



**Pevans East Africa Limited & 4 others v Nation Media Group Limited & 7 others
(Civil Case E018 of 2022) [2023] KEHC 21376 (KLR) (Civ) (4 August 2023) (Ruling)**

Neutral citation: [2023] KEHC 21376 (KLR)

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

CIVIL

CIVIL CASE E018 OF 2022

AN ONGERI, J

AUGUST 4, 2023

BETWEEN

**PEVANS EAST AFRICA LIMITED 1ST PLAINTIFF
MILESTONE GAMES LIMITED 2ND PLAINTIFF
RONALD KAMWIKO KARAUARI 3RD PLAINTIFF
NIKOLOV GUERASSIM NIKOLOV 4TH PLAINTIFF
GENE GRAND 5TH PLAINTIFF**

AND

**NATION MEDIA GROUP LIMITED 1ST DEFENDANT
JOHN KAMAU 2ND DEFENDANT
FINANCE UNCOVERED LIMITED 3RD DEFENDANT
PAUL WAFULA 4TH DEFENDANT
PAUL WANDERI NDUNGU 5TH DEFENDANT
GOOGLE LLC 6TH DEFENDANT
YOUTUBE LLC 7TH DEFENDANT
GOOGLE KENYA LIMITED 8TH DEFENDANT**



RULING

1. The 5th defendant/applicant filed a notice of motion dated 20/4/2023 under sections 1A, 1B, 3 and 3A of the Civil Procedure Act and order 42 rule 6 and order 51 rule 1 of the Civil Procedure Rules and the inherent jurisdiction of the court and all other enabling provisions of the law.
2. The 5th defendant/applicant also filed a notice of preliminary objection dated 26/5/2023 against the notice to show cause given by the Deputy Registrar of this court on 22/5/2023.
3. The 5th Defendant/applicant is seeking the following orders in the application dated 20/4/2023
 - i. Spent.
 - ii. There be a stay of any further proceeding in this suit pending the hearing and determination of the substantive prayers in this application.
 - iii. There be a stay of the order requiring the 5th defendant applicant to appear before court to show cause on the 25th of April 2023 or on any other date, pending the hearing and determination of this application.
 - iv. There be a stay of implementation and or execution of the orders of the Honourable Mr. Justice Sergon dated and delivered on the 31st day of march 2023, pending the hearing and determination of the 5th defendant/ applicant's appeal to the court of Appeal against the said ruling dated and delivered non the 31st March 2023.
 - v. Pending the hearing and determination of other prayers in this application, the honourable Mr. Justice Sergon be pleased do disqualify himself and recuse himself from further involvement with and or determination of the whole or any further part of this case.
 - vi. Further and/or in the alternative and without prejudice to the foregoing prayers, this matter be placed before the Chief Justice for appropriate directions, regarding prayer 5 above.
 - vii. That costs of this application be provided for.
4. The application is based on the grounds on the face of it and supported by the affidavit of the 5th defendant/applicant, Paul Wanderi Ndungu sworn on 20/4/2023.
5. In the said affidavit the 5th defendant/applicant has deposed the Court delivered a Ruling on March 31, 2023 dismissing the 5th defendant' application dated November 24, 2022 which sought review of the ruling made on March 25, 2022, and allowing the Plaintiff's application dated August 10, 2022 which found the 5th Defendant to be in contempt of Court. He thus filed a Notice of Appeal against the ruling and has sought certified copies of the ruling and proceedings.
6. The 5th Defendant is apprehensive that if proceedings in this matter continue, he will be detained and the appeal, which is arguable will be rendered nugatory unless an order for Stay pending Appeal is granted. He is willing to deposit security.
7. The 1st, 2nd, 4th and 7th defendant/respondent did not wish to participate in the application dated 20/4/2023 and the notice of preliminary objection dated 26/5/2023.
8. The notice of preliminary objection dated May 26, 2023 was raised on the grounds that:



