



**Let's Do Business Company Limited v Koskey (Civil Case E222 of 2022)
[2024] KEHC 11026 (KLR) (Commercial and Tax) (19 September 2024) (Ruling)**

Neutral citation: [2024] KEHC 11026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E222 OF 2022
JWW MONG'ARE, J
SEPTEMBER 19, 2024**

BETWEEN

LET'S DO BUSINESS COMPANY LIMITED PLAINTIFF

AND

ALBINA GICHUKU KOSKEY DEFENDANT

RULING

1. On 15th August, 2023 this court pursuant to the Plaintiff's Originating Summons dated 20th June 2022 held that the unstamped and unregistered lease agreement was a valid document for enforcement between the parties and subsequently allowed the arbitration proceedings to proceed as an Arbitrator had been appointed. As a result, the court dismissed the Originating summons.
2. Subsequently the Plaintiff filed the instant Notice of Motion dated 9th October, 2023 under sections 1A, 1B, and 3A of the Civil Procedure Act, Order 51 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya seeking the following orders:-
 - i. spent
 - ii. Pending the hearing and determination of this Application, an order to issue staying the taxation of the Defendant's Party and Party Bill of Costs dated 22nd September, 2023.
 - iii. Pending the hearing and determination of this Application an order staying the arbitration proceedings before Nyagah B. Kithinji, Arbitrator.
 - iv. A stay of further proceedings in this case and/ or arbitration pending the hearing and determination of the Appeal by the Plaintiff on the Ruling of 15th August, 2023
 - v. Costs of the Application be in the cause.



3. The Application is supported by the affidavit of Issa Fidow, the director of the Plaintiff Company. The Application is opposed by the Replying affidavit sworn by Albina Gichuku Koskey on 20th November, 2023. In the said Affidavit, the Applicant argues that the Plaintiff, by the letter dated 26th October, 2023, agreed to appoint Wairimu Gathongo as the sole Arbitrator in place of Nyagah B. Kithinji and a subsequent appointment was done by a letter dated 2nd November, 2023. Further, the Applicant contends that any issues stemming from the appointment of Nyagah B. Kithinji are irrelevant. In addition, the Applicant contends that Plaintiff is not interested in resolving the current dispute and that allowing the Application will inflict substantial prejudice upon the Respondent.
4. At the hearing, the parties agreed to dispense the Application through written submissions. I have considered carefully the parties' written submissions that were orally highlighted before me in support and opposition of the pleadings. From my analysis I note that the only issue that arises for determination is whether the Applicant has met the threshold for granting stay orders sought herein.
5. Both parties submit that for an order of injunction to be granted the principles established in the locus classica case of *Giella v Cassman Brown* (1973) EA 358, must be present that is to say; a party has to establish a prima facie case with a probability of success, prove that damages are inadequate to remedy and the court if in doubt will decide on a balance of convenience.
6. In *Mrao Ltd v First American Bank of Kenya Ltd & 2 others* [2003] eKLR the court defined a prima facie case as one in which, based only on the evidence presented, a tribunal will legitimately determine that the Applicant's rights have been violated and that the Respondent must provide a rebuttal.
7. In the instant case, this court had established that the Respondent's rights had been infringed in its Ruling of 15th August, 2023, when the court made a finding that the issues raised concerning the leased property L.R. no. I.R. 59416/18 in Nairobi County would be dealt with amicably by an Arbitrator in line with the lease agreements and proceeded to affirm the appointment of an Arbitrator.
8. After delivery of the Ruling the Arbitrator Nyagah B. Kithinji having been notified of the court's decision went ahead to invite the parties for a preliminary meeting but he and the Plaintiff however failed to attend the meeting. Subsequently, the parties agreed on the appointment of Wairimu Githongo as the new Arbitrator. Arising from the Application before this court, it appears to me that the Plaintiff is now not desirous of proceeding with the arbitral proceedings and has approached this court to stay its Ruling of 15th August 2023, on the ground that it has filed an Appeal challenging the said Ruling and it is apprehensive the Appeal will be rendered nugatory if the arbitral proceedings are not stayed.
9. This court should address the issue of whether it ought to interfere with the proceedings at the arbitral tribunal. In doing so, the court will be guided by Section 14(8) of the *Arbitration Act* which provides that "While an Application under subsection (3) is pending before the High Court, the parties may commence, continue and conclude arbitral proceedings, but no award in such proceedings shall take effect until the Application is decided, and such an award shall be void if the Application is successful."
10. From the above proviso, it is clear that there is no bar in law for court to stop an arbitral proceeding to continue despite the existence of an Appeal by either party. The court will therefore not interfere with and or stall arbitral proceedings unless sufficient cause is adduced to warrant the exercise its jurisdiction. As per the lease agreements the parties had chosen arbitration as the mode of dispute resolution. I am therefore not persuaded that in the case the arbitration is allowed to proceed there will be prejudice suffered.



11. *Halsbury's Law of England*, 4th Edition. Vol. 37 pages 330 and 332, states 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 proceeding 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.”

12. This position has been reinforced in the decision in *Kenya Wildlife Service v. James Mutembei* [2019] eKLR where the court stated that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

13. Having considered the case circumstances, I am not persuaded that the Applicant has demonstrated circumstances that would warrant this court's interference with the arbitral proceedings. In my view, the mere filing of an Appeal is therefore not enough reason for the court to interfere with the arbitral proceedings. The filing of the Bill of Costs by the Defendant is based on the costs incurred by the Defendant in the suit. The Defendant cannot be denied to claim what was rightfully awarded by the court. In the interest of justice, this court finds the instant unmerited.

14. However, my finding herein above cannot be said to outweigh the Plaintiff's right to Appeal. The Applicant is at liberty to move the appellate court for the said orders of stay if need be.

15. In conclusion I find and hold that the Application dated 9th October, 2023 is unmerited and the same is hereby dismissed with costs to the Defendant/Respondent.

16. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2024.

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J.W.W. MONG'ARE

JUDGE

In the Presence of:-

1. Ms. Omuya for the Plaintiff/Respondent.
2. Mr. Osodo for the Defendant/ Applicant.
3. Amos - Court Assistant

