



REPUBLIC OF KENYA



Wekesa v Masinde (Civil Appeal 12 of 2023) [2023] KEHC 21361 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEHC 21361 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA**

CIVIL APPEAL 12 OF 2023

REA OUGO, J

JULY 26, 2023

BETWEEN

ELIUD SITUMA WEKESA APPELLANT

AND

MELITI WAMALWA MASINDE RESPONDENT

RULING

1. In a notice of motion dated April 3, 2023 brought under articles 50(1) & 159(2) of the *Constitution* of Kenya 2012, section 1A, 1B,3,3A and 80 of the *Civil Procedure Act*, order 51 rule 1,3, and 10 of the *Civil Procedure Rules 2010*. The appellant/ applicant seeks the following orders;
 - i. Spent
 - ii. That the honorable court be pleased to stay proceedings in Bungoma CMCC No 106 of 2020 Meliti Wamalwa Masinde v Eliud Situma Wekesa , pending the hearing and determination of the application.
 - iii. That the honorable court be pleased to stay proceedings in the matter pending the hearing and determination of the appeal to wit Bungoma Civil Appeal No 12 of 2023.
 - iv. That the costs of the application be borne by the respondent.
2. The application is supported an affidavit dated the April 3, 2023 sworn by counsel for the applicant. She avers as follows; she has conduct of the matter. The appellant has filed in Bungoma CMCC No106 of 2020. On the February 16, 2023 the lower court dismissed the appellant’s application dated April 30, 2023 seeking to amend the defense to plead fraud. That applicant is aggrieved by the with the entire ruling and has instructed them to file an appeal against the said ruling to wit Bungoma civil appeal No 12 of 2023. That if the lower court matter proceeds it will render the appeal will be rendered nugatory and that the application has been filed without delay. That the appeal raises triable issues and ought to be heard on merit.



3. The application was opposed. There is an affidavit sworn by Cleveland Mwebi. He avers that the ruling by the trial magistrate was very sound and merited. The appeal has no chances of success and it is a waste of time and that there are no triable issues. That the applicant has not shown any substantial loss it is likely to suffer if the hearing of the lower court proceeds. That the application is an afterthought and is intended to delay the finalizing of the lower court case.
4. The application was canvassed by way of oral submissions. The applicant's counsel reiterated what is her affidavit in support of the application. She submitted that what should guide the court is whether there is an arguable appeal, reliance was made on the case of *Ezekiel Mosebi v H. Young EA* 2019 eKLR. That the application was filed within reasonable time as the ruling was delivered on the February 15, 2022 and they filed their application.
5. Mr Okangi argued that the application is defective and afterthought as the ruling the applicant intends to appeal from is not attached to the application nor have they annexed a letter stating that they have sought the ruling. That the issues raised in the memorandum of appeal are not triable issues. Reliance was made in the case of *Turbo Highway Eldoret Ltd v Dominic Njenga Muniu* civil appeal No E040 of 2021 on the conditions to be met when a party applies for stay of proceedings. That if the stay order is allowed then the applicant should deposit costs of Kshs 10,000/- before they pursue the appeal.
6. In response the applicant submitted that the application is not for stay of execution but for stay of proceedings. That the appeal will be rendered nugatory if the case proceeds yet there is an appeal on the said ruling.

Determination

7. The issue for determination is whether the proceedings in CMCC No 106 of 2020 Bungoma should be stayed. The appellant/ applicant has moved this court after the trial court dismissed an application to amend his defense. The case has not yet been heard and determined.
8. In Nairobi HC Winding-Up Cause No 43 of 2000 *Global Tours & Travel Ltd* Ringera, J had held 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 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.”
9. Guided by the above case, I have to consider a number of issues before granting an order for stay of proceedings. The court has to weigh the pros and cons of issuing such order, the consequences that may arise subsequent to those orders and whether the issuing of such orders would be in the interest of justice.,
10. The applicant's sole purpose of seeking the stay of proceedings order is that they have been denied a chance to amend their defense. The applicants argues that if the case proceeds to hearing in the lower court, then the appeal will be rendered nugatory. There is no requirement in law that the



ruling the subject of the appeal be attached to the application, though in my view it is worth attaching to demonstrate to the court that they have an arguable appeal. The applicant has filed a memorandum with five (5) grounds of appeal. In the said grounds the applicant states that they sought the amendment to plead fraud but the trial court dismissed their application. Attached to this current application the application that was before the trial court, the notice of motion dated the April 30, 2021 and the proposed amended defense and a letter from the ministry of health signed by the Medical Superintendent. I am persuaded that the applicant has an arguable appeal. The application was filed in good time. I do agree with the applicant's submission that the application is not one of stay of execution but one of stay of proceedings and therefore there is no need to deposit a security in court. The respondent will not be prejudiced in any way. I have weighed the pros and cons and in the interest of justice I allow the stay of proceedings in Bungoma CMCC No 106 of 2020 Meliti Wamalwa Masinde v Eliud Situma Wekesa pending the hearing and determination of the appeal in appeal No 12 of 2023, on the following conditions;

- i. The applicant shall file the record of appeal within 45 days from the day of this ruling.
- ii. Matter to be mentioned before the Deputy Registrar a week after the said 45 days for directions on compliance and any further order.
- iii. If the applicant does not file the record of appeal with the 45 days then the order for stay of proceedings shall vacate and the respondent can proceed to have the suit in the lower court fixed for hearing after complying with the relevant procedures provided under the [Civil Procedure Rules](#).
- iv. Costs shall abide the outcome of the appeal.

DATED ,SIGNED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JULY 2023.

R.E.OUGO

JUDGE

In the presence of;

Miss Ogato For the Appellant/Applicant

Respondent- Absent

Wilkister/ Okwaro-C/A

