



REPUBLIC OF KENYA



KENYA LAW
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**Ndabi v Kimotho & another (Civil Appeal 16 of 2023)
[2023] KEHC 17717 (KLR) (19 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17717 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 16 OF 2023
SM MOHOCHI, J
MAY 19, 2023**

BETWEEN

JAMES MUNGAI NDABI APPLICANT

AND

ANN WANJIRU KIMOTHO 1ST RESPONDENT

LAZARUS NOLASCO KUBASA 2ND RESPONDENT

RULING

Introduction

1. The Application before the Court is the Appellant’s Notice of Motion dated 18th January, 2023 brought under article 50 (1), 159(2), (a), & (b) of *the Constitution*, sections IA & B, 3, 3A, of the *Civil Procedure Act*, order 50 rule 1 and order 42 rule 6 of the *Civil Procedures Rules* and all enabling provisions of the Law.
2. The application seeks one (1) substantive prayer namely: -

The court be pleased to order a stay of further proceedings in Nakuru Chief Magistrate’s Court MCCC No.780 of 2019 pending the hearing and determination of the Appeal.
3. The two (2) other subsisting prayers from the initial six (6) Prayers are:-
 - i. The Court be pleased to issue any other order as it may deem just, appropriate and expedient in the interest of justice; and
 - ii. The Costs of this Application be provided.



4. The Application is supported by the Affidavit of James Mungai Ndabi, the Applicant and 2nd Defendant in Nakuru Chief Magistrate's Court MCCC No.780 of 2019 where the 1st Respondent herein is the Plaintiff.
5. The Applicant is enjoined in the proceedings by virtue of being the alleged registered owner of motor vehicle KWG 698G which was on the 12th December 2018 involved in an accident with Motor Cycle Reg. No KMDP 940K.
6. The Applicant had initially successfully managed to set aside the default judgment entered and he was granted leave to file defence. He instead filed an application that his name be struck off the proceedings as the motor vehicle subject to the accident was no longer his property and that he had disposed it off long before the accident.
7. As per the supporting Affidavit, the applicant applied and sought that his name be struck off and his application was found to be without merit and was dismissed by the trial magistrate.
8. The reasoning of the trial magistrate in disallowing the Applicant's Application was, "that the question of ownership of the motor vehicle was a factual and evidential issue for adjudication in trial" and that the Applicant had the opportunity to present his defence and evidence.
9. The Learned Magistrate had just set aside default judgment, and was now undertaking pre-trial motions and the appellant had been directed to file a defence when he elected to file a notice of motion dated 23rd August 2022 praying for "striking out the suit".
10. The substratum, of the Appeal is a challenge ruling by the Hon. