



REPUBLIC OF KENYA



**Ford v Fadhil & 2 others (Commercial Suit 121 of 2008)
[2025] KEHC 1908 (KLR) (4 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1908 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL SUIT 121 OF 2008
JK NG'ARNG'AR, J
FEBRUARY 4, 2025**

BETWEEN

COLLINS STEPHEN FORD PLAINTIFF

AND

SULTANA FADHIL 1ST DEFENDANT

MAURICE M. KILONZO 2ND DEFENDANT

NICANORY A. AKANGA T/A FADHIL & KILONZO

ADVOCATES 3RD DEFENDANT

RULING

1. The 2nd Defendant filed a Notice of Motion application dated 23rd July 2024 under Certificate of Urgency pursuant to Order 42 Rule 6 of the [Civil Procedure Rules](#) and Section 3A and 3d of the [Civil Procedure Act](#).
2. The Applicant seeks for orders that this court be pleased to stay the orders given on 21st November 2023 and issued on 29th January 2024 referring the matter for hearing before this court pending the hearing and determination of the Petitioner's appeal against the said orders, and that costs of this application be provided for.
3. The application is premised on the schedule of grounds therein and the annexed affidavit of Maurice Kilonzo sworn on 23rd July 2024 that the Appellant herein has filed an appeal against the orders of this court issued on 29th January 2024 recalling this matter from the Arbitral Tribunal for hearing before this court. That the said appeal has overwhelming chances of success and will be rendered moot and nugatory unless the orders herein are granted. That unless the orders prayed are granted, the Applicant will suffer prejudice, loss and damage as the case will proceed undefended and in a court without jurisdiction of the 1st instance. That the Applicant has been ailing and has therefore been unable to file the application timeously.



4. The Plaintiff filed a Replying Affidavit sworn on 8th November 2024 by Japheth Asige, the advocate having the conduct of the matter on behalf of the Plaintiff, that the Applicant has not satisfied the conditions for grant of the prayers sought under the provisions of Order 42 Rule 6 of the Civil Procedure Rules 2010. That the Applicant has not demonstrated the substantial loss he will encounter and/or suffer if the case proceeds undefended, the substantial loss he will encounter or suffer due to the alleged lack of jurisdiction by this court and the reason for alleging this court has no jurisdiction of the 1st instance to entertain the suit, and the substantial loss he will suffer for not filing his pre-trial documents and who has prevented him to ask for leave from this court to file the said documents.
5. The Plaintiff deposed that the Applicant has deliberately concealed from this court that the Originating Summons had been referred to arbitration since 20th June 2013 as ordered by this court, that the Respondent for reasons inter alia of unconscionable delay of nearly 10 years and inexplicable and inexcusable bias withdrew from the arbitral proceedings and the arbitrator on 13th April 2023 recused himself from the proceedings, that the arbitral proceedings had been adjourned on numerous occasions, more than 20 times without sufficient cause mainly upon applications by the Applicants, that on 16th January 2020 the Respondents/Plaintiffs case before the tribunal was closed and on 8th August 2021 upon application by the Applicants the tribunal ordered rehearing of the suit, that the conduct of hearing of the suit before the tribunal was unsatisfactory, biased and partial, and that the arbitral tribunal in the circumstances could not conduct and deliver a fair and impartial award/determination.
6. The Plaintiff stated that the Applicant has not adduced any proof of irreparable and/or substantial loss he will incur and/or suffer in case this application is not allowed. The Applicant has not demonstrated any justifiable reason for this suit not to be heard and determined by this court, and that there is no prejudice whatsoever to be suffered by the Applicant if this court proceeds to hear the suit. That the Applicant is merely using the excuse of having filed an appeal to frustrate and delay this suit from being heard and determined by this court. That the Memorandum of Appeal annexed to the Supporting Affidavit of Maurice Kilonzo stating 8 grounds of fact and law filed by the Applicant has no prospect of success.
7. The Plaintiff further stated that the ruling was delivered on 21st November 2023 and the Applicant/Defendants herein were ordered by this court to file responses by 5th December 2023 which they never did. That the medical reports exhibited by the Applicant are from 14th December 2023 and this instant application was filed on 23rd July 2024, 7 months after the ruling was delivered which is unreasonable and/or inordinate. That the Applicant has not provided security of Kshs. 92,845,574 claimed in the originating summons and/or specify the nature of security he is willing to provide for due performance.
8. The application was canvassed by way of written submissions. The Applicant filed submissions dated 11th November 2024 while the Respondent filed submissions dated 8th November 2024.
9. I have considered the Notice of Motion application dated 23rd July 2024, the Replying Affidavit sworn on 8th November 2024 and submissions by the parties. The issue for determination is whether an application for an order of stay is merited.
10. Order 42 Rule 6(1) of the Civil Procedure Rules provides for stay of proceedings as follows: -

No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

11. The court in *Ndabi v Kimotho & Another* (Civil Appeal 16 of 2023) [2023] KEHC 17717 (KLR) (19 May 2023) (Ruling) observed that: -

“Therefore, the test from the above authorities is one that sets out the following parameters for a Courts exercise in discretion, in deciding whether or not to grant a stay of proceedings as sought in this application: -

- a. Whether the Applicant has established that he/she has a *prima facie* arguable case; and
- b. 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.

In an application for stay of proceedings, the Court must consider the overriding objective, and balance the interests of the parties to the suit, since the Court is enjoined to always place the parties on equal footing. Since the overriding objective aims, inter alia, to facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the Act, the balancing of the parties’ interest is paramount in an application for stay of Proceedings pending appeal.”

12. Further, the decision to grant stay of proceedings is discretionary as was held in the case of *Re Global Tours & Travel Ltd*, HCWC No.43 of 2000 as follows: -

“...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 case, 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...”

13. Having read the application and response herein, this court has established that this court referred the matter herein to arbitration on 20th June 2013 but hearing and determination of the matter in the arbitral tribunal was been frustrated by delay and recusal of the arbitrator among other reasons pointing towards lack of fairness and impartiality. It was on that basis that this court was approached and on 21st November 2023, the court delivered a ruling stating that the order referring the matter to arbitration was vacated because the arbitrator abandoned the arbitration proceedings. The court then ordered that the matter proceeds for hearing in the court and parties ordered to file their responses by 5th December 2023.



14. The court in *Kenya Wildlife Service v James Mutembei* (2019) eKLR held: -

“...Stay of proceeding 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...”

15. This court finds that this is an old matter whose determination has been delayed. Granting the prayer of staying proceedings would amount to further delays which will not serve the interest of justice.

16. Accordingly, the application dated 23rd July 2024 is without merit and is dismissed with costs.

DELIVERED VIRTUALLY VIA CTS AT MOMBASA THIS 4TH DAY OF FEBRUARY, 2025

J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Plaintiff

..... Advocate for the Defendants

Court Assistant – Shitemi

