



**Paragon Electronics Limited v Muses (Civil Appeal 254 of 2020)  
[2023] KEHC 1323 (KLR) (Civ) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1323 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL 254 OF 2020**

**CW MEOLI, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**PARAGON ELECTRONICS LIMITED ..... APPLICANT**

**AND**

**FATMA MUSES ..... RESPONDENT**

**RULING**

1. The motion dated July 30, 2020 by Paragon Electronics Limited (hereafter the Applicant) seeks an order to stay proceedings in Nairobi Milimani CMCC No 4406 of 2017 pending hearing and determination of the appeal herein. The motion is expressed to be brought under Article 159 of *the Constitution of Kenya 2010*, Section 1A & 3A of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules* inter alia, on grounds on the face of the motion as amplified in the supporting affidavit sworn by Valentine Ataka, counsel for the Applicant.
2. To the effect that the Applicant was aggrieved by and has lodged an appeal in respect of the ruling delivered in the lower court suit on May 29, 2020. That the Applicant stands to suffer prejudice and substantial loss if stay of proceedings of the lower court suit is not granted as final judgment will be entered as against the Applicant whereas it was not accorded an opportunity to prosecute its case in the lower court. Counsel further deposes that the instant motion was filed expeditiously and has a high probability of success. Finally, he asserts that it is in the interest of justice that stay of proceedings be granted pending hearing and determination of the appeal.
3. Fatma Muses (hereafter the Respondent) opposes that motion by way of grounds of opposition dated April 19, 2021. She takes particular issue with motion on grounds that the application is fatally defective, hopelessly misconceived, frivolous and totally devoid of merit; that the Applicant's prayers as sought in the motion dated July 30, 2020 are vexatious, and intended to delay the expeditious hearing



and determination of the lower court suit; that the lower court suit is pending delivery of judgment and the application is belated and an afterthought representing an abuse of the court process.

4. The motion was canvassed by way of written submissions. Counsel for the Applicant began by rehashing the contents of the affidavit material in support of the motion. First, he cited the decisions in *Phillip Tirop Kitur v Attorney General* [2018] eKLR and *Peter O. Nyakundi & 68 Others v Principal Secretary, State Department of Planning, Ministry of Devolution and Planning & Another* [2014] eKLR to submit that the Respondent having only filed grounds of opposition to the motion, is deemed to admit the depositions in the supporting affidavit which sufficiently prove the Applicant's case.
5. Regarding the prayers sought in the motion, counsel asserted that the appeal herein raises arguable issues with a high chance of success and sufficient cause; that the Applicant is likely to suffer substantial loss and prejudice should the court decline the motion. He relied on *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330, the decisions in *Edward Muchiri Ituma v Beatrice Wangigi & 9 Others* [2019] eKLR and *Martin Kamakya v Resolution Insurance Company Ltd; Peter Ngumbi (Interested Party)* [2021] eKLR. That the motion has been filed in good faith while the Applicant has already filed the record of appeal to enable expeditious disposition of the appeal. Counsel reiterated that the court has the discretion to stay proceedings to meet the ends of justice to avert any prejudice that would otherwise be visited on the Applicant.
6. The Respondent failed and or opted not to file submissions to the instant motion despite being given ample opportunity to do so.
7. The court has considered the material canvassed in respect of the motion. However, it is pertinent to state at this stage, that the court is not concerned with the merits of the appeal. That said, the Respondent opted to file grounds of opposition in opposition to the Applicant's motion. Order 51 Rule 14 (1) of the *Civil Procedure Rules* prescribes the opposing a motion presented before the High Court as follows:-

- “(1) Any respondent who wishes to oppose any application may file any one or a combination of the following documents —
- (a) a notice preliminary objection: and/or;
  - (b) replying affidavit; and/or
  - (c) a statement of grounds of opposition;”

8. Recently the Court of Appeal in *Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited* (Civil Appeal (Application) E012 of 2020) [2022] KECA 1240 (KLR) addressed the effect of filing only grounds of opposition in response to a motion by stating that:-

“Be that as may, it is notable that a statement of Grounds of Opposition is provided for in Order 51 Rule 14 of the Civil Procedure Rules as a recognized pleading opposing an application in the High Court, but is not expressly provided for in the Court of Appeal Rules.

What then is the import of filing Grounds of Opposition in response to an application filed in the Court of Appeal? A “ground” is in this regard defined in *Black's Law Dictionary*, Ninth Edition at page 772 as “the reason or point that something, (as a legal claim or argument), relies on for validity”. An affidavit on the other hand is defined at page 66 as “a voluntary declaration of facts written down and sworn to by a declarant before an officer authorized to administer oaths”. Therefore, any facts sought to be introduced in an



application before this Court can only be done by way of an affidavit, and cannot be by way of Grounds of Opposition, and any attempt to do so through the Respondent's Ground of Opposition will be incompetent. In essence, the Respondent is therefore restricted to only raising issues of law and to making legal arguments in this application." (sic)

9. First, the court takes the following view regarding the election by the Respondent not to swear a replying affidavit in opposition to the motion. The Respondent was well within her right to file grounds of opposition in response to the Applicant's motion but was thereby confined to issues of law. The granting of stay of proceedings pending appeal involves judicial discretion fettered by certain conditionality thus the absence of a replying affidavit by the adverse party does not necessarily give free rein to the applicant.

