



REPUBLIC OF KENYA



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

**Julius v Rono (Civil Appeal E002 of 2021)  
[2022] KEHC 13298 (KLR) (28 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13298 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT BOMET  
CIVIL APPEAL E002 OF 2021  
RL KORIR, J  
SEPTEMBER 28, 2022**

**BETWEEN**

**NGETICH KIKOECH JULIUS ..... APPLICANT**

**AND**

**AMOS KIPRONO RONO ..... RESPONDENT**

**RULING**

1. The Applicant filed a Notice of Motion Application dated April 9, 2021 which sought the following Orders:
  - I. Spent.
  - II 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. 191 of 2018 and all consequential orders.
  - III 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. 191 of 2018 and all consequential orders.
  - IV That the costs of this application be provided for.
2. The Application was brought under Order 51 Rule 1 of the *Civil Procedure Rules* & Sections 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*. It was premised on the grounds on the face of the Application and further by the Supporting Affidavit sworn by Ngetich Kipkoech Julius on 9<sup>th</sup> April 2021.

**THE APPLICANT'S CASE.**

3. It was the Applicant's case that after being dissatisfied with the trial court's Rulings delivered on November 10, 2020 and December 15, 2020, he preferred an Appeal against the said Rulings.



4. The Applicant argued that the trial court delivered a Judgment on January 12, 2021 without giving any notice. That he deserved to be given an opportunity to ventilate his case and the same be determined on merit.
5. It was Applicant's case that he was apprehensive that the Respondent may execute against him if the orders sought were not granted. That he stood prejudiced if he was condemned unheard. It was his further case that the Respondent would not suffer any prejudice that could not be adequately compensated in monetary terms.

#### **THE APPLICANT'S SUBMISSIONS.**

6. The Applicant submitted that it was in the interest of justice that the order for stay of proceedings be granted as the trial court may proceed and determine the matter without the Applicant being given an opportunity to ventilate his case.
7. It was the Applicant's submission that the present application had been filed expeditiously. That the Rulings being appealed against vide a Memorandum of Appeal dated December 28, 2020 were delivered on November 10, 2020 and December 15, 2020. He relied on the case of *Kenya Power & Lighting Co.Ltd vs Esther Wanjiru Wokebii* (2014) eKLR to support his submission.
8. The Applicant submitted that the Appeal raised cognizable and weighty constitutional questions. That the trial magistrate erred in law and in fact when he dismissed the Application dated October 2, 2020 for want of prosecution while the Applicant had properly prosecuted his case. He relied on the case of *Lemanken Aramat vs Harun Meitamei Lempanka & 2 Others* (2014) eKLR to support his submission.
9. It was the Applicant's submission that the Applicant had a right to be heard and have his dispute decided in a fair hearing. That he was not accorded a fair opportunity to ventilate his case contrary to Article 50 of *the Constitution* of Kenya.

#### **THE RESPONDENT'S CASE.**

10. The Respondent opposed the Application through a Replying Affidavit dated May 7, 2021. It was his case that the trial court delivered the final Judgment on November 10, 2020 and that there were no proceedings capable of being stayed.
11. The Respondent stated that the Applicant waived his right to appeal against the Ruling and order issued on November 10, 2020 when he opted for a Review of the said order. That the Applicant would suffer no prejudice if the orders were not granted.
12. It was the Respondent's case that the Applicant had not demonstrated any willingness to provide security for the Decretal sum. That the minor would suffer prejudice if the Application was allowed and the Appeal was dismissed as that would give the Applicant time to place any movable property beyond reach to escape attachment.
13. The Respondent stated that the Applicant was given an opportunity to explain his delay in filing the Defence as required by the law but failed to do so. That he waived his right to be heard and thus he could not blame anyone for his misfortune. It was his further case that the Application lacked merit and was an abuse of due process.

#### **RESPONDENT'S SUBMISSIONS.**

14. The Respondent submitted that the Application was a nullity as there were no active proceedings capable of being stayed. That the Application was for a stay of proceedings and not a stay of execution.



