



Smep Deposit Taking Microfinance Ltd v VekarVekariya & another (Suing as the legal representatives of the Estate of Prasad Gopal Vejaria (Deceased) & 2 others (Civil Appeal E754 of 2021) [2024] KEHC 1309 (KLR) (Civ) (15 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1309 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL
CIVIL APPEAL E754 OF 2021
JN MULWA, J
FEBRUARY 15, 2024

BETWEEN

SMEP DEPOSIT TAKING MICROFINANCE LTD APPELLANT

AND

DOPAL KARSAN VEKARIYA & JASUBEN GOPAL VEKARIYA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF PRASAD GOPAL VEJARIA (DECEASED) 1ST RESPONDENT

FRANCIS MUKURIA KINYANJI 2ND RESPONDENT

ELIJAH MUKURIA MBUGUA 3RD RESPONDENT

RULING

1. By an Application dated 11/04/2023, the Applicant/Appellant sought orders to stay proceedings in Milimani CMCC No. 880/2018 Gopal Karsan Vekariya & Another vs. Francis Mukuna Kinyanjui & Others pending hearing and determination of the Application and final determination of the Appeal against the ruling delivered on 5/11/2021 the subject of the Appeal.
2. The grounds for the application are stated at the Supporting Affidavit sworn on even date by Ruth Njunguna, Legal Officer of the Appellant/Applicant.
3. I have considered the Memorandum of Appeal dated 24/11/2021. The Applicant faults the trial Magistrate for not appreciating that the Appellant in the trial court was merely a financier to the 2nd Respondent for a loan which was secured using the motor vehicle registration no. KCG 784 that is the subject of the suit before the trial court and for which the Applicant has no proprietary interest.



4. On the other hand the Respondent filed a Replying Affidavit sworn on 11/05/2023 by one Gopal Karsan Vekariya the Appellant stating that a similar Application as is before this court had been filed before the trial court and dismissed on 27/05/2022, and urged for dismissal of the Application as it is an afterthought and an attempt to delay the hearing of the case.
5. The Respondent further deposes that it has obtained Interlocutory Judgment against the other Defendants in the suit except for the Applicant, and submits that this court ought not allow the stay of proceedings sought as no prejudice would be caused to itself if the suit is continued to conclusion. I have considered the parties submissions.
6. Stay of proceedings is not to be allowed for flimsy reasons, and ought to be allowed sparingly.

In the case of peter Kariuki Mburu & Another v. Neema Shah [2021] eKLR, the court citing Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera J. (as he then was) stated as follows: -

“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 the interest of justice to order a stay of proceedings and if it is, on what terms it should be granted....”
7. The court added that the pros and cons of granting such stay should be considered including the need for expeditious disposal of the matter, prima facie merits of the intended appeal whether it has chances of success or whether it is arguable, as well as scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.
8. The Respondent therefore submits that the orders sought are not for the interest of justice and should be dismissed citing the case of Port Florence Community Health Care v. Crown Health Care Limited [2022] eKLR where the court held that stay of proceedings is an equitable remedy demanding a party to come to court with clean hands.
9. The Applicant in its submissions dated 30/01/2024 states that should the proceedings in the trial court proceed before the Appeal is heard and determined it would be rendered nugatory and an academic exercise and prejudicial to the Applicant.

In support the Applicant cited several decisions and Order 42 Rule 6(1) and (2) Civil Procedure Rules for the proposition that stay of proceedings pending hearing of an appeal is a right to a party that seeks to be heard on appeal.
10. In the case Boniface Muisyo Nguli v Kamitu Alex & 2 others [2017] eKLR it was held that “... The general rule of thumb is that a party is entitled to move to a higher court and seek orders to stay proceedings of a lower court”. See also Global Tours & Travels Ltd (supra).
11. Further in the case Niazons (K)ltd v China Road & Bridge Corporation (Kenya) [2001]eKLR the court held that “... Where the Appeal may have very serious effects on the entire case so that it stay of proceedings is not granted the result of the Appeal may well render the orders nugatory and render the exercise futile...”
12. I have considered the grounds raised in the Memorandum of Appeal and the pleadings in the trial court suit. There is no doubt that the Applicant is and was a financial institution and financier in favour of the 2nd Respondent/purchaser of the subject motor vehicle which was held as security for the loan advanced to the 2nd Respondent.



13. In the circumstances, the Applicant has no proprietor interest in the vehicle nor did it have physical possession or control of the vehicle; such that any liability that may attach to the party having control and possession would not be the financier/Applicant, unless otherwise proved.

To that end, I am persuaded that the Appeal raises arguable and triable issues.

In the case *Niazsons (K) Ltd (supra)*, the court rendered itself of the effects of failure to stay proceedings that may include the Appeal be rendered nugatory and an academic exercise.

14. I agree with the Applicant that progression of the trial court case would prejudice the Applicant whose role in the whole case is but a financier and would therefore suffer prejudice and loss.

There could have been delay by the applicant to move to court. But delay that is sufficiently explained however long is excusable taking into account the circumstances of each case.

15. Additionally, it is trite that a party ought to be granted an opportunity to ventilate his case to the highest level but if doing so would be obstructed by a denial of orders to stay proceedings in deserving cases, then such orders would not be serving the interest of substantive justice to all the parties in the case.

16. The respondent has already obtained Interlocutory Judgment against the other Defendants in the lower court. This Applicant who was joined in the proceedings sought to be removed therefrom for being not a necessary party to the suit for reasons stated above. The trial court found no merit in the Application and retained it in the proceedings which Ruling is the subject of the Appeal.

17. Lest I am accused of determining the Appeal in this Interlocutory Application, I find the said appeal to have high chances of success and concur with the holding in *Peter Kariuki Mburu (supra)* that among the principles to be considered in an applicant as the one before me is the *Prima facie* merits of the pending Appeal.

18. I am therefore persuaded that the relief sought by the Applicant being an equitable remedy, and demanding that the Applicant comes to court with clean hands the Applicant has met that criteria – as ably stated in *Port Florence Community Health Care case (supra)*.

19. For the foretasted, I find and hold that the Applicant has met the threshold for grant of an order for stay of proceedings in the trial court case as prayed for in the application dated 11/04/2023 at prayer no. 3.

It is allowed, with cost in the cause.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024.

J. N. MULWA

JUDGE

