



**Assets Recovery Agency v Kioko (Anti-Corruption and Economic Crimes Civil Suit 16 of 2020)
[2022] KEHC 14101 (KLR) (Anti-Corruption and Economic Crimes) (19 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14101 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
ANTI-CORRUPTION AND ECONOMIC CRIMES
ANTI-CORRUPTION AND ECONOMIC CRIMES CIVIL SUIT 16 OF 2020
EN MAINA, J
OCTOBER 19, 2022**

BETWEEN

ASSETS RECOVERY AGENCY APPLICANT

AND

MIKE SONKO MBUVI GIDEON KIOKO RESPONDENT

RULING

1. By the notice of motion dated March 11, 2022 the respondent/applicant seeks an order for stay of the proceedings herein pending hearing and determination of an appeal against the ruling of Lesiit J, as she then was, delivered on July 30, 2020 in Nairobi HC Misc Civil Application No 5 of 2020.
2. The application is premised on grounds that:-

“A. Applicant has an arguable appeal that will be rendered nugatory if stay of Proceedings sought is not granted

1. By her ruling dated July 30, 2020 the Hon Lady Justice Lesiit (as she then was) dismissed the applicant's notice of motion herein dated May 18, 2020 in the said foundational and related Nairobi HC Misc Civil Application No 5 of 2020 in which the applicant *inter alia* contended that no "miscellaneous civil application" is known in law filed as a stand-alone interlocutory application seeking final orders without the substratum of a suit.
2. The applicant herein then lodged an appeal to the Court of appeal by a notice of appeal of the same date on July 30, 2020 and by his Draft Memorandum of appeal annexed to his Supporting Affidavit herein, he has demonstrated that he has an arguable appeal with overwhelming chances of success.



3. On March 3, 2022 the Hon. Lady Justice Maina sought to establish that indeed the said appeal was preferred and she granted the applicant 14 days to lodge the instant Motion. Consequently, this matter has now fixed for further Directions set for March 23rd 2022 rendering this Motion urgent.
4. The applicant herein did indeed lodge a notice of appeal dated the same date, July 30, 2020 against the decision made in HC Misc Civil Application No 5 of 2020 and served it on the respondent, indicative of his appeal to the Court of Appeal.

This invocation of the appeal process is neither contested nor otherwise in dispute by the respondent.
5. In spite of Formally requesting for proceedings to be prepared and notification made to the applicant, the High Court Administrator has not in the least furnished the applicant with the said proceedings hence hampering the expedited prosecution of his appeal.
6. The applicant has an arguable appeal arising from the ruling impugned in the said proceedings HC Misc Civil Application No 5 of 2020 implicating the jurisdiction of this honourable court and which appeal will be rendered nugatory if no stay of proceedings herein is granted.
7. Since the said appeal preferred before the Court of Appeal implicates the jurisdiction of this honourable court directly to hear or determine these proceedings which are inextricable tied to Nairobi HC Misc Civil Application No 5 of 2020 which the applicant contended and contends do not have the substratum of a suit in limine, it is imperative to await the outcome of the Court of Appeal's determination thereon.
8. The applicant contends that he was deprived of his right to a fair trial under article 25(c) of the *Constitution of Kenya*.
9. Consequently, the proceedings herein beyond all reasonable doubt ought not to be allowed to continue pending the hearing and determination of the applicant's intended appeal as the said Misc Civil Application No 5 of 2020 IS inexorably tied to these proceedings and indeed these proceedings are tied to, and founded on the said proceedings.
10. The order sought of stay of proceedings is to the end of ensuring that the object of the application is not rendered nugatory, and that substantial loss and irreparable harm is not suffered by the applicant once the case by the respondent in the current proceedings herein proceeds, and simultaneously the applicant's appeal succeeds challenging the Initial Inception and Legality of these proceedings.

B. Applicant has been diligent to have his appeal prosecuted expeditiously

11. In spite of the applicant having applied Orally for the typed Ruing and the proceedings on the very date of the delivery of the ruling in Misc Civil Application No 5 of 2020 on July 30, 2020, (and formally thereafter), the



typed proceedings have Not been availed to the applicant to date to enable him lodge a record of appeal for prosecution before the Court of Appeal.

12. In the result, the applicant cannot therefore be faulted at all in the delay of lodging a record of appeal, and the prayer for stay of proceedings is made to enable the applicant access Justice before the Court of Appeal, pursuant to the right to access Justice so conferred under article 48 of the Constitution of Kenya.
13. The court directed the applicant to file this stay of proceedings on March 3^d 2022 and it is barely a few days after which this motion has been made. It has been thus made with expedition within the stated circumstances.

