



**Ojwang v Mutinda & another (Civil Appeal E496 of 2022)
[2022] KEHC 13069 (KLR) (Civ) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13069 (KLR)

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

**CIVIL
CIVIL APPEAL E496 OF 2022**

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

BETWEEN

CHRISTINE OBONDO OJWANG APPLICANT

AND

NICHOLAS NDAMBUKI MUTINDA 1ST RESPONDENT

PAUL MUNGAI WAHINYA 2ND RESPONDENT

(Originating from Milimani CMCC No. 5400 of 2018)

RULING

1. The appellant/applicant in the present instance brought the notice of motion dated June 27, 2022 supported by the grounds presented on its face and the facts stated in the affidavit of the applicant, who sought for a stay of all proceedings in Milimani CMCC No 5400 of 2018 pending the hearing and determination of the appeal lodged against the ruling delivered on June 21, 2022 in the abovementioned suit.
2. To oppose the motion, the 1st respondent put in a replying affidavit he swore on July 22, 2022.
3. The 2nd respondent did not file any response to the motion or participate at the hearing thereof.
4. The motion was canvassed through written submissions.
5. I have considered the grounds featuring on the face of the motion; the facts deponed in the supporting and replying affidavits respectively; and the rival written submissions placed before me.
6. A brief background of the matter is that the applicant instituted the above-cited suit against the 1st and 2nd respondents and sought various reliefs, arising out of a road traffic accident.



7. From the record, it is apparent that interlocutory judgment was entered against the respondents and the matter proceeded for formal proof, thereby resulting in judgment in favour of the applicant and against the respondents, delivered on April 30, 2020 and later varied on March 26, 2021.
8. Subsequently, the 1st respondent filed the application dated March 25, 2022 and sought to have the judgment set aside and for the grant of leave to put in his statement of defence. Upon considering the application, the trial court allowed it *vide* the ruling delivered on June 21, 2022.
9. The aforementioned ruling has triggered the appeal now before the High Court and the instant motion.
10. It is clear from the instant motion that the issue arising for determination is whether or not to grant a stay of proceedings in the suit, pending the appeal.
11. It is noteworthy that the granting of a stay of proceedings is purely a matter of judicial discretion. This was the position taken by in the case of *Global Tours & Travels Limited Nairobi* HC Cause No 43/2000 cited in the submissions by both the applicant and the 1st respondent, where the court held that:

“..... 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.”
12. Moreover, the court in the case of *In re Estate of Leah Nyawira Njega (Deceased)* [2021] eKLR listed the following as the three (3) main principles for consideration in determining an application seeking a stay of proceedings:
 - a) Whether the applicant has established that he/she has a *prima facie* arguable case.
 - b) Whether the application was filed expeditiously, and
 - c) Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”
13. The first principle relates to the expeditious filing of an application. The applicant on her part states that the motion has been filed expeditiously, while the 1st respondent did not specifically touch on this principle.
14. Upon my perusal of the record and as earlier indicated, the impugned ruling was delivered on June 21, 2022 while the instant motion was brought sometime on or about June 27, 2022. In my view, the motion has been timeously filed.
15. The second principle concerns itself with whether the applicant has an arguable appeal with reasonable chances of success.
16. On the one part, the applicant states and submits that she has an arguable appeal since despite the trial court being satisfied that the 1st respondent had been duly served with summons to enter appearance in the suit but did nothing, the court went ahead to set aside both the interlocutory and final judgment, and to grant the 1st respondent leave to file his statement of defence, thereby denying her the fruits of her judgment and a miscarriage of justice.



17. In retort, the 1st respondent states and submits that the trial court exercised its discretion judiciously and hence no arguable appeal exists.
18. The 1st respondent further submits that the applicant has not established a *prima facie* appeal which will be rendered nugatory if the order sought is denied.
19. A reading of the memorandum of appeal relating to the appeal shows that the appeal is essentially challenging the decision of the trial court in allowing the 1st respondent's application seeking to set aside the judgment and for leave to defend the claim.
20. In my view therefore, the appeal in question raises *prima facie* arguable points of law and fact and whose outcome will directly impact on the suit.
21. Turning to the third principle on the interest of justice vis-à-vis the subject of prejudice, the applicant on the one hand is of the view that unless an order for a stay of proceedings is granted, she stands to be greatly prejudiced.
22. On the other hand, it is the averment and submission of the 1st respondent that the applicant has not shown the prejudice that will be visited upon her should an order for a stay of proceedings be denied and the parties are at liberty to proceed with the suit.
23. Upon weighing the rival positions above and the foregoing circumstances, I am satisfied that the applicant has reasonably shown that unless there is a stay of proceedings during the pendency of the appeal, there is a likelihood that prejudice and hardship will be visited upon her.
24. I will also consider the fourth principle touching on the expeditious disposal of cases vis-à-vis proper use of judicial time. I borrow from the case of [Ezekiel Mule Musembi v H Young & Company \(EA\) Limited](#) [2019] eKLR where the court held that the expeditious disposal of cases ought to be a factor for consideration in determining applications seeking an order for a stay of proceedings.
25. In the present instance, it is apparent that the suit was instituted in the year 2018 and is in the nature of a claim on negligence. It is also apparent that the outcome of the appeal will determine the route that the present suit will take, be it judgment and execution, or retrial. It would therefore only be a practical and proper use of judicial time for the relevant parties to first pursue the appeal before undertaking any further proceedings in the suit.
26. The upshot therefore is that the notice of motion dated June 27, 2022 succeeds as prayed. Accordingly, there shall be a stay of all further proceedings in Milimani CMCC No 5400 of 2018 pending the hearing and determination of the appeal. In the circumstances, costs of the motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the 1st Respondent

..... for the 2nd Respondent

