



**Sakafu Limited v Flowcrete East Africa Limited (Civil Case 002 of 2019)
[2024] KEHC 1151 (KLR) (Commercial and Tax) (12 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1151 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 002 OF 2019
JWW MONG'ARE, J
FEBRUARY 12, 2024**

BETWEEN

SAKAFU LIMITED PLAINTIFF

AND

FLOWCRETE EAST AFRICA LIMITED DEFENDANT

RULING

1. On 13th July 2023, this Court having heard an application by the Plaintiff seeking to leave to amend its plaint and review the orders of this court issued on 28th November 2019, allowed the application by the Plaintiff as prayed. Being dissatisfied by the orders of this court the Defendant, on 25th July 2023, filed a Notice of Appeal under rule 75 of the *Court of Appeal Rules*.
2. Subsequently thereafter, the Defendant filed the present application on 26th November 2023 seeking the following orders:-
 1. Spent
 2. Spent
 3. There be a stay of proceedings herein and the suit generally, pending the hearing and determination of the Applicant's intended Appeal of the Court's Ruling and orders of 13th July 2023
 4. Costs of this Application be provided for.
3. The Application was supported by the grounds set on its face and the supporting affidavit of Rob Weyers notarised on 26th July 2023. The Plaintiff filed the following grounds of opposition to the Application:-



1. That the Application is misconceived and bad in law.
 2. That the prayers sought cannot be granted as sought by the Applicant for reasons that:-
 - a. The Applicant has not established any substantial loss it might suffer if the said orders are not granted.
 - b. The Applicant has not undertaken to provide security for costs for the due performance as may be binding upon it.
 3. That the prayers as sought if granted will stop the hearing of the suit which is a grave judicial action, seriously interfering with the right of a litigant to conduct its litigation.
 4. That the prayers sought, if granted, will impugn on right of access to justice, right to be heard without delay and overall, right to a fair trial.
 5. Contrary to assertions by the Defendant that the court sat on its own appeal, a litigant as is provided for under the Civil Procedure Rules and Civil Procedure Act, has a right to seek a review of a court order.
4. The application, upon directions by the court, was canvassed by way of written submissions. The Defendant, being the Applicant herein filed their written submissions and its list and bundle of authorities on 4th September 2023 while the Plaintiff/Respondent filed their submissions on 5th September 2023. Parties thereafter appeared before the court for highlighting of the same on 2nd October 2023.

Analysis and Determination

5. I have carefully considered the Application by the Defendant and the supporting affidavit sworn by Robe Weyers (not Jonathan Starmer as indicated on the body of the application) and the Applicant's written submissions. Similarly, I have carefully considered the grounds of opposition filed by the Plaintiff/Respondent and the rival submissions thereto. To my mind, this Court is called upon to determine only one issue, to wit; "Whether the Applicant has met the threshold for grant of orders of stay of proceedings pending appeal".
6. The Applicant in its application argues that it is deserving of the orders sought in this application and has in its submissions and supporting affidavit sworn by Rob Weyers accused this Honourable Court of sitting on appeal of its own orders in allowing the application by the Defendant for security for costs, pending the hearing of the Defendant's counterclaim in the present suit. The Defendant argues, quite correctly, that it moved the court without inordinate delay having filed its application on 26th July 2023, which was 13 days after the impugned ruling was delivered. The Applicant further argues that having filed a Notice of Appeal before this Honourable Court, it has discharged its obligation under the law and should therefore be granted the prayers sought.
7. In urging the court to grant the reliefs sought, the Defendant cited several decided cases and urged the court to be guided by them. The Defendant further argued that this court has the requisite jurisdiction to grant the orders sought by virtue of order 42 rule 6 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, which grants it powers to stay the proceedings pending the hearing and determination of the Defendant's intended Appeal. To buttress this point, the Defendant urged the Court to be guided by decision of the retired Justice Ringera in Nairobi HC Winding Cause No.43 of 2000-Global Tours & Travels Limited as cited with approval by the Court of Appeal decision in Civil



Appeal No. E049 of 2021; *Millicent Wamaitba Njogu vs. Pauline Nyambura Waweru*(2022)eKLR which set the criteria for grant of stay orders as follows;

