



**Gathua & another v Commissioner of Insurance (Winding Up Cause 22 of 2006)
[2023] KEHC 2211 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2211 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
WINDING UP CAUSE 22 OF 2006**

EC MWITA, J

MARCH 17, 2023

BETWEEN

BERNARD NJOROGE GATHUA 1ST APPLICANT

BENJO SERVICE LINE CO LTD 2ND APPLICANT

AND

THE COMMISSIONER OF INSURANCE PETITIONER

(The applicants, Bernard Njoroge Gathua (now deceased) and Benjo Service Line Co. Ltd were policyholders of United Insurance Company Limited (the company) and the 149th and 150th respondents in this cause. They had previously filed an application dated 9th April 2021, seeking to terminate this cause in accordance with the Attorney General's opinion to the Commissioner of Insurance the petitioner in the report dated 14th January 2021. In that report, the Attorney General recommended that the winding up cause be terminated and steps be taken to revive the company. The application was dismissed by Mativo J. (as he then was), in a ruling dated 23rd September 2021 on grounds that the application sought to introduce the report as evidence after the case had already been closed and was pending judgment. Following the transfer of the Judge to another station, the file was allocated to this court for further action. On 7th March 2022, the applicants' counsel informed the court that they had lodged a Notice of Appeal dated 5th October 2021 against the ruling of 23rd September 2021 and wanted proceedings herein stayed pending determination of that appeal. The applicants were directed to make a formal application for consideration.)



RULING

Application

1. The applicants filed a notice of motion dated March 9, 2022 under sections 1, 1A, 3, 3A of the [Civil Procedure Act](#) and Order 42 rule 6(1) of the [Civil Procedure Rules](#), seeking stay of further proceedings pending the hearing of the intended appeal to the Court of Appeal against the ruling delivered on September 23, 2021.
2. The application is premised on the grounds on its face and the affidavit sworn on March 9, 2022 by the late Gathua and the subsequent supplementary affidavit sworn on October 28, 2022 by Stephen Gathua Njoroje, a director of the 2nd applicant, to sustain the application following the demise of Gathua.
3. The applicants argued that the intended appeal is arguable and will be rendered nugatory if stay is not granted. This, they asserted, is because the intended appeal concerns the jurisdiction of this court to determine the proceedings, given the Attorney General's opinion to the petitioner.
4. The applicants stated that they have been diligent to have the appeal expeditiously heard and determined but despite their oral application on September 23, 2021 for typed copies of proceedings, proceedings have not been availed to enable them to file the record of appeal. Similarly, the applicants argued that the application was filed timeously on March 9, 2022, two days after the court directed that a formal application be filed. On the other hand, the petitioner filed the petition in 2006 but did not pursue it for nine years. For that reason, the respondents cannot attribute the delay in hearing the petition to them.
5. The applicants also argued that if the petition is heard and allowed before their intended appeal, the winding up orders will violate their right of access to justice and to fair trial guaranteed by the [Constitution](#). The applicants further argued that there will be no prejudice to the respondents if stay is granted. They relied on [Bethuel Muirui Benjamin v Development Bank of Kenya \(Civil Suit 496 of 2000\) \[2006\] eKLR](#) and [Housing Finance Company of Kenya v Sharok Kher Mohammed Ali Hirji & Another \(Civil Application No 74 of 2015\) \[2015\] eKLR](#).

Responses

6. The Statutory Manager opposed the application through a replying affidavit sworn on March 20, 2022 by William Okari Masita, the Managing Trustee of the Policy Holder Compensation Fund, the Statutory Manager of United Insurance Company Limited. The Statutory Manager also filed written submissions dated May 9, 2022, urging the court to dismiss the motion with costs.
7. The petitioner filed a replying affidavit sworn on April 5, 2022 by Godfrey K Kiptum, the Commissioner of Insurance and Chief Executive Officer (CEO) of the Insurance Regulatory Authority as well as written submissions dated June 5, 2022.
8. They argued that the application is procedurally flawed; that the applicants have not filed a valid appeal in the Court of Appeal and that the Notice of Appeal served is not endorsed with the filing date or signed by the Deputy Registrar as required by the Court of Appeal Rules. The respondents relied on [Daniel Nkirimpa Monirei v Sayialel Ole Koilel & 4 others \(Civil Appeal \(Application\) No 140 of 2015\) \[2016\] eKLR](#) to support this position.



