



Riziki Commodities Limited v Vijo Food and Feeds Limited (Commercial Appeal E195 of 2025) [2025] KEHC 2245 (KLR) (Commercial and Tax) (7 February 2025) (Ruling)

Neutral citation: [2025] KEHC 2245 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E195 OF 2025**

**MN MWANGI, J
FEBRUARY 7, 2025**

BETWEEN

RIZIKI COMMODITIES LIMITED APPLICANT

AND

VIJO FOOD AND FEEDS LIMITED RESPONDENT

RULING

1. Before me is a Notice of Motion application dated 2nd August 2024 filed by the appellant pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 42 Rules 6(1) & (2)(b) of the Civil Procedure Rules, 2010, and all enabling provisions of the law. The appellant seeks an order for stay of proceedings in SCC No. E5837 of 2024 pending the hearing and determination of the appeal.
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 Stephen Ananda Amwayi, the appellant's Director. He averred that on 3rd August 2023, the appellant entered into a Cereal Supply Agreement which included a clause on governing law, disputes, and arbitration. He stated that Clause 4(ii) thereof granted exclusive jurisdiction to Kenyan Courts, while Clause 4(iii) required disputes to be settled through arbitration, with the Arbitrator's decision being final. He stated that the appellant filed a Preliminary Objection dated 13th June 2024, challenging the Court's jurisdiction, which was dismissed by the Court in a ruling delivered on 5th July 2024.
3. Mr. Amwayi claimed that the learned Adjudicator disregarded Clause 4(iii) of the said Agreement and found that the Court had the jurisdiction to determine the dispute between the parties herein. That dissatisfied with the said ruling, the appellant filed an Appeal, arguing that the Court erred by disregarding Clause 4(iii) and effectively rewriting the contract between the parties herein. He asserted



that the aforesaid ruling exposes the appellant to risks of execution, thus a stay of execution is necessary to prevent substantial and irreparable loss on the part of the appellant.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 16th September 2024 by Josephat Murunga Mungoche, a Director of the respondent. He averred that the appellant's Appeal is baseless and should be dismissed, noting that the Small Claims Court correctly dismissed the appellant's Preliminary Objection. He further averred that the Small Claims Court ruling could only be properly challenged by way of an application for review and not by way of an Appeal. Mr. Mungoche maintained that Clauses 4(ii) and 4(iii) of the Cereal Supply Agreement are independent, and arbitration is not mandatory. He urged this Court to make an order for deposit of security of Kshs.189,500/= and for the appellant to file a complete Record of Appeal within 30 days, in the event that the appeal proceeds.
5. In a rejoinder, the appellant filed a supplementary affidavit sworn on 23rd September 2024 by Stephen Ananda Amwayi, the appellant's Director. He averred that the instant application was filed without delay. He further averred that the Trial Court has not yet determined monetary damages, making the issue of security for costs irrelevant at this juncture. He emphasized that alternative dispute resolution methods such as arbitration are encouraged by the *Constitution* of Kenya under Article 159 thereof.
6. The application herein was canvassed by way of written submissions. The appellant's submissions were filed by the law firm of Mwaniki Maina Associates Advocates on 24th September 2024, while the respondent's submissions were filed on 20th September 2024 by the law firm of Thairu Ng'ang'a & Associates.
7. Mr. Muhanji, learned Counsel for the appellant cited the provisions of Order 42 Rule 6 of the Civil Procedure Rules, 2010 and the Court of Appeal case of Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, and submitted that the appellant was challenging the jurisdiction of the Small Claims Court to hear and determine the dispute between the parties herein. He expressed the view that was an arguable ground of appeal warranting this Court to grant the orders sought herein so as to prevent this appeal from being rendered nugatory in the event that the appellate Court overturns the Trial Court's decision. Counsel argued that there has been no delay unreasonable or otherwise in filing the instant application noting that it was filed on 2nd August 2024, soon after the Trial Court's ruling was delivered on 5th July 2024.
8. Mr. Thairu, learned Counsel for the respondent referred to the provisions of Order 45 Rule 1 of the Civil Procedure Rules, 2010 and Section 41(d) of the *Small Claims Court Act* and submitted that what is on the ruling of the Small Claims Court is a mere error on the face of its record that can be corrected by way of an application for review. He relied on the case of Gourmet Meats Producers & Importers Ltd v Paul Lainan Nkina [2021] eKLR, and submitted that the appellant's Preliminary Objection filed before the Trial Court did not raise pure points of law. He argued that the presence of an arbitration clause did not automatically exclude the Court's jurisdiction, especially since Clause 4(ii) of the Cereals Supply Agreement dated 3rd August 2023 expressly subjects disputes to the Courts of Kenya.
9. Counsel contended that even if arbitration was the sole dispute resolution mechanism, the correct procedure would be to file an application for a stay of proceedings rather than file a Notice of Preliminary Objection. Mr. Thairu cited the case of Rene Industries Limited v County Government of Kitui [2019] eKLR, and stated that since the appellant never filed an application under the provisions of Section 6(1) of the *Arbitration Act*, the proceedings before the Trial Court ought to proceed. He relied on the case of Gourmet Meats Producers & Importers Ltd v Paul Lainan Nkina [2021] eKLR, and submitted that by filing a Notice of Appointment and a Preliminary Objection, the appellant



