



**Ola Energy Kenya Limited v Times Touch Enterprises Limited (Civil Appeal
E178 of 2024) [2025] KEHC 1550 (KLR) (20 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E178 OF 2024
JK NG'ARNG'AR, J
FEBRUARY 20, 2025**

BETWEEN

OLA ENERGY KENYA LIMITED APPELLANT

AND

TIMES TOUCH ENTERPRISES LIMITED RESPONDENT

RULING

1. The Appellant filed a Notice of Motion application dated 26th June 2024 under Certificate of Urgency pursuant to Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules, Section 1A, 1B and 3A of the *Civil Procedure Act*, and all other enabling provisions of the law.
2. The Appellant seeks that this court be pleased to issue an order of stay of all proceedings in Mombasa CMCC No. E911 of 2023 on terms that will preserve the outcome of the appeal herein pending the hearing and determination before this court, and that costs of this application be provided for.
3. The application is premised on grounds on its face and the annexed affidavit of Benedicta Karimi Kiara sworn on 26th June 2024 that upon hearing of the Appellant/Applicant's Preliminary Objection seeking the striking out of the Plaintiff in Mombasa CMCC No. E911 of 2023, a ruling was delivered by the Hon. Gathogo Sogomo (P.M.) on 28th March 2024 dismissing the Preliminary Objection. That being dissatisfied with the Ruling, the Appellant made a formal application for leave to lodge an appeal in this court, as well as an order for stay of the proceedings pending before the trial court.
4. That the trial court in its ruling delivered on 21st June 2024 granted the order for leave to appeal, consequent to which this appeal has been lodged. That the trial court however dismissed the prayer for stay and directed continuance of proceedings which goes against the purpose and intended outcome of the appeal. That unless directions/orders of the trial magistrate for continuance of proceedings before the trial court are varied and/or set aside by this court, the Appellant will suffer irreversible prejudice.



- That the Appellant is ready and willing to comply with any order/directions as a condition for the grant of stay of proceedings, and that it is fair and in the interest of justice that the orders sought are granted.
5. The Respondent filed a Replying Affidavit sworn by Kennedy Wanjala Barasa on 9th July 2024 that the Appellant raised a preliminary objection seeking to strike out the suit for want of extracting summons to enter appearance, which summons were extracted on 12th October 2023 which had not expired. That the main suit has not been set down for hearing and that the application is only meant to delay trial in the lower court to the detriment of the Respondent. That the Applicant has not shown any exceptional circumstances warranting this court to exercise its discretion. That the appeal has slim chances of success and the same is termed as not arguable.
 6. The Respondent further averred that the order for dismissal is a negative order which is incapable of being executed and thus a stay of proceedings cannot be issued in such circumstances. That the Applicant can proceed with the appeal as it deems fit without staying the proceedings since it is the Respondent who will suffer if the appeal is not dismissed. That the application should therefore be dismissed with costs.
 7. The Appellant filed another Notice of Motion application dated 8th July 2024 seeking that this court be pleased to set aside an early date for hearing of the Appellant's application dated 13th May 2024 for orders of stay of all proceedings in Mombasa CMCC No. E911 of 2023 on terms that will preserve the outcome of this appeal pending the hearing and determination before this court, and that costs of this application be provided for.
 8. The application is premised on grounds on its face and the annexed affidavit of Benedicta Karimi sworn on 8th July 2024 that the Appellant lodged formal application for an order for stay of proceedings pending before the trial court, CMCC No. E911 of 2023 which the court directed to be served upon the Respondent for mention on 11th July 2024. That in a ruling delivered on 28th June 2024, the trial court granted an order citing the Respondent who was misdescribed as 'Ola Gas Energy Limited' for contempt and directed that the matter be mentioned on 11th July 2024 for the contemnors to show cause.
 9. The Appellant/Applicant further stated that the entire proceedings before the trial magistrate leading up to the ruling for contempt on the application dated 15th February 2024 are based on multiple irregularities and are subject to the Appellant's right of appeal which appeal is pending before this court and which will be rendered nugatory unless the said proceedings are halted. That unless the directions/orders of the trial magistrate made on 28th June 2024 are varied and/or set aside by this court, the Appellant will suffer irreversible prejudice in having its senior officers committed to civil jail. That the Appellant/Applicant is ready and willing to comply with any orders/directions as may be issued as a condition for grant of stay of proceedings.
 10. The Respondent filed a Replying Affidavit sworn by Kennedy Wanjala Barasa on 25th July 2024 that the Appellant is out to defeat the ends of justice after without prior notice terminated the dealership agreement it had with the Respondent. That the Appellant wants to ensure the Respondent's suit does not see light of day despite summons to enter appearance having been taken out and are yet to expire. That contempt proceedings are still live in the trial court and no decision has been made as the same is slated for citation of contemnors hence there is nothing to stay as no adverse orders have been granted against the contemnors.
 11. The Respondent stated that the Appellant was granted an opportunity to respond to the Respondent's application dated 15th February 2024 when the court dismissed the preliminary objection on 28th March 2024. That the court then directed the Appellant and the branch manager to respond to the



