



REPUBLIC OF KENYA



KENYA LAW
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**Waweru v Bor & another (Civil Appeal E085 of 2024)
[2024] KEHC 6325 (KLR) (3 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6325 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E085 OF 2024
RN NYAKUNDI, J
JUNE 3, 2024**

BETWEEN

WILSON WAWERU APPELLANT

AND

ROBERT BOR 1ST RESPONDENT

LUCAS ONYANGO OKINDA 2ND RESPONDENT

(Being an application for stay of proceedings under Order 42 Rule 4 and 6 pending the hearing and determination of appeal against the Ruling and Orders of the Honorable T. Mbugua (Adjudicator) delivered on 19th April, 2024.)

RULING

Coram: Before Justice R. Nyakundi

M/s Morgan Omusundi Law Firm

M/s Kimondo Gachoka & Company Advocates

1. Before me for determination is an application dated 19th April, 2024 brought under the provisions of Order 42 Rules 4 and 6, Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3, and 3A of the [Civil Procedure Act](#). The Applicant seeks the following orders:
 - a. Spent
 - b. That this honorable court be pleased to order a stay of any further proceedings in Eldoret Small Claims civil Cause No. E968 of 2023 pending the hearing and determination of this application.



- c. That this Honorable Court be pleased to stay any further proceedings in Eldoret Small Claims Civil Cause No. E968 of 2023 pending the hearing and determination of the Appellant's/Applicant Appeal on the ruling dated 19th April, 2024.
 - d. Spent
 - e. That the costs of this application abide by the outcome of the appeal
2. The grounds in support of the application have been enumerated as follows:
- a. That on the 19th April 2024, the honorable court issued a ruling on the Respondent/Applicant's notice of Preliminary Objection dated 3rd March, 2024.
 - b. That the Honorable court ruled that it had jurisdiction to hear and determine personal injury matters arising out of road traffic accidents deviating from Hon. Justice Kizito's decision in *Ongwari versus Hersi (Civil Appeal 223 of 2022)* (2023) KEHC 20111 (KLR) (3rd July 2023) (judgment
 - c. Being aggrieved by the Ruling, the Appellant/Applicant proceed to appeal before the High Court at Eldoret seeking to set aside the said ruling dated 19th April, 2024 and to strike out the suit in the subordinate court being Eldoret Small Claims Civil Claim No. E968 of 2023.
 - d. That in the Appeal, the Appellant primarily seeks the High Court's determination of whether the small claims court is bound by the High Court decision in *Ongwari v Hersi (Civil Appeal 223 of 2022)* (2023) KEHC 20111 (KLR) (3rd July, 2023) (Judgment).
 - e. That the Appellant/Applicant's Appeal has high chances of success.
 - f. That the Appellant/Applicant is apprehensive that the court may proceed to hear the suit and deliver the judgment in Eldoret Small Claims Civil Case No. E968 of 2023 at the Applicant's detriment.
 - g. That it was the Applicant's contention that the Small Claims Court is guided and bound by the high court decisions, and as such, the Small Claims Court lacks jurisdiction to entertain the suit before it, being Eldoret Small Claims Civil Case No. E968 of 2023.
 - h. That unless stay of proceedings is granted in Eldoret Small Claims Civil Case No. E968 of 2023 is granted, and the trial court proceeds to hear and to deliver judgment, the Applicant's Appeal will be nugatory and the Respondent in the Small Claims Court will suffer irreparable loss and damage.
 - i. That the Appellant/Applicant is ready, willing and able to furnish such reasonable security as this honorable court may deem fit.
3. In response to the application, the respondent filed a replying affidavit sworn by the various Respondents on 15th May, 2024.
- 4. The Respondents deponed that the present application is a waste of judicial time, incompetent, improper and has not been brought in good faith and the same is fatally defective.
 - 5. The Respondent maintained that the Appellant has not met the conditions for stay of proceedings which are arguable Appeal and likelihood of the Appeal being rendered nugatory. The Respondent further indicated that the Appellant has failed to 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 in a single appeal.

