



**Macharia v Waithaka (Civil Appeal E094 of 2024)  
[2025] KEHC 2843 (KLR) (5 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 2843 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MURANG'A  
CIVIL APPEAL E094 OF 2024  
CW GITHUA, J  
MARCH 5, 2025**

**BETWEEN**

**JOSEPH KABAARA MACHARIA ..... APPLICANT**

**AND**

**HARON MWANGI WAITHAKA ..... RESPONDENT**

**RULING**

1. This ruling is in respect of the appellant's Notice of Motion dated 18<sup>th</sup> September 2024 in which he seeks an order of stay of proceedings in Kandara SPMCC E190 of 2023 pending the hearing and determination of his appeal.
2. The application is premised on the grounds stated on its face which are expounded in the depositions made by Ms. Hannah Waithera, the applicant's learned counsel in the affidavit sworn in support of the motion on 18<sup>th</sup> September 2024.
3. In a nutshell, Ms. Waithira deposed that she served the respondent with a list of witnesses and witness statements on 3<sup>rd</sup> September 2024 which was outside the time earlier limited by the court. On 5<sup>th</sup> September 2024 when the case was apparently fixed for hearing, she applied to have the list of witnesses and witness statements admitted out of time and that the witnesses who were present in court be allowed to testify. Her application was rejected and the learned trial magistrate proceeded to strike out the said documents, thereby shutting out the appellant (applicant) from either defending himself or calling witnesses in his defence which was against the rules of natural justice.
4. Ms. Waithera further deposed that by making the impugned order, the trial court allowed the case to proceed for hearing undefended which was likely to cause substantial and irreparable loss to the applicant; that if the proceedings were not stayed, judgement in the matter was going to be delivered to the detriment of the applicant and his appeal will be rendered nugatory. She implored this court to allow the application to avoid a travesty of justice.



5. The application was opposed by the respondent vide a replying affidavit sworn on 30<sup>th</sup> October 2024 by his learned counsel, Mr. Mandela Chege. In the affidavit, Mr. Chege gave a brief history of what transpired before the suit was filed and applicant's conduct thereafter detailing instances in which the applicant had failed to comply with timelines set by the trial court for filing documents in compliance with Order 11 of the Civil Procedure Rules.
6. Counsel further stated that on 14<sup>th</sup> March 2024, the applicant was granted a further 30 days to comply with pre-trial requirements which he failed to do; that instead, he served the respondent with a list of witnesses and witness statements five months later and the trial court, being a court of record lawfully declined to admit them out of time; that in as much as the appellant had a right to be heard and to adduce his evidence, the respondent also had a corresponding right to have his case heard and determined expeditiously. He urged the court to dismiss the application for want of merit.
7. The application was argued orally before me 9<sup>th</sup> December 2024. In his submissions, Mr. Chengecha, learned counsel for the applicant relied on the supporting affidavit sworn on 18<sup>th</sup> September 2024 and added that the applicant was locked out of the hearing at the lower court despite having filed and served his witness statements three days before the hearing date.
8. Counsel submitted that if stay was not granted, the case was going to proceed to conclusion without participation of the applicant given that the respondent's case had already been concluded and matter was pending final submissions; that if the case was determined without the applicant being heard, he will be prejudiced as judgement may be passed against him without the court having heard his version of events and he will be more prejudiced if execution were to be levelled against him. It was the applicant's case that the orders sought should be granted in order to preserve the substratum of the appeal.
9. On his part, learned counsel for the respondent Mr. Mandela denied the applicants claim that he had been locked out of the proceedings in the lower court. He submitted that the applicant had not been shut out from the proceedings but that he is the one who was at fault for having filed his documents out of the time limited by the trial court as a result of which they were expunged from the court record; that the applicant fully participated in the hearing and even cross-examined the respondent's witnesses.
10. In response, Mr. Chengecha emphasized that the applicant was locked out of the hearing as his witness statements were struck out and he was not given an opportunity to present his case.
11. . I have carefully considered the application, the affidavits on record and the rival submissions made on behalf of both parties. Having done so, I find that the only issue arising for my determination is whether the applicant has demonstrated that he is deserving of the order sought.
12. I wish to state at the outset that an order for stay of proceedings is a remedy granted at the discretion of the court in the interest of justice. The remedy should be granted sparingly and only in appropriate cases considering that it has the effect of interrupting a party's right to continue with the trial of his or her case on merit. In deciding whether or not to order stay of proceedings, the overarching consideration for the court ought to be whether it was in the interest of justice to grant the order sought and if it was, on what terms.
13. The Court of Appeal in *Lalita Devi Lalchand Galot V Mohan Galot* [2020] KECA 704 (KLR) cited with approval the decision of Ringera J (as he then was) in *Global Tours & Travels Limited*. Nairobi