9. The respondents asserted that whereas this is an application for stay of proceedings pending appeal, it has been erroneously brought under Order 42 Rule 6 of the Civil Procedure Rules which deals with stay of execution. The respondents contended that the applicants lack capacity to seek stay of proceedings as they are not principal parties in the cause.
10. Turning to the substance of the application, the respondents argued that the application does not meet the conditions for granting stay of execution pending appeal. They relied on [*Grain Bulk Handlers Limited v Mistry Jadva Parbat & Company Limited \(Misc Civil Appl No 538 of 2015\) \[2016\] eKLR*](#) where the court on the conditions for stay pending appeal.
11. On whether there is an arguable appeal, the respondents argued that it is not within the jurisdiction of this court to determine whether there is an arguable appeal in view of the impugned ruling determined by a court of concurrent jurisdiction. This is because the grounds in support of the application go to the merit of the intended appeal. Moreover, this is not an application for review.
12. The respondents submitted that the Judge was correct in finding that the Attorney General's report was not properly introduced and that it was not binding to the court. The respondents argued, therefore, that the applicants had failed to demonstrate arguable points which would be rendered nugatory if stay was not granted.
13. The respondents also asserted that the application was not filed promptly given that it was filed six months after the impugned ruling. The respondents posited that the applicants had not explained the delay in filing the application late despite the fact that the matter had been mentioned in court several times before the March 7, 2022. [*They relied on re Estate of Leah Nyawira Njega \(Deceased\) \(Succession Appeal No 13 of 2019\) \[2021\] eKLR*](#) where a similar application was dismissed due to delay.
14. The respondents added that although the petitioner instituted Civil Appeal No 279 of 2009, they were not responsible for the delay in its conclusion as the matter was subject to the court's diary.
15. The respondents contended, therefore, that granting stay of proceedings will be prejudicial as it will further delay the conclusion of this matter which has been ongoing for over fifteen years. Furthermore, they argued, this matter is of great public interest since the public is affected by the insolvency of the company.
16. The respondents relied on [*Kenya Wildlife Service v James Mutembei \(Meru HCCA No 40 of 2018\) \[2019\] eKLR*](#) for the proposition that the test for granting stay of proceeding is high and stringent as it impinges on right of access to justice, right to be heard without delay and, overall, the right to fair trial.
17. Reliance was also placed on Article 159 (2)(b) of the [*Constitution*](#) as read with Sections 1A and 1B of the [*Civil Procedure Act; Peter Kariuki Mburu & another v Neema Shah \(Voi Civil Appeal No 118 of 2020\) \[2021\] eKLR*](#) and [*Pius Kawinzi Kithoka v Jacinter Kavindu Makau \[2012\]*](#).
18. Relying on [*Machira t/a Machira & Co Advocates v East African Standard Ltd \[2002\] 2 KLR 63*](#), the respondents posited that the applicants had not established that they would suffer substantial loss if stay was not granted. They urged the court to dismiss the application.

Determination

19. I have considered the application the response and arguments by counsel for the parties. The application seeks stay of proceedings pending hearing and determination of the intended appeal to the Court of Appeal. The applicants' application to have the petition terminated following the advisory opinion by the Attorney General was dismissed in a ruling dated September 23, 2021. The applicant's



counsel made an oral application for copies of proceedings and the ruling for purposes of appeal. The applicants also lodged a notice of appeal signifying their intention to appeal.