6. According to the Respondents the appeal does not have plausible or persuasive grounds to alter the original verdict issued by the Small Claims Court. That the court has inherent power to make such orders necessary for the ends of justice and to prevent abuse of the court process and therefore the Applicant's case has not demonstrated a prima facie case with a possibility of success.
7. In the Respondent's view, the applicant has nothing to lose, suffer neither will he be prejudiced in any way so long as this matter continues to be delayed and/or derailed and kept pending in court to his joy, advantage and interest.
8. The parties filed rival submissions which I have carefully gone through and considered the cases cited therein.
9. The Appellant submitted that this honorable court in exercising its discretion on whether to grant an application for stay of proceedings ought to consider special circumstances and the unique fundamental principles/requirements as laid out under Order 42 of the Civil Procedure Rules. On this he cited the decision in Ezekiel Mule Musembi vs H. Young & Company (E.A) Limited (2019) eKLR.
10. It is submitted for the Applicant that the application has been filed expeditiously and without undue delay and that the appeal is arguable bearing the circumstances to therefore warrant a stay of proceedings. The Appellant cited the decision in Niazons (Kenya) Ltd. Versus China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango Otieno, J where the court stated as follows:

“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 orders made nugatory and render the exercise futile, stay ... should be granted.”
11. The Appellant argued that Hon. Justice DKN Magare in Jerusha Auma Ogwari v Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim (Civil Appeal 223 of 2022) (2023) KEHC 20111 (KLR) held that it is not practicable for matters relating to Road Traffic Accidents to be determined in the Small Claims Court. The Appellant holds the position that by dint of Section 38 of the Small Court Act the High court is the final Appellate Court.
12. The Appellant further submitted that a decision made by the High Court is binding to the Small Claims Court being subordinate to the High court. On the exercise of jurisdiction, the Appellant stated that he is guided by the principals of Judicial Authority of the High Court prescribed under Article 165(6) of *the Constitution* of Kenya.
13. It was also the appellant's position that in the statement of claim filed in the lower court, negligence was pleaded and the respondents failed to plead the particulars of the said negligence. He also added that an arguable appeal is not one that will necessarily succeed but it is one that raises tenable positions and this appeal raises legitimate issues. On whether the Applicant's Appeal is arguable, the Appellant cited the decision in Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Appeal Nairobi No. 72 of 2001.



14. Finally, the applicant submitted that he has met all the conditions that warrant a stay of proceedings in Eldoret Small Claim Civil Cause No. E968 of 2023 pending the determination of the instant Appeal.
15. The Respondent on the other hand submitted that for this court to grant stay of proceedings, the Appellants/Appellant ought to have shown that it has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory. The Respondents cited the decisions in Kenya Wildlife Service versus James Mutembei (2019) eKLR and the decision in Re Global Tours & Travel Ltd HCWC No. 43 of 2000.
16. With the cited decisions, the Respondent argued that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power to be exercisable by the court upon consideration of the facts and circumstances of each case.
17. The Respondent further that the stay of proceedings as sought by the Appellant/Applicant is seemingly a delay tactic. That what is critical is that the application has been made without unreasonable delay and the applicant demonstrates that he stands to suffer substantial loss if the order for stay is not made.
18. It is submitted that in the instant case, the question that begs answers is what loss the applicant stands to suffer if the trial court proceeds with hearing this suit. The supporting affidavit does not indicate any loss that the applicant has stated he will suffer if the matter proceeds for hearing and determination in the trial court. The respondents state that all the applicant has said is that the trial court may proceed to hear the suit and deliver judgment and the Appellant's Appeal will be rendered nugatory and the applicant will suffer irreparable loss.
19. In conclusion the Respondents submitted that the Appellant/Applicant has not demonstrated that they have an arguable appeal to warrant issuance of the orders being sought and therefore the application should be dismissed with costs.

Analysis and determination

20. I have carefully gone through the application, the response thereto and the rival submissions. The only issue I find for determination is whether the Applicant has met the threshold for grant of stay of proceedings in Eldoret Small Claim Civil Cause No. E968 of 2023.
21. The principles guiding stay of proceedings were laid down by a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings in the case of William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR;
 - a. First, there must be an appeal pending before the higher Court;
 - b. Second, 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. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, 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. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

22. In the same vein, in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330:

“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 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 not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.”

23. From the foregoing authorities, it is evident that the stay of proceedings is a radical measure which is only exercised in the most of deserving cases. This is a discretionary power that is exercised by the court sparingly. Hence, granting stay of proceedings pending an appeal over interlocutory matters is decided on the facts of each case and with “due regard to the salutary general rule that appeals are not entertained piecemeal.” See *Walhaus & Others v Additional Magistrate, Johannesburg & Another*, 1959 (3) SA 113(A) at 120D

24. The underlying issue in this case is that the Appellant/Applicant has challenged the jurisdiction of the Small Claims Court to handle Road Traffic Accident matters pursuant to the decision in *Jerusha Auma Ogwari v Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim* (Civil Appeal 223 of 2022) (2023) KEHC 20111 (KLR). I take cognizance of the fact that the said decision is binding to the subordinate courts in line with the doctrine of stare decisis.

