



REPUBLIC OF KENYA



**Mutulile & another v Curzon & another (Civil Appeal E227 of 2022)  
[2022] KEHC 13005 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13005 (KLR)

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

**CIVIL  
CIVIL APPEAL E227 OF 2022**

**JK SERGON, J  
SEPTEMBER 23, 2022**

**BETWEEN**

**MARVIN WASIKE MUTULILE ..... 1<sup>ST</sup> APPLICANT**

**OLGA ROSE TUMAINI MUTULILE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**PAUL CURZON ..... 1<sup>ST</sup> RESPONDENT**

**MICHAEL OKOTH ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. The 1<sup>st</sup> and 2<sup>nd</sup> appellants/applicants took out the notice of motion dated May 30, 2022 and supported by the grounds set out on its body and the facts stated in the affidavit of the 1<sup>st</sup> applicant. The following are the orders being sought therein:
  - i. Spent.
  - ii. Spent.
  - iii. That pending the hearing and determination of the intended appeal, this honourable court do issue interim orders restraining the firm of Acorn Law formerly Ojiambo & Company Advocates from acting for the 1<sup>st</sup> respondent in Civil Suit Number 4902 of 2018.
  - iv. That the costs of the application be provided for.
  - v. Any other or further orders that this honourable court may deem fit.
2. The 1<sup>st</sup> respondent opposed the motion through his advocate, Dr Omondi Owino who swore a replying affidavit on June 28, 2022.



3. On his part, the 2<sup>nd</sup> respondent swore a replying affidavit on July 5, 2022.
4. The 1<sup>st</sup> appellant rejoined with the supplementary affidavit sworn on July 11, 2022.
5. At the hearing of the motion, the parties agreed to put in written submissions. Going by the record, at the time of writing this ruling, only the submissions by the applicants and the 1<sup>st</sup> respondent had been availed for perusal.
6. I have considered the grounds laid out on the face of the motion; the facts deponed to in the supporting and replying affidavits respectively; and the contending submissions on record.
7. As earlier noted, the order being sought herein is essentially that of a stay of proceedings in the lower court pending appeal, particularly in respect to representation of the 1<sup>st</sup> respondent by the firm of Acorn Law in the suit.
8. The principles surrounding the granting of an order for stay of proceedings were aptly discussed by the Court of Appeal in *UAP Provincial Insurance Company Limited v Michael John Becket* [2004] eKLR thus:
 

“In order for the applicant to succeed in an application for stay of proceedings pending appeal it is necessary for the applicant to satisfy the court, firstly that the pending appeal is an arguable one, which is not frivolous, and secondly that if the stay of proceedings is not granted the appeal when ultimately heard will be a futile exercise...”
9. Moreover, the High Court in advancing the above position as relates to the granting of an order for stay of proceedings held the following in the case of *William Kamunge & 2 others v Muriuki Mbiti* [2016] eKLR:
 

“...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”
10. In addition, the Court of Appeal in the case of *Chris Munga N Bichage v Richard Nyagaka Tongi & 2 others* [2013] eKLR cited in the submissions by the 1<sup>st</sup> respondent rendered itself thus:
 

“...The law as regards applications for stay of execution, stay of proceedings or injunction is now well settled. The applicant who would succeed upon such an application must persuade the court on two limbs, which are first, that his appeal or intended appeal is arguable, that is to say it is not frivolous. Secondly, that if the application is not granted, the success of the appeal, were it to succeed, would be rendered nugatory. These two limbs must both be demonstrated and it would not be enough that only one is demonstrated.”
11. I will first address the principle on expeditious filing of the instant motion. The applicants state and submit that the application has been brought without unreasonable delay. On the contrary, the respondents are each of the view that the motion is a mere afterthought and an attempt at delaying the lower court proceedings.
12. Upon my perusal of the impugned ruling which was annexed to the replying affidavit of Dr Omondi Owino on behalf of the 1<sup>st</sup> respondent, I note that the same was delivered on March 24, 2022. The applicants then approached this court about two (2) months thereafter through the present motion.



13. I am therefore satisfied that the application before me has been brought without unreasonable delay.
14. The second factor relates to whether the applicants have brought forth a prima facie arguable appeal. On the one part, the applicants argue that their appeal is largely premised on the issue of legal representation of the 1<sup>st</sup> respondent by the firm of Acorn Law allegedly formerly known as Ojiambo & Co Advocates and which firm acted for them in a transaction which forms the subject matter of the dispute pending before the lower court, thus making the appeal arguable.
15. On the other part, the 1<sup>st</sup> respondent states and submits that contrary to the averments being made by the applicants, the firm of Acorn Law is distinct from the firm of Ojiambo & Co Advocates and that the former firm never acted for the applicants in the claimed transaction, and hence the application constitutes mere falsehoods and amounts to an abuse of the court process.
16. The 1<sup>st</sup> respondent is therefore of the view that no arguable appeal exists in the matter.
17. The 2<sup>nd</sup> respondent through his replying affidavit echoes the sentiments made by his counterpart and states that the applicants have not laid any basis to warrant a grant of the orders sought in the instant motion.
18. Upon my study of the record, it is apparent that the main issue arising in the matter concerns itself with the alleged conflict of interest arising out of the legal representation of the 1<sup>st</sup> respondent and going by the grounds set out in the draft memorandum of appeal, it is apparent that this issue constitutes the subject of the appeal and can therefore only be ventilated and determined on appeal and not at this stage.
19. In the premises, I am of the view that the applicants have satisfied me on the existence of an arguable appeal.
20. I must also consider the factor associated with whether the appeal will be rendered a futile exercise should the stay of proceedings be denied.
21. I see no need to belabor my view that since the appeal raises a key issue of alleged conflict of interest and disqualification of the firm of Acorn Law, it goes without saying that to allow the proceedings in the subordinate court to proceed as is while the appeal is pending will inevitably render the appeal futile especially in the event that the appeal succeeds, since the status of the legal representation of the 1<sup>st</sup> respondent in the suit is largely pegged on the determination that will be arrived at on appeal.
22. I prefer to address the factors of expeditious disposal of cases contemporaneously with the proper use of judicial time.
23. The applicants are steadfast in their position that it would be proper for this court to exercise its discretion in their favour, whereas the respondents are of the view that the motion is solely intended to delay the hearing and determination of the suit.
24. Upon considering the competing interests of the parties, I am convinced that it would be proper use of judicial time to first settle the issues of legal representation and conflict of interest on appeal since this will determine the course that the suit will take in that regard and which suit was notably instituted by the applicants. I find that any prejudice to be suffered by the respondents can be adequately compensated by way of costs, if need be.
25. Accordingly, I will allow the notice of motion dated May 30, 2022 in terms of order (iii) and make the following consequent orders:



- i. The firm of Acorn Law (formerly Ojiambo & Company Advocates) be and is hereby restrained from acting for the 1<sup>st</sup> respondent in Civil Suit Number 4902 of 2018 pending the hearing and determination of the intended appeal.
- ii. Costs of the motion shall abide the outcome of the appeal.

**DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2022.**

.....

**J. K. SERGON**

**JUDGE**

In the presence of:

.....for the 1<sup>st</sup> and 2<sup>nd</sup> Appellants/Applicants

.....for the 1<sup>st</sup> Respondent

.....for the 2<sup>nd</sup> Respondent

