



**Transpares Kenya Limited v Kibiigo & another (Suing as the Legal Representatives of the Estate of Julius Kipkering) (Civil Appeal E192 of 2024) [2025] KEHC 4436 (KLR) (8 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4436 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E192 OF 2024  
E OMINDE, J  
APRIL 8, 2025**

**BETWEEN**

**TRANSPARES KENYA LIMITED ..... APPELLANT**

**AND**

**HUDSON SAMUEL KIBIEGO ..... 1<sup>ST</sup> RESPONDENT**

**MIRRIAM CHEPNGENO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF JULIUS  
KIPKERING**

**RULING**

1. By a Notice of Motion dated 6/11/2024 brought under Sections 1A, 1B, 3A and 63(e) of the [Civil Procedure Act](#) and Orders 42 Rule 6 (1) and 51 Rule (3) of the Civil Procedure Rules, the Applicant seeks the following orders:
  1. Spent.
  2. Spent.
  3. That there be stay of proceedings and/or further proceeding and/or writing and/or delivery of the judgment and/or taking any action in Eldoret CMCC No. E157 of 2023 and/or any action pending the hearing and determination of this appeal.
  4. That costs of this application be in the cause.
2. The application is anchored on the grounds on the face of it and it is further supported by the Affidavit dated 6/11/2024, sworn by Advocate Anne Halwenge Odwa.



3. She deposed that the subordinate court matter, Eldoret CMC No. E157 of 2023 came up for defence hearing on 13/03/2024 when the Subordinate Court closed the defence case in the absence of the counsel for the Appellant/ Applicant, that the Appellant/Applicant immediately moved the court vide an application dated 18/03/2024 seeking to set aside the orders of the court closing the defence case, that the subordinate court delivered its ruling on 28/08/2024 and dismissed the Appellant/Applicant's application on the ground that no sufficient cause had been shown and/or advanced by the Appellant/Applicant to warrant setting aside the orders closing the defence case.
4. That the Appellant/Applicant being aggrieved by the said ruling and/or decision of the court sought leave to appeal against the said decision which request the court granted hence the instant appeal, that the Appellant/Applicant similarly filed an application dated 16/9/2024 seeking stay of proceedings pending the hearing and determination the appeal before the subordinate court, that the subordinate court delivered its ruling on 30/10/2024 dismissing the said application, that at the time of dismissing the application dated 16/9/2024 the matter was pending filing of submissions to the main suit and that the subordinate court has directed parties to file submissions within 21 days and fixed the matter for judgment on 29/1/2025.
5. She further deposed that this Court's decision on the appeal will have a direct impact and/or effect on this matter hence the need for this Court to halt action and/or stay the proceedings in Eldoret CMCC No. E157 of 2023 pending the hearing and determination of the Appeal, that the Appellant/Applicant stands to suffer loss should the subordinate court matter proceed before this Court pronounces itself on the weighty legal issues raised in the appeal hence the need to grant stay of proceedings in subordinate court matter to await this Court's decision and that the Appellant/Applicant stands to be prejudiced should this matter proceed for writing of the judgment yet the Appellant/Applicant's witness has not been heard on the matter and that the orders sought ought to be granted to prevent this appeal from being rendered nugatory. Counsel contended that this this Court has power to grant the orders sought in the interest of justice and in the spirit of Article 50 and 159 of *the Constitution* of Kenya, 2010. In the end, she deposed that this this Application has been brought timeously and in good faith.

### **The Response**

6. The Application opposed by the Respondent vide her Replying Affidavit dated 13/11/2024. The Respondent deposed that the Applicant's application for stay of proceedings is an abuse of the court process, frivolous and vexatious and is intended to merely delay the determination of Eldoret CMCC No. E157 of 2023 which is at judgment stage, that Applicant was given an opportunity to be heard four (4) times as enshrined under Article 50 of *the Constitution* of Kenya, by the trial magistrate but the Applicant elected not to exercise this right on the scheduled dates for hearing hence its case was finally closed for non-attendance and that the two rulings by the Honourable C. Wattimah attached to the supporting affidavit to the application now before court clearly demonstrated the same, that the instant application offends the guiding principles of an application for stay of proceedings to wit; whether the applicant has established that he/she has a prima facie arguable case and whether the application has established sufficient cause to the satisfaction of the court that it is the interest of justice to grant the orders sought and that according to the Halsbury's Law of England, 4th Edition, stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation toward the trial on the basis of the substantive merits of the case, and therefore stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not be allowed to continue. This power should be exercised sparingly and only in exceptional circumstances.



