



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL APPEAL NO.83 OF 2021**

**THE HONOURABLE ATTORNEY GENERAL**

**CHARLES KYALO.....APPELLANTS**

**VERSUS**

**DAVID WILSON BAYA MWERI alias DAVID WILSON BAYA MWERI (*Legal*)**

***representatives of the Estate of MOSES YAA BAYA(Deceased)..RESPONDENTS***

***(Being an Appeal against the Ruling and Order of the Honourable W.Chepseba, Chief Magistrate delivered on 17.03.2021 and 15.09.2021 in CMCC No. 91 of 2019)***

**CORAM: Hon. Justice S. M. Githinji**

**Munyuny for the Attorney General**

**Wambua Kilonzo Advocates for the Respondents**

**R U L I N G**

The Appellant herein filed a notice of motion application dated 20.09.2021 under certificate of urgency supported by an Affidavit sworn by Ms. Munyuny on 21.09.2021. The applicant moved the Court for orders:

***a) Spent***

***b) THAT pending interpartes hearing the Honourable Court do issue an Order of stay of proceedings in Malindi CMCC No. 91 of 2019***

***c) THAT pending interpartes hearing the Honourable Court be pleased to stay the orders of Honourable W. Chepseba issued on 17<sup>th</sup> March, 2021 and 15<sup>th</sup> September, 2021 in Malindi CMCC No. 91 of 2019.***

***d) THAT the Honourable Court be pleased to grant the Applicant leave to lodge an Appeal out of time against the decision delivered on 17<sup>th</sup> March, 2021 by Chief Magistrate's Court in Malindi CMCC No. 91 of 2019.***

***e) THAT upon grant of leave to appeal out of time, the memorandum and Record of Appeal lodged herein be deemed as duly filed.***

***f) THAT the cost of this application be provided for.***

The Application was grounded upon the grounds set out in the Supporting Affidavit of **Angela Munyuny** dated 21.09.2021. The gist of the Application is that the Appellant sought to introduce a witness and documents during defence hearing, and after pre-trial directions had been taken, and plaintiff's case heard and closed. That the Honourable Court on 15<sup>th</sup> September, 2021 issued an order closing the Defendant's case, rejecting expert evidence of the Traffic Police Officer who was the Investigating Officer, and production of Inquest File Case by the Executive Officer, Malindi and proceeded to give a Mention date to confirm filing of submissions.

The Appellant's contention is that if the orders in the said application are not granted, there is imminent danger of miscarriage of justice in the event that the trial is concluded without the evidence of the expert witness and that the appellant will be deprived of the constitutional right to a fair trial.

### **The Appellant's Case**

The Appellant avers that on the 8<sup>th</sup> day of March, 2021 the 2<sup>nd</sup> Defendant, DW1, one Charles Kyalo testified on the occurrence of the road traffic accident that occurred on 10<sup>th</sup> March, 2018. He stated that upon police investigations he was not charged with any traffic offence and sought to rely on Inquest Case No. 6 of 2018 where he had testified. Further, that the Appellant made an oral application for the Inquest File to be produced by the Traffic Police who was the Investigating Officer.

On the 17<sup>th</sup> day of March, 2021 the court delivered its Ruling dismissing the application by the Defendants to produce the Inquest File. On 15<sup>th</sup> September, 2021 when the matter was listed for hearing, the Appellant availed the Police Investigating Officer, to testify on his investigations of the accident reported vide OB 99/10/3/2018, the court rejected to hear the testimony of this witness and proceeded to close the Defendant's case and listed the matter for Mention on the 29<sup>th</sup> day of September, 2021 to confirm filing of submissions.

The Appellant also avers that from the records, the Plaintiff in their list of witnesses had listed a police Officer as a witness and tendered in evidence police Abstract which clearly indicates that the issue was pending before Court and it is not true that the evidence of the police officer will amount to trial by ambush as held by the court. It was also the contention of the Appellant that the Plaintiffs closed their case and deliberately failed to call the police officer for ulterior motives so as to conceal material evidence in the case.