10. Moving on to the substantive issues for determination, the power of the court to stay proceedings pending appeal is donated by Order 42 Rule 6 (1) of the *Civil Procedure Rules* as augmented by section 3A of the *Civil Procedure Act*, also invoked by the Applicant. The latter provision reserves the inherent power of the court to make such orders as maybe deemed necessary to meet the ends of justice. Order 42 Rule 6 (1) of the *Civil Procedure Rules* provides that; -

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.

11. Whereas Section 3A of the *Civil Procedure Act* provides that;-

"Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court."

12. As to what constitutes inherent jurisdiction of the court, the Court of Appeal in *Rose Njoki King'au & Another v Shaba Trustees Limited & Another* [2018] eKLR rendered itself as follows;-

"Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by "inherent power" it means that

"Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion."

The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malolm Bell* [2013] eKLR, to add the following:-



“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

13. Ringera, J (as he then was) in *Re Global Tours & Travel Ltd* Nairobi HCCC No. 43 of 2000 (UR) spelt out the applicable considerations in determining an application for stay of proceedings pending appeal as follows:-

“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.”

14. Undoubtedly, the unnecessary proliferation of proceedings which needlessly dissipate the court’s limited time resource is also a key consideration in an application of this nature. The Court of Appeal in *Raymond Ruto & 5 Others v Stephen Kibowen* [2021] eKLR exhorted that; -

“We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing....

“The learned authors of; *Halsbury’s Law of England*, 4th Edition. Vol. 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“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 proceeding beyond all 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 the case.”

15. Essentially, the Applicant seeks to invoke this court’s inherent jurisdiction and judicial discretion to prevent another court from performing its duty to hear a dispute before it, thereby essentially interrupting the adverse right to conduct their hearing itself “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” per *Halsbury’s Laws of England*.(supra)

16. The Applicant asserts in its affidavit material that it had filed an application in the lower court suit seeking to set aside *ex parte* proceedings and the recall of the Respondent for cross examination by the Applicant and adduction of its evidence. That the trial court dismissed the motion prompting the present appeal that allegedly raises weighty issues with a high probability of success. It was further asserted that the Applicant stands to suffer prejudice and substantial loss if stay of proceedings of the lower court suit is not granted because the court below will proceed to pronounce judgment against the Applicant, which is precisely what the Respondent desires.
17. A perfunctory look at the memorandum of appeal (Annexure VA-2) attached to the Applicant’s affidavit material, reveals issues serious enough to merit the court’s consideration on appeal or that are *prima facie* arguable. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR said that an arguable appeal need not be one that will succeed so long as it raises a bona fide issue for determination by the Court. In that case, the court emphasized the right of appeal in the following terms:

“Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized .... in the case of *Richard Ncharpi Leiyagu vs IEBC & 2 Others* (supra); *Mbaki & Others vs Macharia & Another* [2005] 2EA 206; and the Tanzanian case of *Abbas Sherally & Another vs Abdul Fazaiboy*, Civil Application No 33 of 2003; for the holding inter alia that:

- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
- (ii) the right to be heard is a valued right; and
- (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because the violation is considered to be a breach of natural justice...”

18. The instant motion was filed close to two months after the ruling and the Applicant has not explained this delay. This is an important issue as the period of delay as well as explanation thereof is a key consideration in an application of this nature. The delay may not be inordinate however, and the court equally takes judicial notice that during the material period, court activities and services were scaled down due to the COVID-19 pandemic. Any prejudice likely to be suffered by the Respondent could well be compensated through costs. Besides, the prosecution to conclusion of the suit before the lower court while the present appeal is ongoing would not be prudent or efficient utilization of judicial time. Not to mention likely conflicting outcomes. Therefore, allowing the instant motion would prevent a miscarriage of justice and avoid embarrassing the court.
19. As held in *Osbo Chemicals Ltd v Tabitha Wanjiru Mwaniki* [2018] eKLR the court bears the duty imposed by Section 1B & 1A of the *Civil Procedure Act*, to further the overriding objective in Section 1 of the *Civil Procedure Act* which states:

“1A(1)the overriding objective of this Act and the rules made hereunder is to facilitate, the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act;



- (2) The court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in sub-section (1);
- (3) A party to civil proceedings or an Advocate for such a party is under a duty to assist the court to further the overriding objective of the Act, and to that effect, to participate in the process of the court and to comply with the directions and orders of the court.”

20. Consequently, the court is persuaded to grant the motion dated July 30, 2020. in order to facilitate the Applicant’s undisputed right of appeal on condition that the Applicant deposits into court the sum of Kes 100,000/- (One Hundred Thousand) as security for costs by close of business on March 10, 2023.Costs will abide the outcome of the appeal.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicant: Ms.Nakitare h/b for Mr. Ataka

For the Respondent: Mr.Musyoka

**C/A: Carol**

