



REPUBLIC OF KENYA



**KENYA LAW**  
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**Owino v Silicon Consulting Limited & another (Civil Appeal E405 of 2021)  
[2023] KEHC 22959 (KLR) (Civ) (29 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 22959 (KLR)

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

**CIVIL**

**CIVIL APPEAL E405 OF 2021**

**JN MULWA, J**

**SEPTEMBER 29, 2023**

**BETWEEN**

**IBRAHIM HAGGAI OWINO ..... APPELLANT**

**AND**

**SILICON CONSULTING LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ACORN VENTURES LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Notice of Motion Application dated September 20, 2022 the Appellant seeks an order of stay proceedings in Milimani CMCC No 8600 of 2019 – Acorn Ventures Ltd v Silicon Consulting Ltd & Ibrahim Haggai Owino pending the hearing and determination of the appeal, as well as costs of the application.
2. The application was brought pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* and Section 1A, 1B & 3A of the *Civil Procedure Act*. It is premised on the grounds set out on its face and supported by the Appellant’s supporting and supplementary affidavits dated September 20, 2022 and January 26, 2023 respectively.
3. It was opposed through a Replying Affidavit sworn on December 9, 2022 by Antony Munguti, a Director of the 2<sup>nd</sup> Respondent.
4. The court has considered the orders sought, the Affidavit in support and against the same as well as the parties’ respective submissions., and flags issues that fall for determination thus:
  1. Whether the proceedings before the subordinate Court in Milimani CMCC No. 8600 of 2019 should be stayed pending the hearing and determination of the appeal.



2. Who should bear costs of the application?

### Stay of Proceedings

5. Stay of proceedings is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. The power to stay proceedings pending appeal is derived from both Order 42 Rule 6 of the Civil Procedure Rules as well the inherent jurisdiction reserved under Section 3A of the *Civil Procedure Act*. Notably however, the test for stay of proceedings is very high and stringent. Halsbury's Law of England, 4<sup>th</sup> Edition. Vol. 37 page 330 and 332, states 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 proceeding beyond all reasonable doubt ought not to be allowed to continue”

6. In essence, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. Ringera J. in *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 stated thus:

“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.”

7. In *William Odhiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR, a 5-judge bench of the High Court highlighted the principles that underpin the grant of stay of proceedings pending hearing and determination of an appeal over an interlocutory application to a higher Court as follows:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, 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;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;



- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
  - e. Fifth, 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
  - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”
8. It is not in doubt that there is an appeal from the lower court pending before this court. In determining whether the Appellant’s appeal is arguable, it is important to reiterate that such an appeal is not one which must necessarily succeed, but one which ought to be argued fully before the Court. It is enough if the appeal raises just a single bonafide issue- see *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR and *Stanely Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR. Looking at the grounds raised in the Memorandum of Appeal dated July 12, 2021 and without delving into the merits of the appeal, the court is satisfied that the appeal is not frivolous. The grounds relate to lifting of the 1<sup>st</sup> Respondent’s corporate veil and alleged lack of privity of contract between the Appellant and the 2<sup>nd</sup> Respondent. In this court’s considered view, these are arguable points of law and fact.
  9. Will the appeal be rendered nugatory if the proceedings in the lower court are not stayed? The court thinks not. It has been held by courts over and over that an appeal against an interlocutory application would not usually be rendered nugatory if stay is not granted since the dissatisfied party retains the right to pursue the appeal on the point after the conclusion of the case. See the case of William Odhiambo Ramogi & 3 others (*supra*).
  10. Similarly, the court finds that the Appellant has failed to demonstrate that he brought the present application without undue delay. The Ruling subject of the appeal was delivered on June 11, 2021 and the application was filed over one year and three months later on September 20, 2022. This appears to have been triggered by the fact that the 2<sup>nd</sup> Respondent herein through his advocates set down the suit in the lower court for hearing on October 5<sup>th</sup> October 2022, as evidenced by the annexed Hearing Notice marked “IHO - 4”. Save for asserting that his appeal has not been heard due to shortage of judges in the civil division, the Appellant has not tendered any explanation for the delay in bringing the instant application soon after the impugned ruling was delivered. In the court’s view therefore, it would not be in the interest of justice for this court to exercise its discretion in favour of the Appellant in the face of the unexplained delay, which is no doubt inordinate. Granting a stay of proceedings will only serve the purpose of delaying the conclusion of Milimani CMCC No. 8600 of 2019 to the detriment of the 2<sup>nd</sup> Respondent herein.
  11. For the foregoing, the court finds the Appellant’s Notice of Motion dated September 20, 2022 to be devoid of merit. The Application is dismissed with costs to the 2<sup>nd</sup> Respondent.

**Orders accordingly.**

**Delivered, Dated and Signed in Nairobi this 29<sup>th</sup> Day of September 2023.**

**JANET MULWA**

**JUDGE**

