



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC APPEAL NO. E080 OF 2021

HITESH KESHRA VEKARIYA

(On behalf of the Estate of the Late HARJI LAKHAMAN VEKARIYA).....1ST APPELLANT

G.A CONSULTANTS LIMITED.....2ND APPELLANT

DALALI TRADERS AUCTIONEERS.....3RD APPELLANT

-VERSUS-

APICAH FURNITURE LIMITED.....RESPONDENT

RULING

(Being an Appeal against the Ruling of the Honourable D.O Mbeja (PM) dated and Delivered at Nairobi on 3rd September 2021 in Milimani CMCC No. E7272 OF 2020)

INTRODUCTION

1. This ruling is in respect to the Appellants' Notice of Motion dated 17th September 2021. The application seeks the following orders:

i. Spent...

ii. That the Honourable Court be pleased to stay the orders of the Magistrates Court in Milimani CMCC No. E7272 OF 2020 issued on the 3rd September 2021 pending the hearing of this Application inter parties.

iii. That the Honourable Court be pleased to stay the orders of the Magistrates Court in Milimani CMCC No. E7272 OF 2020 issued on the 3rd September 2021 pending the hearing of and determination by this Honourable Court of the instant appeal.

iv. THAT the costs of this Application be provided for.

2. The Application is premised on twelve (12) grounds on its face which are explicated in the supporting affidavit of **Millicent Gatwiri Kinyua**, an Officer of the 2nd Appellant/Applicant and sworn on **20th September 2021**.

3. The Respondent is opposed to the Application and in so doing has filed a **Replying Affidavit and Further Affidavit** sworn by **Monicah Mukule Macharia**, Managing Director of the Respondent herein on **26th October, 2021 and 22nd November 2021** respectively.

4. Directions were taken that the application be canvassed by way of written submissions and all parties indicated that they would be filing and relying on their said written submissions.

A. PARTIES RESPECTIVE SUBMISSIONS

Appellants' submissions

5. The Appellants relied on their written submissions 14th November 2021 and further written submissions dated 30th December 2021. They framed two issues for determination by the Court; the first one being on the law relating to stay of proceedings pending appeal and the second issue being on whether this court should stay the proceedings before the Trial Court pending the hearing and determination of the Appeal. In respect to compliance with the conditions for stay, the Appellants submitted that the ruling of the Trial Court was delivered on 3rd September 2021 and that the current application had been filed expeditiously on 28th September 2021 thus complying with the conditions for grant of stay.

6. The Appellants also submitted that they had complied with **Order 42 Rule 6 of the Civil Procedure Rules** and further that they had established that they will suffer substantial loss in terms of the rental income and service charge which is not being paid by the Respondent.

7. It was also submitted that it was necessary to stay the proceedings of the Trial Court since the instant appeal has sought to challenge the foundation of the Trial Court impugned ruling which proceedings unless stayed the Appeal will be rendered nugatory.

8. The Appellants further urged the court to allow the application and grant stay and they relied on the cases *Ezekiel Mule Musembi H. Young and Company E.A Limited [2019] Eklr, Chris Munga Bichange v Richard Nyagaka Tongi & 2 Others (2013) among others.*

Respondent's submissions

9. The Respondent opposed the Application vide the **Replying Affidavit and Further Affidavit** sworn by **Monicah Mukule Macharia** on **26th October, 2021 and 22nd November 2021** respectively. It was their contention that the Application had not met the criteria for grant of stay of proceedings.

10. It was the Respondent's submission that the application amounted to an abuse of the court process and the Appellants had not demonstrated how they would suffer substantial loss since the Respondent is paying rents.

11. The Respondent also attacked the grounds of the Memorandum of Appeal and submitted that the said grounds were incompetent and fatally defective since they contained untrue statements.

12. On the offer for security, it was the Respondent's contention that none had been offered by the Appellants and hence the application is an abuse of the court process.

13. In support of their submissions, the Respondent relied on various authorities including the case of *Chairman Cooperative Tribunal & 8 Others Exparte Management Committee Konza Ranching & Farming Cooperative Society (2014) eKLR, Chris Munga Bichange v Richard Nyagaka Tongi & 2 Others (2013), James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR among others.*

14. For the said reasons, the Respondent urged the Court to dismiss the application with costs.

B. DETERMINATION

15. I have considered the application, the response to the same and the submissions filed by the respective counsel for the parties. The single issue which arises for determination is whether the Appellants have satisfied the criteria for grant of stay of proceedings.

16. This is essentially an application for stay of proceedings in *MILIMANI CMCC E7272 OF 2020* pending the hearing and determination of this appeal. Stay of proceedings 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. See **Ringera J. (as he then was)** in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* 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”

See also 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, 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.”

17. It should be noted that this Court has powers to stay proceedings pending appeal and this 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.**

18. The use of discretion is to ensure proper use of judicial time and resources to dispense justice for the parties. This is also to guard against multiplicity of applications which are meant to delay the finalization of matters which go against the spirit of **Article 159 of the Constitution** that enjoins the court to hear matters expeditiously. However, this is not to turn a blind eye on deserving applications for stay of proceedings.

19. In the case of **Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd (2015) eKLR**, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

20. The provisions of **Article 159(2)(a)(b)(c) and (d)** of the **Constitution of Kenya** as read with **Sections 1A and 1B** of the **Civil Procedure Act, Cap 21** enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.

21. This is a matter that is still pending before the Magistrates court. An order staying these proceedings would be counterproductive and would delay the finalization of this case. No compelling reason or prima facie case has been established to warrant the court to stay the proceedings. The delay that would be occasioned by the stay of the proceedings in the lower court would defeat the purpose of expeditious disposal of matters.

22. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit **Milimani CMCC Civil Suit No. E7272 of 2020** that is pending in the lower court to the detriment of the Respondent.

23. For the above reasons, the Application dated **20th September, 2021** is dismissed with no orders as to costs.

24. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JANUARY, 2022

E. K. WABWOTO

JUDGE

In the presence of: -

Mr. Simon Kamande for the Appellants.

Ms. Rotich h/b for Ms. Awour the Respondent.

Court Assistant; Caroline Nafuna.

E. K. WABWOTO

JUDGE