7. According to the Respondent, the Applicant has not shown that there is an exceptional circumstance to warrant orders of stay of proceedings and that in the circumstance the Applicant's application for stay of proceedings is intended to merely embarrass and delay the determination of Eldoret CMCC No. E157 of 2023 as no substantial loss has been demonstrated by the Applicant. She contended that it is a cardinal principle of the law that "litigation must come to an end". The Respondent further deposed that she stands to suffer prejudice if the application dated 6/11/2024 is allowed as this will further delay the determination of Eldoret CMCC No. E157 of 2023 yet the minors who are the beneficiaries of the deceased are languishing in poverty and cannot even raise school fees for their education having lost their sole provider and the court should reject the same and allow the trial court to proceed and write its judgment.
8. In the end, the Respondent maintained that judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice. She thus implored the Honourable Court to exercise its judicial discretion and dismiss this instant application in the interest of justice.

### **The Submissions**

9. The Application was canvassed vide written submissions. The Applicant filed submissions on 15/11/2024 while the Respondents filed on 21/11/2024.

### **The Applicant's Submissions**

10. Counsel for the Applicant submitted that the Appellant/Applicant had filed the instant appeal challenging the orders made by the Court on 28/8/2024 refusing to reopen the defence case to allow the Appellant's witnesses testify and that application is made in appreciation of the fact that an appeal does not operate as stay of proceedings. Counsel maintained that the Appellant/Applicant is entitled to the orders sought by virtue of the provisions of Order 42 Rule 6(1) of the Civil Procedure Rules 2010 which gives this Court an unfettered discretion to grant an order for stay of proceedings pending the hearing and determination of the appeal.
11. Counsel submitted that the order of stay being sought is necessary so as not to render this appeal in the event that the subordinate court matter, which already has a judgment date for 29/1/2025 is concluded without factoring in the Appellant/ Applicant's evidence and the appeal, which seeks to reopen the defence case, succeeds. Counsel maintained that the decision of this Court as to whether the subordinate court's order refusing to reopen the defence case should stand will directly impact the subordinate court's proceedings and the appeal is therefore likely to be rendered nugatory should the matter proceed to conclusion keeping in mind that the subordinate case is already pending judgment on 29/1/2025.
12. That as things stand the subordinate court has only the Respondent's evidence on record, the Appellant/Applicant's case having been closed in the absence of the Appellant/Applicant's evidence. According to Counsel, it would only be in the interest of justice and in accordance with Article 50 of *the Constitution* for the application for stay of proceedings pending the hearing and determination of the appeal to be allowed given that if the matter were to proceed as it is and judgment is entered, it would be difficult for the Appellant/Applicant to undo the damage or loss that may arise which includes possibly satisfying a decree procured without factoring in its evidence. Additionally, Counsel submitted that granting the orders sought would prevent wastage of precious judicial time to have the matter go back for retrial in the event that this appeal succeeds and the trial court is ordered to consider the Appellant/ Applicant's evidence.



13. Counsel then relied inter alia on the holdings in the following cases;

- i. *Nine Trading Limited v Premier Industries Limited (Civil Appeal E463 of 2022) [2023] KEHC 21501 (KLR) (Civ) (28 July 2023) (Ruling)* where the Court while handling an application for stay of proceedings held that;

Considering the undisputed background to the application and without delving into the merits of the appeal, the court finds that the Applicant's apprehension that it risks being condemned unheard and judgement being rendered against it without its participation in the trial, is not farfetched. The hallowed right of a party to a fair hearing is protected by *the Constitution*. The court is therefore satisfied that the Applicant has an arguable appeal. Moreover, because the suit in the court below is in its final stages upon close of the parties' respective cases, it is evident that unless the proceedings are stayed in the present instance, it is likely that the objects of the appeal may be defeated, thereby rendering the appeal nugatory. Additionally, it would not constitute proper use of judicial time to allow two concurrent active proceedings in respect of the same matter. In any event, the court notes that the Respondent has not demonstrated the likelihood of prejudice that is beyond compensation through an award of costs. Upon considering all the relevant factors and the competing interests of the parties, the court is persuaded to exercise its discretion in favour of the Applicant."

