



REPUBLIC OF KENYA



**FTG Holland v Afapack Enterprises Limited & another (Civil Case 352 of 2012)
[2025] KEHC 912 (KLR) (Commercial and Tax) (17 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 352 OF 2012
MN MWANGI, J
JANUARY 17, 2025**

BETWEEN

FTG HOLLAND APPLICANT

AND

AFAPACK ENTERPRISES LIMITED 1ST RESPONDENT

AFA CHEMICAL LIMITED 2ND RESPONDENT

RULING

1. The plaintiff/applicant filed a Notice of Motion application dated 15th January 2024 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules 2010, and all other enabling provisions of the law. The plaintiff's prayer is for this Court to issue an order for stay of all further proceedings in this suit, pending the hearing and determination of its appeal, on such terms as may be just.
2. The application is premised on the grounds on the face of the Motion and it is supported by an affidavit sworn on the same day by Andreas Nuijten, the plaintiff's local country representative. He averred that this Court delivered a ruling on 16th June 2023, in which it set aside the judgment entered by the Court on 13th July 2020 in favour of the plaintiff. Aggrieved by the said ruling, the plaintiff lodged an appeal against it at the Court of Appeal being Civil Appeal No. E982 of 2023. He contended that the said appeal has high chances of success. He asserted that the Court improperly exercised its discretion under Order 10 Rule 11 of the Civil Procedure Rules, 2010. Mr. Nuijten contended that the Court failed to account for the defendants' unjustifiable two-year delay in filing their application to set aside the judgment.
3. In opposition to the application, the defendants filed a replying affidavit sworn on 23rd April 2024 by Aleem Sadrudin Fazal Rehemtulla, one of the defendants' Directors. He averred that the instant



application is an afterthought having been filed after the lapse of six months from the date the ruling was delivered on 16th June 2023, with no explanation for the delay. He further averred that since the plaintiff has already lodged an appeal at the Court of Appeal, the instant application ought to have been filed at the Court of Appeal.

4. The application herein was canvassed by way of written submissions which were highlighted on 25th July 2024. The plaintiff's submissions were filed by the law firm of Mohammed Muigai LLP on 29th April 2024, while the defendants' submissions were filed on 28th May 2024 by the law firm of Soita & Associates Advocates.
5. Mr. Mwangi, learned Counsel for the plaintiff cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and submitted that this Court has the requisite jurisdiction to hear and determine the instant application. He relied on the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 cited by the Court in Ezekiel Mule Musembi v H. Young & Company (E.A) Limited [2019] eKLR, in arguing that staying the proceedings herein will serve the interests of justice in view of the fact that the plaintiff has lodged an appeal against this Court's ruling delivered on 16th June 2023, which appeal is arguable and has high chances of success. He further argued that if the said appeal succeeds, it could result in the reinstatement of the judgment set aside by the Court. Counsel stated that the delay in filing the instant application was due to the plaintiff's status as a foreign company and its Director's illness, requiring the appointment of a local representative, as noted in the plaintiff's witness statement.
6. Mr. Isinta, learned Counsel for the defendants relied on the case of William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others [2019] eKLR, cited by the Court in Turbo Highway Eldoret Ltd v Muniu [2022] KEHC 10197 (KLR), and submitted that a high threshold must be met to justify staying proceedings. He further submitted that while the plaintiff argued that the Court has jurisdiction to grant the orders sought, the reasons provided do not align with the principles established in the aforesaid case. He stated that in any event, the plaintiff has not demonstrated any exceptional circumstances to warrant being granted the orders sought.
7. In a rejoinder, Mr. Mwangi submitted that directions for filing of written submissions at the Court of Appeal have been received. On the issue of unreasonable delay, he contended that the appeal at the Court of Appeal was filed on 18th December 2023 and the instant application was filed before the hearing date. He further submitted that the plaintiff has satisfied all the six principles laid down by the Court in William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others (supra).

Analysis And Determination.

8. Upon consideration of the instant application, the affidavit filed in support thereof, the replying affidavit by the defendants and the written submissions by Counsel for the parties, the issue that arises for determination is whether an order for stay of proceedings should issue.
9. Stay of proceedings is provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which provides that –

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.

10. The Halsbury's Laws of England 4th Edition Volume 37, pages 330 to 332, states as hereunder in respect to stay of proceedings -

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 courts general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.

11. The principles to be considered by a Court when dealing with an application for stay of proceedings were considered by the Court in *Re Global Tours & Travel Ltd*, High Court Winding up Cause No.43 of 2000, where Ringera J., held that -

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 for 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.

12. Further, in the case of *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* (supra) cited by the defendants herein, the Court comprising a five Judge bench laid out the following principles to be considered when dealing with an application for stay of proceedings pending appeal -

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and



- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
13. It is trite that this Court has the requisite jurisdiction to issue an order for stay of proceedings. However, it is manifest discretion can only be exercised subject to the plaintiff establishing the principles laid down by the Courts in the *Re Global Tours & Travel Ltd* and *William Odhiambo Ramogi* cases. It is noteworthy that an application for stay of proceedings pending appeal ordinarily ought to be filed in the appellate Court, since one of the factors to be established by the plaintiff is whether the appeal is arguable and if it has any chances of success. It is trite that Courts are prohibited from re-evaluating their own decisions except where an application for review of such decision has been made. In determining whether or not the plaintiff's appeal is arguable, this Court would be forced to re-evaluate its decision which is contrary to the law and the rules of natural justice.
14. In this case, the plaintiff averred that it has since filed an appeal against this Court's ruling delivered on 16th June 2023 at the Court of Appeal being Civil Appeal No. E982 of 2023. The instant application therefore ought to have been filed at the Court of Appeal pursuant to the provisions of Rule 5(2)(b) of the Court of Appeal Rules which states that –
- Subject to sub rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -
- a. ...
- b. in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.
15. In view of the analysis I have made in this ruling, and in the absence of an explanation by the plaintiff as to why the instant application was filed before this Court as opposed to the Court of Appeal, this Court finds that the application herein was filed before the wrong forum.
16. Accordingly, it is my finding that the defendant's application dated 15th January 2024 is incompetent. It is hereby struck out with costs to the defendants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 17TH DAY OF JANUARY, 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Ms Kaunda h/b for Mr. Mwangi for the plaintiff/applicant

No appearance for the defendants/respondents

Ms B. Wokabi - Court Assistant.

