



Mugo v Festus (Civil Appeal E055 of 2021) [2024] KEHC 4095 (KLR) (8 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4095 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KERUGOYA
CIVIL APPEAL E055 OF 2021
RM MWONGO, J
APRIL 8, 2024**

BETWEEN

HESBON KIRAKA MUGO APPELLANT

AND

ERICK KIRAKA FESTUS RESPONDENT

(The appellant having been aggrieved and dissatisfied with the Ruling made on 7th December, 2021 by Hon. L.W. Kabaria, P.M in Gichugu Principal Magistrate's Court Civil Case No. 56 of 2020)

RULING

1. By a ruling dated 7th December 2021 in PMCC Civil Case No. 56 of 2020, the lower court dismissed the appellant's application of 14th June 2021 for stay of proceedings of that case.
2. Dissatisfied by the lower court's decision, the appellant filed an appeal, and simultaneously sought stay of the proceedings of the lower court case pending hearing and determination of the application, and subsequently of the appeal. It is urged that the appellant will be rendered nugatory should stay not be granted.
3. The respondent opposed the application. In the replying affidavit the respondent points that in Civil Suit No. 56 of 2020, the respondent is seeking compensation for assault causing grievous harm after the lower court made a conviction in a Criminal Case No. 221 of 2020 in which the appellant was convicted. On this, the respondent asserts that notwithstanding an appeal against the criminal conviction having been filed in HCCR Appeal No. E055 of 2021, the Civil suit No. 56/2020 can run concurrently with the appeal.
4. The respondent further asserts that grant of stay of Civil Suit No. 56/2020 will amount to an unnecessary interference in the respondent's right to seek compensation for the assault upon him by the appellant/applicant.



5. Parties filed submissions as directed by the court.
6. The applicant's submission is that the appellant's conviction for assault in the lower court in Criminal Case No. 221/2020 is the subject of appeal in the High Court in HCCA No. E005 /2021. The Appellant was granted bail pending appeal, and whilst awaiting the hearing of the appeal, the respondent filed a Civil Case in Gichugu No. E056/2020 against the appellant. Therefore, the appellant filed an application in that case seeking a stay of the civil proceedings, pending conclusion of the criminal appeal. The lower court dismissed the application. That decision is now the subject of the appeal herein.
7. The appellant urges that he has a constitutional right of appeal which cannot be ignored. At the same time the appellant notes that under Order 42 rule 6(1) no appeal can in itself operate as a stay of execution of the orders /decree appealed against. The appellant accepts that for a stay he must demonstrate that substantial loss may result to him; that the application is made without unreasonable delay; and that the court may call for security for the due performance of the decree.
8. Further, the appellant cited the cases of:
 - *UAP Insurance Company Ltd. v Michael John Beckhoff* [2014] eKLR which holds that an appellant has to show that he has an arguable appeal.
 - *Niaz Sons (K) Ltd v Chania Road & Bridge Company Ltd (K)* [2001] eKLR where Onyango Otieno, J (as he then was) said:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the exercise futile, stay should be granted”.
9. The respondent submitted that the lower court held that the Criminal Appeal No. E005/2021 can run concurrently with Gichugu Civil Suit No. 56/2020, as no law bars criminal matters and civil matters from proceeding concurrently.
10. The respondent cited cases of: *Kenya Wildlife Service v James Mutembei* [2019] eKLR where it was held that stay of proceedings, should not be confused with stay of execution, that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation, impugning on his right to access to justice, the right to be heard and the right to fair trial. *Global Tours & Travel Ltd* Nairobi High Court Winding Up Cause No. 43 of 2000 where Ringera J (as he then was) stated that whether or not to grant stay of proceedings is a matter of judicial discretion; and that:

“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”.
11. The respondent also submitted that the appeal does not raise any arguable appeal; and that Section 193 A of the *Criminal Procedure Code* provides that:

“The fact that any matter in issue in any criminal proceedings is also directly or substantially in issue in any civil proceedings shall not be a ground for any stay prohibition or delay of the criminal proceedings”.

Issues for Determination

12. . The only issue for determination is whether stay of proceedings should be granted.



Analysis and Determination

13. The circumstances, as I understand them, are that the applicant was found guilty of assault in a criminal case in the lower court. That decision was appealed against by the appellant. In the meantime, the respondent filed a civil suit for compensation for the said assault. That civil case was sought to be stayed pending the criminal appeal, but the application failed on grounds that both criminal and civil suits could proceed concurrently.
14. The impugned ruling of the lower court declining stay was issued on 7th December, 2021. The applicant filed a memorandum of appeal swiftly on 21st December 2021, and the application herein on 8th February 2022, also within reasonable time.
15. The application asserts that if the civil proceedings at Gichugu Law Court continue and are not stayed, the applicants “appeal will be rendered nugatory”. Whilst this may be partially true, the applicant is relying on the potential success of the Criminal Appeal to counter the possible consequences of the civil compensation claim.
16. The law on stay of proceedings is as follows: In *Global Tours & Travels Ltd.* Nairobi High Court Winding Up Cause No. 43 of 2000, Ringera J (as he then was) stated”:

“In deciding whether to order stay [of proceedings] 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 utilisation of judicial time and whether the application has been bought expeditiously”.

17. In *Halsbury’s Laws of England*, 4th Ed. Vol 37 Page 330 and 332 the threshold for stay of proceedings is described 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 be allowed to continue.....”

This is a power, it has been emphasised, that ought to be exercised sparingly, and only in exceptional cases.”

Conclusion and Disposition

18. In light of all the above, it is clear that interrupting the civil proceedings sought to be interrupted herein, because there is a criminal appeal pending, is not an appropriate and proper ground for stay of those proceedings. The respondent is entitled to have his day in civil court to pursue civil compensation for assault.

He will have to prove his case on the civil standard. In the meantime, the criminal appeal will proceed utilising the criminal standard for proof.
19. This is what is meant by Section 193 A of the *Criminal Procedure Code*, already quoted above, that an issue in criminal proceedings that is also an issue in civil proceedings shall not be a ground for any stay prohibition or delay in criminal proceedings. This applies both ways.



20. Accordingly, I am persuaded that the applicant's application cannot succeed and it is hereby disallowed and dismissed.

21. Orders accordingly.

DELIVERED AT KERUGOYA ON THE 8TH DAY OF APRIL, 2024

R. MWONGO

JUDGE

Delivered in the presence of:

Kimotho for Applicant

Ndungu for Respondent

Murage, Court Assistant