25. In *Kidero & 5 Others v. Waititu and Others, Sup. Ct. Petition No. 18 of 2014* (Consolidated with Petition No. 20 of 2014), Njoki Ndungu, SCJ, in her concurring opinion, made the following pertinent remarks (para. 236):

“The principle of stare decisis in Kenya unlike other jurisdictions is a constitutional requirement aimed at enhancing certainty and predictability in the legal system. The Articles of establishment and jurisdiction reveal the Court's vital essence and the decisions of this Court protect settled anticipations by ensuring that *the Constitution* is upheld and enforced, and that the aspirations of the Kenyan



people embodied in a system of constitutional governance are legitimized. The constitutional contours of Article 163(7) oblige this Court to settle complex issues of constitutional and legal controversy, and to give jurisprudential guidance to the lower Courts. In the exercise of our mandate, we determine the constitutional legality of statutes and other political acts to produce judicially-settled principles that consolidate the rule of law and the operation of government, and the political disposition, particularly in the settlement of electoral disputes. As a Court entrusted with the final onus of settling constitutional controversies, one of our principal duties is the enforcement of constitutional norms.”

26. Having said that, the decision by Kizito J in *Jerusha Auma Ogwari v Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim* (Civil Appeal 223 of 2022) (2023) KEHC 20111 (KLR) has left many, particularly the litigants at crossroads as to whether to apply the said decision on matters jurisdiction or the *Small Claims court Act* under Section 12 which speaks in the following terms: -

- “(1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to—
- (a) a contract for sale and supply of goods or services;
 - (b) a contract relating to money held and received;
 - (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
 - (d) compensation for personal injuries; and
 - (e) set-off and counterclaim under any contract.”

27. In the instant case, one cannot say that the preferred appeal is not arguable. We have had a plethora of decisions where it has been constantly held that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. I am of the considered view that the issues raised in the appeal are those this court will need to consider and determine at the hearing of the appeal by considering the trial court’s reasoning as against the Applicant’s arguments and arrive at its own decision. On the arguability test therefore, the appeal passes.
28. Taking it a notch higher, as I have said, the decision by Kizito J has left litigants at crossroads. This in my view a substantial question of law under clause (3)(b) or (d) of Article 165 of *the Constitution* of Kenya 2010, which should be heard by an uneven number of Judges not being less than three, assigned by the Chief Justice.
29. The court in *Kenya Medical Research Institute v Attorney General & 3 others* [2014] eKLR had this to say on the Article 165(4):

“Article 165(4) of *the Constitution* stipulates circumstances under which the Chief Justice can exercise his powers under that Article. It is a requirement that the substantial question of law which justifies the invocation of the said provision must either be where the Court is required to make a determination of the question whether a right or fundamental freedom in the Bill of Rights has been denied,



violated, infringed or threatened or a determination in respect of a question respecting the interpretation of *the Constitution*. It is therefore clear that Article 165(4) can only be invoked in specific and limited circumstances. This is therefore, in our view, not an ordinary jurisdiction. A Bench empaneled under the said provision cannot therefore be termed as an Industrial Court so as to be constituted solely of Industrial Court Judges. In any case, it is not contended that this Court as constituted is not properly seized of the jurisdiction to determine the twin issues contemplated under Article 165(4) of *the Constitution*.”

Decision

30. Given that background of these Appeals the numerous cases filed before the small claims court are being challenged as being automatically null and void without more ado by the adjudicators. This in essence almost renders the Act impotent in respect of the matter on personal injury claims.
31. I am then persuaded that this is one of the cases where there is need to stay the proceedings in order to have the appeal determined to finality. This matter in the manner it is being explored and litigated raises arguable points of law of general public importance that triggers the jurisdiction of the Small Claims Court. In reference to the certain dicta in *Jerusha Auma Ogwari v Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim* (Civil Appeal 223 of 2022) (2023) KEHC 20111 (KLR). Thus, permitting the matter to be adjudicated by an empanelled bench of an even number by the Chief Justice to revisit the inherent issue in the matter. There is need for a final decision to be made whether matters arising out of these appeals are within the jurisdiction of the Small Claims Court. For that reason, the following orders do issue:
 - a. The Proceedings in Eldoret Small Claims Civil Cause No. E967 of 2023 are hereby stayed pending the determination of the Applicant’s Appeal on the ruling dated 19th April, 2024.
 - b. The hon the Chief Justice consider empanelling a bench of uneven number of judges, being not less than three (3) to hear and determine the instant appeal.
 - c. Status Conference on 20.6.2024
 - d. The Costs shall abide by the outcome of the Appeal.

It is so ordered.

DATED SIGNED AND DELIVERED AT ELDORET THIS 3RD DAY OF JUNE, 2024

In the Presence of

M/s Akinyi for Mr. Omusundi Advocate for the Respondent

Mr. Amihanda Advocate for the Appellant

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R. NYAKUNDI

JUDGE