effectively submitted to the jurisdiction of the Small Claims Court and is therefore estopped from later challenging it.

Analysis and Determination.

10. Upon consideration of the instant application, and the affidavits filed in support thereof, the replying affidavit by the respondent 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.
11. Stay of proceedings is provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 which states 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.

12. An excerpt drawn from the Halsbury's Laws of England 4th Edition Volume 37 at pages 330 to 332 states as follows 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.

13. 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.

14. Further, in the case of *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* [2019] eKLR, the High Court comprising a five Judge bench laid out the following principles that should 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.
15. It is not in contest that there is already an Appeal pending in this Court from the ruling of the Small Claims Court delivered on 5th July 2024. This Court will therefore have to determine whether the said appeal is arguable in order for it to exercise its discretion in favour of the appellant.
 16. On perusal of the Memorandum of Appeal dated 29th July 2024 filed in this Court by the applicant, it is evident that the said Appeal is premised on grounds that the Trial Court failed to evaluate the evidence tendered by the parties on the contract dated 3rd August 2023, the Trial Court failed to consider the indicated mode of dispute resolution between the parties as stated under paragraph 4(iii) of the said Agreement by finding that it had exclusive jurisdiction to determine the dispute, the Trial Court erred in the application of Section 6 of the *Arbitration Act*, the Trial Court erred in finding that the appellant subjected itself to the jurisdiction of the Court, and that the Trial Court erred in finding merits to the Preliminary Objection, but still dismissed it.
 17. From the above summation of the grounds of appeal, it is apparent that the appellant's bone of contention with the Trial Court's ruling is that there was an Arbitral Agreement between the parties herein to refer all disputes between them to arbitration, and as such, the Trial Court had no jurisdiction to determine the dispute between the parties herein. It is trite law that jurisdiction is a very pertinent question of law and if a Court determines that it has no jurisdiction it has no option but to down its tools. That was the holding by the Court in the Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] KECA 48 (KLR). In view of the fact that this Court will have to determine whether or not the Trial Court has the requisite jurisdiction to determine the dispute between the parties herein, I am persuaded that the Appeal herein is arguable
 18. This Court however notes that other than allege substantial and irreparable loss, the appellant has not demonstrated what loss it will suffer in the event that the instant application is disallowed.
 19. On the question of whether there exists exceptional circumstances to warrant the appellant being granted the orders sought, this Court is alive to the fact that this Appeal arises from a decision of the Small Claims Court which is guided and/or operates within the confines of the Small Claims Courts



Act. Disputes filed in the Small Claims Court ought to be determined within 60 days of filing of the claim pursuant to the provisions of Section 34(1) of the *Small Claims Court Act* which states that –

All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim.

20. In view of the above provisions and the need to determine the issue of jurisdiction for the Small Claims Court to hear the dispute between the parties herein, this Court finds that there exist exceptional circumstances to warrant the orders being sought to be granted. Further, in the event that the instant application is not allowed, the Appeal shall be rendered nugatory as there are high chances that the Small Claims Court will have delivered its judgment before this Appeal is heard and determined, and execution may ensue. This Court further finds that the application herein was filed timeously, as it was filed barely a month after the delivery of the Trial Court's ruling and three (3) days after the filing of the instant appeal.
21. In the end, I find that the applicant has made out a case to warrant being granted an order for stay of proceedings pending appeal.
22. The upshot is that the instant application is merited and is allowed in the following terms –
 - i. An order for stay of proceedings in SCC No. E5837 of 2024 is hereby granted pending the hearing and determination of the appeal herein.
 - ii. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 7TH DAY OF FEBRUARY 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Muithirania h/b for Muhanji for the appellant/applicant

Mr. Thairu for the respondent

Ms B. Wokabi – Court Assistant.

NJOKI MWANGI, J.

