered those submissions alongside the entire record. The main issue for determination is whether the lower court proceedings should be stayed.
7. A decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from Order 42 rule 6 (1) of the Civil Procedure Rules.
8. *In Re Global Tours & Travel Ltd HCWC No 43 of 2000* Ringera, J (as he then was) held that: -

' 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 case, 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 reiterate the foregoing here in total and state that, the applicant ought to have shown that he has an arguable appeal with high chances of success such that, if stay of proceedings is not granted, the appeal will be rendered nugatory. He should also have shown that there would be prejudice to be suffered if the proceedings were left to continue.
10. I have seen the memorandum of appeal in this matter. The applicant is challenging the trial court's decision to dismiss his preliminary objection on several grounds. Inclusive amongst them is that; the trial court failed to appreciate the time when the cause of action arose, the trial court imported non-existent terms to the oral contract between the parties, the court made conclusive findings at a preliminary stage, that it misdirected itself on the facts of the case, and made a wrong finding that the objection did not meet the ingredients of a preliminary objection.
11. I find the said grounds to be arguable, and if proven, the appeal may succeed. The grounds raise triable issues that require judicial consideration, thus the intended appeal cannot be said to be prima facie without merit. The application was also brought timeously considering that the appellant was able to obtain a copy of the ruling and file the application in less than 30 days.
12. Further, the preliminary objection forming the basis of the intended appeal ought to be determined at the preliminary stage because its success would lead to the striking out of the entire suit.
13. This court therefore sees no need to continue with proceedings which may be struck out altogether should the intended appeal succeed. The conclusion of the lower court suit during the pendency of this suit would also render the intended appeal nugatory. That would be a waste of judicial time and would visit unnecessary expenses upon the parties. On the other hand, if the appeal fails, the respondent may be compensated by an award of costs.
14. From the foregoing, there seem to be no justification to decline the orders sought. The court is however cognizant of the need to prosecute the intended appeal expeditiously. In the end, the court makes the following orders: -
 - a. The application is found to be merited and prayer (b) is allowed as prayed.



- b. The Record of Appeal be filed and served within 60 days of the date hereof.
- c. The costs shall abide the outcome of the appeal.

It is so ordered

DATED and DELIVERED at Nairobi this 20th day of January, 2023.

A. MABEYA, FCIArb

JUDGE

