



**West Kenya Sugar Co. Ltd v Simiyu & another (Suing as Administrator and Personal Representative of the Estate of Victor Masibo Simiyu - Deceased) (Civil Appeal E072 of 2022) [2023] KEHC 19345 (KLR) (30 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 19345 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BUNGOMA  
CIVIL APPEAL E072 OF 2022**

**DK KEMEL, J**

**JUNE 30, 2023**

**BETWEEN**

**WEST KENYA SUGAR CO. LTD ..... APPELLANT**

**AND**

**FRANCIS MASIBO SIMIYU & MARY NANJALA MASIBO (SUING AS ADMINISTRATOR AND PERSONAL REPRESENTATIVE OF THE ESTATE OF VICTOR MASIBO SIMIYU - DECEASED) ..... RESPONDENT**

**RULING**

1. The appellant/applicant moved this court by way of a notice of motion application dated December 22, 2022 seeking the following reliefs;
  - a. Stay of proceedings and or further proceedings in Kimilili PMCC No E155 of 2021 pending the hearing of this application.
  - b. Stay of proceedings and or further proceedings and or hearing of this matter and or taking of any action in Kimilili PMCC No E155 of 2021 pending the hearing and determination of this appeal.
  - c. Costs of the application be in the cause.
2. The application is supported by the affidavit of Cherotich Cynthia, counsel in conduct of the matter for the applicant who deponed inter alia; that the respondent's case came up for hearing on July 14, 2022 when the applicant raised an objection to the production of a school assessment report from Makhonge Primary School which the respondent intended to produce without calling the maker; that in a subsequent ruling, the court ruled and disallowed the objection on the grounds that the applicant was at liberty to call the school administration if it wished to confirm that the deceased was a student in the said institution and thereafter ordered the respondent to produce the said document; that after



the ruling, the applicant sought stay of proceedings as they pursued the appeal and a prayer for stay of proceedings which was declined necessitating the instant application; that the applicant stands to suffer loss if the matter in the subordinate court proceeds to hearing.

3. Learned counsel C Mwebi for the respondent filed a replying affidavit to the application wherein he deponed inter alia; that according to the ruling, the trial court would comply with the ruling of this court if the appeal would be successful.; that in any case, the applicant has now shown the prejudice it will suffer if the matter proceeded before the lower court.
4. Parties canvassed the application by way of written submissions. Both parties duly filed and exchanged submissions.

### **Analysis and determination.**

5. I have given due consideration to the application, rival affidavits and the submissions. I am of the strong view that the only issue left for determination by this court is as framed by both parties that is; whether the applicant is entitled to orders of stay pending appeal.
6. I am alive that the appeal arises from a ruling by the learned trial magistrate in the course of hearing. The objection as can be gleaned from the application and the reply thereto relates to the production of a document by the respondent in which the applicant vociferously opposed. The issue then turns on whether the applicant is entitled to stay of proceedings pending the determination of the appeal already lodged in this court. It should however be noted that I do not yet have the record of appeal as I only have the parties' dispositions on the subject. Neither do I have a copy of the order challenged.
7. In light of this, the court in *David Morton Silverstein v Atsango Chesoni* (2002) eKLR held that;

“We do not have to decide these points in this application; they will be conclusively determined in the intended appeal. What we have to do in this application is to determine whether the point is an arguable one, that is, that it is not a frivolous one.”
8. I am alive to the fact that the production of evidence in a trial forms a very crucial role so that in the instant application, the applicant impugns the trial court's order of production which may ultimately have a bearing in the determination of the matter before that court.
9. The conditions under which a stay of proceedings can be entertained has been discussed in many authorities; in *Re Global Tours & Travel Limited*, (2000) LLR 1061, Ringera, J (as he then was) was held;

“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 for 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.”



10. The above receives a stamp of authority from the Halsbury's Law of England, 4<sup>th</sup> Edition, Vol 37 page 330 which provides;

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.

11. Applying the facts of the application before me to the authorities cited above, I am minded that the role of the court is to administer justice to the parties. The main contention herein relates to the production of a letter from a school where the deceased allegedly schooled. There is no evidence tabled before me in relation to the said document save for the parties disposition.
12. An appeal is already before this court awaiting determination and that the applicant's plea is to be granted a stay of proceedings pending the determination of that appeal. I take cognizance of the fact that the merits or otherwise of the appeal is yet to be delved into but at this stage, iam bound to apply the above decisional authorities to the instant application and determine whether a stay is merited in the circumstances.
13. The respondent's contention is that there is no prejudice that will be suffered by the applicant if the matter proceeds in the lower court. I do not think this is true because once a document is produced, it forms part of the record and worth consideration by the court. It will go to the root of the very decision of that court and plays a very immense role in the decision that will be arrived at. It is fair and just that the appellant be given an opportunity to ventilate its appeal. As regards the respondent's claim of delay and prejudice, it is noted that appeals are always disposed of by way of written submissions and hence the same can easily be wrapped up in a short period after which the parties can then go and proceed with the matter in the lower court.
14. Having addressed my mind to the above, I find that it is just and fair that the applicant is granted orders of stay of proceedings in the subordinate court pending the hearing and determination of the appeal. I however note that management of judicial time is very key as there are many deserving litigants who need that time and opportunity. I therefore find that the stay of proceedings is hereby granted on condition that the applicant prepares and serves the record of appeal within 30 days as of today. The Deputy Registrar of this court is directed to call for the trial court's record and commence admission of appeal within 14 days as of this date. The costs of the application shall abide the outcome of the appeal.
- 15 Orders accordingly.

**DATED AND DELIVERED AT BUNGOMA THIS 30TH DAY OF JUNE 2023**

**D.KEMEI**

**JUDGE**

**In the presence of :**

Miss Kosegei for Appellant/Applicant

Wekesa for Mwebi for Respondent

**Kizito Court Assistant**