C. Determination of objection on fatally-defective proceedings in Misc HC Civil Application No 5 of 2020 tied to these proceedings herein on appeal entitles this honourable court to stay the proceedings pending the High Court's decision on the validity of the proceedings herein

14. The applicant has lodged his notice of appeal on the ground protesting that his notice of motion dated May 18, 2020 pointed out that the proceedings in Misc 5 of 2020 lodged by way of a stand-alone interlocutory motion without the substratum of a suit are manifestly frivolous, vexatious, and constitute a gross abuse of Court process whose aim was to harass the applicant, and sought to secure adverse Orders implicating the applicant's bank accounts on affidavit material not subjected through a trial.
15. Moreover, such a process of seeking final orders by way of an interlocutory motion without the substratum of a suit is antithetical and wholly contra both articles 25(c) and article 50(1) of the [Constitution of Kenya](#) and stands in violation of the applicant's under the Constitution to challenge all such allegations contained in the interlocutory documents by the respondent as mandated under article 50(2)(k) of the [Constitution of Kenya](#) where an orally conducted trial is envisaged but which was denied the applicant in this instance.
16. The intended proceeding herein being tied to, and wholly premised on HC Misc Civil Application No 5 of 2020 is thus not Constitutionally-tenable and remains wholly unsupportable, were this honourable court to proceed as now intended and by the interlocutory Motion lodged by the respondent in the cited proceeding to a final adjudication, then the Constitutional provisions cited above will stand violated.
17. A stay of the proceedings herein is thus imperative pending the outcome of the applicant's stated appeal.
18. Consequently this honourable court ought to stay any further proceedings as the applicant contends before the Court of Appeal that this Court cannot be moved in furtherance of such a Constitutional mandate by way of a "Miscellaneous Civil Application" at the instance of the respondent herein, which is in reality a stand-alone interlocutory motion that is manifestly groundless.



19. On this ground alone, the stay of proceedings sought by the applicant pending the hearing and determination of his cited appeal before the Court of Appeal is mandated as the "applicant" in the original proceedings herein -Asset Recovery Agency cannot, (and it could not possibly) succeed in finality on the basis of the interlocutory Motion it lodged.

D. Based on binding precedent from the Supreme Court and Court of Appeal under the doctrine of stare decisis the stay of proceedings is imperative

20. Based on the many persuasive decisions of the High Court, of the binding Court of Appeal and of the Supreme Court establishing that a "Miscellaneous Civil Application" cannot found a Civil Suit, the applicant's appeal to the Court of appeal will be rendered nugatory and great injustice will be visited on the applicant should this Court then proceed to hear and determine the proceedings herein.
21. Order 3 Rule 1 of the *Civil Procedure Rules* prescribes the manner in which a suit should be instituted and the respondent is not at liberty to substitute the legally prescribed method of lodging a suit to do so by way of an unknown procedure. This is an arguable point on appeal as demonstrated by the applicant.
22. The prescribed modes of commencing a suit that are by way of a Petition, Judicial Review, Originating Summons, or a Complaint and the interlocutory notice of motion is an unknown procedure to initiate and Conclude a proceeding with such draconian orders sought against the applicant.
23. Under ground 10 of his memorandum of appeal as exhibited herein, the applicant raises for determination by the Court Of Appeal the issue of the Learned Judge of this Court Hon. Lessit (LJ as she then was) having departed from the decisions cited to her in dismissing the applicant's Motion dated May 18, 2020 and which were binding on her therefore offending the doctrine of stare decisis.
24. Pursuant to article 163(7) of the *Constitution of Kenya*, the doctrine of stare decisis is Constitutionally- anchored.
25. Under article 2 and 3 of the Constitution of Kenya, it was incumbent on the learned Magistrate in deciding on the applicant's Motion dated 18th May 2020 in the cited related and antecedent proceedings (HC Misc Civil Application No 5 of 2020) to give deference to the Constitutionally-anchored doctrine of stare decisis in dealing with the applicant's said P.O.
26. Hence it is imperative to stay the proceedings herein to have this issue determined by the Court of Appeal on appeal.

E. No Prejudice will be visited on the Respondent by grant of stay of proceedings

27. No demonstrable prejudice will be suffered in any event by the respondent in the grant of a stay of proceedings as sought.



28. At any rate the alleged (and purported) cause of action was incepted in and via an ancillary proceeding upon which these proceedings are based hence it is imperative that for due administration of Justice the law be pursued and followed.

