



**Nine Trading Limited v Premier Industries Limited (Civil Appeal  
E463 of 2022) [2023] KEHC 21501 (KLR) (Civ) (28 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 21501 (KLR)

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

**CIVIL**

**CIVIL APPEAL E463 OF 2022**

**CW MEOLI, J**

**JULY 28, 2023**

**BETWEEN**

**NINE TRADING LIMITED ..... APPELLANT**

**AND**

**PREMIER INDUSTRIES LIMITED ..... RESPONDENT**

**RULING**

1. For determination is the Notice of Motion brought by Nine Trading Limited (hereafter the Applicant) and dated 27<sup>th</sup> July, 2022. The substantive prayer sought therein is an order to stay the proceedings in Milimani CMCOM No. E567 of 2020 pending hearing and determination of the appeal herein. The application is expressed to be brought *inter alia* under Order 42 rules 6 of the [Civil Procedure Rules](#) (CPR). It is supported by the grounds laid out on its face and the depositions in the affidavit of the Applicant's Director Jayesh Kotecha.
2. To the effect that when the suit came up for hearing, the Applicant's advocate experienced a technical hitch which prevented him from cross-examining a witness and calling evidence. He stated that the trial court subsequently dismissed the Applicant's application seeking to have its witness tender evidence and further seeking leave to cross-examine the witness summoned by Premier Industries Limited (hereafter the Respondent). It was stated that the Applicant, being aggrieved with the decision of the trial court, intends to challenge it by way of the appeal and that he is apprehensive that unless the order for stay as sought is granted, there is a likelihood that the suit in the court below will be determined without its participation, contrary to the rules of natural justice.
3. The Motion was opposed by the Respondent by way of the replying affidavit sworn by its Director Sundip Shah. The deponent averred that neither the Applicant's witness nor its advocate logged in for the lower court hearing session which took place on 14<sup>th</sup> March, 2022 despite having been duly served



with a hearing notice to that effect. The deponent further averred that the explanation given by the Applicant's advocate for his and his client's non-attendance was not supported by sufficient evidence and hence the trial court acted correctly in declining to grant the orders sought before it. That the Applicant has therefore not demonstrated sufficient grounds to warrant the grant of the order sought, while the Respondent stands to suffer prejudice through delay if the stay order is granted.

4. The court directed that parties file written submissions on the Motion. Counsel for the Applicant anchored his submissions on Order 42, Rule 6 of the Civil Procedure Rules relating to stay of execution/proceedings and Articles 50 and 159(2)(d) of the Constitution on the right to a fair hearing and the administration of justice without undue regard to procedural technicalities, respectively. Counsel also cited the decisions rendered by the Court of Appeal in UAP Provincial Insurance Co Ltd v Michael John Beckett [2004] eKLR and Niazsons (K) Ltd v China Road & Bridge Corporation Kenya [2001] eKLR to argue that the appeal raises arguable issues and that unless the stay order sought is granted, the Applicant will be condemned unheard, and the appeal will be rendered nugatory. The court was therefore urged to exercise its discretion in favour of the Applicant, by allowing the Motion.
5. In reply, the Respondent's counsel contended that firstly, the Motion has been brought under the wrong legal provisions since Order 42, Rule 6 of the CPR is inapplicable here. Counsel contended that there is nothing to be stayed in the impugned ruling and hence no stay can be granted. Here citing the decisions in Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR and Catherine Njeri Maranga v Serah Chege & another [2017] eKLR on the principles pertinent to the grant of an order of a stay of execution.
6. Secondly, regarding stay of proceedings, counsel cited Global Tours & Travel Ltd-Nairobi HC Winding-Up Cause No 43 of 2000 and Mukunya Mugo A & another v Elizabeth Mugure Mukunya [2020] eKLR on the applicable principles in applications of this kind. It was submitted that there has been inordinate delay on the part of the Applicant in bringing the instant Motion and that the Applicant has not established any *prima facie* grounds to render it deserving of an order of a stay of proceedings. Reliance was placed on the decision rendered in Millicent Wamaittha Njogu v Pauline Nyambura Waweru [2022] eKLR in that regard. On those grounds, the Respondent urged the court to dismiss the Motion with costs.
7. The Court has considered the material canvassed in respect of the Motion. It is worth stating that at this stage, that the court is not concerned with the issue of whether the decision rendered by the trial court on 24<sup>th</sup> June, 2022 is proper and reasonable, since the said decision forms the substratum of the appeal, which will be considered at the appropriate time. For now, what is before the court for consideration and determination is the prayer seeking a stay of proceedings in the suit pending the appeal.
8. The power of the court to stay proceedings is donated by Order 42, Rule 6 (1) of the Civil Procedure Rules which provides: -