application dated 15th February 2024 and that instead of responding, the Appellant opted to file an application for leave to appeal against the ruling of the trial court. That there is no danger that the senior officers will be committed to civil as the court has not done so and all they have to do is purge the contempt. That the trial court never stayed its directions with regard to the Respondent's application dated 15th February 2024. That allowing the application will impact on expeditious disposal of matters which will prejudice the Respondent and that chances of the said appeal are very slim. The Respondent therefore prayed that the Appellant/Applicant's application should be dismissed with costs.

12. The applications were canvassed by way of written submissions. The Applicant filed submissions dated 29th August 2024 while the Respondent filed submissions dated 4th November 2024.
13. I have considered the Notice of Motion application dated 26th June 2024, the Replying Affidavit sworn on 9th July 2024, the Notice of Motion application dated 8th July 2024, the Replying Affidavit sworn on 25th July 2024, and submissions by the parties. The issue for determination is whether this court can grant an order for stay of proceedings in the lower court in Mombasa CMCC No. E911 of 2023 pending hearing and determination of the appeal herein.
14. The Appellant/Applicant stated that a ruling was delivered by Hon. Gathogo Sogomo on 28th March 2024 dismissing the preliminary objection. That being dissatisfied with the ruling, the Appellant/Applicant made an application for leave to lodge an appeal in this court together with stay of proceedings in the trial court. That in the ruling delivered on 21st June 2024, court granted leave to appeal but dismissed the prayer for stay.
15. The Respondent contended that the Appellant/Applicant raised preliminary objection seeking to strike out the suit for want of extracting summons to enter appearance which summons were extracted on 12th October 2023 and had not expired. That the main suit had not been set down for hearing and that the application was meant to delay trial in the lower court to the detriment of the Respondent. That the Appellant/Applicant has not shown exceptional circumstances warranting this court to exercise its discretion. That the appeal has slim chances of success and that the Appellant/Applicant can proceed with the appeal without staying the proceedings since it is the Respondent who will suffer if the appeal is not dismissed.
16. Order 42 Rule 6(1) of the Civil Procedure Rules provides: -

“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.”
17. The court in *Kenya Wildlife Service v James Mutembei* (2019) eKLR held that: -

“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.”



“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”.

18. The court has discretionary powers to grant an order for stay of proceedings, which power must be exercised judiciously. The court is required to consider the interest of justice on whether the appeal would be rendered nugatory and this is in turn determined by whether the appeal is arguable.
19. This court has perused the Memorandum of Appeal dated 24th June 2024 with the following grounds of appeal: -
 1. That the learned Trial Magistrate erred in law and in fact in failing to take into account the fact that the Respondent’s failure to extract Summons to Enter Appearance within Thirty (30) days from the date of lodging the Plaint dated 7th August, 2023 and serve it upon the Appellant as a Corporate as the law requires rendered the suit a nullity, incompetent and an abuse of the Court process.
 2. That the learned Trial Magistrate erred in law and in fact in failing to take into account the clear and apparent facts arising from a cursory review of the Pleadings before the Court, including the E-Filing platform, alluding to the pure point of law and thus fell into error in the application of the test in Mukisa Biscuits Manufacturing Ltd -vs- Westend Distributors case.
 3. That the learned Trial Magistrate erred in law and in fact in failing to consider the Appellant’s Submissions dated 16th February, 2024 or distinguish the authoritative precedents cited therein which are binding to the Trial Magistrate as a Sub-ordinate Court in regard to the principles applicable in dealing with Preliminary Objections of the nature dated 19th January, 2024 filed by the Appellant.
20. The Appellant/Applicant has annexed the impugned rulings to the application and it is clear to this court that the appeal is arguable. The applications for stay of proceedings were also filed without unreasonable delay.
21. This court also noted the Respondent’s suggestion that the Appellant/Applicant can proceed with the appeal without staying the proceedings since it is them who will suffer if the appeal is not dismissed. However, I find that judicial time must not be wasted on proceedings that would end up being an academic exercise.
22. Accordingly, I find that the Notice of Motion applications dated 26th June 2024 and 8th July 2024 are merited and allowed. The prayer for stay of proceedings in the lower court in Mombasa CMCC No. E911 of 2023 pending hearing and determination of the appeal is granted. Costs be in the cause.

DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 20TH DAY OF FEBRUARY, 2025.



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J.K. NG'ARNG'AR, HSC

JUDGE

In the presence of: -

..... Advocate for the Appellant/Applicant

..... Advocate for the Respondent

Court Assistant – Shitemi