Prejudice to the applicant if stay of proceedings is not granted

29. The applicant's right to a fair trial under article 25(c) and 50(1) of the [Constitution of Kenya](#) will stand abridged irreparably and hence the need to give deference to the applicant's right to a Fair Trial espoused under article 10(2)(b) of the [Constitution of Kenya](#).
 30. Immediately the applicant's notice of appeal in Misc Civil Application No 5 of 2020 was lodged and served on the respondent, there was no action in the matter, and then the EACC lodged this fresh matter and until an ex parte date before this Court was fixed by the respondent for 2022.
 31. This honourable court was notified of the lodging of the applicant's appeal and an oral stay of proceedings was made by the applicant's Advocates on record whereupon this honourable court sought for proof of the lodging of the said appeal.
 32. The matter was accordingly adjourned to February 21st, 2022. Still, this honourable court stated to the applicant's Advocate to demonstrate the lodging of the applicant's Nairobi HC Appeal No E846 of 2021 which although demonstrated, the Court insisted on filing copy of the said Memorandum of appeal and receipt of the same.
 33. The motion herein fully merited.”
3. The Application is supported by the affidavit of Mike Sonko Mbuvi Gidion Kioko sworn on March 11, 2022, in which he has reiterated the grounds for the application and annexed the impugned ruling.
 4. The application is vehemently opposed by the applicant/respondent through the affidavit of Cpl. Sautet Jeremiah sworn on April 4, 2022. Cpl Sautet deposes inter alia, that the applicant is not entitled to the orders sought; that the applicant/respondent instituted the preservation proceedings by way of a miscellaneous application in accordance with Sections 81 and 82 of the [Proceeds of Crime and Anti-Money Laundering Act](#) and Order 51 of the [Civil Procedure Rules](#) and hence it is not true that appeal has overwhelming chances of success; that this application was filed 1 year and 6 months late; that the appeal is not arguable; that the respondent/applicant was not deprived of his right to a fair trial as provided under article 25(c) of the [Constitution](#); that the respondent/applicant shall suffer no prejudice should these forfeiture proceedings continue and that this application lacks merit and it should be dismissed.
 5. Learned Counsel for the parties canvassed the application by way of written submissions.
 6. In summary learned Counsel for the applicant argued that Order 42 Rule 6(1) of the [Civil Procedure Rules](#) vests the court with jurisdiction to grant the order sought; that the applicant seeks to secure the just determination of his appeal since it is his right more so given that the orders appealed against were obtained ex parte and unprocedurally; that the appeal against Lesiit J's ruling is arguable and meritorious and the same risks to be rendered nugatory should stay not be granted. It is further argued that jurisdiction to grant stay is conferred to ensure the ends of justice are met. Learned Counsel for the



applicant reiterated that the applicant ought to be remitted to exercise his right to appeal the decision of Lesiit J. on the issue of delay Counsel submitted that the proceedings and ruling of Lesiit J have never been availed to the applicant, a matter which is outside the scope and power of the applicant hence the stay of proceedings is warranted. Counsel contended that the right to access to justice will be vitiated if the proceedings herein are not stayed pending the hearing and determination of the applicant's appeal before the Court of Appeal. Learned Counsel urged this court to allow the application. Counsel cited numerous authorities in support of his submissions.

7. For the applicant/respondent it was argued that stay of execution is purely a discretionary matter exercisable within the parameters of the law and it was incumbent upon the respondent/applicant to prove the conditions under Order 42 Rule 6(2) of the *Civil Procedure Rules*. Learned Counsel for the respondent submitted that the applicant had not proved the said conditions namely: -That the application has been made without unreasonable delay. Counsel submitted that the ruling that was appealed was delivered on July 30, 2020 but this application was filed on March 11, 2022 a year and 6 months later. Counsel contended that nothing stopped the applicant from seeking stay immediately the ruling was delivered and that the application for stay did not require the typed proceedings hence there was no reason inhibiting the filing of the application immediately. Counsel contended that the applicant had no intention to file this application but only did so when this matter was listed for mention before the Deputy Registrar. Counsel urged this court to find there was inordinate delay in filing the application and hence find it is not merited. That the applicant has not demonstrated the irreparable harm or substantial loss he will suffer in the event the application for stay is denied in that the preservation orders are not final orders and were only issued to preserve the funds pending the hearing and determination of the forfeiture application. That as such no substantial loss is likely to be suffered.
8. Learned counsel also submitted that the application has no merit; that the appeal by the applicant is not arguable; that the memorandum of appeal does not elicit any triable issues and the applicant is only intent on delaying the forfeiture proceedings and as such the application should not be allowed.
9. In a brief rejoinder learned counsel submitted that the application before this court is one for stay of proceedings but not stay of execution; that the right to access to justice should not be compromised; that should these proceedings go on and the appeal succeeds the court will have acted in vain; that this court must balance the interests of both parties and further that no demonstrable prejudice will be suffered by the respondent should these proceedings be stayed. For the above rejoinder Counsel placed reliance on the cases of *David Morton Silverstein v. Atsango Chesoni* [2002] eKLR; *Easy Coach Limited v Patrick Watani Maende & 2 others* [2018] eKLR, *Rai Plywoods (Kenya) Limited vs Sub-County Co-operative officer, Turbo & Soy & 2 others* [2019] eKLR and article 48 of the Constitution.

