



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT BOMET

CIVIL APPEAL NO. E009 OF 2021

BENJAMIN MOMANYI.....APPELLANT

VERSUS

JOASH NYAKARU MAYIEKA & SAMUEL DICK MAYIEKA (suing as the legal representative of the estate of **BENESENSIA NYANGWESO ONDIEKI).....
RESPONDENT**

RULING

1. The Appellant filed a Notice of Motion Application dated 23rd November 2021 which sought the following Orders:

I. Spent.

II. THAT pending the hearing and determination of this application *inter partes* on further orders of the court, there be a stay of further proceedings in **Bomet CMCC 22 of 2018; Joash Nyakuru Mayieka & Samuel Dick Mayieka (suing as the legal representative of the estate of Benesensia Nyangweso Ondieki - DECEASED) Versus Benjamin Momanyi**.

III. THAT this honourable court be pleased to stay further proceedings in **Bomet CMCC 22 of 2018; Joash Nyakuru Mayieka & Samuel Dick Mayieka (suing as the legal representative of the estate of Benesensia Nyangweso Ondieki - - DECEASED) Versus Benjamin Momanyi** pending the hearing and determination of this Appeal.

IV. THAT the costs of this application be provided for.

2. The Application was brought under Order 12 Rule 2 (a), Rule 7 and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1B 1(a) and 3A of the Civil Procedure Act, Section 3A of the Insurance (Motor Vehicle Third Party Risks) (Amendment) Act, 2013, Laws of Kenya. The Application was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Kelvin Nguire on 23rd November 2021.

The Applicant's Case.

3. It was the Applicants case that a Ruling in **Bomet CMCC 22 of 2018; Joash Nyakuru Mayieka & Samuel Dick Mayieka (suing as the legal representative of the estate of Benesensia Nyangweso Ondieki - deceased) versus Benjamin Momanyi** was delivered by the trial court on 29th March 2021. That being aggrieved by the decision of the trial court, they lodged an appeal against the entire Ruling.

4. It was Applicant's case that they filed an application dated 6th July 2021 that sought a stay of proceedings of the trial court pending the appeal. It was their further case that the application was dismissed on 24th September 2021 in their absence.

5. The Applicant stated that the present appeal **Bomet High Court Civil Appeal No. E009 of 2021** raised triable issues and unless proceedings were stayed, the appeal would be rendered nugatory. It was the Applicant's case that the appeal was meritorious with a high chance of success.

6. The Applicant stated that he would suffer prejudice and would be condemned unheard if the orders sought were not granted.

7. The Applicant swore a Supplementary Affidavit dated 3rd January 2022, where he stated that Order 42 Rule 6 of the Civil Procedure Rules allowed the applicant to make a similar application to the high court should the court appealed from refuse to grant the stay orders sought. It was his further case that the application had been made without any unreasonable delay and that the same would not occasion any prejudice

to the Respondent.

The Applicant's Submissions.

8. The Applicant submitted that he filed an application dated 6th July 2021 for stay of proceedings before the trial court in **Bomet CMCC 22 of 2018**. That the same dismissed the same on the basis that the court did not see sufficient reason demonstrated to stay its own proceedings unless the high court did so, hence this application. He relied on Order 42 Rule 6 of the Civil Procedure Rules.

9. It was the Applicant's submission that he has established an arguable case and relied on the cases of **NBK vs Geoffrey Wahome Muotia (2016) eKLR, Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others (2013) eKLR and Ezekiel Mule Musembi vs H. Young & Company (E.A) Limited (2019) eKLR**. It was his further submission that his application dated 28th January 2021 raised serious grounds as to why the Plaintiff's suit should be struck out since the alleged sued defendant died on the spot when the alleged accident occurred. According to the Applicant, the plaintiff could not be a party to the suit according to Order 1 of the Civil Procedure Rules.

10. The Applicant submitted that Article 50 of the Constitution provided for a fair hearing for any dispute that had to be resolved in accordance with the law. He relied on the case of **Pinnacle Projects Limited vs Presbyterian Church of East Africa, Ngong Parish & Another (2018) eKLR** to support his submission.

11. The Applicant further submitted that they moved with haste to file the appeal and that the appeal raised triable issues. It was his further submission that the appeal was meritorious with a high chance of success.

The Respondent's Case.

12. It was the Respondent's case that the Applicant had filed a similar application in **Bomet CMCC No. 22 of 2018** that sought stay of proceedings. That the said application was dismissed by the court. It was the Respondent's case that the Ruling date was given in open court on 13th September 2019. It was his further case that the application was then dismissed on 24th September 2019 and thereafter the suit was fixed for inter parties hearing on 29th November 2021.

13. The Respondent averred that since the application was dismissed, the appellant never sought leave to appeal or file an application seeking to lodge an appeal out of time with respect to the contested Ruling.

14. The Respondent stated that the instant application was *res judicata* and an abuse of the court process and that the appellant was trying to appeal the court's Ruling of 24th September 2021 through the back door.

15. The Respondent averred that the applicant was deliberately delaying the matter from kicking off as it was scheduled for hearing on 24th January 2022.

