



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 01 OF 2021

CHRISTOPHER MBAKA OISEBE.....1ST APPELLANT

PHYLIIS NYANCHAMA MBAKA.....2ND APPELLANT

VERSUS

KENYA ELECTRICITY TRANSMISSION CO. LTD.....RESPONDENT

RULING

1. The 1st and 2nd appellants brought the Notice of Motion dated 21st May, 2021 supported by the grounds presented on its face and the facts stated in the affidavit of advocate K Moseti. The appellants sought for a stay of all proceedings in Milimani CMCC NO. 4677 of 2017 pending the hearing and determination of the appeal and an order to the effect that the Executive Officer-Milimani Commercial Courts do supply the appellants with certified copies of the ruling delivered on 6th December, 2020 at their expense.
2. The respondent put in a replying affidavit sworn by advocate Samwel Rambo on 26th July, 2021, to oppose the Motion.
3. The appellants rejoined with the further affidavit of advocate Robert Ndemo Mokaya sworn on 23rd July, 2021.
4. The respondent similarly filed a notice of preliminary objection dated 14th July, 2021 and raised the ground that the instant Motion offends the provisions of Section 7 of the Civil Procedure Act. The appellants responded to the preliminary objection by filing the replying affidavit sworn by advocate Hesbon Momanyi on 23rd July, 2021.
5. When the parties attended court, directions were given that the preliminary objection and the instant Motion be heard and determined together. Consequently, the parties put in written submissions on the same.
6. I have considered the grounds featuring on the face of the Motion; the facts deponed in the supporting and replying affidavits respectively; the preliminary objection and affidavit in response thereto; and the rival written submissions.
7. A brief background of the matter as set out by the parties is that the appellants filed ELC civil suit No 461 of 2015 at Kisii High Court which suit was determined by a consent order dated 5th October 2016.
8. The respondent thereafter filed a fresh suit namely Milimani CMCC NO. 4677 of 2017 and sought to recover from the appellants sums allegedly overpaid.
9. Subsequently, the appellants filed the application dated 17th May, 2019 and sought for leave of the trial court to amend their defence which application was dismissed by the trial court vide the ruling delivered on 6th December, 2019 thereby precipitating the present appeal which seeks to challenge the aforementioned ruling.
10. The record shows that the appellants filed the application dated 20th January, 2020 before the trial court and sought for an order of a stay of proceedings in the suit pending hearing and determination of the present appeal.
11. I think is appropriate to first determine the preliminary objection which is premised on the argument that the Motion is *res judicata*.
12. In reply thereto, Hesbon Momanyi states that the preliminary objection is an abuse of the court process since it does not raise any points of law. The deponent further states that the instant Motion is not *res judicata* since the prayers sought therein are distinct from those sought in the application dated 20th January, 2020 filed before the subordinate court. These sentiments are echoed in the submissions filed on behalf of the appellants.

13. In its submissions, the respondent argue that the application dated 20th January, 2020 which sought for similar prayers as those now sought in the instant Motion was heard and determined by the trial court on 18th September, 2020 wherein the court granted a stay of proceedings for 60 days on the condition that the appellants pursue the appeal.

14. In the case of **Mukisa Biscuit Company v West End Distributors Limited (1969) EA 696** cited by the respondent, where the court defined the term ‘preliminary objection’ in the following manner:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”

15. The Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** offered the following interpretation on the legal term ‘res judicata’ in the manner hereunder:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the Civil Procedure Act, 2010;

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

16. Upon the perusal of the instant Motion, it is apparent that the same is essentially seeking an order for a stay of proceedings, similar to the order sought in the application dated 20th January, 2020.

17. Upon my perusal of the record, I note that the appellants availed a copy of the court order issued on 21st July, 2021 to indicate that the trial court had by way of the ruling delivered on 18th September, 2021 granted the appellants a conditional stay of proceedings for a period of 60 days to enable them prosecute the present appeal, in default of which the respondent would be at liberty to fix the suit for hearing.

18. Be that as it may, the provisions of Order 42, Rule 6(2) of the Civil Procedure Rules, 2010 express that even where an application for a stay of execution or proceedings is denied or granted by the trial court, the court sitting on appeal is at liberty to consider a similar application and to make such orders as it deems just.

19. In view of the foregoing, I am satisfied that there is nothing to preclude this court from entertaining the instant Motion notwithstanding the fact that a similar application had previously been filed before the trial court. Consequently, the preliminary objection dated 14th July, 2021 is hereby overruled with costs to the appellants.

20. Turning to the merits of the instant Motion, upon my perusal of the record I note that a certified copy of the impugned ruling was annexed to the appellants’ list and bundle of documents dated 27th July, 2021 and hence order 4) of the Motion has since been overtaken by events.

21. It is clear that the sole issue now pending for determination is whether or not to grant a stay of proceedings in Milimani CMCC no. 4677 of 2017 pending this appeal.

22. The granting of a stay of proceedings is purely a matter of judicial discretion. The principles surrounding the granting of an order for stay of proceedings are aptly discussed by the court in the case of **William Kamunge & 2 others v Muriuki Mbithi [2016] eKLR**:

“...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”

23. The *first* principle concerns whether the application has been expeditiously filed. The appellants on their part explained that the delay was occasioned by the time taken in confirming the outcome of the application dated 20th January, 2020 seeking a similar order for a stay of proceedings in the suit, partially due to the impact of the global Covid-19 pandemic. In reply, the respondent states that there has been an inordinate delay in bringing the instant Motion and without explanation.

24. Upon my consideration of the explanation given above and the passage of time in between, I am of the view that while there has been a delay in bringing the Motion, I do not find the delay to be inordinate.

25. The *second* principle concerns itself with whether the applicant has an arguable appeal with reasonable chances of success. The appellants are of the view that their appeal raises arguable grounds and has high chances of success, and that if the order sought herein is denied, the suit will proceed for hearing in the absence of an opportunity for them to amend their pleadings, thereby rendering the appeal nugatory.

26. From my perusal of the grounds featured in the memorandum of appeal, it is apparent that the appeal seeks to challenge the ruling delivered by the trial court where the court declined to grant the appellants leave to amend their statement of defence to include a counterclaim.

27. I am satisfied that the appellants have demonstrated that the appeal raises prima facie arguable points of law and fact and that if an order for a stay of proceedings is denied and the suit proceeds for hearing, there is a likelihood that the appeal will be rendered nugatory.

28. The *third* principle touches on the interest of justice vis-à-vis the subject of prejudice. The appellants state and submit that they will be greatly prejudiced if the order sought is denied, thereby denying them their constitutional right to a fair hearing, while stating that the respondent does not stand to be prejudiced if the order for a stay of proceedings is granted.

29. Upon the foregoing circumstances hand in hand, I am satisfied that the appellants have 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 result to them.

30. Concerning the *fourth* principle on the expeditious disposal of cases vis-à-vis proper use of judicial time, upon considering the foregoing circumstances, I find that it would only be a practical and proper use of judicial time for the parties to first pursue the appeal before undertaking any further proceedings in the present suit.

31. In the end therefore, the Motion dated 21st May, 2021 is hereby allowed on merits giving rise to issuance of the following orders:

- i. There shall be a stay of all further proceedings in Milimani CMCC NO. 4677 of 2017 upending appeal.**
- ii. Costs of the Motion shall abide the outcome of the appeal.**

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF NOVEMBER, 2021.

.....

J. K. SERGON

JUDGE

IN THE PRESENCE OF:

..... **FOR THE 1ST AND 2ND APPELLANTS**

..... **FOR THE RESPONDENT**