Analysis and determination

10. Unlike in the case of stay of execution, Order 42 Rule 6 of the *Civil Procedure Rules* does not set out the conditions for grant of stay of proceedings. Guidance however may be found in the *Halsbury's Laws of England*, 4th Edition Vol. 37 page 330 and 332 which states: -

“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.”

11. This issue has also been the subject of several cases and in the case of [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR Gikonyo J stated:-

“(5)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. See Ringera J in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 persuasively 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 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” (emphasis added).

12. It is also well settled that stay of proceedings pending appeal should be granted so as not to render the appeal nugatory – see the case of [Kenya Wildlife Service v James Mutembei](#) (supra) and the case of [Port Florence Community Health Care v Crown Health Care Limited](#) [2022] eKLR.

13. I am also minded to adopt the reasoning of Odunga J, as he then was, in the case of [Principal Kathiani High School & another v Joseph Mbugua Githebu t/a Mwaki Jumla Supplies](#) [2021] eKLR that: -

“24. The courts are now enjoined to give effect to the overriding objective in the exercise of this powers under the [Civil Procedure Act](#) or in the interpretation of any of its provisions. According to Section 1A (2) of the [Civil Procedure Act](#) “the court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective.” While under Section 1B some of the aims of the said objective are; the just determination of the proceedings; the efficient disposal of the business of the court; the efficient use of the available judicial and administrative



resources; and the timely disposal of the proceedings, and all other proceedings in the Court, as a cost affordable by the respective parties.

27. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. This does not necessarily imply that all precedents are ignored but that the same must be interpreted in a manner that gives effect to the said objective. What is expected of the Court is to ensure that the aims and intendment of the overriding objective as stipulated in section 1A as read with section 1B of the Civil Procedure Act are attained. It is therefore important that the Court takes into consideration the likely effect of granting the stay on the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing and see where the scales of justice lie considering the fact that it is the business of the court, so far as possible, to secure that any transitional motions before the Court do not render nugatory the ultimate end of justice.
14. In this case the applicant seeks to stay this forfeiture application pending hearing of an appeal of Lesiit J's, as she then was, ruling delivered on July 30, 2020. First thing to note is that there has been inordinate delay in bringing this application as the same was filed on March 11, 2022 more than 1½ years after the ruling was delivered. No plausible explanation was given for the delay. Indeed, the application was filed only after this court directed parties to come for pre-trial and learned Counsel for the respondent notified this court that they had appealed the ruling. It would appear therefore that the application was filed merely to delay these proceedings. This is more so given that the appeal itself has never been filed – only the notice of appeal – reason allegedly being that Counsel has not been able to obtain the proceedings and the impugned ruling which again is not merited as this court has not been furnished with any correspondences to demonstrate that an application was made for the same but it was not acted upon.
15. Secondly, I have perused the impugned ruling and in my view there is no arguable appeal. I say so being cognizant of the principle that an arguable appeal is not one that must succeed. I am also cognizant of the decisions cited by learned counsel for the applicant as to the manner in which proceedings must be initiated. However the proceedings upon which Lesiit J, as she then was, made a determination were initiated by way of an originating motion but not by way of a notice of motion as alleged. The originating motion was made pursuant to sections 81 and 82 of the Proceeds of Crime and Anti-Money Laundering Act. I am not therefore persuaded that the appeal, if there is one, is arguable.
16. It is my finding further that granting a stay of the proceedings herein would be antithetical to the overriding objective set out in Sections 1A and 1B of the Civil Procedure Act and the obligations placed on this court by article 159 (2) (b) of the Constitution to ensure that justice is not delayed. Accordingly, the application dated March 11, 2022 is dismissed with costs to the respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF OCTOBER, 2022.

E N MAINA

JUDGE

