



Karanja & another (Sued as administrators of the Estate of the Late Joseph John Karanja) v Pinnacle Projects Limited & another (Commercial Appeal E182 of 2023) [2024] KEHC 6693 (KLR) (Commercial and Tax) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6693 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E182 OF 2023**

MN MWANGI, J

MAY 15, 2024

BETWEEN

**EDWARD MUKUNDI KARANJA 1ST APPELLANT
VERONICA WANJIKU KARANJA 2ND APPELLANT
SUED AS ADMINISTRATORS OF THE ESTATE OF THE LATE JOSEPH JOHN
KARANJA**

AND

**PINNACLE PROJECTS LIMITED 1ST RESPONDENT
DAVID KABUBII KURIA 2ND RESPONDENT**

RULING

1. Through an application dated 29th September, 2023 brought under the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 Rule 1 of the *Civil Procedure Rules* and under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of law, the appellants/applicants seek the following orders-
 - i. That pending the hearing and determination of the substantive appeal, there be a stay of further proceedings in Milimani MCOMMSU No. E1256 of 2021; Pinnacle Projects Limited & another –versus- Edward Mukundi Karanja (Sued as Administrators to the Estate of the late Joseph John Karanja & another);
 - ii. That the Court be at liberty to make any further orders in the interest of justice; and
 - iii. That the costs of and/or incidental to this application do abide the outcome of the appeal.



2. The application is predicated on the grounds in support of it and the affidavit of Edward Mukundi Karanja, the 1st applicant herein, sworn on 29th September, 2023. The application was opposed vide a replying affidavit sworn by David Kabubii Kuria, the 2nd respondent herein, sworn on 31st October, 2023.
3. The parties filed written submissions in support of their rival positions. The applicants' submissions are dated 23rd October, 2023, whereas the respondents filed submissions dated 16th November, 2023.
4. In the applicants' submissions, Mr. Kigata, learned Counsel for the applicants stated the present application is precipitated by the ruling of the Chief Magistrate's Court in Milimani MCOMMSU NO. E1256 of 2021: Pinacple Projects Limited & another versus Edward Mukundi Karanja (sued as Administrators of the Estate of the late Joseph Karanja, where the Court ruled that the dispute before the said Court was not time barred since a cause of action pegged on a contract arises at the time of breach and not at the time of executing the agreement. Counsel stated that the applicants being aggrieved by the said ruling filed Appeal No. E182 of 2023 which raises substantive issues that require determination by the High Court as an appellate Court as per the grounds on the Memorandum of Appeal dated 11th August, 2023.
5. He stated that the application has been made and filed expeditiously and without undue delay and it is in the interest of justice that the same be allowed as prayed. He relied on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 and Section 3A of the *Civil Procedure Act*.
6. Mr. Kigata submitted that in an application for stay of proceedings pending appeal, a Court exercises discretionary powers which must be exercised judiciously. He stated that the Court has to consider if it will be in the interest of justice to grant the same. He submitted that the appeal before the Court raises substantive issues that require candid analysis and determination.
7. It was submitted that this Court ought to take into account factors such as 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. Counsel relied on the case of County Secretary *County Government of Busia v Manwari & Co. Advocates* [2021] eKLR, where the Court held that even a single bonafide arguable ground of appeal is sufficient to satisfy the requirement. He also relied on the case of *Stanley Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
8. Mr. Kigata submitted that the appeal filed on 22nd September, 2023 before this Court will be litigated on the grounds that the suit before the lower Court was filed outside the timelines under Section 4(1) of the *Limitation of Actions Act*, which provides that actions of contract, tort and certain other actions cannot be brought after the end of six years from the date from which the cause of action arose. Counsel contended that the suit is time barred having been filed after 9 years from when the cause of action accrued, and that the suit was filed in the wrong cause as the same ought to have been determined by the family Court.
9. He contended that the grounds enumerated in the Memorandum of Appeal demonstrate beyond peradventure that the applicants have an arguable appeal worthy of juridical investigation and determination.
10. The applicants' Counsel also contended that if the suit proceeds before the Chief Magistrate's Court, then the appeal before this Court will be rendered nugatory since any decision made thereto will not have any effect other than to render the appeal a mere academic exercise. He cited the case of *Board of Management of Kapletundo Secondary School v Lakeside Products Agencies* [2022] eKLR, to support



his argument. He also cited the case of *Niazsons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd* [2000] eKLR, in support of the same argument.