- He relied on the case of *Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi* (2014) eKLR to support his submission.
15. It was the Respondent's submission that an Appeal had no legs to stand on if it was brought against an order which had already been the subject of a Review. He relied on the case of *Paul Misori Orago vs City Council of Nairobi* (2017) eKLR to support this submission.
  16. The Respondent submitted that the impugned Rulings were delivered on November 10, 2020 and December 15, 2020 and that the present Application had been filed on April 9, 2021. That the difference of about 4-5 months had not been explained. It was his further submission that by then, the final Judgment had already been delivered. He relied on the case of *Re Estate of Leah Nyawira Njenga* (2021) eKLR to support his submission.
  17. I have read through and considered the Notice of Motion Application dated April 9, 2021, the Replying Affidavit dated May 7, 2021, the Applicant's Written Submissions dated November 8, 2021, and the Respondent's Written Submissions dated November 25, 2021. The only issue for my determination is whether the Applicant should be granted the order for stay of proceedings in Sotik PMCC No. 191 of 2018.
  18. The matter in the trial court was filed on November 14, 2018 where the Respondent sought special and general damages on behalf of the minor Amos Kiprotich Rono who had been injured in an accident involving Motor Vehicle Registration Number KBW 400E.
  19. Interlocutory Judgment was entered against the Applicant on January 30, 2020 and the matter thereafter proceeded for formal proof hearing on September 15, 2020.
  20. Before Judgment could be delivered, the Applicant filed an Application dated October 2, 2020 that sought the default Judgment be set aside and that he be allowed to file a Defence out of time. The Application was allowed and Judgment was stayed until that Application was determined.
  21. In a Ruling dated November 10, 2020, the trial court dismissed the Application for want of prosecution. Being aggrieved with the said Ruling, the Applicant filed another Application dated November 16, 2020 in which he sought a Review of the Ruling dated 10<sup>th</sup> November 2020.
  22. The trial court ruled on this Application on November 15, 2020 where it equally dismissed the said Application. Judgment in the case thereafter was delivered on January 12, 2021.
  23. In the case of *Kenya Wildlife Service vs James Mutembei* (2019) eKLR, Gikonyo J 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 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 also *HMI v KBH* [2021] eKLR)
  24. I am persuaded by the case of *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 where Ringera J set out principles to be considered in granting an order for stay of proceedings as:-

“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”.

25. The Court of Appeal in the case of *David Morton Silverstein vs Atsango Chesoni* (2002) eKLR held that:-

“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. In an application to stay proceedings, the court is required to exercise judicial discretion in the interest of justice. In the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Limited* (2015) eKLR the court observed that:-

“What matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice”

27. The trial court proceedings indicate that Judgment in Civil Suit Number 191 of 2018 at Sotik Principal Magistrate's Court was delivered on January 12, 2021. That indicated the close of proceedings at the trial court. The aggrieved party was at liberty to appeal the said Judgment as he/she was dissatisfied.

28. The Applicant in the present Application has prayed for an order of stay of proceedings in the trial court pending an Appeal. The attached Memorandum of Appeal indicated that the Applicant challenged the trial court's Rulings delivered on November 10, 2020 and December 15, 2020. It is salient to note that the Applicant did not appeal the Judgment.

29. From the content of his Application, it appears that the Applicant intended to seek a prayer of stay of execution pending an Appeal. However, in the present Application, he explicitly sought for the stay of proceedings in the trial court. In the case of *Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi* (2014) eKLR, Githua J correctly stated that:-

“Having analysed the provisions of Order 42 rule 6 of the *Rules*, it is clear to me that the said provisions only apply to applications for stay of execution of a decree or order issued by a court pending hearing of an appeal but the same do not apply to applications for stay of proceedings such as the application now before me. It is apparent from the face of the application and from the submissions made by the parties that counsel for both parties were operating on the mistaken belief that the conditions prescribed in Order 42 rule 6(2) were also applicable to applications for stay of proceedings which is not the case.”



30. It is trite law that parties are bound by their pleadings as they are the bedrock from which proceedings are derived from. In the case of *David Sironga Ole Tukai vs Francis Arap Muge & 2 Others* (2014) eKLR, the Court of Appeal held that:

“In an adversarial system such as ours, parties to litigation are the ones who set the agenda, and subject to rules of pleadings, each party is left to formulate its own case in its own way. And it is for the purpose of certainty and finality that each party is bound by its own pleadings. For this reason, a party cannot be allowed to raise a different case from that which it has pleaded without due amendment being made. That way, none of the parties is taken by surprise at the trial as each knows the other’s case is as pleaded. The purpose of the rules of pleading is also to ensure that parties define succinctly the issues so as to guide the testimony required on either side with a view to expedite the litigation through diminution of delay and expense.”

31. In the case of *Elizabeth O. Odhiambo V South Nyanza Sugar Co. Ltd* (2019) eKLR, Ndungu J held that:

“The court, on its part, is itself bound by the pleadings of the parties. The duty of the court is to adjudicate upon the specific matters in dispute, which the parties themselves have raised by their pleadings. The court would be out of character were it to pronounce any claim or defence not made by the parties as that would be plunging into the realm of speculation and might aggrieve the parties or, at any rate, one of them. A decision given on a claim or defence not pleaded amounts to a determination made without hearing the parties and leads to denial of justice.”

32. After considering the present Application and the written submissions, it is my finding that there are no live proceedings in the trial court as the same were concluded once the Judgment was delivered. Thus, there are no proceedings to stay.

33. It is also my further finding that the Application has been overtaken by events as the Judgment delivered superseded the two Rulings that the Applicant intended to Appeal.

34. The Notice of Motion Application dated April 9, 2021 lacks merit and is dismissed with costs to the Respondent.

**RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28<sup>TH</sup> DAY OF SEPTEMBER, 2022.**

.....

**R. LAGAT-KORIR**

**JUDGE**

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

