



**Ndungu v KPMG International Co-operative (Commercial Case E139 of 2019)  
[2024] KEHC 3159 (KLR) (Commercial and Tax) (3 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3159 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E139 OF 2019**

**AA VISRAM, J**

**APRIL 3, 2024**

**BETWEEN**

**RICHARD BORO NDUNGU ..... PLAINTIFF**

**AND**

**KPMG INTERNATIONAL CO-OPERATIVE ..... RESPONDENT**

**RULING**

1. I have considered the Notice of Motion dated 15<sup>th</sup> June, 2022, together with the supporting affidavits sworn on even date and the further affidavit sworn on 31<sup>st</sup> October, 2022; and the replying affidavit sworn in opposition to the same on 6<sup>th</sup> October, 2022, together with the rival submissions made by the parties; and the applicable law.
2. The Applicant is seeking a stay of proceedings pending the hearing and determination of its appeal of the decision by Mwita, J. issued on 3<sup>rd</sup> June, 2022, and a suspension of his orders directing the Applicant to file its pleadings within certain timelines; and to comply with case management.
3. The Applicant submitted in relation to the test for a grant of stay of proceedings. The same are detailed in its written submissions and form part of the record.
4. Counsel submitted that the crux of the application is based on the fact that the impugned ruling stipulated that jurisdiction of the court to hear the case will be determined over the course of the hearing on the merits of the case. In his view, this was improper because, he submitted that jurisdiction ought to be determined from the outset.
5. He further stated that there is no reason why this court and the Court of Appeal should not consider the same issue of jurisdiction at the same time. He submitted that the appeal will be rendered nugatory



if this court were to proceed and hear the matter because time and expense will have been incurred or expended in the meantime.

6. Finally, he submitted that no prejudice will be occasioned to the parties if the application is granted and prejudice has not been alleged by the Respondent.
7. In opposition to the application, counsel for the Respondent submitted that such an application is discretionary, and the present application is a classic example of delay, the suit having been instituted in 2019, and to date has not proceeded.
8. He submitted that pursuant to Order 17, the courts have the discretion to refuse to adjourn matters. In the present matter, numerous applications have been filed by the Applicant with an intention to delay the hearing of the suit, and to date, there is no defence on record.
9. Counsel submitted that the appeal has not been filed and no steps have been taken to show that the Applicant intends to prosecute the said appeal. Finally, counsel stated that the Applicant has not shown how the appeal will be rendered nugatory in the event the orders sought are not granted.
10. Having considered the written submissions briefly summarized above, before I address the question of whether or not the threshold for a grant of stay of proceedings and suspension of the various orders have been met, I find that the larger issue before me is whether or not this court, may suspend the orders of another court of concurrent jurisdiction?
11. The Applicant is praying that this court suspend the orders of Mwita, J. and stay proceedings pending appeal in direct contradiction to his ruling issued on 3<sup>rd</sup> June, 2022. In the said ruling, the court stated that “summons to enter appearance was properly served” and the learned Judge directed parties to comply with the Order 11. He further directed the Applicant to file and serve its defence within specific timelines. The said ruling therefore required the Applicant to take specific steps and actions within an express timeline.
12. The present application therefore seeks prayers that amount to urging this court to sit on appeal in relation to those orders, and to sit as an appellate court.
13. To my mind, this court has no such jurisdiction to vacate or suspend the orders of a court of concurrent jurisdiction. To do so, would be to sit on appeal of the orders of my learned brother, Mwita, J. and that is not the function of this court, or of the High Court in general, in relation to courts of concurrent jurisdiction.
14. In my view, the *Civil Procedure Rules* provide adequate mechanisms for an aggrieved party in relation to such orders. These are either by preferring an appeal to a higher court, in this case, the Court of Appeal; or by way of a review; before the same judge, where possible in relation to the orders in question. I note that an appeal has already been filed in the Court of Appeal, and to my mind, that court was the appropriate forum to seek the present orders, and not this court.
15. Finally, I am of the view that in the event such a practice were to be normalized, it would result in a situation where contradictory orders may be issued by multiple courts of concurrent jurisdiction in relation to the same issue, and affecting the same parties. In short, this would lead to confusion and chaos and may render both the appellate and review process of no value.
16. Based on the reasons above, I do not think it would be appropriate for this court to address the question of whether the threshold has been met in relation to the prayers sought because addressing the same would be akin to sitting on appeal of the orders issued by my brother, Mwita, J.



17. Based on the reasons set out above, I find that the application dated 15<sup>th</sup> June, 2022, is without merit and the same is dismissed with costs.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 3<sup>RD</sup> DAY OF APRIL 2024**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

..... For the Plaintiff/Applicant

..... For the Defendant/Respondent

