



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Julius v Mitei (Civil Appeal E001 of 2021)
[2022] KEHC 13295 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13295 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BOMET
CIVIL APPEAL E001 OF 2021**

RL KORIR, J

SEPTEMBER 28, 2022

BETWEEN

NG'ETICH KIPKOECH JULIUS APPLICANT

AND

ALPHINE KIPSANG MITEI RESPONDENT

RULING

1. The present Application dated April 9, 2021 was filed under Certificate of Urgency. It is supported by the sworn affidavit of Ng'etich Kipkoech Julius, the Applicant herein. It is premised under Order 51, Rule 1 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3, (3A) and 63 (e) of the Civil Procedure Act, Cap 21 Laws of Kenya.
2. The Applicant seeks a Stay of proceedings in Sotik Principal Magistrate's Court Civil Case No. 27 of 2019 and all consequential orders. The specific prayers are: -
 - (1) That the Application be certified urgent and service thereof be dispensed with in the first instance. (Spent)
 - (2) That pending the hearing and determination of this Application, this honourable Court be pleased to issue an Order Staying the proceedings in Sotik Principal Magistrate's Court Civil Case No. 27 of 2019 and all consequential orders.
 - (3) That pending the hearing and determination of this Appeal, this honourable Court be pleased to issue an Order Staying the proceedings in Sotik Principal Magistrate's Court Civil Case No. 27 of 2019 and all consequential orders.
 - (4) That the costs of this Application be in the cause.
3. The Application is premised on the following grounds: -



- (1) That the subordinate court issued a ruling dated November 15, 2020 dismissing the Appellant/Applicant's Application for reviewing the Orders issued on November 10, 2020.
 - (2) That the Defendant/Applicant herein being aggrieved with the rulings of the subordinate court has preferred this Appeal against the said rulings.
 - (3) That this Appeal has overwhelmingly high chances of success and unless the Orders herein are granted, the Appeal will be rendered nugatory and the Appellant/Applicant will be prejudiced and will have been condemned without the benefit of a defence and supportive documents.
 - (4) That it is a constitutional dictate that the Court at all material times shall, where sufficient cause is shown, afford every party an opportunity to prosecute his case in a fair hearing which constitutional right has been denied to the Appellant/Applicant.
 - (5) That the Respondent will not be prejudiced in any way that will not be adequately compensated in monetary terms, unlike the Appellant/Applicant who would have been condemned unheard.
4. On October 21, 2021, the Respondent filed a Replying Affidavit dated May 7, 2021. He opposed the Application stating that there were no pending proceedings before the trial court that were capable of being Stayed and that the Applicant waived his right of appeal against the trial court's ruling when he opted for a review of the said Orders. Further, he averred that no security had been furnished by the Applicant and that he was likely to be prejudiced. He also stated in his Affidavit that the Applicant had failed to provide an explanation for his delay to file a defence within the required timelines and therefore could not blame anyone for his misfortunes.
 5. This Court issued directions on October 14, 2021 directing the parties to canvass the Application by way of written submissions.

Applicant's Submissions

6. On November 18, 2021, the Applicant filed its written submissions dated November 8, 2021. Counsel for the Applicant argued that it was in the interests of justice that the Court granted the Orders they prayed for. They relied on the case of *Global Tours & Travels Limited*: Nairobi High Court, Winding Up Cause No. 43 of 2000 and that of *Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabii* Civil Appeal No. 326 of 2013 (2014) eKLR.
7. They argued that they had filed the Application expeditiously and that their appeal was arguable. To this end, they cited the case of *Lemanken Aramat vs. Harun Meitamei Lempaka & 2 Others* (2014) eKLR.
8. Lastly, the Applicant submitted that he had a right to be heard and to have the dispute filed by way of the Application, resolved in a fair public hearing as stipulated under Article 50 of *the Constitution* of Kenya, 2010.

Respondent's Submissions

9. The Respondent filed his submissions dated on November 25, 2021 on November 29, 2021. Through his counsel, the Respondent submitted that the trial court delivered its final judgment on November 10, 2020 and that there were no proceedings to be Stayed. Therefore, the proper Application would have been Stay of execution.



10. The Respondent submitted that the Application was premised on Order 51 Rule 1 of the *Civil Procedure Rules* and not Order 42 Rule 6 which dealt with Stay of execution of decree or judgment. He cited the case of *Kenya Power & Lighting Company Limited vs. Esther Wanjiru Wokabi* (2014) eKLR to this end.
11. He also cited the case of *Re Estate of Leah Nyawira Njega (deceased)* [2021] eKLR which outlined the requirements for granting a Stay of proceedings as follows: That there had to be a prima facie arguable appeal. To support this position, he cited the case of *Paul Misori Orago vs. City Council of Nairobi* (2017) eKLR.
12. Secondly, was whether the Application was filed expeditiously. The Respondent submitted that the impugned judgments had been delivered on November 10, 2020 and December 15, 2020 and that the Application was filed on April 9, 2021 which was about 4-5 months after the delivery of judgment. Thus, it was not filed expeditiously. He cited the case of *Re Estate of Leah Nyawira Njega (supra)* in support of this.
13. Lastly, the Respondent submitted that the present Application was an abuse of due process and ought to be dismissed.