- ii. *Easy Coach Limited versus Patrick Watani Maende and 2 others [2018] eKLR* where the Court held as follows:

"I however, consider that the appeal in this case could be rendered nugatory if the proceedings trial court proceeded to conclusion and determination before the appeal is heard. The appellant may have been compelled to satisfy decree of the trial court without indemnity or contribution by the intended 3'4 parties. Although, the High Court may set aside the proceedings of the trial court, substantial loss may have been occasioned by way of execution of any judgment obtained by the plaintiff against the Appellant as to make it impossible to reset the parties to the original positions and restart the hearing with the 3' Parties enjoined. It is, with respect, not just a question of setting aside the testimonies of the two or three witnesses who have testified as there is nothing to stop the trial court from proceeding to full hearing and determination and judgment in the matter which may then be executed to the detriment of the appellant who seeks to bring in 3'd Parties in accordance with the Civil Procedure Rules. Section IA of the *Civil Procedure Act*, moreover seeks the just, expeditious, proportionate and affordable dissolution of disputes. A retrial occasioned by successful appeal after the trial has closed and judgment rendered would only escalates costs."

- iii. In the matter of *Re Global Tours & Travel Ltd; Nairobi HCWC No. 43 of 2000*, where the Court held that:

"...if the applicant succeeds on its appeal, most unsavoury situation will result where the company shall have wound up and its assets, if any, sold to pay its debts on a petition, which the Court of Appeal would have considered unworthy of hearing on merits. To undo what would have been done in the meantime would be impossible or impossible without further litigation. That is not the kind of damage which can be compensated by an award of costs, and it would not be optimum utilisation of judicial time to proceed with the trial of the petition at the risk of such prospects.



In those premises it would be in the interest of justice to grant an order of stay of proceedings in this case pending appeal."

14. Turning to the replying affidavit sworn by Miriam Chepng'eno on 13/11/2024, Counsel submitted that the paragraph 4 of the Replying affidavit has dwelt on the merits of the appeal which is not within the province of this court to determine in the instant application. As such, Counsel submitted that the court should disregard the depositions made therein.
15. As regards the issue that the Appellant/ Applicant has not demonstrated what substantial loss it will suffer if the order sought is not granted, Counsel submitted that the said argument is a total misconception of the law with the regard to an application for stay of proceedings pending appeal. Counsel urged that the governing rules with regard to an application of this nature is Order 42 Rule 1 of the Civil Procedure Rules, 2010 and not Order 42 Rule 6(2) which deals with conditions to be fulfilled for grant of orders of stay of execution pending appeal. Counsel submitted that the wording of Order 42 Rule 6(1) of the Civil Procedure Rules is very clear and the said provision is only for applications for orders of stay of execution and not stay of proceedings pending appeal. Counsel submitted that this position was made clear in the case of in the matter of re Global Tours and Travels Limited; Nairobi HCWC No.43 of 2000 (Supra).
16. Counsel contended that the Respondents' argument that the application is meant to delay the conclusion of the subordinate Court matter is far from the truth given that when the court made its orders closing the defence on 13/3/2024, the Appellant/Applicant filed an application on 18/3/2024 seeking to set aside the order. Counsel submitted that when the court dismissed the Application on 28/8/2024, the Appellant/Applicant filed this appeal on 13/9/2024 and move the court on 16/9/2024 with an application for stay of proceedings pending appeal and similarly when the subordinate court dismissed the application for stay of proceedings pending appeal the Appellant/Applicant filed the instant application on 6/11/2024. Counsel maintained that it is only upon the delivery of the ruling on 30/10/2024 that the Appellant/Applicant could have an opportunity to file the instant application which is within their right having been aggrieved with the subordinate court's decisions. Counsel urged that from the above it is evident that the Appellant/Applicant has in all instances moved with speed to ensure that there is no delay occasioned even as it pursues the available remedies provided in law to safeguard is right to be heard and to access justice.
17. In the end, Counsel submitted that Respondents have further argued that they will be prejudiced if the order of stay of proceedings is granted as they are languishing in poverty. Counsel however contended that as things stand no judgment has so far been rendered in favour of the Respondent and there is no telling whether the judgment will be entered in favour of the Respondents and as such the Respondents' financial situation cannot be used as a reason to deny the Appellant/applicant the order sought. Counsel maintained that Appellant/Applicant has a right under *the Constitution* to ventilate its appeal and given that the outcome of the appeal has a direct impact on the subordinate court proceedings especially on whether the Appellant should be given an opportunity to present its defence case. Counsel urged that granting the order of stay of proceedings at this stage would serve the greater ends of justice and pray that the application be allowed.

