



**Makena v Nalwa (Civil Appeal E127 of 2024)
[2024] KEHC 13086 (KLR) (23 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 13086 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E127 OF 2024
RE ABURILI, J
OCTOBER 23, 2024**

BETWEEN

FAITH MAKENA APPELLANT

AND

WAFULA NALWA RESPONDENT

RULING

1. The appellant's application dated 25th June, 2024 seeks orders of stay of proceedings in Kisumu CMCC No E230 of 2023 pending the hearing and determination of this appeal as filed. The appellant also prays for costs of the application. On 27th June 2024, an interim order of stay of the said proceedings was granted pending the hearing and determination of the application as filed under certificate of urgency.
2. The grounds upon which the application is predicated are that the applicant's preliminary objection dated 6.3.2024 that the suit had abated for failure to take out and serve ever been served with summons to enter appearance in the suit as stipulated in Order 5 Rule 1(6) of the *Civil Procedure Rules* was dismissed, which dismissal the applicant was aggrieved by and had filed the appeal herein which appeal is not frivolous but raises serious pertinent issues for this Court's determination including whether the lower court had jurisdiction to hear and determine the suit which had abated by effluxion of time for failure to serve summons to enter appearance .
3. It was also averred that the hearing of the suit in the court below when this appeal is pending will be in violation of the applicant's right to a fair hearing and that the applicant will therefore be prejudiced by the failure to grant stay of proceedings pending the hearing and determination of the appeal.
4. Additionally, that the appeal which is meritorious will be rendered nugatory if an abated suit is heard and determined without jurisdiction hence the application herein will save the court's precious time and labour for the court users.



5. The application is supported by the affidavit sworn by the appellant Faith Makena reiterating her grounds albeit too argumentative.
6. Opposing the application, the respondent filed a replying affidavit sworn on 17th September, 2024 in which he deposed that the Notice of motion dated 25th June 2024 as filed is incompetent, an afterthought, mischievous, contemptuous, an abuse of the court's time and misuse of the judicial process hence should be dismissed with cost to the respondent. That the application dated 25th June 2024 filed before this Court seeking for stay of court contempt proceeding against the Appellant/ applicant pending hearing and determination of the appeal does not meet the threshold stipulated under order 42 rule 6 sub Rule 2(a) of *Civil Procedure Rules* 2010 hence should not be granted. That the ruling dated 23rd May 2024 that dismissed the appellant/applicant's preliminary objection is a negative order incapable of being stayed by this honorable court pending hearing and determination of the appeal. That the appellant/ applicant never sought any leave from the lower court to appeal the said ruling dated 23rd May 2024 immediately after the ruling was delivered as alleged in her application.
7. The respondent urged this Court to peruse the records of the lower court and particularly the proceedings of 23rd May 2024 to confirm the same. The respondent deposed that the appellant participated in the proceedings for contempt of Court after which parties were directed to file submissions, within the given timelines.
8. The respondent further deposed that failure to obtain leave to appeal against the ruling impugned deprives this court of jurisdiction to hear and determine the appeal herein which should be struck out with costs to the respondent.

Submissions

9. The application was canvassed by way of written submissions. On the part of the appellant/applicant, it was submitted reiterating the grounds and depositions at length. However, most of the submissions hinge on the merits of the appeal as opposed to the merits of the application for stay of proceedings and therefore this court must resist the temptation of venturing into the merits of the appeal, to avoid summary determination of the appeal.
10. The respondent submitted on two issues namely, that this court has no jurisdiction to hear and determine the application for stay of proceedings and ultimately the appeal because the appellant did not seek and obtain leave to appeal from the ruling on the preliminary objection as impugned. The respondent relied on the cases of *Isaac Mbugua Ngirachu v Stephen Gichobi Kaara* [2021] eKLR and *In Stephen Omondi Juma v Sprocer Awuor Rabote* [2022] eKLR and *Nyutu Agrovet v Airtel Networks Ltd* [2015] eKLR among others to support this position.
11. Secondly, that the application does not meet the threshold for grant of stay as stipulated in Order 42 Rule 6(2) (a) of the *Civil Procedure Rules*. Reliance was placed on the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR.
12. Further contention was that the order appealed from is an negative order of dismissal of a preliminary objection hence it is incapable of being stayed. He relied on the case of *Chege v Gachora* (Civil Appeal 265 of 2023) [2024] KEHC 1994 (KLR) (29 February 2024) (Ruling).

Analysis and Determination

13. Having examined the application, the rival affidavits and submissions by the parties' Counsel, the only issue for determination is whether the Applicant has met the conditions for stay of proceedings in the lower court pending appeal.



