



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

CIVIL APPEAL NO. E181 OF 2020

MUTHEE GICIAINI.....1ST APPELLANT

JAMES GITHINJI WAWERU.....2ND APPELLANT

VERSUS

KEVIN ODUOR ODHIAMBO.....RESPONDENT

RULING

1. For determination is the motion by **Muthee Giciaini** and **James Githinji Waweru** (hereafter the Applicants) dated 31st August 2020. The key prayer seeks an order to stay proceedings in **Milimani CMCC No. 1934 OF 2019** pending hearing and determination of the appeal filed herein. The application is expressed to be brought *inter alia* under Section 3A of the Civil Procedure Act, Orders 42 rules 4,6, and 7 and 51 rule 1 and 3 of the Civil Procedure Rules. It is supported by the affidavit of **Mandela Chege**, the Applicants' advocate. To the effect that the suit in the lower court had proceeded *ex parte* on 20th February 2020; that the Applicants' subsequent application to have the proceedings set aside and to be allowed to ventilate their defence was dismissed on 27th August, 2020, prompting this appeal; that the appeal will be rendered nugatory if the lower court proceedings are not stayed pending appeal as the trial court had already set a date for receiving closing submissions; that the Applicants had moved the court timeously; that the Applicants have a good appeal and are ready to furnish such security as the Court may order.

2. The motion was opposed by **Kevin Oduor Odhiambo** (hereafter the Respondent) through two replying affidavits sworn by his advocate **Sethna Isabwa Atonga**. Both were sworn on 25th January 2021. It is not immediately clear to the court why counsel swore two affidavits on the same date, or indeed why both the advocates for the parties herein arrogated to themselves the role of deposing on some of the pertinent matters which are essentially contentious, and best left to the respective parties to swear. Be that as it may, the gist of the affidavits of the Respondent's advocate is as follows. That the Applicants ought to have obtained leave to lodge the appeal, which in any event is frivolous; that the appeal is an afterthought and an abuse of the process of the Court and there is no demonstration of likelihood of substantial loss being suffered by the Applicant; and that the Respondent stands to suffer prejudice if the application is allowed. Some of the depositions appear to go to the merits of the appeal while others are argumentative in nature, raising as they do technical objections to the motion.

3. The court had directed that parties file written skeletal submissions ahead of the oral canvassing of the motion. By their written and oral submissions, the Applicants argued that they have a strong and arguable appeal and approached the court timeously; that that the stay sought is intended to forestall the conclusion of the lower court suit; that granting the motion is consistent with the principle of judicious use of the Court's time resource ; that the Applicants will suffer substantial loss if the motion is denied ; and that no leave was required to appeal from the ruling delivered on 27th August 2020.

4. On his part, the Respondent reiterated the depositions in the replying affidavit. He took the position that the application is not grounded in the appropriate legal provisions, in this case Order 42 rule 6 of the Civil Procedure Rules; that the appeal herein is frivolous with naught chance of success; and that allowing the motion would prejudice the Respondent by delaying the realization of the fruits of his successful litigation as he had already filed submissions in the lower court suit. The Respondent's counsel asserted that the application was an abuse of the court process and ought to be dismissed with costs, or alternatively if granted, the court should attach a condition requiring the Applicants to deposit security in the sum of Kshs 2.8 million.

5. The Court has considered the material canvassed in respect of the motion. It is correct, as pointed out by the Respondent that the motion invokes a plethora of provisions, some of which have no relevance to the prayers sought. The power of the court to stay proceedings, which is the key prayer in the instant motion is found in Order 42 Rule 6 (1) of the Civil Procedure Rules. The Court may also make orders to stay proceedings where the ends of justice so require, under section 3A of the Civil Procedure Act, also invoked by the Applicants. The former provision is in the following terms:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court “.

6. In the much-cited case of **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 (UR) Ringera, J** (as he then was) spelt out the applicable considerations in determining an application for stay of proceedings as follows:

“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).