### **The Respondents' Submissions**

18. On whether there is an arguable appeal that raises triable issues, Counsel for the Respondents contended that the Applicant has not demonstrated at all the failure to appear on 13/03/2024 when the Honourable Court issued its orders closing the defence case, which is the basis of the appeal. Based on the above and the contemptuous conduct of the Applicant failing to appear on 13/03/2024 despite being granted a last adjournment on 7/02/2024 and the defence hearing date of on 13/03/2024 having



been taken by consent. Counsel submitted that the Applicant's appeal does not raise triable issues to impugn the rulings of the trial court.

19. On whether orders stay of proceedings will occasion prejudice against the Respondent, Counsel submitted that the proviso in Article 159(2)(a)(b) and (d) of *the Constitution* of Kenya, 2010 as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 which enjoins this Honourable court to foster and to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties. It is our humble submission that a further delay of the conclusion of Eldoret CMCC No. E157 of 2023 is greatly prejudicial to the beneficiaries of the estate of the deceased especially his children who are all school going minors in need of financial support having lost their provider. Counsel urged that in the circumstances, the instant Application was brought in bad faith with a view to further delay the matter at the expense of the needy and vulnerable beneficiaries of the deceased, who was the sole breadwinner of his young family, immediately prior to his demise.
20. Counsel relied on the decision in the case of Kenya Wildlife Service-vs-James Mutembei [2019] eKLR where the Court held that:

“...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...”

21. Counsel also cited the case of Re Global Tours & Travel Ltd HCWC No.43 of 2000 (supra) and also the Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, with regard to the issue of stay of proceedings.
22. With regard to the issue of costs, Counsel submitted that it is trite law that costs follow the cause. Counsel then cited the case of Joseph Oduor Anode vs. Kenya Red Cross Society, Nairobi High Court Civil Suit No.66 OF 2009; [2012] eKLR where Odunga J expressed himself thus:

“In matters of costs, the general rule as adumbrated in the aforesaid statute the *Civil Procedure Act* is that costs follow the event unless the court is satisfied otherwise. That satisfaction must, however, be patent on record. In other words, where the Court decides not to follow the general principle, the Court is enjoined to give reasons for not doing so....”

### **Determination**

23. I have considered the Application, the Replying affidavit and the written Submissions filed by both parties as well as the authorities cited. The sole issue for determination is

### **Whether this Court ought to grant the Applicant herein stay of proceedings pending the hearing and determination of the appeal.**

24. Order 42 Rule 1 that Counsel for the Applicant has submitted is the applicable provision in applications of this nature is titled Form of appeal and it provides as follows;
  1. Every appeal to the High Court shall be in the form of a memorandum of appeal signed in the same manner as a pleading. (2) The memorandum of appeal shall set forth concisely and under distinct heads the grounds of objection to the decree or order appealed against, without any argument or narrative, and such grounds shall be numbered consecutively



25. Order 42 rule 6(1) of the Civil Procedure Rules which Counsel in her submissions is emphatic is not the relevant applicable provision on the other hand provides that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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.

