



Ng'ang'a & 4 others v Mutiso (Suing as the legal representative of the Estate of EJM - Deceased) (Civil Appeal E133 of 2022) [2024] KEHC 5421 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5421 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
CIVIL APPEAL E133 OF 2022**

FR OLEL, J

MAY 3, 2024

BETWEEN

VINCENT NJAU NG'ANG'A 1ST APPELLANT
IRENE KALELE MUTINDA 2ND APPELLANT
ODHIAMBO KENNEDY 3RD APPELLANT
DR FREDRICK ONYANGO 4TH APPELLANT
SHALOM COMMUNITY HOSPITAL 5TH APPELLANT

AND

JONATHAN MUENDO MUTISO RESPONDENT
**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF EJM -
DECEASED**

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 27th September 2022 brought pursuant to provisions of Article 159(2)(d) of the *constitution of Kenya* 2010, Section 1A, 1B, 3A & 79G of the *Civil Procedure Act*, Order 42 rule 6(1) and Order 51(1) of the *Civil Procedure Rules*, and all other enabling provision of law. The applicant seeks for orders that:
 - a. Spent.
 - b. Spent.
 - c. That pending the hearing and determination of this Application and the Appeal, there be stay of proceedings in Machakos MCCC No 74 of 2021, *Jonathan Muendo Mutiso(Suing as the legal Representative of the Estate of E.J.M- Deceased) v Vincent Njau Nganga & 4 others*.



- d. That costs of this application be in the cause.
2. The application is supported by the grounds on the face of the said application and the supporting affidavit of one Hope Wambugu, who depones that stay of proceeding was being sought on the basis that there was a criminal case, Machakos Criminal Case No 315 of 2019 (Republic v The 1st to 3rd Defendants in this Matter) which had been instituted over the same matter and its prosecution was ongoing. It was the Appellants contention that the proceedings in the criminal matter forms the basis upon which the civil suit was instituted and they had intended to obtain the proceedings and documents therein to support the ongoing civil case. The appellants had initially sort for stay of proceedings in the primary civil suit vide their Application dated 16th June 2022, which application was heard on merit and had been dismissed by the learned trial Magistrate vide her ruling dated 16th August 2022 in total disregard of the grounds raised therein, hence this Appeal.
 3. Further the Appellants averred that it was therefore proper and just to have the proceedings in the primary civil matter stayed pending hearing of this application/Appeal. They had an arguable appeal with high chances of success and the respondents would not suffer any prejudice should such an order be issued. The appellants reiterated that it was of critical importance to their case that the criminal case be concluded and they be allowed to get the proceedings relating thereto to support their defence in the civil matter. Their application had been made in good faith and urged the court to exercise its discretion in its favour.
 4. The respondent filed his replying affidavit dated 17th November 2022 opposing this application and stated that it was unfounded, incompetent, bad in law and constituted an abuse of the court process. The law upon which the application was premised did not support the prayers sought and it was to be noted that Section 193A of the [criminal procedure code](#), Cap 75 laws of Kenya also provided that criminal case proceedings would not be stayed, prohibited or delayed on the basis that there were civil proceedings with similar facts either directly or substantially which were being pursued concurrently.
 5. The respondent chronologically fleshed out various dated and incidents where the Appellants had delay pretrial and hearing of the civil suit and this had forced the trial court to grant them the last adjournment on 11.05.2022, only for them to file the application dated 16th June 2022 seeking to stay the proceedings in the civil matter. The said application was heard on merit, found to be unmeritorious and was dismissed. The Applicants were also faulted for trying to steal a march in these proceedings by introducing the proceedings of the criminal case as part of their exhibits, yet the same were not part of the initial application as filed and hence the court was urged to expunge the same from the record.
 6. The respondent further averred that he were keen to proceed with the civil suit and was greatly inconvenienced and prejudiced by the delay caused by the Appellants, yet all parties had complied with provisions of Order 11 of the [civil procedure rules](#) and pretrial conference had also been held to confirm compliance. The Appellants had even offered to negotiate settlement of this matter but all that had been in vain. They had therefore moved court with unclean hands in Equity, and were underserving of the orders sought. The respondent further urged the court to consider the fact that his son Baby E.J.M died on 05.05.2019 and it was a very emotional matter which should be heard and determined expeditiously and on merit to enable the family get closure.
 7. Finally, the respondent also averred that the Appellants would not be prejudiced in any manner should the two suits (both criminal case and the civil case) proceed. The standards of proof in the criminal case was proof beyond reasonable doubt, while in the civil case the court would determine the evidence presented on a balance of probabilities. Therefore, the outcome of the criminal case whether positive or negative could not be used to influence the outcome of the civil case. The Appellants had all along been



aware of the criminal case which commenced on 09.05.2019, while the civil matter had commenced in 2021 and could not be heard to allege of any prejudice, which they may suffer.

