



**Githii t/a Kiarie Kariuki & Githii Advocates v Gichaba t/
a Gichaba & Company Advocates (Commercial Case E386 of 2020)
[2023] KEHC 22904 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22904 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E386 OF 2020
FG MUGAMBI, J
SEPTEMBER 29, 2023**

BETWEEN

**CHRISTINE GITHII T/A KIARIE KARIUKI & GITHII
ADVOCATES PLAINTIFF**

AND

**WESLEY MR GICHABA T/A GICHABA & COMPANY
ADVOCATES DEFENDANT**

RULING

Background

1. This ruling determines the Notice of Motion application dated 18th June 2023. It was brought under articles 10, 47, 48 and 50(1) of the [Constitution](#) of Kenya 2010, sections 1A,1B and 3A of the [Civil Procedure Act](#) Cap 21 and Order 42 rule 6, Order 51 rules 1 and 3 of the [Civil Procedure Rules](#), 2010, the inherent jurisdiction of the Court and all other enabling laws.
2. It seeks the following prayers:
 - i. Spent
 - ii. Spent
 - iii. That pending the hearing and determination of the appeal in the Court of Appeal, there do issue a temporary order of stay of proceedings herein.
 - iv. That the costs of the application be provided for.



3. The application is premised on the grounds on the face of it and supported by the affidavit of Wesley M.r. Gichaba sworn on 18th June 2022. It is opposed through a replying affidavit sworn by Christine Githii on 29th June 2022. The application was canvassed by way of written submissions.

Analysis

4. Having considered the application, the rival affidavits and submissions by the parties, the only issue for determination is whether the applicant has met the conditions for stay of proceedings pending appeal. Order 42 rule 6(2) of the *Civil Procedure Rules* enumerates the factors that the Court ought to consider in an application for stay of proceedings pending appeal. It provides that:

“No order for stay of execution shall be made under sub rule (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.”
5. These principles are now well established through judicial pronouncements. In *William Odiambo Ramogi & 2 Others V the Honourable Attorney General & 3 Others*, [2019] eKLR, a 5-judge Bench of the High Court, re-emphasized these principles for grant of stay of proceedings as cited in *Turbo Highway Eldoret Ltd V Muniu*, (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) in the following terms:
 - i. There must be an appeal pending before the higher Court;
 - ii. Where such stay is sought in the Court hearing the case as opposed to the higher Court to which the appeal has been filed and there is no express provision of the law allowing for such an application, the applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - iii. The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - iv. The Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - v. The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and finally,
 - vi. The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.



6. It follows from the above that the remedy of stay of proceedings is one that should be granted in very exceptional circumstances. This has been expressed in numerous judicial decisions some of which cite the *Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330* to the extent that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....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 this case.”

7. In the case before me, the applicant’s interlocutory appeal rests on the fact that the sole issue in this suit is whether payment was made or not, which question could be easily proven by use of account statements held by the respondent.
8. I am cognizant that the subject of the intended appeal is the impugned ruling dismissing the application for orders of production of account statements by the respondent, to be relied on at the hearing of this matter by the applicant and in the alternative, for orders compelling the Manager, ABSA Bank, Market Branch, to produce under oath the same statements in default of which the suit be dismissed.
9. The respondent argues that the defendant ought to have produced proof of payment of the claim sum if indeed he had made the said payment. Being the party alleging that such payment was made, the burden of proof was on him as required under section 107 and 108 of the *Evidence Act* to produce statements to show that he indeed made payment of the sums as set out in his professional undertaking.
10. I have considered the evidence placed before me in a bid to addressing my collective mind to whether refusing the application would render the appeal nugatory, 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.
11. In considering those matters, a Court 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 (See: *Turbo Highway Eldoret (supra)*).
12. On the question of an arguable appeal, I am cognizant of the fact that an arguable appeal does not necessarily mean an appeal that is likely to succeed. What I do know on the strength of the impugned ruling is that the Court found that:
- “the applicant made payment and therefore has alternative means of access through other documentation such as banking slips or banker’s cheques or RTGS slips or bank instructions to prove payment in support of the disputed sum of Kshs. 2,700,000/=.”
13. In my view, the veracity of the plaintiff’s claims can still be rebutted by evidence that is within the reach of the defendant and which would be able to test the defendant’s rebuttal without necessarily having to stay the proceedings.



14. On this basis, while the appeal may be an arguable one, I am not convinced that it will be rendered nugatory by the mere fact that the suit may proceed and a judgment on merits given. I concur with Ngugi, J (as he then was) in *Turbo Highway Eldoret* (*supra*) that to hold so would mean that proceedings at the trial courts would be hampered arbitrarily and it would be easy for parties to use such interlocutory appeals to impede trials.
15. In this case, where judgment on the main suit is pending, the applicant has not shown any exceptional circumstances that exist and which would hinder this Court from making a determination on merit after which the applicant can then file an appeal on the decision if need be, in the interest of expedited justice. I do not therefore think that the applicant has met the threshold for stay of the proceedings in this case.
16. The applicant also raises issue with the suit proceeding by way of written submissions as opposed to viva voce evidence. I note from the Court record that parties did not object to the directions given by the Court for the OS to proceed by way of written submissions and the parties had in fact appeared before the Learned Judge, severally for compliance mention, the last time being on 21st July 2022. In my view, the prayer for the OS to proceed by viva voce evidence is therefore an afterthought by the applicant and not sufficient to stall the determination of the matter.
17. In addition, I note that while the impugned ruling was delivered on 10th December 2021, it was not until June 2022, over six months later that the defendant filed the current application. The explanation for the time in between is not satisfactory

Determination and orders

18. In conclusion, and for all the reasons stated, I find that the application dated 18th June 2023 devoid of merit and it is dismissed with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