It is further alleged that both the ruling and orders of the court offends fundamental rules of evidence provided under Section 12 and Section 48 of the Evidence Act as regards the opinion of expert witnesses and will occasion injustice and irreparable harm to the Defendants. That in the event that the expert witnesses; the Police Officer and the Executive Officer are not given a chance to testify, the Defendants stand to suffer grave prejudice which is against the rules of natural justice, unconstitutional and a breach of the right to fair trial which must be accorded to all parties.

### **The Respondent's Case**

The Respondent opposed the said Application by filing a Replying Affidavit by Geoffrey Kilonzo, sworn on 27.09.2021 and filed on the 5<sup>th</sup> day of October, 2021. He contends that on 6<sup>th</sup> February, 2020, the Appellants filed witness statements and that they did not bother to file a list of witnesses and neither did they seek leave to file any further documents or list of witnesses. That the inquest file which the Appellant seeks to rely on was not filed and the findings of such inquest do not establish the liability or lack of it to parties therein.

He further states that if the application is allowed, it will prejudice the Plaintiff's case whose case was closed on 5<sup>th</sup> October, 2020 and that the Plaintiff will not have the opportunity to reiterate what the intended witnesses will say and this will amount to an ambush on the Plaintiff.

### **Submissions**

The Appellant filed her Submissions on the 30<sup>th</sup> day of September, 2021 and urge the court to hear the Appeal and grant her the orders sought, relying on the provisions of Order 42 Rule 6 of the civil Procedure Rules, Section 79G of the Civil Procedure Act, Section 48 of the Evidence Act and Article 50 of the Constitution. **Mr. Angela Munyuny** for the Appellant submitted that the Applicant has satisfied the conditions of Order 42 rule 6(2) save for the delay in respect of the orders issued on 17<sup>th</sup> March, 2021, of which delay in filing the appeal against the ruling delivered on 17<sup>th</sup> March, 2021 was occasioned by mistake and facts beyond the Applicant's control in that the counsel was indisposed and the matter was in abeyance for a long time.

That in the event the orders of stay are not granted, the Applicant stands to suffer grave prejudice which is unconstitutional, against the rules of natural justice and in breach of the right to fair trial. That the appeal is arguable and has a high chance of success which will be rendered nugatory if the proceedings are not stayed. The Appellant directed the court to the case of **MWK v JDK (2020) eKLR** where the court held that it is trite that courts discretion must be exercised judiciously. That 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. That in deciding whether to order a stay, a 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.

**Mr. Munyuny** also relied on the authorities of **Kenya Anti-Corruption Commission vs Ahmed Mwadani & 4 Others (2011)** persuading the court to consider that the technicalities of procedure, that it is the length, width and depth of the interpretation of the Act, provision or rule and nothing whatsoever can prevent the court in civil cases from acting fairly and justly in every situation in the face of the objective. Similarly, the Appellant relied on the authorities of **Abdullahi Mohamed vs Mohammad kahiye (2015) eKLR** and **Wambua Katiti vs Obed Mose Nyagaka (2019) eKLR** in support of the application.

The Respondent filed their submissions on the 1<sup>st</sup> day of October, 2021 and submitted that when a court is faced with such an application, it is bound to consider whether the said application meets the threshold and requirements for granting it: As per Order 3 Rule 2 of the Civil Procedure Rules, the Defendant/ Applicant was duty bound to file a list of witnesses, statements and documents. That the Applicant cannot therefore purport to call new witnesses after the close of the Plaintiff's case.

**Mr. Wambua** for the Respondent submitted that the applicant through the application is only keen to cause hardship to the Respondent and that the Applicant failed to file any list of documents and did not equally seek leave to file the same. **Mr. Wambua** also informed the court that there is need for extreme caution in exercising the orders sought by the Applicant on account of what is referred to as mere technicalities.

