



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CASE NO. 387 OF 2017

MWACHON HOLDINGS LIMITED.....PLAINTIFF/RESPONDENT

VERSUS

SAYANI INVESTMENTS LIMITED.....DEFENDANT/APPLICANT

RULING

NOTICE OF MOTION APPLICATION

The Applicant/Defendant filed a Notice of Motion Application dated **18th July 2019** for orders that; -

1. There be a stay of proceedings pending the hearing and determination of this Application.
2. There be a stay of proceedings pending the hearing and determination of the intended appeal.

Which Application is supported by the sworn Affidavit of **Karim Jetha** dated **18th July 2019** on the following grounds that;

1. On **17th June 2019** the Court delivered a ruling dismissing the Defendant's Application dated **5th September 2018** seeking for an order to strike out the Plaintiff.
2. The Defendant is in the process of appealing the ruling and has lodged a Notice of Appeal dated **27th June 2019**.
3. Unless the matter is stayed, the Defendant is likely to set the matter down for hearing and if the hearing proceeds and a determination made, it will render the Appeal nugatory.
4. The Appeal is arguable and touches on merits of the suit and has the effect of disposing of the suit in its entirety.
5. The Application was brought without unreasonable delay.

PLAINTIFF'S GROUND OF OPPOSITION

The Plaintiff/Respondent raised the following grounds of opposition to the Application dated **18th July 2019** as follows; -

- a. **Order 42(6) 1 CPR 2010** deals with Appeals on Judgments and not Rulings, the Application dated **18th July 2019** is misconceived and an abuse of the Court's process.
- b. There is no prejudice that will be suffered by the Applicant if the stay proceedings is not granted.
- c. There is no plausible reason given by the Applicant to justify the order of stay of proceedings.
- d. The Respondent shall place reliance in the ***Kenya Power & Lightning Company vs Esther Wanjiru Wokabi*** where the court laid down principles that a court should consider on whether or not to grant an order for stay of proceedings.

e. It is unfair to deny the Plaintiff the judgment seat (see **Halsbury's Law of the England, 4th Edition Volume 37 Page 330 and 332**).

f. The Respondent had complied with the Order 2 of Civil Procedure Rules and filed all the requisite documents in Court only to be served with the Application to strike out the suit.

g. The Application should be dismissed since it is scandalous, vexatious and an abuse of the Court process.

REPLYING AFFIDAVIT

The Application was opposed vide the sworn Replying Affidavit of Judy Kibet dated 6th August 2019 and states that; -

1. The Applicant filed a party & party bill of costs for **Kshs.952, 000** which has been set down for taxation and it is important that the costs and its security be taken care of. (**Annexed bill of costs "JK 1"**)
2. The Applicant stands to suffer irreparably if the suit/proceedings are stayed on an interlocutory stage and also stands to suffer a loss of business which is currently running since the date the demand letter was issued. (**Annexed - JK 2**)
3. The orders sought for stay of proceedings are in bad faith since it is meant to forestall the prosecution of the suit which has high chances of success.

DEFENDANT'S SUBMISSIONS

On whether the application was filed expeditiously, the Defendant submits that the Application herein was filed timeously. The Notice of Appeal was lodged on 27th **June 2019** while this Application was lodged on 18th **July 2019**.

Whether the Applicant has established that it has a *prima facie* arguable case. It is its submission that it has an arguable appeal with high chances of success. The Plaintiff cannot sustain the present suit as it is neither a director or shareholder in safety banner limited. It is basic law principle that a company is a separate legal entity from its owners and has a right to sue and be sued (**See Salomon -versus- Salomon [1897] AC 22**). It is without a doubt that the Plaintiff company has no locus to institute and sustain the present suit.

The Defendant submits that it has satisfied all the parameters for stay of proceedings and the Application was filed expeditiously.

PLAINTIFF'S SUBMISSIONS

The Plaintiff implores the court to consider the *prima facie* merits of the intended appeal whether it will succeed or not, whether it is an arguable one, the scarcity and the optimum utilization of the Judicial time and whether the application has been brought expeditiously.

On the time taken, the Plaintiff submits that it has been about two years and a month since this suit was filed. It has been a year and a month since it was fixed for hearing before **Hon. Ngetich J.**

It is the Plaintiff's submission that the instant appeal is speculative as is no record of appeal generated and filed in the Court of Appeal, no Memorandum of Appeal has been filed.

