



Mahadi Energy Limited & another v Premier Bank Kenya Limited (Previously Trading as First Community Bank Limited & 3 others; Kenya Law Reform Commission & another (Interested Parties) (Constitutional Petition E066 of 2024) [2025] KEHC 6182 (KLR) (9 May 2025) (Ruling)

Neutral citation: [2025] KEHC 6182 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CONSTITUTIONAL PETITION E066 OF 2024**

G MUTAI, J

MAY 9, 2025

BETWEEN

MAHADI ENERGY LIMITED 1ST PETITIONER

IBRAHIM HUSSEIN MAHADI 2ND PETITIONER

AND

**PREMIER BANK KENYA LIMITED (PREVIOUSLY TRADING AS FIRST
COMMUNITY BANK LIMITED 1ST RESPONDENT**

ATTORNEY GENERAL 2ND RESPONDENT

KENYA BANKERS ASSOCIATION 3RD RESPONDENT

CENTRAL BANK OF KENYA 4TH RESPONDENT

AND

KENYA LAW REFORM COMMISSION INTERESTED PARTY

SHA BEEL PROJECT SERVICES LIMITED INTERESTED PARTY

RULING

1. Before this court is a notice of motion dated 23rd April 2025 seeking the following orders;
 - a. Spent;
 - b. That the Honourable Court be pleased to arrest the ruling slated for delivery on 24th April 2025;
 - c. That there be a stay of proceedings in this matter pending the hearing and determination of the application;



- d. That there be a stay of proceedings in this matter pending the hearing and determination of the appeal against part of the ruling delivered on 26th March 2025;
 - e. That the costs of the application be borne by the 1st Respondent.
2. The application is premised on the grounds stated in the body of the Motion as well as on the supporting affidavit of Mr Ibrahim Hussein Mahadi sworn on 23rd April 2025. Mr Mahadi deposed that this honourable court reviewed its decision of 6th February 2025 vide a ruling delivered on 26th March 2025. In the latter ruling the Court stated that it would revisit the two grounds in the preliminary objection dated 2nd December 2024 that it did not deal with in its decision.
 3. He stated that the revisiting of the preliminary objection is an unknown mechanism in law, as the court would not be correcting any error that could fall under the slip rule, and that by doing so, the court would effectively be sitting on appeal on its own decision.
 4. He averred that the Petition stands the risk of being struck out or otherwise invalidated without the court having had full opportunity to hear parties on the issues raised.
 5. Mr Mahadi further averred that if the stay sought were not granted, the Petitioners would suffer irreparable harm, through, inter alia, the loss of properties that are currently being preserved by a conservatory order made on 25th October 2024 and inhibitory orders made on 8th November 2024. He therefore urged the court to allow the application as prayed.
 6. In response the 1st Respondent filed Grounds of Opposition dated 24th April 2025 seeking to have the said application dismissed with costs, on the grounds that the said application was frivolous, vexatious, an abuse of court process; that the Petitioners/Applicants' application did not meet the mandatory conditions for granting of orders of stay of proceedings as provided for in Order 41 rule 6 (2) of the Civil Procedure Rules; that the Petitioners /Applicant are guilty of undue delay in filing the instant Motion, in so far as it was filed almost 1 month after delivery of ruling dated 26th March 2024, and specifically on the eve of the court's scheduled date for delivery of a full ruling on the 1st Respondent's preliminary objection. The deliberate filing of the Motion late was a clear indication that the Petitioners were only keen in delaying or disrupting the court's processes; that the petitioners have further not provided any security as provided by order 42 rule 6 (2) of the Civil Procedure Rules and further had not proved that they stand to suffer substantial loss or damage, as the suit properties are owned by/ registered to other parties.
 7. It was further stated that the application was unmerited and dead on arrival; that the instant application is premature as it is made on the presumption that this honourable court will ultimately uphold the 1st Respondent's preliminary objection; that the instant application was grounded on the misconception that this court did not have the power to order the re-hearing of the 1st Respondent's Preliminary Objection dated 2nd December 2024, when the correct position is that Order 45 rule 5 of the Civil Procedure Rules grants powers to this court to re-hear a suit /application that had been subjected to an application for review, and in respect of which review had been upheld.
 8. The application was canvassed by way of written submissions.
 9. The Petitioners, through their advocates, Gachiri Kariuki & Company Advocates, filed their written submissions dated 25th April 2025. Counsel for the Petitioners submitted that the criteria for granting an order for stay of proceedings were set in the case of Turbo Highway Eldoret Ltd v Muniu [2022] KEHC 10197 (KLR). The Petitioners in this case met all the conditions. It was urged that, being



aggrieved by the ruling of the court delivered on 26th March 2025, they had filed a Notice of Appeal dated 8th April 2024.

