



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL CASE NO 597 OF 2002**

NUREZ ZAHERALI KURJI.....1<sup>ST</sup> PLAINTIFF  
RAHIM SADRUDIN KURJI.....2<sup>ND</sup> PLAINTIFF  
HUSSEIN ZAHERALI KURJI.....3<sup>RD</sup> PLAINTIFF  
ABDULALI AKBERALI.....4<sup>TH</sup> PLAINTIFF

**VERSUS**

AMEER KASSIM LAKHA.....1<sup>ST</sup> DEFENDANT  
AMIR REHEMTULA.....2<sup>ND</sup> DEFENDANT  
SHIRAZ ABDULALI KARIM KURJI.....3<sup>RD</sup> DEFENDANT  
ALTAF ABDULALI KARIM KURJI.....4<sup>TH</sup> DEFENDANT  
MINAZ SHOKATALI KARIM KURJI.....5<sup>TH</sup> DEFENDANT  
FIAZ SHOKATALI KARIM KURJI.....6<sup>TH</sup> DEFENDANT  
RIYAZ SHOKATALI KARIM KURJI.....7<sup>TH</sup> DEFENDANT  
NAWAZ SHOKATALI KARIM KURJI.....8<sup>TH</sup> DEFENDANT  
KARIM SHASODIN KARIM KURJI.....9<sup>TH</sup> DEFENDANT  
ARIF SHASODIN KARIM KURJI.....10<sup>TH</sup> DEFENDANT

**RULING**

1. In their Notice of Motion application dated 13<sup>th</sup> February 2020 and filed on 14<sup>th</sup> February 2020, the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants sought a stay of the proceedings herein pending the hearing and determination of their intended Appeal that had already been filed at the Court of Appeal. The said application was supported by the Affidavits of the 9<sup>th</sup> Defendant that he swore on 13<sup>th</sup> February 2020 and 24<sup>th</sup> July 2020 on his own behalf and on behalf of the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 10<sup>th</sup> Defendant herein.

2. The 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants contended that they filed their application without undue delay and were emphatic that the hearing of the case herein would cause them substantial loss as there had been a delay in prosecuting the case and their witnesses were at an advanced age making it difficult for them to recall events that happened twenty six (26) years ago. They contended that the throw away costs were paid pursuant to a court order and was not in abandonment of any part of the intended appeal.

3. In opposition to the said application, on 2<sup>nd</sup> July 2020, the 4<sup>th</sup> Plaintiff swore a Replying Affidavit on his own behalf and on behalf of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Plaintiffs herein. The Plaintiffs averred that there had been a delay in filing the present application considering that the Ruling was delivered on 28<sup>th</sup> November 2019. They added that the appeal had not raised any arguable issues but that the same was aimed at preventing them from prosecuting the suit on merit. They pointed out that they paid the throw away costs as was ordered by the court.

4. It was their further averment that the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants never made any attempts to set down the suit for hearing on account of the advancing age of their witnesses and that it was in the interests of justice that the suit herein be heard and determined on merit. They stated that the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants had not met the conditions of being granted an order for stay of proceedings and thus urged this court to dismiss their application with costs.

5. The 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants submitted that the issue of substantial loss had to be prevented as the same would render an appeal nugatory. In this regard, they placed reliance on the cases of **Rhoda Mukuma vs John Abuoga [1988] eKLR** and **James Wangalwa & Another vs Agnes Naliaka Cheseto [2013] eKLR**.

6. Further, they relied on the case of **Albert Muchira Kigoro vs Leonard Njue Njagi [2019] eKLR** where the court therein held that the discretion to be exercised in dismissing a suit for want of prosecution should have regard as to whether the party who instituted a suit had lost interest in prosecuting the same, whether the delay was inordinate, whether the delay was unreasonable, whether the delay was inexcusable and was likely to cause prejudice to a defendant on account of that delay. They were emphatic that money could not compensate memory of a key witness.

7. On their part, the Plaintiffs placed reliance on the cases of **Kenya Wildlife Service vs James Mutembei [2019] eKLR**, **Ezekiel Mule Musembi vs H. Young & Co (E.A) Limited [2019] eKLR** and **Kenya Power and Lighting Company Limited vs Esther Wanjiru Wokabi [2014] eKLR** in support of their submissions that the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants had not met the threshold of being granted an order for stay of proceedings and that in any event, the same would only cause unnecessary delay in the prosecution of this matter.

8. Notably, Order 42 Rule 6 (1) of the Civil Procedure Rules, 2010 provides as follows:-

**“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 to have such order set aside.”**

9. As the Court of Appeal held in the case of **UAP Insurance Company Ltd vs Michael John Beckett [2004] eKLR**, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted. In that case, it stayed proceedings pending hearing and determination of an appeal that had arisen from an order that had been made by the High Court. It held that an appeal would be futile if the proceedings before the arbitrator were not stayed.

10. This court took the view that the delay in filing the present application was not inordinate and did not cause any prejudice to the Plaintiffs herein. Indeed, with the onset of Covid-19 pandemic and the downscaling of court operations in March 2020, cases did not proceed to trial as directions on how the cases would be handled were yet to be given by the Hon Chief Justice David Maraga.

11. Having said so, this court took cognisance of the fact that in the event the matter herein proceeded to trial, when it does, and the Court of Appeal found that this court had not exercised its discretion judiciously, not only would the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants' appeal be rendered nugatory as their witness would have testified to their detriment but also precious and scarce judicial time would have been wasted in hearing proceedings only for the same to be set aside and/or vacated. The Appeal was not frivolous as it had raised a triable issue that was best determined on appeal before any further proceedings could continue in this court.

12. It is better that a case is delayed for a little while longer and is heard on merit and an appeal be heard and determined on merit as opposed to the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants participating in proceedings which could be terminated by the Court of Appeal if their appeal was found to be merited.

13. However, as this court will not be hearing the intended Appeal and so as not to appear as sitting on appeal on its own case, it would be prudent that it gives interim orders as the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants sought a stay of proceedings pending the hearing and determination of the Appeal herein.

#### **DISPOSITION**

14. For the foregoing reasons, the upshot of this court's decision was that the 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup>, 9<sup>th</sup> and 10<sup>th</sup> Defendants' Notice of Motion application dated 13<sup>th</sup> February 2020 and filed on 14<sup>th</sup> February 2020 was merited and the same is hereby allowed in terms of Prayer No (2) therein for a period of thirty (30) days to enable them seek an order for stay of proceedings from the Court of Appeal. **Costs of the application herein will be in the cause.**

15. It is so ordered.

**DATED and DELIVERED at NAIROBI this 30<sup>th</sup> day of November 2020**

**J. KAMAU**

**JUDGE**