20. When this matter came up for directions on March 7, 2022, the applicants' counsel informed the court that they had lodged their notice of appeal against the ruling and wanted proceedings stayed pending determination of the intended appeal. The court directed that a formal application be filed for consideration. The applicants filed this application seeking stay of further proceedings pending the hearing of the intended appeal.
21. The applicant's case is that the intended appeal is arguable and will be rendered nugatory if stay is not granted. They argued that the intended appeal concerns the jurisdiction of this court to determine the proceedings, given the Attorney General's advisory opinion to the petitioner. The applicants stated that despite their advocate's oral application for typed proceedings made in court on September 23, 2021 when the ruling was delivered, proceedings have not been availed to enable them to file the record of appeal.
22. The respondents opposed the application arguing that it is flawed, that no valid notice of appeal was filed, that the application does not meet the conditions for granting stay of proceedings and that there is no proof that the intended appeal will be rendered nugatory.
23. The issue for determination is whether the applicants have met the threshold for granting stay of proceedings. The application is brought under Order 42 rule 6 of the Civil Procedure Rules. although Sub rule 1 mentions stay of both proceedings and execution, Sub rule 2 deals exclusively with stay of execution pending appeal.
24. In *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 Others [2019] eKLR*, the court outlined conditions one must satisfy for grant of stay of proceedings. These were that: there must be an appeal pending before the higher court; since there is no express provision allowing for such an application, the applicant should explain why the stay has not been sought in the higher court due to the potential of an application for stay of proceedings causing inordinately delay the trial; the applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable; the applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted; the applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings necessary as opposed to having the case concluded and all grievances arising taken up in a single appeal and the applicant must demonstrate that the application for stay was filed expeditiously and without delay.

The authors of *Halsbury's Laws of England, 4th Edition, Vol 37* state at p 330 thus:

'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.'



25. Whether or not to grant stay of proceedings is an exercise of discretion and, like all other discretions, it must be exercised judicially and in the interest of justice. This was stated in *Global Tours & Travels Limited (Nairobi HC Winding Up Cause No 43 of 2000)* as follows:

'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.'

26. The propriety of granting a stay of proceedings pending 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. (*Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling)*).

27. In this application, the applicants have merely stated that the appeal will be rendered nugatory if stay is not granted. The applicants have also not demonstrated that there is an appeal pending. This fact is admitted by the applicants themselves that a record of appeal has not been filed because typed copies of proceedings have not been supplied. This blame, it would appear, is being passed over to the court. However, the applicants apart from stating that their advocate orally applied for proceedings in court, no evidence has been placed before the court to show that the oral request was followed up with a letter inquiring whether typing of proceedings had been concluded or that they paid for the proceedings. They have not shown that they have been on the issue of proceedings since when the oral application was made.

28. Further still, the applicants have not shown that this application was presented promptly and without delay. The ruling was delivered on September 23, 2021. A perusal of the record shows that counsel for the applicant made an oral application for stay of proceedings immediately the ruling was delivered. The court declined to grant stay advising counsel to file a formal application and serve so that the respondents could respond before a decision was made. No application was however filed until March 9, 2022, about six months later and only after the court again directed that a formal application be filed. No attempt was made to explain why the applicants took six months to file this application.

29. An applicant seeking stay of proceedings must demonstrate exceptional circumstances which would persuade the court to make an order for stay of proceedings instead of allowing the case to proceed to hearing and conclusion and then an appeal filed against all grievances that may arise.

30. Having considered the application and arguments by parties, the conclusion I come to is that the applicants have not met this high threshold for granting stay of proceedings in this case. They did not take steps to move the court promptly and have not shown exceptional circumstances to persuade the court to grant stay of these proceedings.

31. Consequently, the application dated March 9, 2022 is declined and dismissed. Each party will, however, bear their own costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF MARCH 2023



E C MWITA
JUDGE