HC winding up Cause No. 43 of 2000 in which the factors that should guide the exercise of the courts discretion in applications for stay of proceedings were enumerated in the following terms;

“.....As I understand the law whether or not to grant a stay of proceedings or further proceedings of a decree or order appealed 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 expedition 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.”

See also : Lucy Waitthera Kimanga & 2 Others V John Waiganjo Gichuri (2015) eKLR; Kenya Power & Lighting Company Limited V Esther Wanjiru Wokabi (2014) eKLR.

15. Upon perusing the court record, I have noted that the proceedings of the trial court were not availed to this court to enable it ascertain the circumstances in which the trial court issued its orders of 5<sup>th</sup> September 2024.  
  
The ruling in which the impugned orders were made was also not availed and it is therefore impossible for this court to establish the reasons that formed the basis of the trial court’s decision to decline admitting the applicant’s documents out of time.
16. Be that as it may, it is not disputed that the trial court’s order had the effect of preventing the applicant from presenting evidence in support of his case. It is also not disputed that the respondent has already closed his case and the matter is now pending filing of final submissions. Given these undisputed facts, I agree with the applicant that if stay was not granted, the respondent’s case will be concluded without the trial court having the benefit of hearing his version regarding how the accident in question occurred.
17. I am aware that the respondent is of the view that the applicant was responsible for the fate that has befallen him because he is the one who failed to file his documents on time and that although he was not allowed to present evidence in his defence, he participated in the hearing of the respondent’s case. This may be so but without the benefit of the trial court’s proceedings, I am unable to make any finding of fact regarding what actually transpired before the trial court or whether or not the pending appeal was arguable.
18. Given the foregoing, I find that the determination of this application turns on balancing the competing interests of the parties and what prejudice each party is likely to suffer if the application was determined one way or the other. Under Article 50 (1) of *the Constitution*, every person including the applicant has a right to be heard in his or her case but the respondent, just like any other litigant, has a constitutional right to have his case heard and concluded expeditiously.
19. If the application was dismissed, the applicant will definitely suffer grave prejudice as he was likely to be condemned unheard which is the eventuality he sought to prevent by filing the instant application and the appeal. This therefore means that if the application was rejected, his pending appeal will be rendered nugatory.
20. On the other hand, if the application was allowed, the respondent was likely to suffer some prejudice related to delay in the conclusion of his case but this is prejudice which can adequately be compensated



by an award of costs. The court can also make orders which would expedite hearing and determination of the appeal to facilitate quick disposal of the primary suit.

21. . Flowing from the foregoing, I am satisfied that the interests of justice requires that the instant application be allowed but on conditions that would accelerate hearing of the appeal. Consequently, I allow the application and hereby issue an order staying proceedings in the primary suit pending the hearing and determination of the applicants appeal. The order is granted on condition that the applicant will file and serve the record of appeal within the next 30days. The Hon. Deputy Registrar is also directed to call for the lower Court's original record and avail it before this court within the same period of time. The appeal will be mentioned on 10<sup>th</sup> April 2025 to confirm compliance and further orders.
22. Costs follow the event and are at the discretion of the court. The respondent is awarded costs of the application.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MURANG'A THIS 5<sup>TH</sup> MARCH 2025.**

**HON. C.W. GITHUA**

**JUDGE**

In the Presence of :

Ms. Waithira for the applicant

Mr. Mandela for the respondent

Ms. Susan Waiganjo, Court Assistant