8. The respondent reiterated that this appeal was filed to merely delay quick dispensation of justice, was completely unmerited and prayed that this Application be dismissed with costs.

Analysis & Determination

9. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and both set of submissions filed by the parties. The court discerns that the only issues which arise for determination is whether this court should stay further proceedings in the primary suit Machakos Civil Suit No 74 of 2021 Machakos MCCC No 74 of 2021, *Jonathan Muendo Mutiso (Suing as the legal Representative of the Estate of E.J.M- Deceased) v Vincent Njau Nganga & 4 others* pending hearing and determination of this Appeal.

10. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. Also See *Kenya Shell Limited v Benjamin Karuga Kibiru & nother* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- a) There must be an appeal pending before the higher Court;
- b) where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c) The Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d) The Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e) The Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and.
- f) The Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

11. Further In the words of 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, 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 (emphasis added)”

12. What emerges from the discussion above is that the grant of an order of stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy. As a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter before a magistrate’s Court or Tribunal only in exceptional circumstances. While difficult to determine with mathematical precision when the Court will use this power, it is only to be sparingly used where, in the words of South African authors, Gardiner and Lansdown (6th Ed. Vol. 1 p. 750),

“grave injustice might otherwise result or where justice might not by other means be attained.” As the authors correctly write, the Court will generally “hesitate to intervene, especially having regard to the effect of such a procedure upon the continuity of proceedings in the Court below.”

13. Considering the facts herein, first and foremost, the applicant has not demonstrated the any exceptional circumstances which exist that would warrant the granting of the orders of stay of proceedings. Even based on the grounds advanced that it intends to obtain evidence from the criminal case to support the civil case, the same still rings hollow. During pretrial the applicants are at liberty to file all witness statements and trial bundle containing all relevant documents to support its defence. They need not rely on the prosecution case in the criminal matter to defend themselves adequately in the civil matter. Also as pointed out by the respondents, the parameters and standard of proof in the two cases are totally different. As an analogy even in road accident cases, conviction in a traffic case does not necessarily lead to a finding that the person so found guilty is 100% liable for the accident. The court handling the civil case will still evaluate the evidence independently and arrive at it own conclusion. A similar scenario would obtain herein regardless of the outcome of the criminal matter.
14. The courts are also now enjoined under Section 1A and 1B of the *civil procedure Act* to give effect to the overriding objective in the exercise of its powers or in the interpretation of any of its provisions. According to section 1(B) of the *Civil Procedure Act* for purposes of attaining its overriding objective “the Court shall aim for; the just determination of the proceedings; the efficient disposal of the business of the Court; the efficient use of the available judicial and administrative resources; and the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties. It is therefore important that the Court takes into consideration the likely effect of granting stay of the proceedings in question. In other words, the Court ought to weigh the likely consequences of granting the stay or not doing so and lean towards a determination which is unlikely to lead to an undesirable or absurd outcome.
15. The respondent raises a valid point when he avers that his family need emotional closure over the death of Baby E.J.M who died on 05.05.2019. The respondent’s averments that the appellants have on several occasions caused delay in the primary suit are not denied. Their insurer also offered a negotiated settlement but again midway also withdrew the said offer. The yardstick is for the court to balance or weigh the scales of justice by ensuring both parties are on equal footing and to ensure the execution of one party’s right should not defeat or derogate the right of the other. The Court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court.



16. In the circumstance of this case, it would be prudent and logical to allow the appellant to pursue their appeal but not to stay the proceedings of the trial court. The criminal case was commenced in May 2019 and as at the time of delivering this ruling the same should have ideally been concluded. Further the inconvenience caused to the respondent, if the proceedings in the primary suit are stayed, would be greater than that which would be caused to the Appellants if an order of stay of proceedings is granted but the Appeal is ultimately dismissed.

Disposition

17. Taking all relevant factors into consideration I do find that the application dated 27th September 2022 lacks merit and the same is dismissed with costs to the respondents.
18. The lower court file placed herein, will be immediately returned to the Magistrate court registry and be mentioned before the trial Magistrate for direction.
19. Further this Appeal (if the Appellants so wish to continue with having it hear on merit) will be determined using a Skelton file containing the primary documents relevant to this Appeal and the ruling appealed against.
- 20 It is so ordered

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 3RD DAY OF MAY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

DELIVERED ON THE VIRTUAL PLATFORM, TEAMS THIS 3RD DAY OF MAY, 2024.

In the presence of;

No appearance for Appellant

No appearance for Respondent

Sam Court Assistant

