



Train Builders Limited & another v Chemukangi (Civil Appeal E16 of 2022) [2022] KEHC 13438 (KLR) (24 May 2022) (Ruling)

Neutral citation: [2022] KEHC 13438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E16 OF 2022**

DK KEMEL, J

MAY 24, 2022

BETWEEN

TRAIN BUILDERS LIMITED 1ST APPELLANT

SIDIAN BANK LTD 2ND APPELLANT

AND

EDWIN MUMELO CHEMUKANGI RESPONDENT

RULING

1. The appellant herein has filed an application dated March 8, 2022 seeking firstly; an order for stay of further proceedings in Bungoma CMCC No 277 of 2018 pending the hearing and determination of the instant application; secondly, an order for stay of further proceedings in Bungoma CMCC No 277 of 2018 pending the hearing and determination of this appeal Bungoma Civil Appeal No 16 of 2022 and lastly, for an order that the respondent submit to a second medical re-examination by a doctor of the appellants' choice together with his National ID and all treatment documents relied on.
2. The application is supported by an affidavit sworn by Everline Ogato, an advocate. It was deponed that the respondent sued the appellant for damages for injuries alleged to have arisen from a road traffic accident in Bungoma CMCC No 227 of 2018. It was deponed that the respondent never served the appellants with the treatment notes save for an out-patient card which does not capture the injuries sustained by the respondent. The appellants referred the respondent to attend a second medical examination by the appellant's doctor and on booking him for the said medical examination, on July 19, 2018, he did not avail his treatment documents and which was rescheduled for July 27, 2018. It was deponed that on July 27, 2018 the respondent failed to turn up for the second medical examination. It was deponed that the appellants filed an application seeking to have the respondent compelled by the court to attend the second medical examination by the appellant's doctor but it was dismissed *vide* a ruling dated December 3, 2021 and the matter fixed for hearing on April 21, 2022. It was deponed that on February 3, 2022 the appellant's insurance gave instructions to appeal on the said



ruling. It was deponed that should the suit Bungoma CMCC No 27 of 2018 proceed for hearing on the scheduled date then the appellants will suffer irreparable loss and prejudice as the injuries alleged to have been sustained by the respondent have never been confirmed and that the Bungoma Civil Appeal No 16 of 2022 raises triable issues and unless the proceedings herein are stayed, this application stands to be rendered nugatory.

3. The application is opposed. Vide a replying affidavit dated March 22, 2022, the respondent contends that the application lacks merit, is made in bad faith and the same ought to be dismissed. The respondent averred that there are no reasonable grounds in the application on the alleged appeal and the same ought to be dismissed. He averred that the failure to be examined by the appellants doctor was occasioned by the omissions and/or commissions of the appellants. It was deponed that as per the consent orders, their medical examination was to be done immediately before the next hearing date. He contended that he has suffered prejudice, loss and damage at the instance of the appellants whose vehicle was carelessly driven that it knocked him down.
4. The application was canvassed by way of written submissions.
5. The appellants submitted that the principles set to govern stay of proceedings were enshrined in the case of *Ezekiel Mule Musembi v H Young & Company (EA) Limited* (2019) eKLR where Justice J V Odunga while allowing an application for stay of proceedings stated that it is the courts discretion in deciding whether or not to grant stay of proceedings.
6. The respondent submitted that the application lacks merit, is made in bad faith and the same ought to be dismissed with costs. It was submitted that there is already a consent entered into in the lower court by the parties to the effect that the respondent's case proceeds to conclusion and that the said consent has not been set aside or appealed against.
7. I have considered the rival affidavit and the submissions by learned counsels. I find that the issue for determination is whether the applicant is entitled to an order for stay of proceedings pending determination of Bungoma Civil Appeal No 16 of 2022 appeal.
8. 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. See Ringera J in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 persuasively 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” (emphasis added)



9. Further, according to illumination on the threshold for stay of proceedings in the following passages in *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.”

10. The provisions of section 22 of the *Civil Procedure Act*, cap 21, laws of Kenya stipulates:

“Subject to such conditions and limitations as may be prescribed, the court may, at any time, either of its own motion or on the application of any party make such orders as may be necessary or reasonable in all matters relating to the delivery and answering of interrogations, the admission of documents and facts and the discovery inspection, production, impounding and return of documents or other material objects producible as evidence.....”

11. The central question in the case is whether the appellants request for re-examination of the respondent was reasonable in the circumstances. To respond to that issue, I must emphasize that ours is an adversarial system, which requires discovery and the exchange of a list of documents before the start of the hearing in order to ensure fairness and justice and to ensure the parties are on an equal footing.
12. All of the above, in my opinion, is intended to ensure that parties do not ambush one another and that all necessary materials are presented to the court during the course of the proceedings in order to ensure fairness and justice.
13. The problem does not compel any party to pursue its case in a specific manner. In truth, the provision is not mandatory, it is optional on the part of the court, as the term “may” indicates. However, the court should be guided by the principles of fairness and what is conducive to justice while exercising that discretion.
14. Given the foregoing, I do not find that the appellants request for a medical re-examination of the respondent is unreasonable. In the pleadings before me, there is no sturdy evidence that the respondent was antagonistic to the doctor nominated by the appellants. The respondent, on the other hand, declined to be examined by any doctor despite several requests. That strikes me as absurd, and this court should not excuse it on the grounds that the appellants must establish their case or that such an order would restrict the respondent’s freedom of choice.
15. In the instant case it is my considered opinion that it would be in the interest of justice to exercise court’s discretion and grant stay of proceedings as it will only serve the purpose of principles of fairness and what is conducive to justice while exercising that discretion. I am satisfied that the applicants have demonstrated that they have an arguable appeal to warrant issuance of the orders being sought.



However, the prayer sought *vide* no 4 of the application is premature in view of the fact that the appeal is yet to be heard and hence the same is declined.

16. Accordingly, I find the application dated March 8, 2022 has merit. The same is allowed in terms of prayers 3 thereof. The parties are directed to set down the appeal for hearing on priority basis. The costs of the application shall abide in the appeal.

DATED AND DELIVERED AT BUNGOMA THIS 24TH DAY OF MAY, 2022.

D. KEMEI

JUDGE

In the presence of:

Mrs. Telot for Ogutu for the Appellants

No appearance for Change for the Respondent

Kapkota Court Assistant