10. Counsel submitted that the Petitioners' appeal raises substantial questions and arguable points, and that the appeal would be rendered nugatory if the application is not allowed. He urged that the Petitioners would suffer substantial loss if the suit properties were not preserved, as they would be transferred to third parties. That would render their appeal an academic exercise.
11. Counsel submitted that the application was filed without delay, as it was made 14 days after lodging the appeal. Counsel thus urged that the court allow the application as prayed.
12. The 1st Respondent, through its advocates, Messrs. Igeria & Ngugi Advocates, filed written submissions dated 25th April 2025. Counsel submitted on two issues, namely, whether this court can rehear a matter after allowing an application for review, and whether the petitioners have met the conditions for the grant of a stay of proceedings.
13. On the first issue, counsel relied on Order 45, Rule 5 of the Civil Procedure Rules and submitted that when an application for review is granted, the court may rehear the case or make such other order regarding the rehearing as it thinks fit. It was urged that the Petitioners had not raised significant or crucial grounds to challenge this court's powers under the said order and therefore do not have arguable grounds of appeal or sufficient reasons to be granted an order for stay of proceedings.
14. On the second issue, counsel submitted that the Petitioners have not established the necessary conditions for the grant of a stay of proceedings, as there is no appeal pending before the court of appeal, only a Notice of Appeal, which represents an intention to appeal. The grounds of appeal do not raise substantial questions for determination, nor are they arguable. The Petitioners have not demonstrated that the appeal would be rendered nugatory and that they would suffer irreparable loss if the orders sought are not granted. Counsel further submitted that the suit properties had commercial and quantifiable value, having been willingly charged to the 1st Respondent by the Petitioners.
15. Counsel for the 1st Respondent submitted that the application herein was filed with undue delay as it was filed on the eve of the scheduled delivery of the ruling and one month after the delivery of the court's ruling to rehear the 1st Respondent's Notice of Preliminary Objection on merit.
16. In conclusion, counsel submitted that a stay of proceedings is a grave judicial action which will interfere with the 1st Respondent's right of access to justice and urged the court to dismiss the application herein with costs.
17. The 2nd Interested Party, through its advocates Omusolo Mungai & Company Advocates, filed its written submissions dated 25th April 2025. Counsel submitted on two issues for determination, namely, whether this honourable court has the power to revisit and determine the pending grounds in the preliminary objection dated 2nd December 2024; and if the Petitioner/Applicant had satisfied the conditions warranting an order for stay of proceedings.
18. On the first issue, counsel relied on Order 45, Rule 5 of the Civil Procedure Rules and submitted that the power to revisit and determine issues not previously addressed is grounded in law. That all the parties were heard orally on all grounds raised in the preliminary objection, and that the petitioners had also filed submissions on the same, and therefore, this court is within its jurisdiction and constitutional mandate to pronounce itself on all issues raised and argued.
19. On the second issue, counsel submitted that the Petitioners/Applicants do not have an arguable appeal as the provisions of Order 45 Rule 5 remain valid. The delay in filing the application was inordinate,



as the Petitioners had tendered sufficient reason. Further, no sufficient cause has been demonstrated to warrant the orders sought.

20. Counsel submitted that the application herein is premature as the court had yet to render its determination on the entirety of the objection. Counsel urged the court to dismiss the application with costs.
21. I have considered the application, as well as the responses thereto, and the submissions of the parties. Has a case for the grant of the orders of stay of execution been made? What orders should be issued in this matter?
22. The conditions under which Courts may grant a stay of proceedings have been discussed in a plethora of decisions of the Kenyan courts of record. In *Kenya Wildlife Service v James Mutembei* [2019] KEHC 10478 (KLR) the Court stated as follows: -

“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. See Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000* persuasively stated thus;

“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 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.”

23. The court in the case of *Turbo Highway Eldoret Ltd v Muniu* [2022] KEHC 10197 (KLR) eloquently stated as follows:-

“In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- 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.

19. All these factors must be considered, in a given case, in the spirit concisely expressed in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330: 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 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 this case.

21. In short, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera J. in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000)*: 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 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 (emphasis added)

22. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy.
24. I am not persuaded that there is a case for a stay of proceedings in this matter. The said remedy should be granted sparingly and only in the clearest of cases. This is not one such case.
25. In any case, based on the provision of Order 45 Rule 5, it does not seem to me as though there is a strong appeal on the merits that would justify the issuance of the extraordinary order of stay of proceedings.
26. In my view, the application is founded on apprehension or speculation, without foundation. At this point, none of the parties can tell with certainty how the court will rule in this regard regarding the preliminary objection.
27. I must state at this point that I do not see what injury the Petitioners/Applicants will suffer if the matter proceeds. If it is unsuccessful, it can still appeal against the said decision in a single appeal or can have the appeals consolidated. That would be beneficial to the court and all the parties.
28. It is therefore my view that the Application dated April 23, 2025 lacks merit. The same is hereby dismissed with no order for costs.
29. Orders accordingly.

DATED AND SIGNED IN MOMBASA THIS 9TH DAY OF MAY 2025. DELIVERED VIRTUALLY THROUGH MICROSOFT TEAMS.

GREGORY MUTAI

JUDGE

In the presence of:-

Messrs Mwanzia and Origi, for the Petitioners/Applicants;

Mr Njoroge for the 1st Respondent;

Ms Kiiru, for the 2nd Interested Party; and

Arthur - Court Assistant.