11. He prayed for the costs of the instant application to abide the outcome of the appeal.
12. In opposing the application, Ms Aisha stated that the instant application does not meet the threshold for stay of proceedings and relied on *Halsbury's Laws of England*, 4th Edition Vol. 37 page 330 and 332, quoted with approval by the Court in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR. Counsel also relied on the case of *Re Global Tours & Travel Ltd* HCWC. No. 43 of 2000 quoted in approval in the case of *Lauren M. Isiabo Sawe & Company Advocates v Teresa Chebichii Rutto & 2 others*, where Ringera J., (as he then was) stated that 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.
13. The respondent's Counsel stated that the applicants have not demonstrated any exceptional circumstances to warrant stay of proceedings in the lower Court case. She contended that the application has been strategically brought in bad faith with the intention to delay the expeditious hearing of the lower Court case.
14. Ms Aisha cited the case of *Watu Credit v Geoffrey Mokaya Aboki & Karen Chepkurui* [2022] eKLR, where the Court held that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts on the right to expeditious trial.
15. Counsel contended that the applicants have not demonstrated that the respondent's suit in the lower Court is unlikely to succeed on the basis of the pleadings filed. Further, that they have not proved that the appeal will be rendered nugatory if this Court does not grant an order for stay of proceedings pending appeal.

Analysis And Determination.

16. I have considered the application herein, the supporting affidavit, the replying affidavit filed and the submissions filed by Counsel for the parties. The issue for determination is if this Court should grant stay of proceedings of the lower Court case.
17. The principles for consideration in determining whether or not to grant stay of proceedings pending appeal are provided for in Order 42 Rule 6 of the *Civil Procedure Rules*, 2010, which reads as follows-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.”
18. In the case of *Lucy Waitthera Kimanga & 2 others v John Waiganjo Gichuri* [2015] eKLR, the Court observed as follows on the issue of stay of proceedings:
- “a) The decision 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.
- b) 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.
- c) In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order.
- d) 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.” (emphasis added).
19. I have perused the Memorandum of Appeal filed by the applicants. It raises the fundamental issue of whether the Trial Magistrate erred by not finding that the cause of action arose on or about 18th June, 2014 and became statute barred on or about 17th June, 2020. The Memorandum of Appeal also raises other issues of whether the Hon. Magistrate erred in law and fact in failing to find that as the claim by the respondents is for professional fees for distribution of the estate, the same ought to have been determined by the Family Court. The appellants in one of the grounds of appeal contend that there was no privity of contract between the appellants and the respondents, among other grounds of appeal.
20. Although the respondents contend that the instant application has been made in bad faith so as to delay the hearing and determination of the case in the lower Court, having looked at the grounds of appeal filed, it is my considered view that in the event the appellate Court finds that the suit in the lower Court was filed outside the timelines provided for under Section 4(1) of the *Limitation of Actions Act*, that on its own will have the effect of extinguishing the claim in the suit in lower Court, and there will be nothing left for the said Court to determine.
21. The respondents are keen to have the case in the Trial Court proceed expeditiously so that the rights of the parties can be determined. The applicants on the other hand are of the opinion that if stay of proceedings is not granted, their appeal will be rendered nugatory. I hold the same view as the applicants, as it is better for the lower Court case to be stayed than to have it heard and determined, just for the 1st appellate Court to find that the appeal was merited, yet judicial time will have been expended in hearing the case in the lower Court.
22. In the premise, the application dated 23rd September, 2023 is allowed. I hereby make the following orders-



i. That pending the hearing and determination of the appeal herein, there shall be stay of proceedings in Milimani MCOMMSU NO. E1256 of 2021- Pinnacle Projects Limited & another v Edward Mukundi Karanja (sued as Administrators of the Estate of the late Joseph Karanja & another);

ii. Costs of the application dated 29th September, 2023 are granted to the applicants.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 15TH DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Nadio h/b for MR. Kigata for the Appellants/applicants

Ms Aisha for the Respondent

Ms B. Wokabi – Court Assistant.

