



REPUBLIC OF KENYA



KENYA LAW
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**Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021)
[2022] KEHC 10197 (KLR) (30 June 2022) (Ruling)**

Neutral citation: [2022] KEHC 10197 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL E040 OF 2021**

**JM NGUGI, J
JUNE 30, 2022**

BETWEEN

TURBO HIGHWAY ELDORET LTD APPELLANT

AND

DOMINIC NJENGA MUNIU RESPONDENT

RULING

1. The main Appeal in this matter is against the Ruling of Hon. L. Arika in Nakuru CMCC No. 1139 of 2015 dated March 16, 2021. The import of the said ruling is that the Trial Court allowed the Respondent herein to produce a document without calling its maker. Similar applications for stay of proceedings pending appeal before the Trial Court were declined. This prompted the filing of the present application dated July 12, 2021 seeking the following prayers:
 1. Spent
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 3. THAT there be stay of proceedings and/ or further proceedings and/ or hearing and/ or any action pending the hearing and determination of this appeal.
 4. THAT costs be in the cause.
2. The Application is supported by the grounds on the face of it and the affidavit dated July 12, 2021 by Amit Aggrawal, the Applicant's director. He essentially narrates the events before the Trial Court which are that the Applicant raised an objection to the production of a towing receipt issued by a Benlam Investments Agency that the Respondent intended to produce without calling its maker as required by Section 35 of the *Evidence Act*. He depones that the Trial Court allowed the production of the said receipt and the Respondent proceeded to testify. Subsequently, he says the Trial Court allowed



- the Applicant to appeal that ruling but declined the Applicant's oral application for stay of proceedings pending appeal.
3. It is his deposition that the Applicant subsequently filed a formal application for stay of proceedings dated April 23, 2021, which the Trial Court again dismissed on June 29, 2021. Accordingly, he says there is no stay of proceedings pending the determination of the Appeal to this Court and that the instant application is to preserve the subject matter. He maintains that documents must be produced by their maker and that the Applicant will be prejudiced should the proceedings is Nakuru CMCC No. 1139 of 2015 be allowed to continue and render the appeal nugatory.
 4. The Respondent opposed the application vide his affidavit dated February 9, 2022. He contends that the application is a waste of judicial time since the same was dealt with in the Trial Court and that the seeking of stay of proceedings in the Subordinate Court on account of an Appeal which has no basis is only meant to delay the proceedings.
 5. The Respondent contends that the Applicant has a history of delaying the proceedings and took almost a year to file completion documents (sic). He says that the contested document was already produced in Court and that the Applicant's Counsel cross examined- (the Respondent) on the same. He claims that that the Applicant has not disputed the existence of the accident before the Subordinate Court and that the Applicant will not be prejudiced in any way as the case is yet to be closed.
 6. To the Respondent Section 3A of the *Civil Procedure Act* gives the Court inherent power to make such orders necessary for the ends of justice and to prevent abuse of the Court process. The Respondent thus states that the Applicant's case has not demonstrated a prima facie case with the possibility of success.
 7. The Application was argued by way of written submissions. The Applicant's submissions are dated April 9, 2022. The Applicant relies on the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* and submits that it has met the conditions set out therein. First the Applicant submits that the application has been promptly filed because the Ruling appealed from was delivered on February 12, 2021, the reasoned ruling furnished to them on March 17, 2021, the formal application for stay of proceedings filed in the Lower Court on May 5, 2021, the ruling thereof delivered on June 29, 2021 and the instant application filed on July 14, 2021.
 8. Secondly, the Applicant submits that it stands to suffer substantial loss if the orders are not granted. It contends that it has an arguable appeal with high chances of success. The Applicant argues that if the proceedings are allowed to continue the Court may make an award in favour of the Respondent whose, means are unknown and the Respondent may proceed to execute the decree, upon which such monies may be out of reach.
 9. The Applicant maintains that the appeal will be rendered nugatory if the matter is allowed to proceed and relies on the case of *Kenya Commercial Bank Limited v Nicholas Ombija* [2009] eKLR. Lastly, the Applicant contends that this being an appeal against an interlocutory decision, the issue of security does not arise.
 10. The Respondent's submissions are dated April 21, 2022. The Respondent submits that the Applicant has not met the conditions for stay of proceedings which are an arguable appeal and the likelihood of the appeal being rendered nugatory. The Respondent relies on the description of an arguable appeal given in *Mbarak Said Ali & another v Sultan Palace Development* [2021] eKLR.
 11. He further submits that the Applicant's appeal is not arguable because it does not have plausible or persuasive grounds to alter the original verdict. He contends that the Appeal is frivolous since it is a tactic by the Applicant to delay the proceedings. The Respondent argues that the Applicant neither



