



**Chege v Gachora (Civil Appeal 265 of 2023) [2024] KEHC 5821 (KLR) (23 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 5821 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT THIKA  
CIVIL APPEAL 265 OF 2023  
FN MUCHEMI, J  
MAY 23, 2024**

**BETWEEN**

**SIMON KABOGO CHEGE ..... APPLICANT**

**AND**

**PAUL KIMANI GACHORA ..... RESPONDENT**

**RULING**

**Brief facts**

1. This application dated 14<sup>th</sup> February 2024 seeks for orders for stay of proceedings in Civil Suit No E1872 of 2023, a declaratory suit pending hearing and determination of the appeal herein against the ruling delivered on 30<sup>th</sup> August 2023.
2. In opposition to the application, the respondent filed a Replying Affidavit dated 15<sup>th</sup> April 2024.

**Applicant's Case**

3. The applicant states that he was involved in a road traffic accident with motor vehicle registration number KBP 634E while driving motor vehicle registration number KAZ 869L. Consequently, the respondent filed the primary suit Thika CMCC No 718 of 2021 against the applicant seeking compensation for injuries sustained in the said accident.
4. The applicant contends that he was never served with Summons to enter Appearance or any pleadings in the primary suit. Later he learnt that interlocutory judgment was entered in favour of the respondent. The applicant further states that he filed an application dated 14<sup>th</sup> March 2023 seeking to set aside the interlocutory judgment issued on 7<sup>th</sup> December 2022 and allow him to file his defence so that the suit is heard on merit. The application was dismissed on 5<sup>th</sup> April 2023 for non-attendance and the applicant contends that his advocates filed another application on 10<sup>th</sup> May 2023 seeking to reinstate the application dated 14<sup>th</sup> March 2023. The application was dismissed and being aggrieved with the said ruling, the applicant filed his memorandum of appeal dated 6<sup>th</sup> September 2023.



5. The applicant states that at the time of the accident his motor vehicle registration number KAZ 869L was insured by Pioneer General Insurance Limited.
6. The applicant further states that the respondent has since filed the declaratory suit Civil Suit No E1872 of 2023 against his insurer seeking a declaration that it is bound to settle the decretal amount awarded to him in the primary suit by virtue of the insurance policy that was valid at the time of the accident.
7. The applicant is apprehensive that if the proceedings in the declaratory suit are not stayed, his insurer risks being compelled to pay and yet the respondent obtained judgment in the primary suit without undergoing cross examination or the applicant participating in the proceedings. In the event the respondent obtains orders in the declaratory suit, his insurer will be ordered to pay the decretal sum. If this happens, the appeal will be rendered nugatory occasioning him and his insurer substantial and irreparable loss.
8. The applicant further contends that if the appeal finally succeeds, the respondent may be required to refund the decretal sum to his insurer during the ongoing case proceedings which could pose a significant challenge.
9. The applicant states that neither he nor his insurer have personal knowledge of the respondent or his whereabouts, thus complicating the situation and reimbursement process.
10. The applicant argues that his right to a fair hearing as provided under Articles 25(c) and 50 of the *Constitution* was grossly violated when the court dismissed his applications without affording him audience. Thus, the applicant contends that it is only fair and just that the order for stay of proceedings in the declaratory suit be granted.
11. The applicant further states that he has an arguable and persuasive appeal with high chances of success that could alter the verdict in the primary suit. Further, the applicant contends that the application has been made expeditiously, without delay and in the utmost good faith as the respondent shall not be prejudiced in any way if the orders sought are granted.
12. The applicant supported his application further with a supporting affidavit sworn by Jackson Karani, who stated that he was instructed by the Board and Management of Pioneer General Insurance Limited to swear the affidavit. Essentially, the deponent's affidavit is similar to that of the applicant.

### **The Respondent's Case**

13. The respondent states that the applicant has a habit of filing one application after another since judgment was delivered in Thika CMCC No 718 of 2021 on 7<sup>th</sup> October 2022. The respondent further states that the said applications have been dismissed and the applicant has not shown in the present application that he is likely to suffer should the orders sought not be granted.
14. The respondent argues that litigation must come to an end and the applicant should be prevented from filing multiple proceedings involving the same issues. Further, the respondent contends that the applicant conduct is an abuse of the process of the court. He files numerous applications and fails to prosecute them in a bid to frustrate him and evade settling the decretal sum. The respondent further states that it is obvious that the behavior of the applicant is intended to delay the finalization of the matter to the respondent's detriment.