14. Both parties cited the conditions set out under order 42 Rule 6 of the *Civil Procedure Rules*. Although the Sub-rule 1 mentions both the stay of execution and stay proceedings, the conditions given under Sub-rule 2 apply solely to stay of execution pending appeal and not stay of proceedings.
15. In the case of *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* [2019] eKLR, a 5-judge Bench of the High Court, after scanning through various decisions on the question of stay of proceedings, laid down 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. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR where the following six principles were laid down by the Court:
 - 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.
16. All these factors must be considered, in a given case, in the spirit concisely expressed in *Halsbury's Laws of England*, 4th Edition, Vol. 37 at p. 330, 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 reasonable doubt, ought not to be allowed to continue.
17. 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 his case.



18. In other words, a stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. Ringera J. in *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No 43 of 2000) had this to say on this matter of stay of proceedings:

“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)

19. What emerges from the discussion above is that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy.
20. As a general rule, 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 *Gardiner and Lansdown* (6th Ed. Vol. 1 p. 750), “grave injustice might otherwise result or where justice might not by other means be attained.”
21. 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.” Hence, the propriety of granting a 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.” (*Walhaus & others v Additional Magistrate, Johannesburg & another*, 1959 (3) SA 113(A) at 120D; *S. v Western Areas Ltd & others* 2005 (5) SA 214 (SCA) at 224D.
22. In the present case, it is not possible to say that the preferred appeal is not arguable. Although the respondent took time to submit that the appeal was filed without leave of court as contemplated in Order 43 of the *Civil Procedure Rules*, I have perused the trial court record and found that on the same date when the ruling on the preliminary objection was rendered, the appellant’s counsel sought leave to appeal and he was granted the said leave hence the appeal is competently before this court.
23. Additionally, the respondent contended that as the order appealed from was a negative order dismissing the preliminary objection, it cannot be stayed. I agree that a negative order is incapable of stay. However, there are exceptions including situations where the negative order relates to an injunction and like in the instant case, the stay sought is not against the order of dismissal but for stay of further proceedings. I hasten to add that the stay as sought here is not against execution but stay of proceedings.
24. It is worth noting that on numerous occasions, courts have 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. See *Kuko & another v Ali & another; Robinson (Interested Party)* (Civil Application E023 of 2023) [2024] KECA 305 (KLR) (22 March 2024) (Ruling). (Court of Appeal at Eldoret).
25. The Appeal in the instant case relates to the question of whether the Trial Court correctly disallowed the preliminary objection raised by the appellant that the suit in the court below had abated for non-



issuance and service of Summons to enter Appearance upon the respondent after filing of suit and within thirty days of filing suit.

26. The issue of non-service of summons to enter appearance is not novel to this court which has had occasion to determine it at length in its previous decisions. It is also not a complex issue as far as this court is concerned and if all the parties were to argue the appeal devoid of procedural delays, this court is capable of determining that issue expeditiously so as to put the issue to rest and let the parties ventilate their real grievances. This is an issue that this Court will have to consider and determine at the hearing of the appeal by weighing the reasoning given by the Trial Court vis a vis the Applicant's contention and arrive at its own decision. The Appeal is therefore arguable.
27. As to whether the appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given, I have no doubt in my mind that any judgment rendered is capable of being stayed.
28. It follows that whether a party that had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the trial court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek stay of proceedings in the Trial Court. See the case of *Reliance Bank Ltd v Norlake Investments Ltd* [2002] I EA 227, where the court held that the factors which can render an appeal nugatory are to be considered within the circumstances of each particular case, and in doing so, the Court is bound to consider the conflicting claims of both sides. In the circumstances of that particular case, the Court stated inter alia:

“To refuse to grant an order of stay to the applicant would cause to it such hardships as would be out of proportion to any suffering the respondent might undergo while waiting for the applicants appeal to be heard and determined.”
29. Thus, the rule of stay is more challenging for a party requesting for a stay of proceedings. In particular, an 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.
30. In the instant case, the appellant filed this appeal in June 2024 and already, four months are gone since its filing. There is therefore delay in the hearing of the main suit by four months and still counting. The issue of whether the suit in the lower court abated is, as I stated earlier, an arguable one and one, if decided in the affirmative, will determine the suit in limine. What that means is that should this application be disallowed and the case in the lower court proceeds to hearing, then this court on appeal decides that the suit abated, the lower court would have wasted all the time determining a dead suit.
31. On the other hand, since this interlocutory appeal is not complex and the parties can be conditioned to expedite it, I find that it is in the interest of justice to allow stay of proceedings in the lower court to pave way for this appeal since the lower court trial record is already here.
32. Accordingly, I hereby allow the application by the appellant and stay the proceedings in Kisumu CMCC E230 of 2023 pending hearing and determination of this appeal conditional upon the appellant filing and serving a complete record of appeal together with submissions within 10 days of today upon which the respondent will have 5 days of the date of service to file and serve written submissions and in default on the part of the appellant, the orders herein shall lapse and appeal deemed dismissed.



33. Mention on November 11, 2024 to fix a judgment date.
34. The costs of this application shall be in the main appeal.
35. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE

