



Takata Limited v Solio Ranch Limited (Environment & Land Case 18 of 2021) [2023] KEELC 17682 (KLR) (11 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17682 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NANYUKI
ENVIRONMENT & LAND CASE 18 OF 2021**

**AK BOR, J
MAY 11, 2023**

BETWEEN

TAKATA LIMITED PLAINTIFF

AND

SOLIO RANCH LIMITED DEFENDANT

RULING

1. The Defendant brought the application dated November 21, 2022 seeking to stay proceedings in this suit and the orders issued by this court on September 28, 2022 vide which the firm of Kaplan & Stratton Advocates was added as a defendant to this suit, pending hearing and determination of both the application and the appeal being Civil Case E138 of 2022 filed in the Court of Appeal.
2. The application was made on the grounds that the Defendant was dissatisfied with the ruling delivered by this court on September 28, 2022 and had lodged an appeal and had also served a record of appeal on the Plaintiff. The Defendant urged that it has good and sound grounds of appeal against the ruling of this court which include the failure to rule on the preliminary objection as a matter of priority, the lack of nexus to sustain a suit against the firm of Kaplan & Stratton Advocates and the court’s failure to appreciate the role an advocate plays when acting as a stakeholder in a sale transaction agreement. The Defendant was apprehensive that unless the orders of stay of proceedings were granted, this suit may progress substantively before the appeal is determined which would render the appeal academic and nugatory.
3. The application was supported by the affidavit of Dr Fred Ojiambo, SC who exhibited copies of the ruling, Notice of Appeal and the Memorandum of appeal setting out the grounds of appeal. He averred that the application was brought without unreasonable delay and added that the Defendant stood to suffer loss if the orders for stay of proceedings were not granted.



4. Engineer Michael Kamau swore the replying affidavit in opposition to the Defendant's application and averred that the Defendant had not met the threshold for the grant of stay of proceedings and added that the application was in total violation of its right of access to justice, right to be heard without delay and the overall right to a fair trial. He averred that the appeal was frivolous based on the findings of the court that the privilege only covered nondisclosure of communication made to the advocate by the client in the course of his employment except with the client's consent and that there was no bar to a party suing a law firm where that party is aggrieved by the conduct of the law firm or the advocate in a case or other transaction.
5. Engineer Kamau deponed that the Defendant had failed to establish a *prima facie* case and was guilty of undue delay in that it took almost two months to bring the application after the ruling was delivered on September 28, 2022. He averred that granting a stay for an indefinite period may cause undue delay in the conclusion of the suit which would occasion a miscarriage of justice. He added that based on the fact that the Defendant had already filed its defence and would not suffer any loss if the matter continued to trial, then the court ought not to stay proceedings.
6. The court directed parties to file and exchange written submission which they did. The Defendant submitted that it relied on Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) and that the principles underpinning stay of proceedings were set out in [Gichuhi Macharia and Another v Kiai Mbaki and 2 Others](#) [2016] eKLR as well as in [Lucy Waitibera Kimanga and 2 Others v John Waiganjo Gichuri](#) [2015] eKLR. Firstly, the decision whether or not to grant stay of proceedings was a matter of judicial discretion to be exercised in the interest of justice and where it was in the interest of justice to stay the proceedings, the terms on which it should be granted. Thirdly, that in deciding whether to stay the proceedings the court should weigh the pros and cons of granting the order while bearing in mind factors such as the need for expeditious disposal of cases, the *prima facie* merits of the intended appeal based on whether it was an arguable one, the scarcity and optimum use of judicial time and whether the application was brought expeditiously.
7. The Defendant submitted that it had an arguable appeal raising pertinent issues to be addressed by the Court of Appeal including this court's finding being in dissonance with the doctrine of privity of contract, the principle of advocate client privilege where the firm may be forced to disclose confidential information shared by the client without its consent, the sustainability of a suit against an agent where the principal was disclosed and the fact that the Plaintiff acquiesced to the abandonment of the sale transaction and received a refund of the deposit which it had paid with interest.
8. Defendant maintained that it had demonstrated legitimate points of law which deserve judicial determination by the Court of Appeal. It went further to argue that it would be a waste of judicial time and money for this court to proceed with the case only for the Court of Appeal to rule that it erred in allowing the amendments. It contended that if the appeal were successful in the absence of the orders of stay sought, the Defendant would have no recourse because the damage would already have ensued.
9. The Defendant submitted that there had been no unreasonable delay in the filing of the application while mentioning that it swiftly prepared and filed its notice of appeal on October 11, 2022 and thereafter filed this application on November 21, 2022. The Defendant concluded that the power to grant or refuse an order for stay of proceedings was discretionary and should be exercised in such a way as to not prevent an appeal. Further, that a Judge should not refuse stay if there are good grounds for granting it merely because in its opinion a better remedy may become available to the applicant at the end of the proceedings.
10. The Plaintiff submitted that for this court to grant stay of proceedings it ought to be shown that there was an arguable appeal with high chances of success and that it would be rendered nugatory. On



whether the Defendant had an arguable appeal, the Plaintiff submitted that its case against the firm of Kaplan & Stratton Advocates was that the firm continued holding the deposit for five years long after the suit property had been sold to a third party and that the disposal of the land was well within the firm's knowledge and that what is to be determined is whether a firm of advocates may be sued for damages for holding the deposit paid towards the purchase price after the land is sold to a third party. The Plaintiff urged that the Defendant had failed to establish that it had an arguable appeal.

11. The Defendant relied on *Halsburys Laws of England*, 4th Edition Vol 37 pages 330 and 332 which states that stay of proceedings was a serious, grave and fundamental interruption in the rights a party has to conduct its litigation towards the trial on the basis of the substantive merits of its case and that the court's general practice was that stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue. In essence that that power is to be exercised in exceptional cases where the proceedings are shown to be frivolous, vexatious, harassing or manifestly groundless or where there is clearly no cause of action in law or equity. That an applicant for stay on this ground must show that the plaintiff might not succeed and could not possibly succeed on the basis of the pleading and the facts of the case.
12. The Plaintiff submitted that the Defendant had failed to establish to the required standard that its appeal would be rendered nugatory firstly, because it was not being called upon to disclose any privileged information with regard to its client and that in fact in the Statement of Defence dated November 21, 2022 which it filed there was no disclosure and that no prejudice would be occasioned to the firm of Kaplan & Stratton Advocates. Secondly, that the Defendant had not established what privileged information it was likely to be compelled to disclose, and lastly, it had failed to show the substantial loss it would suffer if the proceedings were not stayed.
13. The Plaintiff submitted that the delay of 60 days in bringing the application was not only inordinate, but also unexplained. It relied on Article 159 (2) of the *Constitution* as read with Sections 1A and 1B of the *Civil Procedure Act* which enjoin the court to facilitate the overriding objective of the Act to render justice in all civil proceedings in a just, expeditious, proportionate and affordable cost to the parties. The Plaintiff pointed out that the sale transaction which forms the substratum of its case was entered into in 2014 and it filed suit in 2020 for which pre-trial was yet to take place. It concluded that it was in the interest of justice that the matter proceeds for hearing without further delay because there were no exceptional circumstances demonstrated by the Defendants to warrant a stay of proceedings. Further, that staying the proceedings for an indefinite period would delay the conclusion of the suit and thereby occasion a miscarriage of justice especially in light of the fact that upon filing the record of appeal in November 2022, the Defendant had not taken any steps to prosecute the appeal.
14. The issue for determination is whether this court should stay these proceedings pending hearing and determination of the appeal lodged by the Defendant against the decision this court gave on September 28, 2022 for the joinder of the firm of Kaplan & Stratton as a defendant in the case. The order was made following the Plaintiff's application for amendment of its suit to seek interest, loss of bargain and damages against the law firm for holding the deposit the Plaintiff paid towards the purchase price for over 5 years after the land in question was sold to a third party with the firm's knowledge.
15. In determining whether to stay proceedings, one of the factors to be considered is if there was delay in bringing the application. The Defendant filed the application for stay of proceedings on November 24, 2022 without giving any explanation for the delay of almost two months in bringing the application.
16. In exercising its discretion on whether or not to stay these proceedings, this court is required to weigh the pros and cons of granting or denying the order to stay proceedings. One of the grounds of appeal is that the firm may be compelled to disclose confidential information without the Defendant's consent.



The court notes that the firm of Kaplan & Stratton Advocates filed its Statement of Defence after the court gave its ruling. Looking at the totality of the circumstances of this case, the court is not persuaded that it is in the interest of justice to stay these proceedings.

17. Stay of proceedings would fundamentally interfere with a plaintiff's right to a fair trial on the merits of its case. The Defendant has not been shown that these proceedings, beyond reasonable doubt, should not be allowed to continue. In the court's view, no exceptional circumstances have been demonstrated to warrant the stay of further proceedings in this matter.
18. In light of the duty bestowed upon this court by the Constitution and the overriding objective of the Civil Procedure Act and the Rules which govern these proceedings, as well as the duty of the court to handle matters presented to it in a manner that achieves the just determination and disposal of proceedings in an efficient and expeditious fashion, this court is inclined to refuse to exercise its discretion in favour of the Defendant.
19. The court declines to grant the prayers sought in the application dated November 21, 2022. The Plaintiff is awarded the costs of the application.

DELIVERED VIRTUALLY AT NANYUKI THIS 11TH DAY OF MAY 2023.

K BOR

JUDGE

In the presence of: -

Mrs Joyce Kariuki the Plaintiff

Ms E Onyango holding brief for Dr F Ojiambo SC for the Defendant

Stella Gakii- Court Assistant