## The Applicant's Submissions

15. The applicant reiterates what he deposed in his affidavit and submits that he was never served with the pleadings in the primary suit. That the respondent did not provide proof of service yet the trial court dismissed the application dated 30<sup>th</sup> August 2023. The applicant thus argues that it is in the interests of justice that an order of stay of the proceedings in the declaratory suit be granted as the appeal has high chances of success.

## The Respondent's Submissions

16. The respondent submits that the trial court delivered its judgment on 7<sup>th</sup> October in his favour following which the applicant filed an application for setting aside judgment dated 14<sup>th</sup> March 2023 but failed to serve him. On 29<sup>th</sup> March 2023, the matter came up for mention for directions, the court directed that the application would be dismissed if the applicant did not serve the respondent. On 5<sup>th</sup> April 2023, the trial court dismissed the application.
17. Consequently, the applicant filed another application dated 10<sup>th</sup> May 2023 seeking to set aside the orders of 5<sup>th</sup> April 2023 and reinstate the application. The trial court dismissed the application vide a ruling dated 30<sup>th</sup> August 2023. Being dissatisfied with the said ruling, the applicant filed another application dated 18<sup>th</sup> September 2023, which was also dismissed in the ruling delivered on 22<sup>nd</sup> February 2024.
18. The respondent contends that the applicant has filed yet another application camouflaging as the insurer seeking stay pending appeal, yet the court conclusively determined all the issues being raised by the applicant. The respondent submits that the applicant has been filing one application after another to prevent him from enjoying the fruits of his judgment which is now one year old. Additionally, the conduct of the applicant clearly shows he is a vexatious litigant.
19. The respondent relies on Order 42 Rule 6(1) of the *Civil Procedure Rules* and the case of *Machira t/a Machira & Co. Advocates v East African Standard (No 2)* [2002] eKLR and submits that the applicant has not satisfied the conditions for stay of execution.
20. The respondent further relies on the case of *Elyjoy Kagani v Bank of Africa (K) Limited & 3 others* [2017] eKLR and submits that the issues raised in the Memorandum of Appeal are frivolous and are not arguable.
21. Relying on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the respondent contends that the applicant has not demonstrated that he would suffer substantial loss if the declaratory suit proceeds. The respondent argues that he is the one likely to suffer substantial loss and damage as his judgment has not been complied with to date. It is further argued by the respondent that he should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment and that litigation must come to an end.
22. The respondent contends that although the applicant has not indicated his readiness to furnish security for the due performance of the decree, the respondent states that he is entitled to equal treatment before the law. Without prejudice to the foregoing, the respondent urges the court to be guided by the decision in *Edward Kamau & Another v Hannah Mukui Gichuki Misc. No 78 of 2015* and employ a balancing act between the rights of the parties by granting stay of execution on condition that the applicant pay half the decretal amount of Kshs 918,352/- to the respondent and deposit the other half amount of Kshs 459,176/- in a fixed joint interest amount of both advocates.



## The Law

### Whether the applicant has met the conditions for grant of stay of proceedings pending appeal.

23. It is trite law that whether or not to issue an order for stay of proceedings is a matter of the court's discretion exercised after due consideration of the merits of the case and the likely effect on the ends of justice. The exercise of that discretion should be premised on conscientious and judicious decision based on defined principles which were expounded by Ringera J in *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No 43 of 2000:-

“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 in the interest of justice to order a stay of proceedings and if it is so, on what terms it should be granted. In deciding whether to order a stay, 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 utilization of judicial time and whether the application has been brought expeditiously.”

24. Similarly the threshold for stay of proceedings has been illuminated in the passages in [\*Halsbury's Law of England\*](#), 4<sup>th</sup> Edition, Vol. 37 page 330 and 332 that:-

“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 to be allowed to continue.

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show merely that the plaintiff might not, or probably would not, succeed but that he could not possible succeed on the basis of the pleading and the facts of the case.”

