



Onchiri (Legal & Personal Representative of the Estate of Pauline Kasesya Mwinzi) v Endere & another (Civil Case 4 of 2020) [2023] KEHC 21383 (KLR) (Civ) (4 August 2023) (Ruling)

Neutral citation: [2023] KEHC 21383 (KLR)

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

CIVIL

CIVIL CASE 4 OF 2020

AN ONGERI, J

AUGUST 4, 2023

BETWEEN

**JOHN KENYATTA ONCHIRI (LEGAL & PERSONAL REPRESENTATIVE OF
THE ESTATE OF PAULINE KASESYA MWINZI) PLAINTIFF**

AND

DR. FRANK ENDERE 1ST DEFENDANT

ST. MARY'S MISSION HOSPITAL LANGATA 2ND DEFENDANT

RULING

1. The application coming for consideration in this ruling is the one dated June 15, 2022 brought under Order 42, rule 6 and Order 51 rules 1 and 3 of the *[Civil Procedure Rules](#)*, 2010, Sections 1A, 1B and 3A of the *[Civil procedure Act](#)* and all other enabling provisions of law on the face of the application seeking for orders of stay of further proceedings in this suit pursuant to the order dated May 20, 2022 pending the hearing and determination of an appeal lodged by the 1st defendant to the Court of Appeal against the said order.
2. The application is based on the following grounds;
 - i. That the 1st defendant/applicant has already appealed against the ruling and order dated May 20, 2022 in the Court of Appeal.
 - ii. That the 1st defendant/applicant's appeal to the Court of Appeal would be rendered nugatory if further proceedings are conducted in the suit based on the plaintiff's amended plaint but the appeal subsequently succeeds.



- iii. That there would be an unnecessary expenditure of judicial time if further proceedings are conducted in the suit but the appeal already preferred subsequently succeeds.
3. The application is supported by the affidavit of the defendant/applicant Dr Frank Enderein which he deposed that being dissatisfied by the ruling dated May 20, 2022, the Applicant appealed to the Court of Appeal which if successful would be rendered nugatory if further proceedings are concluded in this suit, based on the Plaintiff's amended Complaint, which would be unnecessary expenditure of Judicial time.
 4. The respondent opposed the application and filed grounds of opposition dated July 22, 2022 and a replying affidavit sworn by the plaintiff John Kenyatta Onchiri on July 22, 2022 in which he deposed that Order 42 rule 6, under which the Applicant has brought the application deals with stay of execution and not stay of proceedings, no memorandum of appeal has been adduced to enable the court assess the merit and chances of success of the appeal, there is no substantive case before the Court of Appeal, and that the Applicant has not demonstrated that he will suffer substantial loss if the order of stay is not granted.
 5. The Plaintiff further deposed that the ongoing suit has a clear Cause of action in law and equity, and the prayers sought would prejudice the Plaintiff if the matter would delay for no reason, infringes the Respondent's right to Access to Justice, Right to be heard without delay and Right to a fair trial. If the court granted an order of stay, it would be undermining its own ruling dated May 20, 2022.
 6. The 2nd defendant filed an affidavit sworn by Victoria Wahu the legal officer of 2nd defendant on July 7, 2022 supporting the application dated June 15, 2022 in which it is deposed that the Court ruling allowed the Plaintiff to amend his Complaint, which Ruling has been appealed and the notice of Appeal served onto the Plaintiff. If the court does not grant a Stay of execution on all the orders contained in the ruling, the Appeal would be rendered nugatory.
 7. The Applicant in his submissions averred that the court has unfettered discretion to order stay of proceedings pending an appeal of its order or decree if the court is satisfied that substantial loss may result to the applicant and the application is made without undue delay. There is no mandatory requirement for the applicant to provide security as a prerequisite for the grant of the order.
 8. In response to the Plaintiff's Grounds of opposition, replying affidavit and List of Authorities, the applicant deposed that Order 42 Rule 6 applied to the present application and that the conditions to be met by an applicant for stay of execution do not apply for an applicant seeking stay of proceedings. The Applicant needed not adduce the Memorandum of Appeal as only the Court it was before should assess the merit of the Appeal.
 9. The Plaintiff/Respondent in his submissions deposed that the issue for determination was whether the current proceedings should be stayed pending the final determination of the Appeal. The applicant had filed the application incompetently, relying on order 42 Rule 6 of the [Civil Procedure Rules](#) whose provisions regards Stay of Execution. The Applicant has also not established the threshold for a Stay of Proceedings there being no substantive case before the Court of Appeal. He also raised that the Applicant had filed the Appeal out of time and the Memorandum of Appeal stands to be struck out.
 10. The Plaintiff Respondent relied on an extract from [Halsbury Law of England](#), 4th Edition. Volume 37, Page 330 and 332 which provides:

“The stay of proceedings is a serious, brave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of 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 . . . It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or 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. The sole issue for determination is whether the court should be granted stay of proceedings pending the hearing and determination of the interlocutory appeal.
12. The Section relied on by the applicant deals with stay of execution pending appeal.
13. Stay of execution is different from stay of proceedings. I find that the habit of filing interlocutory appeals only delays the determination of suits.
14. In the matter of *Henry Bukomeko & 2 Others vs Statewide Insurance Co Ltd* Uganda Supreme Court Civil Appeal No 13 of 1989 the Court held that:

“.....It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency.”

15. Similarly in *Kenya Wildlife Service vs James Mutembei* [2019] eKLR it was held that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent.”

16. I find that the appeal is not competent as no leave was sought before lodging the same.
17. The application dated June 15, 2022 is not merited. It will only serve the purpose of delaying the disposal of this suit. The same is dismissed with costs to the Plaintiff.
18. The parties are directed to comply with order 11 of the *Civil Procedure Rules* within 30 days of this date.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 4TH DAY OF AUGUST, 2023.

.....
A. N. ONGERI

JUDGE

In the presence of:

..... **for the Plaintiff/Respondent**

..... **for the 1st Defendant/Applicant**

..... **for the 2nd Defendant**