26. Because the applicant is seeking not only for the stay proceedings in which there is a decision of the Court dismissing the applicant’s Application to open the proceedings and allow the applicant to present her defense, it follows then that the applicant then is seeking for stay of proceedings as well as a stay of the court’s determination. Clearly therefore, the provisions of Order 42 Rule 1 are irrelevant in the circumstances and the relevant provision of the Rules is Order 42 Rule 6(1) and the court shall proceed under this provision.

27. When determining an Application seeking stay of proceedings, the Court is required to exercise its discretion after due consideration of the merits of the case and the likely effect that such an order may have on the need to ensure that the ends of justice are met. The exercise of the court’s discretion must be grounded on judicious principles as the Hon. Justice Ringera held in the case of Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000 (Supra) as hereunder:

“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 so, 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.”

28. Similarly, I also fully associate myself with the guidelines to be met in Applications for stay of proceedings set out in the Halsbury’s Law of England, 4<sup>th</sup> Edition, Vol. 37 page 330 and 332 which I have herein below reproduced as follows:

“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 proceedings 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 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.”

29. Further, in the case of *Kenya Wildlife Services v Jane Mutembi* (2019) eKLR, again, Hon. Justice F. Gikonyo 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 proceedings is high and stringent.”

30. In the instant case, because it is common ground that the applicant did not put forth her defense in the lower court, what the court ought to consider are the circumstances under which this happened and whether the applicant was prejudiced by the decision of the court in light of these circumstances to lead to the conclusion that her rights under Article 50 of *the Constitution* were infringed and as a result, if the proceedings are not stayed and the lower court goes ahead to deliver its judgement then the appellant will be prejudiced as submitted.
31. In considering the issues raised, I note that in their Replying Affidavit and subsequent submissions, the respondent deposed that the applicant was accorded four occasions by the lower court to proceed with its defense but the applicant failed to proceed on the given dates but chose to adjourn and/or failed to appear despite the relevant hearing dates being taken by consent. That subsequently, the court closed the applicant’s case and set a date for judgement.
32. These averments were not at all rebutted, challenged and or controverted by the applicant by way of a Further Affidavit. I also note that Counsel for the applicant steered cleared of this issue in her submissions and also did not rebut the same as submitted upon by counsel for the respondent. Without going into all the other issues raised, in my considered opinion, being satisfied that contrary to the applicant’s assertion that she was unfairly and unjustly denied the opportunity to put across her case by the lower court, I am of the finding that she was accorded every opportunity to do so and she spurned those opportunities at every turn and can therefore now not claim that the act of the Hon Magistrate in closing the case without her ventilating her defense will cause her prejudice in light of the fact that she is the author of her own misfortune. In this regard, I further find that the applicant does not merit the exercise of the court’s discretion in her favor for reasons that the applicant has come to court with unclean hands.
33. On this ground therefore, coupled with the fact that the trial court being a court of first instance, her right of appeal is still fully reserved, I fully associate myself with the holding Justice Ringera in the above cited case that 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.....On the same vein, I also associate myself fully with the finding of Gikonyo J that stay of proceedings impinges on the right of access to justice, right to be heard without delay and overall right to fair trial. Therefore, the test for stay of proceedings is high and stringent.”



34. Finally, by dint of the fact that in proceedings before the court, Section 1A of the *Civil Procedure Act* sets out the overriding objectives which the court is enjoined to abide by which are as I have hereunder reproduced is as follows;
1. The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, [Emphasis mine] proportionate and affordable resolution of the civil disputes governed by the Act.
  2. The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
  3. A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court [Emphasis mine]
35. Being satisfied also that the guidelines as set out in in the excerpt from the Halsbury's Laws of England herein above laid out are in tandem with the authorities that I have herein cited and which I have found to be persuasive and therefore relevant, I am of the finding that the applicant's application lacks merit and the same is accordingly dismissed in its entirety. The interim orders herein issued are now hereby set aside and the applicant is to bear the costs of the application.

**READ DATED AND SIGNED AT ELDORET ON 8<sup>TH</sup> APRIL 2025**

**E. OMINDE**

**JUDGE**