Issues for Determination

14. From the Application, the rival Affidavits and the respective submissions, the only issue for determination is whether or not the Application is merited.

Whether or not the Application has merit.

15. The threshold for Stay of proceedings was properly set out in *Halsbury's Law of England, 4th Edition*. Vol. 37 at pages 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.”

16. In the case of *Kenya Wildlife Service –vs- James Mutembei* [2019] eKLR the Court held that: -

“...Stay of proceeding should not be confused with Stay of execution pending appeal. 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...”



17. A brief background on this Application is that judgment in default of appearance was entered by the trial court against the Applicant and the matter proceeded to formal proof hearing where the Respondent presented evidence against the defendant/Applicant. Subsequently, the Applicant filed an Application before the trial court seeking to set aside the default judgment. Consequently, judgment was entered against the Applicant on November 10, 2020. The trial court also dismissed the Application to set aside the default judgment, for want of prosecution. Being dissatisfied with this Ruling of November 10, 2020, the Respondent then filed for review vide Application dated November 16, 2020 in the same trial court. The said Application was also dismissed on December 15, 2020 whereupon he proceeded to this Court and filed on January 5, 2021, a Memorandum of Appeal dated December 28, 2020.
18. The denial of the Applications before the trial court provoked the present Application seeking Stay of proceedings in the trial court pending the hearing and determination of the Application and the subsequent Appeal.
19. An Application for Stay of proceedings seeks a higher threshold than an Application seeking Stay of execution pending appeal under Order 42. The two are distinct from one another. In the case of *Kenya Wildlife Service vs. James Mutembei* [2019] eKLR it was held that: -
- “...Stay of proceedings should not be confused with Stay of execution pending appeal. 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 right of 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...”
20. Ringera J (as he then was) in *Re Global Tours & Travel HCWC No. 43 of 2000* clearly set out the parameters that should be considered by the Court in seeking to grant Stay of proceedings. He 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 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...”
21. Undoubtedly, Stay of proceedings is a discretionary Order. The principles to guide the court while determining whether to grant stay of proceedings are:-
- a. Whether an applicant has established that he /she has a prima facie arguable case;
 - b. Whether the applicant has filed expeditiously and
 - c. Whether the applicant has established sufficient case to the satisfaction of the court that is in the interest of justice to grant the orders sought.
22. I now consider the facts of the present case. From my perusal of the judgment delivered on November 10, 2020 and marked as “NKJ 4” and the Ruling delivered on the same date, it is clear that the trial



court adequately discharged its functions the moment it delivered these decisions. It follows then that the only avenue for redress by the Applicant would be an appeal in respect of the judgment and a review in respect of the Ruling which he has already done as evidenced by the Memorandum of Appeal filed on January 5, 2021. The Respondent also applied for a review of the trial court's Order and the trial court rendered itself in the Ruling on December 15, 2020 by dismissing the Application for review.

23. From the foregoing, it is clear that there are no live proceedings in the trial court for which the Applicant seeks Stay. On the contrary, it is the Applicant who has moved this Court vide Memorandum of Appeal dated December 28, 2020 and filed on January 5, 2021 seeking to appeal the judgment of the trial court.
24. As rightfully submitted by the Respondent, the correct Application that ought to have been filed at this point would have been an Application seeking Stay of execution of judgment or decree from the impugned decision under Order 42 Rule 6. In the absence of this, this Court can only address itself to the prayers and grounds outlined by the Applicant in this Application. These prayers relate to stay of proceedings and not stay of execution.
25. The Court of Appeal in the case of *David Morton Silverstein vs. Atsango Chesoni* (2002) eKLR stated thus: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

26. An Order of stay of proceedings will be considered at the very minimum, where there are ongoing proceedings in a subordinate court, for which an Applicant would be seeking stay. However, the facts of this case clearly demonstrate that there are no live proceedings for which the Applicant seeks a Stay. In the premise, this Court is unable to delve into the merits of the Application to determine whether the principles regarding stay of proceedings have even been met or not.
27. It is the view of this Court that the present Application amounts to a waste of precious judicial time. Indeed the Court of Appeal in *Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others* Civil Appeal No. 25 of 2002 [2009] KLR 22 stated thus:-

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

28. In the end, I find that this Application lacking in merit. It is dismissed with costs to the Respondent.
29. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED THIS 28TH DAY OF SEPTEMBER, 2022

.....
R. LAGAT-KORIR
JUDGE

Ruling delivered in the presence of Mr.Kefa for the Appellant/Applicant, Ms.Kusa for the Respondent and Kiprotich (Court Assistant).