That the Applicant were supposed to furnish their evidence when filing their pleadings and it is only with the leave of court that documents may be supplied later.

He also submitted that there is no provision in the rules that permits the court to otherwise accept a list of witnesses or documents filed outside the time lines provided in **Order 3 Rule 7** and **Order 7 Rule 5**. That the Appellant's application is in violation of Article 50 (1) of the Constitution and will greatly prejudice the Respondent. He relied on the authority of **Nicholas Kiptoo Korir Arap Salat vs Independent Electoral & Boundaries Commission & 7 Others (2014) eKLR** where court held that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court and a party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court. Similarly, whether the court should exercise the discretion to extend time is a consideration to be made on a case-to-case basis and the delay should be explained to the satisfaction of the court. He finally stated that grant of orders sought is not a matter of right but of the court's discretion which should be carefully exercised. That the Application is an attempt by the appellant to obstruct the course of justice and the same should be dismissed with costs.

### **Analysis and Determination**

Stay as an order imposes a stop to the proceedings. It is not in doubt that this Court has powers to stay proceedings pending appeal and its jurisdiction is derived from both Order 42 rule 6 of the **Civil Procedure Rules** as well the inherent jurisdiction reserved in section 3A of the **Civil Procedure Act**. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992**.

Whereas the Court in such an application may be entitled to look at the intended appeal and see whether or not the intended appeal is not frivolous so as to satisfy itself that it is not being asked to suspend the proceedings so as to frustrate the hearing and delay the expeditious disposal of the matter, care must, however, be taken to ensure that the Court does not purport to preside over the intended appeal so as to avoid usurping the powers of the appellate Court.

In such applications the Court aims at 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 Plaintiff proceeds with the suit and the appeal succeeds. Obviously, the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas this court agrees that delay is neither the sole factor nor the predominant factor to be considered, this court is convinced that delay is a factor that ought to be taken into account. In **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J** (as he then was) held that:

***“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 matter, it should bear in mind such factors as the need for expeditious disposal of case, 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.”***

An illumination on the threshold for stay of proceedings in the following passages in **Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332**, is that:

***“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.”***

I do observe that delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration as delay defeats equity and equity aids the vigilant, and not the indolent.

In **David Morton Silverstein vs. Atsango Chesoni Civil Application No. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296** the Court of Appeal citing **Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001** held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J** (as he then was) held that:

***“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...should be granted.”***

As regards delay, the order sought to be appealed against was made on 15<sup>th</sup> September, 2021. This appeal was filed on 22<sup>nd</sup> September, 2021 while the application for stay of proceedings was filed on 22<sup>nd</sup> September, 2021. As was appreciated by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229**:

***“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the***

*entire system of the administration of justice.”*

When all is weighed, the scale reads that the discretion to stay the proceedings of the trial court must be exercised judiciously and on higher threshold. I find that the applicant raised grounds in the application, fails to establish exceptional circumstances that would merit granting the stay of the proceeding of the trial court. The Appellant had a legal way of ensuring that they zealously defended their case by making a formal application seeking leave to file a list of additional witnesses and documents.

In the instant case I find that it would not be in the interest of justice to exercise court’s discretion and grant the sought stay of proceedings as it will only serve the purpose of delaying the matter that is pending in the lower court. I am not satisfied that the Applicants have demonstrated that they have an arguable appeal to warrant issuance of the orders sought. If anything, if the finding in the lower court matter will not be in their favour, they will still have the right to appeal, even on the grounds raised in this application.

Accordingly, and for purposes of clarity, the stay of proceedings is declined. However, leave to appeal out of time is allowed and the Memorandum and Record of Appeal lodged herein are deemed as duly filed, just incase the appellant is possessed of the necessary energy and interest to pursue it.

Costs be in the cause.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 21<sup>ST</sup> DAY OF OCTOBER, 2021.**

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**S.M.GITHINJI**

**JUDGE**

**In the presence of:**

1. Miss Munyuny for the Appellant
2. Mr Kilonzo is absent