- a. “Whether the Applicant has established that he/she has a prima facie arguable case;
 - b. Whether the application was filed expeditiously; and
 - c. Whether the Applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.”
8. The Defendant argues that it has met the above test set out by the honourable Judge and that this court should grant the reliefs sought in the present application.
9. In opposing the Application, the Plaintiff filed grounds of opposition enumerated above. The Plaintiff argues that under order 42 rule 6 of the *Civil Procedure Rules*, upon which the present application is premised, the guiding principle is that a stay of proceedings cannot be granted unless the Applicant satisfies the twin principles of (a) application has been made without inordinate delay and (b) the applicant is likely to suffer a substantial loss if the order of stay is not granted. The Plaintiff urged the court to find that the Defendant has not satisfied the second principle of “substantial loss to be suffered”. The Plaintiff urged the court to find that these orders being sought herein are to be granted at the court’s discretion, which discretion should be exercised judiciously. In doing so, the plaintiff urged the Court to be guided by the Court of Appeal decision in Civil Appeal Case No. E049 of 2021-*Millicent Wamaitba Njogu v Pauline Nyambura Waweru* (2022)eKLR also cited by the Defendant, where the court stated that granting of stay orders are discretionary in nature and the Applicant must establish the twin principles before the court can exercise such discretion and in this case, the bar is higher, noting that the Defendant seeks to stay proceedings, because of the prejudice it causes to a litigant wanting to prosecute its suits to finality.
10. I have considered carefully the rival arguments put forward by the parties. I note that the present application has been brought under order 42 rule 6 of the Civil Procedure Rules which provides as follows;

“Order 42 Rule 6;

Stay in case of appeal [Order 42, rule 6]

1. No appeal or second appeal shall operate as a stay of execution or proceedings 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.
2. No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.”

11. The above provision of the [Civil Procedure Rules](#) enjoins the court to use its discretion judiciously and stay proceedings pending the hearing and determination of an Appeal filed by a party before it. In the present case, the Court notes that the Defendant has filed on 25th July 2023 a Notice to Appeal seeking to overturn its decision of 13th July 2023. The Court notes that under 42 rule 1 of the [Civil Procedure Rules](#), the law provides as follows

“Form of appeal [Order 42, rule 1]

- (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.”

12. I note from a perusal of the record the Defendant is yet to file a Memorandum of Appeal as envisioned for under order 42 rule 1. I am persuaded that what the Defendant has filed and placed before this court is a Notice of Appeal. Whereas a Notice of Appeal is sufficient for purposes of filing an application for Stay as filed hereunder, in my view, it is incumbent upon a party wishing to halt the proceedings to move with the requisite speed and put in the Appeal as provided under order 42 rule 1 cited above. It is my considered view that a Notice of Appeal simply notifies the court of a party’s intention to file an Appeal and does not replace the Memorandum of Appeal, upon which the Court is invited to consider if an applicant has a prima facie arguable appeal. order 42 rule 1 is clear that an Appeal before the court should include a detailed memorandum of appeal which sets out concisely under “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.” The Memorandum of Appeal is therefore distinct and separate from the Notice of Appeal which gives the trial court advance notice that an aggrieved party is moving to a higher court to challenge its decision.

13. In the case before me, I note that no memorandum of appeal as envisioned by order 42 rule 1 of the [Civil Procedure Rules](#) has been placed before me for consideration. This therefore means that there is



no Appeal to warrant an order of Stay of proceedings as sought in the current Application. Further, the Civil Procedure requires that a party seeking to stay of proceedings reliefs to demonstrate that they stand to suffer substantial loss if the orders sought are not granted. The Applicant has placed no material before this court to demonstrate what loss it stands suffer if these proceedings are not stayed as prayed. This, in my view, is a crucial requirement for the grant of the reliefs sought under order 42 rule 6 to warrant this court to exercise its discretion and grant an order of stay of proceedings as sought.

14. In conclusion, the court therefore finds and holds that the present application is devoid of merit and the same is hereby dismissed with costs to the plaintiff/respondent.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 12TH DAY OF FEBRUARY, 2024.

J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Wangila for the Defendant/Applicant.
2. N/A for the Plaintiff/Respondent.
3. Amos - Court Assistant

MONG'ARE,J.

