



Multichoice Kenya Limited v Events & Functions Limited (Civil Appeal E170 of 2023) [2023] KEHC 27149 (KLR) (20 December 2023) (Ruling)

Neutral citation: [2023] KEHC 27149 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E170 OF 2023
RE ABURILI, J
DECEMBER 20, 2023**

BETWEEN

MULTICHOICE KENYA LIMITED APPELLANT

AND

EVENTS & FUNCTIONS LIMITED RESPONDENT

RULING

Introduction

1. This ruling determines the application dated 16th November 2023 in which the applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. Spent
 - d. That there be a stay of proceedings in respect of Kisumu CMCC No. E187 of 2023: Events and Functions Limited v Multichoice Kenya Limited pending the hearing and determination of the present Civil Appeal No. E170 of 2023 Multichoice Kenya Limited versus Events & Functions Limited.
 - e. That costs of this application be provided for.
2. The application was supported by the affidavit sworn by Ruth Omondi, the applicant's Finance Director, sworn on the 16th November 2023 as well as the grounds therein.
3. The applicant's case is that vide an application dated 14th August 2023 before the subordinate court in Kisumu CMCC No. E187 of 2023: Events and Functions Limited v Multichoice Kenya, it sought stay of proceedings pending arbitration and that the dispute between the parties be referred to arbitration



- as provided for in the parties' subject Agency Agreement but that the said application was declined by the subordinate court vide a ruling rendered on the 21st September 2023 leading to the instant appeal.
4. It is the applicant's case that the subordinate court has since set down the matter for hearing on the 25th January 2024 thus disadvantaging the applicant who had not filed a defence having challenged the trial court's jurisdiction on account of the existing arbitration clause contained in the Agency Agreement.
 5. The applicant further averred that failure to grant the orders sought would render its intended appeal nugatory and prejudice its right to be heard. It was further averred that the respondent would suffer no prejudice if the orders sought were granted.
 6. In response, the respondent filed grounds of opposition dated 21st November 2023 stating that under clause 22.5 of the Agency Agreement, any party was not prohibited from going to court and further that there was no justification for stay of proceedings as the parties had been given a hearing date.
 7. The respondent further contended that the applicant had taken 2 months to file the instant application and thus they did not deserve the discretion of the court.
 8. The parties' counsel argued the application orally on 20/11/2023 reiterating the grounds, affidavit in support and the grounds of opposition.

Analysis and Determination

9. I have considered the Application and the opposition thereto, the proceedings herein, the oral submissions by learned Counsel for both the applicant and the respondent as well as the applicable law.
10. Apparently, none of the parties specified the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal. This court will therefore have to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interest justice to grant the orders staying proceedings.
11. The underlying interest ought to be that the appeal should not be rendered nugatory. Gikonyo J addressed the question of an order for stay of proceedings being an important consideration in the case of *Lucy Waitthera Kimanga & 2 others vs John Waiganjo Gichuri* [2015] eKLR.
12. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court.
13. This court is cognisant of the fact that an arguable appeal only need to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed as was held in the case of *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015]eKLR.
14. In the case of *UAP Insurance Company Ltd vs Michael John Beckett* [2004] eKLR, the Court of Appeal also held that all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.
15. In the case of *David Morton Silverstein v Atsango Chesoni* (2002) eKLR, the Court of Appeal citing Kenya *Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another* [1998] eKLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.



16. Further in the case of *Niazsons (K) Ltd. V China Road & Bridge Corporation (Kenya)* [2001] eKLR, Onyango-Otieno, J (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

17. From all the above judicial pronouncements, it is clear that the prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is also important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.

18. This court notes that the Ruling which the Appellant has appealed against was delivered on 21st September 2023. The Memorandum of Appeal was filed on 18th October 2023 which was within 30 days of the date of the ruling, while the present application was filed on 16th November 2023. Less than two (2) months cannot be said to have been inordinate. This court is thus satisfied that the present application was filed without undue delay.

19. A perusal of the aforesaid Memorandum of Appeal shows that the intended appeal is not frivolous or vexatious. It is arguable as the question before the appellate court is whether or not the lower court exercised its discretion correctly in not granting stay of proceedings considering the existence of an arbitration clause in the Agency Agreement between the parties herein at Clause 22, which clause's validity is up for consideration and determination by the appellate court.

20. Accordingly, having considered the affidavit evidence and the case law, this court has come to the firm conclusion that this is a suitable case for the grant of an order of stay of proceedings so as not to render the Appeal herein nugatory. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being an academic exercise.

21. As was held in the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, the Court of Appeal rendered itself as follows: -

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

22. The upshot of the above is that the instant application is found to be meritorious. It is hereby allowed.

23. Accordingly, there shall be stay of proceedings in respect of Kisumu CMCC No. E187 of 2023: Events and Functions Limited v Multichoice Kenya Limited, pending the hearing and determination of this.

24. Costs shall be in the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 20TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE

