



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

ELC NO. 56 OF 2012

EMERG INVESTMENTS LTD.....PLAINTIFF

VERSUS

KENYA FARMERS ASSOCIATION LTD....DEFENDANT

RULING

Application

1. The applicant moved the court through notice of motion dated **09/11/2021** brought under **Order 42 Rule 6(1), Order 51 rules (1) (2) of the Civil Procedure Rules, Sections 1A, 1B, 3of the Civil Procedure Act, Articles 159(2) (d) and 50(1) of the Constitution of Kenya** seeking the following orders:

1. ...Spent

2. That pending the hearing and determination of this application, there be a stay of proceedings and the hearing/trial of the main suit herein

3. That there be a stay of proceedings and of the hearing/trial of this suit, pending the hearing and determination of the intended appeal to the Court of Appeal

4. That costs of this application be in the cause of the appeal

2. The application is supported by the affidavit sworn on the same day by David Ole Naeku where he deposed that he is the acting company secretary of the applicant's company; that by an application dated **12/03/2020**, the applicant had applied to have M/s Sheth & Wathigo Advocates ordered to recuse themselves from acting for the respondent herein owing to the conflict of interest since they are the applicant's advocates and had given advice to the applicant over this and other matters and that the advocates were witnesses herein; that ruling on was delivered on **10/03/2020** where the said application was dismissed with costs.

3. He went on to state that the applicant sought and obtained leave to appeal against the said ruling to which it filed a Notice of Appeal dated **18/12/2020** and applied for typed copies of proceedings; that to date, the typed proceedings have not yet been availed which resulted in the substantive Record of Appeal not lodged; that parties have been in direct consultations and they have tried to explore an amicable out of court settlement; that M/s Sheth & Wathigo Advocates are privy to confidential client information obtained from the applicant and which information they have used and continue to use against the applicant herein; that the applicant maintains that it is improper, in conflict of interest and in breach of Advocate/Client confidentiality for the firm to persist in acting for the respondent as against the applicant.

4. He further stated that negotiations are still ongoing; that the applicant will be highly prejudiced should the hearing proceed with the said Advocates on record for the respondent owing to the alleged conflict of interest; he finally deposed that the applicant has a strong appeal with overwhelming chances of success and that unless the stay of proceedings sought are granted, the appeal will be rendered nugatory.

Response

3. The respondent filed a replying affidavit dated **22/11/2021** sworn by Nalinkumar Mehgi Shah where he deposed that he is the Managing Director of the respondent company; that the application is incompetent and inept to the extent that there is no scope and basis as the applicant has not satisfied the main principles in granting of stay of proceedings; that the applicant raised the same grounds for the application over and over with no evidence to support his claim and therefore abusing the court process; that a ruling was delivered on **10/12/2020** and the matter came up for hearing but the applicant's Advocate never raised the issue of stay or intended appeal but sought

adjournment.

6. He further deposed that the applicant never demonstrated in what manner the progression of the matter will occasion any difficulty or injustice to warrant stoppage of prosecution of the matter which has taken too long in court; that the applicant sought and was granted adjournment to negotiate after which the respondents wrote to the applicant with their out of court settlement proposal; that the applicant ignored and on the next mention date **10/10/2021** the applicant intimated to the court that it was no longer interested in negotiations and wanted to stay proceedings and pursue appeal; that the positions taken by the applicant are illustrative of its resolve to delay to delay the matter; that the applicant has not demonstrated the substantial loss/irreparable damage its likely to suffer should the application not be allowed; he deposed that this matter has been in court from **2012** pending determination and the applicant is keen to delay its conclusion and urged the court to dismiss the application for abuse of court.

7. The applicant filed a supplementary affidavit dated **07/12/2021** sworn by David Ole Naeku where he reiterated the contents of its earlier affidavit and deposed that a letter by Sheth Wathigo Advocates was written on a "Without Prejudice Basis" on the ongoing out of court settlement; that indeed the matter never proceeded due to the ongoing negotiations between the parties towards an amicable settlement; that the respondent has been shifting goal posts thus stalling the process of an amicable settlement; that one of the reasons for the instant application not have been filed earlier was that parties were still negotiating with a hope to reaching an amicable settlement and thus urged the court to stay these proceedings pending appeal.

Submissions

8. Upon perusal of the file, no party filed their submissions.

Determination

9. The issue that arises for determination in the instant motion is whether the applicant has met the threshold for grant of stay of proceedings. The principles to be applied in an application of stay of proceedings are well settled. The court must determine whether the Applicant has established that he/she has an arguable appeal, whether the application was filed expeditiously and whether the Applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought as Ringera J held in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000**.

10. The applicant filed an application dated **12/03/2020** to have the firm of M/s Sheth & Wathigo Advocates recused from acting for the respondent herein owing to conflict of interest and a ruling was delivered on **10/12/2020** dismissing it with costs. The applicant sought leave to appeal and was granted however, the record of appeal is yet to be lodged. The applicant stated that they are yet to get to be supplied with the typed proceedings despite requesting for the same. It is noteworthy that the applicant insists that negotiations for an out of court settlement are still ongoing further, that their intended appeal has high chances of success and that unless stay of proceedings is granted, the intended appeal will be rendered nugatory.

11. The respondent on the other hand stated that the applicant failed to satisfy the main conditions in granting stay of proceedings. Further that the applicant raised the same grounds in its earlier application thus abusing the court process. It averred that they wrote to the applicant a letter with their proposal for negotiations but the applicant ignored the same until when the matter came up for mention thus delaying the matter.

12. In the case of **Kenya Wildlife Service v James Mutembei (2019) eKLR** the court held that:

"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 proceedings is high and stringent."

13. In the present case, the ground upon which the applicant bases its application to a large extent relates to the aspect of want of recusal by the firm of M/s Sheth & Wathigo Advocates from representing the respondent herein. It is a fact that a ruling on the same was made on **10/12/2020** and therein this court found that no conflict of interest existed. The applicant has a right to appeal but in the instant case, an appeal has not yet been filed. The applicant stated that the reason for the delay in filing the appeal was that they are yet to be supplied with the typed proceedings despite following up with the court.

14. It is clear from the available evidence that the applicant wrote a letter to the court requesting for typed proceedings on **18/12/2020** and the same was received by court on **21/12/2020**. The applicant cannot use this as an excuse since it had almost one year to follow up and obtain the proceedings. Further, no evidence of subsequent follow up letters or email has been annexed by the applicant to show that delay in supplying them with the typed proceedings lies with the court.

15. It is this court's opinion that the applicant is clearly not keen in advancing their appeal but using it as a tactic to delay the main suit and therefore granting an order staying proceedings would be counterproductive as it would delay the finalization of the main suit keeping in mind that this is an old matter. Further, no compelling reason has been established to warrant the court to stay the proceedings and it is my view that the applicant has not established an arguable appeal.

16. On whether the application has been filed timeously, the ruling was delivered on **10/12/2020** and this application was filed on **9/11/2021** which is almost a year after delivery of the ruling. In the circumstances it is my opinion that there was inordinate delay in filing the same. Regarding the issue of whether the applicant is likely to suffer substantial loss in the event the stay of proceedings is not granted, it is my view that the applicant has not demonstrated the substantial loss it is likely to suffer. Furthermore, the appeal is yet to be filed and this detracts from the image of a serious litigant in the defendant.

17. In the case of **Silverstein –vs- Chesoni [2002]1 KLR 867** the Court held that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

18. This court should not be perceived to condone unwarranted delay of proceedings. By granting a stay of proceedings, it will only prolong and delay the hearing and determination of suit which is contrary to the principle of expeditious disposal of disputes pending before the court. The court of Appeal in the case of **Peter Kariuki Mburu & another v Neema Shah [2021] eKLR** in dismissing an applicant’s application for stay of proceedings held as follows:-

“It is evident that the stay of proceedings as sought is seemingly a delay tactic as the Appellants/Applicants have severally been required to set down the application dated 17th July, 2020 for hearing and have failed to do so... It appears that the Appellants/Applicants want to hide their indolence in the guise of an Appeal having squandered the several chances they have had to prosecute their said application. Even then, the application as it stands is not dismissed, meaning the Appellants/Applicants are aware of their right to have it prosecuted but have still chosen to apply for stay so as to further delay the matter.”

19. This court has come to the conclusion that the application dated **09/11/2021** lacks merit and is hereby dismissed with costs to the respondent. The hearing date for the main suit shall remain **26/04/2022**.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 3RD DAY OF FEBRUARY, 2022

MWANGI NJOROGE

JUDGE, ELC, NAKURU