The Plaintiff submits that the Defendant has failed to justify why the stay of proceedings is necessary, when in the forum before the Business Premises Rent Tribunal (BPRT) they admitted the relationship/transaction by accepting rent from the Respondent. The Application is a mere afterthought meant to waste judicial time.

The stay of proceedings pending appeal was elaborated in **Kenya Wildlife Service versus Joseph Musyka Kalonzo (2017) eKLR** where it was held; -

"The instant case it is my considered opinion that it would not only be in the interest of justice to exercise court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is pending."

The Plaintiff submits that the conditions for stay have not been met and that the court is invited decline granting stay.

DETERMINATION

After considering the pleadings and submissions filed by parties the issue to be determined is whether stay of proceedings should be granted.

The Applicant is seeking stay of proceedings pending the hearing and determination of this Application as well as the intended Appeal.

The court in the case of **Kenya Wildlife Service -vs- James Mutembei [2019] eKLR** held that: -

"...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...

Further, in deciding whether or not to grant stay of proceedings as sought in this Application this Court must be guided by any of the following three main principles;

- 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.

The above mentioned principles were laid down by Ringera J. (as he then was) in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** who 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”.

I have considered the submissions above. It is the court’s view that the only issue for determination is whether on the facts and circumstances of this case the Applicant is entitled to the orders sought, pending the appeal.

Whether or not to grant the order is a matter of judicial discretion to be exercised in the interest of justice, which discretion is unlimited save that it should be exercised judiciously. In determining the question, the Court exercises its inherent power under Sections 1A, 1B and 3A of the Civil Procedure Act. In **Kenya Power & Lighting Company Limited vs Esther Wanjiru Wokabi, High Court Civil Appeal No. 326 of 2013 (2014) eKLR Githua J** while referring to the Ringera J in the case of **Global Tours and Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** stated as follows:

“To my mind, the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

- 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.”

I fully agree with that court and I will apply the said principles in this case. It is not disputed that a complaint was filed at the 3rd Respondent concerning the Applicant who is an advocate and a Member of Parliament at Kisumu West. What is in dispute is the allegation that the Applicant withheld Kshs.700,000/= plus interest. The complainant had also complained that the Applicant issued to her cheques which were dishonoured and he also misled her by giving her false information regarding the status of the matter. On the other hand, the Applicant’s claim that the matter was fully settled by consent and was recorded as so before the 2nd and 3rd respondent. He also claimed that despite the consent the 2nd respondent continued with the hearing and made a decision to strike

the advocate’s name off the roll of advocates.

In my view there exists a dispute between the parties in this case. The Court of Appeal in the case of **UAP Provincial Insurance Company Ltd vs Michael John Beckett. Civil Appeal No. 26 of 2000** observed as follows:-

“In interpreting the provision which, as we have said is somewhat similar to the provision in our statute, English courts have held that the court need not stay proceedings in cases where there was no “real dispute”. Lord Swinton Thomas LJ, captured the significance of the words “there is not in fact any dispute between the parties” as used in the 1975 English Arbitration Act, and which appear in our Section 6(1) (b), in the English case of Halki Shipping Corpn vs Sopex Oils Ltd (1998) 1 W L R 726 which presents striking similarity with the circumstances in the present appeal. We bear in mind that the case was decided under the 1996 Arbitration Act of England”.

1. The ruling of this court of 17th June, 2019 is where the Defendants application of 5th September, 2018 was dismissed and the Plaintiff was found to have a reasonable cause of action to be canvassed and ventilated at the hearing interpartes by parties.
2. The Applicant sought stay of proceedings pending appeal under **Order 42 Rule 6 CPR & Section 3 CPA.**

3. The Applicant has had time for almost 3 years the opportunity to seek similar orders from the appellate court.

4. Parties/Counsel move the court for hearing and determination of the suit. Since 2019 to date neither of the Parties/Counsel have moved the court and hence there is no danger of rendering the appeal nugatory.

5. Similarly, the pendency of the suit, has not vitiated the Respondents/Applicants right of appeal in any way.

DISPOSITION

1. The application of stay of proceedings pending appeal is dismissed with costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 30TH JUNE 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

HAM LAGAT & AND ASSOCIATES – PLAINTIFF

MONGERI, KINYANJUI & CO ADVOCATES – DEFENDANT

COURT ASSISTANT: TUPET