- a. There is no money decree in this suit and thus a Notice to Show Cause why execution should not be issued under order 22 rule 18 of the [Civil Procedure Rules](#) is inapplicable;
 - b. The Deputy Registrar lacks Jurisdiction to consider a Notice to Show Cause arising out of Contempt of Court proceedings;
 - c. The Notice to Show Cause issued on 22nd Mat 2023 condemns the 5th Defendant without hearing him and suggests that it will be dispensed with if he tenders an undisclosed amount into Court;
 - d. The Notice to Show Cause is an abuse of the Court process and designed to frustrate the Application for Stay pending Appeal; and
 - e. The Notice was served directly upon the 5th Defendant without copying his Advocates on record.
9. The 3rd Plaintiff filed a Replying affidavit in response to both the Application and the Notice of Preliminary Objection where he deposed that an application seeking a Stay of Proceedings should have been filed in the Court of Appeal, and there is no requirement to annex typed proceedings thus unavailability of typed proceedings cannot justify the applicant's failure to move the right court. The orders sought are negative orders, seeking to reverse the decision of the High Court, and can only be done by the Court of Appeal.
 10. The 3rd Plaintiff added that the 5th Defendant accuses the presiding Judge of bias yet seeks orders from the same Court for Stay of execution. That the applicant had failed to demonstrate any substantial loss that he would suffer if the stay was not given and has failed to file a Replying Affidavit to the Notice to Show Cause.
 11. The 5th defendant/applicant filed written submissions in both the application and Preliminary objection. He submitted that as per order 42 rule 6 (1), an application for Stay pending Appeal may be made from the Court Appealed from thus clothing the Court with Jurisdiction to determine the present application.
 12. Further, rule 43 of the [Court of Appeal Rules](#) contemplates that an Application for Stay can be lodged in the High Court in the first instance.
 13. He submitted that the Principles applicable when considering a prayer for stay pending Appeal are as set out in order 42 rule 6(2) of the [Civil Procedure Rules](#).
 14. The 5th Defendant has brought the present application without undue delay and he faces the threat of being detained which will affect his health yet the rules governing contempt of Court provide for either committal to Civil Jail or payment of a fine. The Applicant deposed in his Supporting Affidavit that he is willing to offer security.
 15. He Relied on the finding in [Esther Wanjiru v Jackilne Arege](#) (2014) Eklr to the effect that "an Applicant for an order of Stay pending Appeal is not required to prove that he has an arguable appeal and it is not necessary to consider whether the Applicant has a meritorious appeal before the Appeal Court.
 16. He also submitted that the applicant's prayer for recusal the Honourable Justice Serگون is otiose and the Defendant leaves this aspect of the direction to the Court.
 17. As regards the Preliminary objection, the 5th Defendant relied on the provisions of order 49 rule 5 to submit that the power of the Registrar is limited to issuance of notices to show cause in execution of decreed and not orders, thus the Deputy Registrar acted Ultra vires.



18. The Applicant also submitted that the Notice to Show Cause purported to be I execution of a money decree yet no such situation obtains in this suit and should be struck out.
19. The plaintiffs submitted that the power of Court to grant a Stay of Execution pending Appeal as provided for under order 42, rule 6(2) is fettered by three mandatory conditions: that there's established a sufficient cause, satisfaction of a substantial loss and the furnishing of security and the application must be made without undue delay. The Applicant has not demonstrated any substantial loss he would suffer if the application is not allowed, has not demonstrated sufficient cause and the application is thus premature and speculative.
20. The Plaintiff also pointed out that the Applicant willingly disobeyed Court orders by continuing to make defamatory publications against the Plaintiff during the pendency of Court orders.
21. The Plaintiff also submitted that evidence has been adduced to show the status of the appeal and the delay in filing the appeal could not be excused by late proceedings as they are not a requirement for interlocutory appeals. The current application is thus meant to create unnecessary delay in this matter and should be dismissed.
22. The Plaintiff also submitted that the prayer for recusal had been overtaken by events as the judge who was first handling the matter had already been transferred.
23. With regards to the preliminary objection, the plaintiff submitted that it fails to state what the applicant is objecting to and therefore lacks legal basis. He further submitted that the discretion of a Deputy Registrar to issue a notice to show cause does not amount to a point of Law. He asked the court to dismiss the preliminary objection with costs to the plaintiff.
24. The issues for determination in the notice of preliminary objection and the application by the 5th defendant/applicant are as follows;
 - i. Whether the notice of preliminary objection has merit.
 - ii. Whether the 5th defendant/applicant should be granted stay of the ruling dated 31/3/2023 pending appeal to the Court of Appeal.
 - iii. Whether the 5th respondent/applicant should be granted leave to appeal against the ruling delivered on 31/3/2023.
25. On the issue as to whether the notice of preliminary objection dated 26/5/2023 is merited, the 5th defendant/respondent argued that the Deputy Registrar lacks jurisdiction to entertain the notice to show cause arising out of contempt proceedings and further that the said notice to show cause dated 22/5/2023 is a gross abuse of the due process of the court and is designed to frustrate and scuttle the application for stay pending appeal dated 20/4/2023.
26. I find that it is the court that directed issuance of the notice to show cause and the Deputy Registrar was acting under the directions of the court.
27. Since the 5th defendant/applicant was cited for contempt the law requires that notice to show cause be served directly on the contemnor as well as his advocate.
28. I therefore find that the Deputy Registrar was right in issuing the notice to show cause.
29. Since the 5th defendant/applicant has sought leave and stay of the orders issued by the court on 31/3/2023, this court will now consider his application dated 20/4/2023.
30. The governing provisions is order 42 rule 6 which states as follows;



- (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
31. I find that there is no money decree against the 5th defendant/applicant to require deposit of security.
32. However, since the impugned order seeks to take away the personal liberty of the Applicant, I find that it is in the interest of justice to grant the 5th defendant/Applicant a chance to exercise his right of appeal.
33. I grant the 5th defendant/applicant leave and stay of execution of the ruling delivered on 31/3/2023 pending appeal to the Court of Appeal.
34. The 5th defendant/applicant is granted an extension of 30 days to file his appeal to the Court of Appeal.
35. The costs of the application and notice of preliminary objection to abide the appeal.

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

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A. N. ONGERI

JUDGE

In the presence of:

..... for the Plaintiff

..... for the Defendant

