



**Gatumo alias Nichilas Mugo Gatumo v Muthee (Civil Appeal
E515 of 2024) [2025] KEHC 9598 (KLR) (Civ) (3 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 9598 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E515 OF 2024

JN MULWA, J

JULY 3, 2025

BETWEEN

**NICHOLAS MUGO GATUMO ALIAS NICHILAS MUGO
GATUMO APPELLANT**

AND

ANNE MUKAMI MUTHEE RESPONDENT

RULING

1. The Appellant herein by an Application dated 18/04/2024 sought an order of stay of proceedings in the trial court, CMCC No. 3734/2017 made on 18/03/2024 wherein the trial magistrate expunged the Appellant's (then defendant) list of documents and witness statement dated 1/03/2024.
2. The Appellant relies on provisions of Order 46 Rule 6 of the *Civil Procedure Rules* (CPR) Section 1A, 1B and 3A of the *Civil Procedure Act*, (CPA) and on his Supporting Affidavit sworn on an even date.
3. It is the Appellant's case that the expunged documents in the cause of the hearing of the suit had been filed and were on record and had been used in a previous application dated 3/01/2023 upon which the Respondent had filed a Replying Affidavit attacking the said documents and therefore that the Respondents had not been ambushed with the said documents during the hearing of the suit.
4. By expunging the documents and witness statements, the Appellant states that he was prejudiced by his evidence being thrown out hence the appeal, and seeks orders as prayed citing constitutional imperative that justice should be administered without undue procedural technicalities.
5. In response to the application, the Respondent filed a Replying Affidavit sworn by his Advocate Luchemo Brenda Akhonya on 23/05/2024 stating that orders sought if granted would be prejudicial to its case as four witnesses have already testified with only one pending in the liquidated claim.



6. Additionally the Respondent pleads that the Applicant filed the impugned documents on the eve of further hearing of the suit without leave of court to which he objected, terming it as trial by ambush and which objection the trial court upheld and the suit proceeded thereafter with only one witness remaining to testify.
7. For the foregoing the Respondent has urged the court to dismiss the application and allow the 7 years old suit to proceed to conclusion.
8. In his further affidavit, the Appellant denied being responsible in the delay in conclusion of the case citing his numerous applications and that it was only days before the last hearing that he realized that by an oversight, his list of documents had not been filed but had only been attached as exhibits in one of his application dated 3/01/2023.
9. The court has considered the parties submissions. The Appellant submits that if stay is not granted, his intended appeal shall be rendered nugatory as his opportunity to use the expunged documents will have been lost which, citing the case of *Niazsons (K) v China Road & Bridge Corporation Kenya* [2001]eKLR will create very serious effects on the entire case that will render the appeal nugatory.
10. On the Respondent's part, it is submitted that the applicant was never denied a chance to prosecute his case citing numerous applications he had since 2021 causing delays and so should not approach the court on account of delay.

Further the Respondent submits that the expunged documents were filed without leave of court at the eve of further hearing when at least three out of the four witnesses had testified which if granted would have denied prejudice to the respondent, in view of the long litigation period carried by the applicant.

Analysis and Determination.

11. Striking out pleadings and documents is provided under Order 2 Rule 15 *Civil Procedure Rule* which provides that:-
 1. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that:-
 - a. It discloses no reasonable cause of action or defence in law; or
 - b. It is scandalous frivolous vexation; or
 - c. It may prejudice, embarrass or delay the fair trial of the action; or
 - d. It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly as the case may be.
12. Additionally, Order 7 Rule 17 (2) *CPR* provides:-
 - (2) No pleadings subsequent to the reply shall be pleaded without leave of the court and then shall be pleaded only upon such terms as the court thinks fit.
13. Order 7 Rule 5 *CPR* provides for documents that must accompany a defence or counterclaim, being
 - a. An affidavit under Order 4 rule 1(2) where there is a counter claim;
 - b. A list of witnesses to be called at the trial;



- c. Written statements signed by the witnesses except witnesses and
- d. Copies of documents to be relied on at the trial;

Provided that statements under Sub-Rule (c) may with leave of court be furnished at least fifteen days prior to the trial conference under Order II.

- 14. Then, at Order 7(2) Rule 17 cited above; no pleading subsequent to the reply shall be pleaded without leave of court and then shall be pleaded only upon such terms as the court thinks fit.
- 15. The Appellant in his further affidavit admits that indeed the impugned document were not filed at all not just within the statutory periods but also that the suit proceeded for hearing, with the plaintiffs suit almost completed with only one witness remaining when, without leave of court and at the eve of further hearing, he divided to file the same. The court notes the old age of the case having been filed in 2017 and having been adjourned numerous times apparently by the appellants numerous applications.
- 16. It cannot be true that during the eight years of its existence, the Appellant who was duly represented by counsel did not know or realize that the said documents had not been filed. Further and more importantly, the said documents were filed without leave of court on the eve of further hearing of the suit.

Clearly, the appellant cannot approach the court faulting the trial court for its refusal to admit the said documents when the Respondents case was almost fully heard and concluded.

- 17. As observed in the case of *Muchanga Investment Ltd. v Safari Ltd & 2 others*, the court of appeal held that judicial time is the only resource the courts have at their disposal and its management does properly or adverse if affect the entire system of administration of justice.
- 18. While the Appellant cries that if stay orders are not granted he would suffer prejudice by his appeal being rendered nugatory, it appears that the Respondents interest in the case have completely been ignored. An eight years old case is sought to be stayed for obvious neglect and lack of interest in the finalization of the case by the applicant as the material facts reveal.
- 19. Justice cuts both ways, and he who comes to court seeking equity must also do equity as the maxim of equity states.

The court is required to deny equitable relief to a party who violates good faith with respect to the subject of the claim. Between the two parties, the court finds that the Respondent would be more prejudiced if the orders sought are granted.

- 20. *Halsbury's Law of England*, 4th Edition, Vol 37 Page 330 – 332 it is stated:-

“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”

- 21. Therefore, stay of proceedings is a radical remedy, which is only to be granted in very exceptional circumstances as held in *Global tours & Travel Limited* in Nairobi HC Wind up case no. 43 of 2000 and amplified in *William Odhiambo Ramogi & 3 Others v AG & 6 Others* [2020] eKLR.
- 22. The court is not convinced that the Appellant has demonstrated any substantial loss it may incur if the orders are denied. It is not enough to only cite Order 42 Rule 6 *Civil Procedure Rules*. Further,



no exceptional circumstances have been demonstrated to warrant grant of the relief sought by the Appellant.

23. On whether the appeal shall be rendered nugatory if stay of proceedings is denied, the court thinks not. An appeal against an interlocutory application would not usually be rendered nugatory since an aggrieved party retains the right to pursue the appeal on the points after conclusion of the case with other grounds as held in *William Odhiambo Ramogi (supra)* and I *Ibrahim Haggai Owino v Silicon Consulting Limited & Acorn Ventures ltd* [2023] eKLR
24. The court finds no merit in the application dated 18/04/2024. It is dismissed with costs.
Let the trial court case proceed from where it reached to conclusion.
Orders accordingly.

DELIVERED DATED AND SIGNED AT NAIROBI THIS 3RD DAY OF JULY, 2025

JANET MULWA.

JUDGE