25. In that regard, for an order of stay of proceedings to issue the following points of consideration ought to be adhered to:-
- Whether the applicant has established that he has a prima facie arguable case;
  - Whether the application was filed expeditiously; and
  - 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.

Whether the applicant has established that he has a prima facie arguable case



26. Cognizant of the fact that an arguable appeal needs only raise a single bona fide point worthy of consideration by the Judge who will hear the appeal and it need not be one that must necessarily succeed. *Cooperative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
27. I have keenly perused the memorandum of appeal and note that the applicant's main contention is that it was never served with any summons or pleadings and as such it did not participate in the lower court proceedings. Accordingly, the trial court ought to have heard and determined his application to set aside judgment and set it aside ex debito justitiae, however, the trial court dismissed the same. I have also perused the trial court's ruling and looked at the court's reasoning. Without going to the merits of the appeal, I find that the applicant has not raised any arguable grounds of appeal.

### **Whether the application was filed expeditiously**

28. The instant application was filed on 15<sup>th</sup> February 2024 whereas the ruling was delivered on 30<sup>th</sup> August 2023. This was a period of 6 months after the date of delivery of the ruling. Moreover, the applicant did not provide any information on when the declaratory suit was filed as well as the date of delivery of judgment. This court therefore has no material to assist it to ascertain whether the application was filed expeditiously.

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

29. In an application to stay proceedings the court is required to exercise judicial discretion in the interest of justice in any deserving case. This has been demonstrated in the case of *Christopher Ndolo Mutuku & another v CFC Stanbic Bank Limited* (2015) eKLR the court observed that:-

“.....what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

30. The applicant filed an application dated 18<sup>th</sup> September 2023 in the main suit Thika CMCC No 718 of 2021 seeking orders for stay of execution of the ruling delivered on 30<sup>th</sup> August 2023 pending the hearing and determination of the appeal. In that application, the applicant has duplicated the same grounds he had raised in the earlier application. The ruling of the court delivered on 29/02/2024 dismissed the application on the premise that the applicant failed to satisfy the conditions to warrant stay of execution pending appeal.
31. The applicant has now brought the current application, which essentially raises issues similar to those in his earlier application dated 18<sup>th</sup> September 2023. However, he seeks for orders for stay of proceedings in the declaratory Civil Suit No E1872 of 2023 filed by the respondent against Pioneer General Insurance Company Limited. It is not in dispute that the applicant is the judgment debtor in Civil Suit No 718 of 2021 and is not a party in the declaratory suit in which he correctly states that the parties therein are the respondent and Pioneer General Insurance Company Limited. The applicant has not explained in what capacity he brought this application because he is not a party to the declaratory suit. In my view, the applicant is a stranger in the said suit and would be entitled to seek for any orders.
32. On perusal of supporting affidavit by the applicant, it is evident that his appeal is against the ruling of Magistrate dated 30<sup>th</sup> August 2023 that denied the appellant orders to set aside the interlocutory judgment. Notably, the appeal is not against the main suit whose judgment was delivered on 7<sup>th</sup> December 2022 where the applicant herein was a party. It is noted that in this appeal, pioneer General



Insurance are not a party and the applicant has no authority to act for them even if they had interest in this appeal.

33. The applicant in this appeal unsuccessfully brought the application dated 18<sup>th</sup> September 2023 seeking for orders for stay of execution in Thika CMCC No 718 of 2021 pending hearing and determination of the appeal. Having failed to obtain stay orders in the court ruling delivered on 22<sup>nd</sup> February 2024, he filed this particular application. In my view, the applicant is trying to take the court in circles hoping to obtain orders to stay the execution of the lower court judgment which tricks cannot work in that the law is not in his favour in the issues he has raised herein.

### **Conclusion**

34. It is my considered view that the application dated 14<sup>th</sup> February 2024 is not properly before the court, it is misconceived and an abuse of the due process of the court. The application is hereby struck out with costs.
35. It is hereby so ordered.

**RULING DELIVERED, DATED AND SIGNED AT THIKA THIS 23<sup>RD</sup> DAY OF MAY 2024.**

**F. MUCHEMI**

**JUDGE**

