



Njagi & 9 others v Invesco Assurance Company Limited (Insolvency Petition E015 of 2019) [2022] KEHC 296 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)

Neutral citation: [2022] KEHC 296 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
INSOLVENCY PETITION E015 OF 2019**

WA OKWANY, J

APRIL 28, 2022

BETWEEN

**SALESIO KINYANJUI NJAGI 1ST PETITIONER
GREGORY MWANIKI KARUNGA 2ND PETITIONER
ALISA NJERI 3RD PETITIONER
JACKLEAH WANGARI 4TH PETITIONER
NYAGA NTHIA 5TH PETITIONER
ALICE KAGENI NDWIGA 6TH PETITIONER
EMMACULATE WANJIRU MARIGU 7TH PETITIONER
JULIET MUTHONI NTHIGA 8TH PETITIONER
VANESSA KAMBI 9TH PETITIONER
NANCY MUTHONI KINYUA 10TH PETITIONER**

AND

INVESCO ASSURANCE COMPANY LIMITED RESPONDENT

RULING

1. The petitioners filed an Insolvency Petition dated 22nd May 2019 seeking to liquidate the respondent/ Company. The Company opposed the Petition through the Preliminary Objection dated 25th October 2019 which this court dismissed through vide the ruling dated 17th April 2020. The Company is aggrieved by the said ruling and intends to challenge it on appeal. The Company then filed the application dated 28th May 2021 seeking the following orders; -



1. Spent.
 2. This Honourable court be pleased to stay the proceedings in this petition pending the hearing and determination of the intended appeal by the respondent against the ruling of the honourable court delivered on 15th April 2021.
 3. Costs of this application be provided for.
2. The application is supported by the affidavit of Company's Legal Manager Mr. Paul Gichuhi who is the Legal Manager and is premised on the following grounds that the proceedings before the trial court are still ongoing thus making the stay of proceedings necessary to enable the court of appeal effectively hear and determine the appeal. The respondent states that its appeal will be rendered nugatory unless the stay orders sought are granted.
 3. The petitioners opposed the application through the replying affidavit of their advocate Mr. Morris M. Karigi who states that the application is brought in bad faith and is intended to scuttle the timely disposal of the petition. The petitioners aver that the Company has been indebted to them since 2018 without indicating when and how they intend to settle the debt. It is their case that the Company's right of appeal should be weighed against the petitioner's right to timely determination of the petition.
 4. The application was canvassed by way of written submissions. The respondent Company submitted that the appeal was arguable and had a high chance of success. In support of this counsel referred the court to the case of *Stanley Kang'ebe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR* where the court observed that:-

‘An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.’
 5. Counsel submitted that the appeal raised a serious question of law on whether or not the insurance company's inability to settle its debt was something that could only be undertaken by experts according to the Insurance Act. Counsel further submitted that the appeal would be rendered nugatory if the orders of stay were not granted. It was submitted that the nature of the appeal was such that it would strike out the petition if successful.
 6. Advocate for the petitioner submitted that the respondent company did not establish a prima facie arguable appeal as the applicant's intention was to delay the hearing and determination of the petition. Counsel submitted that the court should not exercise its jurisdiction to aid a party that had been abusive of the Court process. Counsel further submitted that the applicant had not demonstrated sufficient cause to warrant grant of the discretionary orders sought.

Issues

7. Whether the applicant has given sufficient reason for stay of proceedings pending the hearing and determination of the appeal.

Analysis

8. I have carefully considered this application, the respondents' response, the submissions and the authorities the parties cited. The main issue for determination is whether the applicant has made out a case for the granting of orders for stay of proceedings pending the hearing and determination of the appeal.



9. The applicant argued that it has an arguable appeal with high chances of success. It was the applicant's case that under the *Insurance Act*, the liquidation of an insurance company cannot be undertaken in the absence of the Commissioner of insurance.
10. The petitioners, on the other hand, argued that the appeal has no chances of success as the preliminary objection did not meet the threshold for what constitutes a preliminary objection.
11. The principles to be considered in an application for stay of proceedings were set in the case of *Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi (2014) eKLR* where the Court held as follows: -
 - a. Whether the applicant has established that he/she has a prima facie arguable case.
 - b. Whether the application was filed expeditiously and
 - c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”
12. *In 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 that matter, 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.”
13. The above-cited cases reveal that the court's power to stay proceedings is discretionary in nature and that the Applicant for stay is required to demonstrate that it has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory.
14. In the present case, the appeal challenges the dismissal of the Preliminary Objection that raised noncompliance, by the petitioners, with Section 121 of the Insurance Act. According to the applicant, if upheld, the Preliminary Objection had the effect of summarily determining the suit. The applicant further argued that failure to grant stay of proceedings would render the appeal nugatory.
15. My finding is that the mere fact that the PO was found to be unmerited did not have the effect of substantively determining the Petition which is yet to be heard and determined on its merit. Courts have taken the position that stay of proceedings should only be granted in exceptional cases as they have the effect of delaying or stalling the prosecution of cases.
16. In sum I am not persuaded that this is a proper case for the granting of orders for stay of proceedings. I therefore dismiss the application dated 28th May 2021 with orders that costs shall abide the outcome of the main Petition.



DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 28TH DAY OF APRIL 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Ms Wangoi for Omiti for Respondent.

Ms Kimathi for Njagi for Petitioner.

Court Assistant-Sylvia