contested the production of the contested document at pre-trial nor issued a notice to the Respondent requiring the calling of the maker of the document.

12. The Respondent reasons that the appeal will not be rendered nugatory since the action appealed against has already taken place i.e., the production of the towing receipt. He contends that the said production is therefore not amenable to stay having been completed.
13. The Respondent also argues that the stay of proceedings is a grave judicial action and as such a much higher standard and stringent test ought to be applied. He cites the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR and submits that the grant of stay of proceedings should be exercised sparingly and in exceptional cases. He further relies on *Global Tours & Travels Limited*, Nairobi High Court Winding Up Cause No. 43 of 2000 (UR) and an excerpt from Halsbury's Law of England 4th Edition Vol. 37 at Page 330 and 332.
14. As to the provisions of Order 42 Rule 6(2), the Respondent submits that the Applicant has not met the conditions set out therein. He contends that no substantial loss will occur to the Applicant, nor will the Applicant be prejudiced since it already cross-examined the Respondent's witness on the production of the receipt on matters that were already pleaded.
15. Lastly on the issue of security, the Respondent urges that the Applicant be directed to deposit the amount pleaded in an interest generating account as security.
16. Having looked at the application, the rival affidavits and submissions by the parties, the only issue for determination is whether the Applicant has met the conditions for stay of proceedings pending appeal.
17. Both parties cited the conditions set out under order 42 Rule 6 of the Civil Procedure Code. Although the Sub-rule 1 mentions both the stay of execution and stay proceedings, the conditions given under Sub-rule 2 apply solely to stay of execution pending appeal and not stay of proceedings.
18. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:
 - a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;



- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
19. All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330:
- 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 proceedings, beyond 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 this case.
21. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*:
- 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)
22. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy.
23. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate's Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750), "grave injustice might otherwise result or where justice might not by other means be attained." As the authors correctly write, the Court will generally "hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below."
24. Hence, the propriety of granting a stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with "due regard to the salutary general rule that appeals are not entertained piecemeal." (*Walhaus & Others v Additional Magistrate, Johannesburg & Another*, 1959 (3) SA 113(A) at 120D; *S. v Western Areas Ltd & Others* 2005 (5) SA 214 (SCA) at 224D.



25. In the present case, it is not possible to say that the preferred appeal is not arguable. As numerous decisions have held, 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. The Appeal in the instant case relates to the question of whether the Trial Court correctly allowed the Respondent to produce a document without calling its maker. This is in my view an issue that this Court will need to consider and determine at the hearing of the appeal by weighing the reasoning given by the Trial Court vis a vis the Applicant's contestation and arrive at its own decision. The Appeal therefore passes the arguability test.
26. I am not persuaded, however, that the appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given. A judgment given is capable of being stayed. Whether the fact that a party had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the Trial Court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek stay of proceedings in the Trial Court.
27. The rule is more exacting for a party requesting for a stay of proceedings. In particular, an Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal. The Applicant has not met this high threshold in this case.
28. Consequently, I find that the Application dated 12/07/2021 is without merit. It is hereby dismissed with costs.
29. Orders accordingly

DATED AND DELIVERED AT NAKURU THIS 30TH DAY OF JUNE, 2022

JOEL NGUGI

JUDGE

