



REPUBLIC OF KENYA



**KENYA LAW**  
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**Otieno v Bolton & another (Civil Case 92 of 2019)  
[2022] KEHC 14472 (KLR) (Civ) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 14472 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 92 OF 2019**

**JN MULWA, J**

**SEPTEMBER 29, 2022**

**BETWEEN**

**LINDON NICHOLAS OTIENO ..... PLAINTIFF**

**AND**

**DALE BOLTON ..... 1<sup>ST</sup> DEFENDANT**

**SCHOLA MUNYAO T/A MUNYAO KAYUGIRA & CO ADV .. 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before the court is an applicant dated January 13, 2022 brought by the 2<sup>nd</sup> defendant, Munyao Kayugira & Co Advocates, under provisions of order 42 rule 6(1) of the *Civil Procedure Rules* (CPR) and sections 1A, 1B and 3A of the *Civil Procedure Act*. The applicant seeks an order to stay further proceedings in the matter pending hearing and determination of an intended appeal from the ruling and order of the court (Hon J Kamau J) dated May 26, 2020. Grounds for the application are stated at the face thereof, and supported by an affidavit of the 2<sup>nd</sup> defendant as well as written submissions dated May 19, 2022.
2. In opposition, the plaintiff filed grounds of opposition dated April 28, 2022.
3. In issue is the court's ruling dated May 26, 2020 (J Kamau J) and in particular dismissing the applicant's applicant dated June 7, 2019 wherein the 2<sup>nd</sup> defendant sought the striking out of the suit against her for want of reasonable cause of action.



4. In the impugned ruling the court held that:

“It appears to this court that the suit was filed against both defendants much the same way that an author of an article in the newspaper is normally sued along with the newspaper that publishes the article”.

5. For clarity purposes, the 2<sup>nd</sup> defendant and applicant herein is an Advocate of the High Court of Kenya and was acting in that capacity for the client, upon whose instructions she wrote the impugned letter that was deemed defamatory of the plaintiff (respondent) in this applicant.

6. The plaintiff therefore filed this suit against the advocate as the 2<sup>nd</sup> defendant and her client as the 1<sup>st</sup> defendant. The impugned letter is dated December 11, 2018 stating that the defendant jointly and or severally falsely and maliciously authored, uttered, printed and/or published the alleged defamatory words to several parties, and which by innuendo could be interpreted to mean that the plaintiff was a criminal, unprofessional, a conspirator, dishonest and fraudulently, and sought damages for defamation and loss of reputation to the plaintiff.

7. It is the ruling stated at paragraph 4 above that the applicant seeks to appeal from and thus prays that further proceedings in the case be stayed pending hearing and determination of the intended appeal. As at time of writing this ruling, no appeal had been filed by a memorandum of appeal or at all.

#### **The Applicants Submissions.**

8. The applicant seeks to stay further hearing/proceedings of the suit to await outcome of the intended appeal, yet to be filed, stating that the appeal would be rendered nugatory as orders of the appellate court would serve no purpose should the appeal succeed, citing Supreme Court of Kenya decisions; *Gatirau Peter Munya vs Dickson Mwenda Kithinji & 2 others* [2014] eKLR.

9. The applicant further submits that as agent/advocate for the 1<sup>st</sup> defendant, a disclosed principal, the claim falls within the general principal of common law that an agent of a known and disclosed principal cannot be sued, and cannot be forced to remain a party in proceedings. Authorities cited are *Victor Mabachi & another vs Nurtun Bates Ltd* [2013] e KLR, *Antony Francis Warehemu t/a Warehemu & 2 others vs Kenya Post Office Savings Bank* and *Mannel Anidos vs Kinangop Windpark Limited (In receivership) & 2 others* [2019] eKLR.

#### **The Respondent's Case**

10. By the grounds of opposition dated April 28, 2022, the respondent/ plaintiff terms the application as frivolous and an abuse of court process, does not meet the conditions for grant of stay orders, and is only meant to defeat the overriding objective of the court. The applicant has filed submissions dated May 19, 2022. There are no submissions on record by the respondent despite the applicant having saved theirs upon the respondent on the May 19, 2022 and court order for filing by both parties, having been issued.

11. I have considered the applicant's submissions, and all other pleadings on record, including the applicant dated June 7, 2019, and the court's ruling on the said applicant dated May 26, 2020.

12. The suit arose from an alleged defamatory letter written by the applicant in her capacity as advocate for the 1<sup>st</sup> defendant to the plaintiff. The plaintiff filed the suit against the 1<sup>st</sup> defendant as well as the 2<sup>nd</sup> defendant, the advocate under whose instructions the advocate wrote the letter. Upon seeking from



the court by applicant dated June 7, 2019 to be removed from the determination suit the court made the impugned ruling that:

“It appeared to this court that the suit was filed against both defendants much the same way an author of an article in the newspaper is normally sued along with the newspaper that publishes the article”

13. Though the applicant has not attached the notice of appeal and letter requesting for proceedings nor the order to be appealed against to the supporting affidavit as exhibits, a perusal of the court record shows that a notice of appeal dated June 2, 2020 was filed on the July 5, 2020. It is however not clear why the memorandum of appeal and record of appeal are not yet filed two years since the filing of the notice of appeal.
14. Be that as it may, I have considered the applicant’s submissions and cited authorities. Order 42 rule 6(2) of the Civil Procedure Rules provides for conditions to be met by an applicant for orders of stay to be granted by the court.
15. It is important to state that stay of proceedings as is the case in the instant application should not be confused with an order for stay of execution pending appeal, as provided under rule 6(2) of order 42 CPR.
16. The suit is yet to be fixed for hearing dispute orders of the court dated May 26, 2020 that pre-trial directions to be undertaken within 60 days of the said orders. It is now well over two years. No reasons have been advanced yet no order of stay of proceedings is in place.
17. In her submissions, the applicant has basically tendered submissions on her intended appeal to the Court of Appeal, and not as to why the proceedings in this court ought to be stayed pending hearing and determination of the intended appeal.
18. The case Gatirau Peter Munya va Dickson Mwenda Kithinji & 2 others [2014] e KLR, supports an application for stay of execution where the applicant must satisfy the court that:-
  - a. The intended appeal is arguable and not frivolous and that;
  - b. Unless the order of stay is granted, the appeal or intended appeal were it to eventually succeed, would be rendered nugatory”
19. The applicant seeks to prevent the suit being heard while she remains a party to the proceedings. Conspicuously is lack of the proposed grounds of appeal to the court of appeal, upon which this court may discern the arguability and probable success of the intended appeal. To that end, I find that the cases cited, are out of context, and not relevant to the application at hand; as much as they may be applicable in the appeal to be filed.
20. What I deem to be the only issue for determination is whether the applicant has met the threshold for grant of stay of proceedings in this case, pending hearing and determination of intended appeal to the Court of Appeal. A decision whether to stay or not of proceedings is at the discretion of the court. It is a question as to whether it is in the interest of justice to order a stay and if so, on what terms it should be granted. The court is also under an obligation to consider the pros and cons, the expeditious disposal of cases, as well as scarcity and optimum utilization of judicial time as well as whether the application was brought expeditiously – See Re-Global Tours & Travel Ltd HCWC No 43 of 2000, cited in Peter Kariuki Mburu & another vs Neema Shah [2021] e KLR.



See also *Kenya Wildlife Service vs James Mutembei* [2019] e KLR where the court rendered that

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the rights to access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”

21. The application is premised on the sections 1A, 1B and 3A of the *Civil Procedure Act* as well. These provisions mandate courts to render justice in all proceedings in a just, expeditious, proportionate and affordable cost to parties. The Court of Appeal in the case *UAP Insurance Company Ltd vs Michael John Beckett* [2004] e KLR held that what an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if stay of proceedings is not granted. I have stated earlier that no grounds of appeal have been stated by way of a draft memorandum of appeal or otherwise. As such, the court has not been given an opportunity to glance, so as to determine the arguability of the intended appeal.
22. In *Benson Khwatenge Wafula vs Director of Public Prosecutions & 2 others* [2020] e KLR on the matter of stay of proceedings, where a draft memorandum of appeal was in place, held that:

“A perusal of the grounds and the draft memorandum of appeal exhibited leads us to the conclusion that the intended appeal is arguable. We recognise that an arguable appeal needs only raise a single *bona fide* point worthy of consideration by the bench that will hear the appeal and need not be one that must necessarily succeed”.
23. What then is the purpose for an order of stay of proceedings? The proceedings sought to be stayed are defamatory proceedings. Ordinarily, such proceedings seek monetary compensation in terms of damages. The reliefs sought by the plaintiff against the defendants is not different. It is compensatory damages for defamation of character and reputation. The applicant has not submitted what damages if any, she would suffer that would not be compensated by an award of damages if the stay orders are not granted vis-a-viz – staying the proceedings to await the hearing and determination of the intended appeal.
24. There is no dispute as to the courts inherent powers to stay proceedings pending appeal. The powers are derived from order 42 rule 6 *CPR* and section 3A of the *Civil Procedure Act*. What matters in my view in such an application is the overall impression the court makes out of the sum total of the circumstances of each case, and whether there would be justice to the rival parties interests to persuade the court to stay the proceedings. As stated in the case *Re Global Tours & Travel* (supra), the sole question is whether it is in the interest of justice to order a stay of proceedings in the circumstances, and if so, on what terms.
25. Upon weighing the pros and cons of granting the stay orders, I am persuaded that a grant of stay of proceedings in this matter, and taking into account the age of the said case, would cause more harm than good to the parties whose interests must be considered equally. The upshot is that I find no compulsive reasons to allow the application by the 2<sup>nd</sup> defendant dated January 13, 2022. It is dismissed with no orders as to costs.
26. To hasten the speedy progression of this case, I direct that the plaintiff to take steps to have the case listed down for pre-trial directions within 60 days of this ruling. In default, the defendants shall be at liberty to apply to safeguard their interests.
27. Orders accordingly.

**DELIVERED, DATED AND SIGNED AT NAIROBI THIS 29<sup>ND</sup> DAY OF SEPTEMBER, 2022.**



**J.N. MULWA**  
**JUDGE.**

