



REPUBLIC OF KENYA



**Ouandji v Bank of India & 2 others (Civil Suit 84 of 2008)
[2022] KEHC 112 (KLR) (Commercial and Tax) (18 February 2022) (Ruling)**

Neutral citation: [2022] KEHC 112 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 84 OF 2008
A MSHILA, J
FEBRUARY 18, 2022**

BETWEEN

LOUIS ROGER OUANDJI APPLICANT

AND

BANK OF INDIA 1ST RESPONDENT

TRACTOR BELL LIMITED 2ND RESPONDENT

STEPHEN KARANJA T/A DELALI TRADERS 3RD RESPONDENT

RULING

1. The Notice of Motion is dated 6th October 2021 and was brought under the provisions of Order 51 Rules 1, 3 and 15 of the *Civil Procedure Rules* and Sections IA, 1B & 3A of the *Civil Procedure Act*. The Applicant sought orders that;
 - a. The Court to stay taxation proceedings of the 2nd defendant/Respondent's Party & Party Bill of Costs dated 12th August, 2021 and any other taxation proceedings flowing from the Court orders of 29th July, 2021 pending hearing and determination of this application.
 - b. The Court be pleased to stay taxation proceedings in respect of the 2nd defendant/respondent's Party & Party Bill of Costs dated 12th August, 2021 and any other taxation proceedings flowing from the Court orders of 29th July, 2021 pending the hearing and determination of the Intended Appeal.
2. The application was supported by the grounds on its face and by the supporting affidavit sworn on even date by Louis Roger Ouandji who stated that vide a Notice of Motion Application dated 8th March



2021, the 2nd defendant/respondent moved the Court seeking review of its judgement delivered on 13th July, 2020.

3. On 29th July, 2021, the Court delivered a ruling on the said review Application, ruling in favour of the 2nd defendant/respondent herein and reviewed the judgment by varying its order on costs to the effect that the plaintiff/applicant is to bear the 2nd and 3rd defendants/respondents' costs of the main suit.
4. Aggrieved by the entire Court ruling and orders of 29th July 2021, the plaintiff/applicant filed a Notice of Appeal on 4th August, 2021 and is in the process of compiling the Record of Appeal.
5. The applicant stated that unless a stay of taxation proceedings of the 2nd Defendant's Party & Party Bill of Costs dated 12th August 2021 and any other taxation proceedings flowing from the Court orders of 29th July 2021 is granted, the intended Appeal will be rendered nugatory and/or pyrrhic victory.
6. The Respondents did not file any response to the present application. The applicant also confirmed that the Respondents had not served him with any responses and thus, the Application stands unopposed.

Applicant's Case

7. It was the Applicant's submission that at the very onset that the Court should stay taxation proceedings in respect of the 2nd Defendant's Party & Party Bill of Costs dated 12th August, 2021 and any other taxation proceedings flowing from the Court orders of 29th July, 2021 pending the hearing and determination of the Intended Appeal.
8. Further, that should the taxation proceed/continue and the Bill is taxed, there was the likelihood of the execution taking place before the appeal is heard and determined and the Appeal would be thus rendered nugatory. It would also be prejudicial to the Applicant if the execution were effected against him whilst he was in the process of prosecuting an appeal against the orders; Success in the appeal would mean that the applicant would seek from the 2nd Defendant/ respondent a refund of any sums paid to them during execution which would render the whole appellate process an exercise in futility but it would be too late as judicial time and resources would already have been used.
9. The Applicant relied on the cases of: *Ezekiel Mule Musembi v H. Young Company (E.A) Limited [2019] eKLR*; *Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664*
10. The applicant concluded his submission by stating that an arguable appeal has already been preferred as the issue as to whether an order on costs should be a subject of review or an appeal is an arguable one. The application was filed expeditiously and sufficient cause has been shown that it is in the interest of justice that the orders sought are granted. No prejudice will be occasioned on the Respondents if the orders sought are granted as the stay is not against continuation of a hearing of a main suit but only the taxation process. The main suit has already been concluded and judgment delivered.

Issues for Determination

11. After considering the Applicant's Application and written submissions there is only one issue for determination;
 - a. Whether the Applicant has satisfied the conditions for grant of stay of proceedings pending appeal?

Analysis



12. This court has discretion and power to stay proceedings pending appeal. This jurisdiction is derived from of Order 42 rule 6 (1) of the Civil Procedure Rules.
13. In the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000* Ringera, J (as he then was) held 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 case, 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...”
14. The first issue is to determine is whether the application was brought without unreasonable delay. The impugned ruling which the applicant intends to appeal was delivered on the 29th July, 2021; the applicant then proceeded to file the instant application for stay of proceedings on the 6th October 2021 which means the applicant took approximately two (2) months to file the instant application. From the circumstances of this case this period is not deemed to be unreasonable delay and this court finds that the Applicant file the application if good time and without delay.
15. The second issue this court has to consider on whether to grant stay of proceeding is if the appellant/ applicant has shown that he has an arguable Appeal. The applicable law is found at Section 3A of the [Civil Procedure Act](#) which empowers this court to grant such orders as would be expedient for the ends of justice to be met especially where the Applicant may not have satisfied the conditions for stay of execution.
16. The applicant intends to appeal against the ruling on the said review application by Lady Justice Ngenye, in which the judgment was reviewed by varying the order on costs to the effect that the Applicant is to bear the 2nd and 3rd defendants/respondents' costs of the main suit.
17. This court concurs with the Applicants submission that it would be prejudicial to the Applicant if the execution were effected against him whilst he was in the process of prosecuting an appeal against the orders and the appeal would also be rendered nugatory. Success in the appeal would mean that the applicant would then have to seek from the 2nd Defendant/ respondent a refund of any sums paid to them during execution which would render the whole appellate process an exercise in futility. Even though the Applicant may not have satisfied the conditions for stay of execution as envisaged by Order 42 Rule 6 of the Civil Procedure Code, this court is satisfied that he is deserving of the orders as he is found to have an arguable appeal.
18. Further, the application is unopposed and the presumption is that no prejudice will be occasioned on the Respondents if the orders sought are granted since the Respondent though duly served put in no response to that effect. But in balancing the interests of the parties and in the interest of justice this court will exercise its discretion and grant a conditional stay of proceedings provided the Applicant provides security for due performance.

Findings and Determination



19. For the forgoing reasons the court makes the following findings and determinations;
- i. This court finds that the application dated 6/10/2021 was filed in good time.
 - ii. The application for stay of execution pending the hearing and determination of the appeal is found to have merit and it is hereby allowed on the following terms;
 - iii. The Applicant pays into court half of the proposed taxable costs within 30 days from the date hereof;
 - iv. In default the stay orders stand vacated;
 - v. The costs of this application to be borne by the applicant;

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF FEBRUARY, 2022.

HON. A. MSHILA

JUDGE

In the presence of;

Mr. Kihara holding brief for Mr. Njenga for the 2nd defendant/Respondent

No appearance for the Applicant

Lucy -----Court Assistant