16. It was the Respondent's case the stay of proceedings was a serious, grave and fundamental interference in the right of any party to conduct litigation and that this court should not allow it.

17. The Respondents stated that the deponent, Kevin Ngure was bereft of the capacity to depone the affidavit.

18. I have read through and considered the Notice of Motion Application dated 23rd November 2021, the Replying Affidavit dated 14th December 2021, the Supplementary Affidavit dated 3rd January 2022, the Applicants written Submissions dated 3rd January 2022. I discern two issues for determination as follows: -

i) Whether the Application dated 23rd November 2021 was *res judicata*

ii) Whether the Applicant should be granted the order for stay of proceedings in Bomet CMCC Number 22 of 2018.

(i) Whether the Application dated 23rd November 2021 was *res judicata*.

19. The principles that relate to issues of Stay are well settled. Order 42 Rule 6 (1) of the Civil Procedure Rules stipulates: -

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.

20. In the persuasive case of **Stanley Karanja Wainaina & Another vs. Ridon Anyangu Mutubwa (2016) eKLR**, Njuguna J stated that: -

“Counsel for the Respondent submitted on the provision of Order 42 Rule 6 (1) of the Civil Procedure Rules and argued that the Appellants had been granted a stay of execution by the trial court and in bringing the present application it was an abuse of the court process. In my view, Order 42 Rule 6(1) allows a party to file another application for stay of execution in the High Court

whether the application for such stay shall have been granted or refused by the court appealed from. I appreciate the argument by the learned counsel and this court shares the same sentiment in that once an application has been dealt with by a court of competent jurisdiction and between the same parties, a similar application cannot be filed before another court as that would be an abuse of the court process or at best, res judicata. Unfortunately, that legal provision is part of our laws and until the same has been amended, we have no choice but to live with it as it is.”

21. In the equally persuasive case of **Patrick Kalava Kulamba & Another vs. Philip Kamosu and Roda Ndanu Philip** (suing as the legal representative of the estate of **Jackline Ndinda Philip (deceased)**) (2016) eKLR, Meoli, J held that:

“So long as an appeal from the substantive decision of the lower court has been lodged, an application under Order 42 Rule 6 (1) of the Civil Procedure Rules can be entertained afresh in the High Court”.

22. It is not disputed that the Appellant filed an application dated 6th July 2021 that sought stay of proceedings pending the appeal. It was also not disputed that the application for stay was dismissed on 24th September 2021. Order 42 Rule 6 (1) allows the appellant to file an appeal before this court for it to be determined afresh.

23. It is my finding that the Application dated 23rd November 2021 is properly before this court and is not *res judicata*.

(ii) Whether the Applicant should be granted the order for stay of proceedings in Bomet CMCC Number 22 of 2018.

24. In the case of **Kenya Wildlife Service VS James Mutembei (2019) eKLR**, Gikonyo J held that:

“Stay of proceedings should not be confused with stay of execution pending appeal. 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”.

Additionally, in the case of **Global Tours & Travels Limited; Nairobi HC winding up cause no. 43 of 2000** Ringera J (as he then was) persuasively stated that: -

“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.”

25. In the **Kenya Wildlife Case (supra)**, Gikonyo J quoted Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332, 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.”

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 the case”.

26. The Court of Appeal in the case of **David Morton Silverstein VS. Atsango Chesoni (2002) eKLR** held that:

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay.”

27. I have perused the Memorandum of Appeal dated 13th April 2021 and the grounds raised by the Appellant. Prima facie they raise arguable points for consideration on appeal.

28. The Applicant has relied on the case, which I find persuasive of **Stanley Kinyanjui Vs Tony Ketter & 5 others (2013) eKLR**, which stated that an arguable appeal needed only one arguable ground. That an arguable appeal was not one that had to succeed but one which ought to be argued fully before the court. The Court of Appeal in the case of **University of Nairobi V Ricatti Business of East Africa (2020) eKLR** reiterated the same position where it stated:

“An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is

not frivolous”.

29. Based on the aforementioned grounds and case law, it is my finding that the applicant has demonstrated that he has an arguable appeal.

30. Regarding the issue of delay, the applicant filed the present application on 24th November 2021. His previous application for stay of proceedings was dismissed on 24th September 2021. The delay herein has not been satisfactorily explained. It is my conviction however that the Applicant should not be driven away from the seat of justice and that he should have his day in court to prosecute his application.

31. Clothed by the discretionary power of this court, it is my finding that the applicant has made out a case for the stay orders pending the hearing and determination of the appeal. However, due regard must be given to time in order to avoid delaying this matter any further. As stated by the Court of Appeal in **Muchanga Investments Limited Vs. Safaris unlimited (Africa) Ltd & 2 others (2009) eKLR:**

“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.”

32. In the end, I grant prayer 3 of the Notice of Motion dated 23rd November 2021. The Appellant shall file the Record of Appeal and ensure that the Appeal is listed for directions within 30 days from the date of this Ruling failing which the stay shall lapse. Costs in this application shall abide the appeal.

Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY, 2022

.....

R. LAGAT-KORIR

JUDGE

Ruling transmitted electronically to the parties at