“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”



9. In the renowned case of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 (UR) Ringera, J (as he then was) succinctly set out the applicable considerations in determining an application for stay of proceedings in the following manner:

“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).

See also *Christopher Ndolo Mutuku and Anor. v CFC Stanbic Bank Limited* [2015] eKLR; and *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] e KLR.

10. As held in the above case, the need to avoid the unnecessary dissipation of judicial time and multiplicity of proceedings is a paramount consideration in an application of this nature, as is the question whether the appeal will be rendered nugatory if the subject proceedings are not stayed. As observed by Onyango Otieno, J (as he then was) in the authority of *Niazsons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd*. Nairobi HCCC No. 126 of 1999:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay (stay of proceedings) should be granted.”

11. Moreover, the Court of Appeal in the case of *Wachira Waruru & Anor. v Francis Oyatsi* [2002] 2 EA 664 rendered itself thus:

“In an application for stay of proceedings pending appeal where the judgment is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

12. Upon the court’s study of the record and material presented, it is clear that the instant Motion was brought without unreasonable delay, having been filed about one (1) month from the date of delivery of the impugned ruling on 24<sup>th</sup> June, 2022. From the memorandum of appeal on record, it is apparent that the appeal lies against the decision by the trial court declining to grant the Applicant’s request for leave to re-open the plaintiff’s case and for leave to cross-examine the Respondent’s witness, and for the Applicant be allowed to defend the case pending in the subordinate court. There is no dispute that the said suit proceeded for hearing on 14<sup>th</sup> March, 2022 the Respondent being the plaintiff in the suit adducing evidence in the absence of the Applicant and/or its advocate, thus prompting the application which was the subject of the impugned ruling.
13. Considering the undisputed background to the application and without delving into the merits of the appeal, the court finds that the Applicant’s apprehension that it risks being condemned unheard, and judgment being rendered against it without its participation in the trial, is not farfetched. The hallowed



right of a party to a fair hearing is protected by the Constitution. The court is therefore satisfied that the Applicant has an arguable appeal.

14. Moreover, because the suit in the court below is in its final stages upon close of the parties' respective cases, it is evident that unless the proceedings are stayed in the present instance, it is likely that the objects of the appeal may be defeated, thereby rendering the appeal nugatory. Additionally, it would not constitute proper use of judicial time to allow two concurrent active proceedings in respect of the same matter. In any event, the court notes that the Respondent has not demonstrated the likelihood of prejudice that is beyond compensation through an award of costs. Upon considering all the relevant factors and the competing interests of the parties, the court is persuaded to exercise its discretion in favour of the Applicant.
15. Consequently, the motion dated 27<sup>th</sup> July, 2022 is hereby allowed on condition that the Applicant shall fully prosecute the appeal within six (6) months of today's date failing which the stay order shall automatically lapse and the Respondent be at liberty to proceed with the lower court suit. Cost will be in the cause.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**C.MEOLI**

**JUDGE**

In the presence of

For the Applicant: Mr. Chacha

For the Respondent: Ms. Njagi h/b for Mr. Kimani

C/A: Carol