See also **Christopher Ndolo Mutuku and Anor. V CFC Stanbic Bank Limited (2015) eKLR**; and **Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi (2014) e KLR**.

7. The need to avoid unnecessary proliferation of proceedings which needlessly dissipate the Court’s limited time resource is a key consideration in an application of this nature, as is the consideration whether the appeal will be rendered nugatory if the subject proceedings are not stayed. As observed by Onyango **Otieno, J** (as he then was) **Niazsons (Kenya) Ltd. v China Road & Bridge Corporation (Kenya) Ltd. Nairobi HCCC No. 126 of 1999**:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay (stay of proceedings) should be granted.”

8. The Court of Appeal in **Wachira Waruru & Anor. v Francis Oyatsi [2002] 2 EA 664** held that:

“In an application for stay of proceedings pending appeal where the judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

9. There is no dispute that the Applicants moved the court expeditiously, by filing the instant motion within days of the ruling of the lower court. The Respondent’s assertion that the appeal herein is incompetent for want of leave has no basis. The ruling appealed from emanated from an application brought under Orders 10 Rule 11 and 45 Rule 1 and 2 of the Civil Procedure Rules, *inter alia*. Pursuant to the provisions of Order 43 Rule 1 (g) and (x) of the Civil Procedure Rules, an appeal lies as of right from these two orders. Further, upon my perusal of the memorandum of appeal filed herein, and the copy of the ruling appealed from, I am unable to agree with the Respondent that the appeal is frivolous. *Ex facie*, therefore, the Applicants have presented an arguable appeal.

10. Additionally, it is pertinent that the trial Court has already entered judgment against the first Applicant and having proceeded to hear the suit before it *ex parte*, reserved a date for filing of submissions. Evidently, if the proceedings are not stayed, judgment would be delivered, defeating the very objects of the instant application and appeal, thereby rendering the appeal nugatory. The Applicants’ fate would stand sealed as they would have been shut out from participating in the trial. Such an outcome does not seem in the circumstances of this case to serve the ends of justice. Moreover, it would amount to an injudicious use of limited judicial time to allow two concurrent active proceedings in respect of the same matter, where there exists a real possibility that if the lower court suit is finalized and resolves in the Respondent’s favour, a fresh round of applications or appeals would be provoked.

11. It is true however as the Respondent has emphasised, that he will be compelled to wait longer for his judgment if the application is allowed. But in my considered view, he will not be unduly prejudiced and may well be compensated through costs. His suit was filed in 2019 and any consequent delay need not be excessive as the Court can impose conditions for the expeditious prosecution of the appeal, especially since the lower court file has been availed and proceedings in the lower court typed. Stay of proceedings is not to be taken lightly, as it curtails the right of the adverse party to progress his case to conclusion and where such order leads to excessive delay, may compromise the possibility of a fair trial. A balance must be struck between the Applicants’ undoubted right of appeal and the Respondent’s right to the expeditious determination of his case. That said, there is no justification in this case for the order of a deposit of Shs. 2.8 million as urged by the Respondent, as the final judgment is yet to be rendered in the lower court suit.

12. Weighing one thing against another, the Court is persuaded that the justice of the matter lies in exercising its discretion by allowing the application. Prayer (3) of the motion dated 31st August 2020 is therefore allowed, on condition that, in compliance with the Notice to File the Record of Appeal issued herein by this Court on 19th October 2020, the Applicants do file the said record of appeal within 30 (thirty) days of today’s date and thereafter set down the appeal for directions within 5 (five) months of today’s date. In default, the stay order granted herein will automatically lapse and the Respondent will be at liberty to proceed with the lower Court suit to completion. The Respondent is awarded the costs of the instant application in any event.

DELIVERED AND SIGNED ELECTRONICALLY ON THIS 27TH DAY OF MAY 2021.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Miss Naututu.

For the Respondent; Mr Atonga.

Court Assistant: Carol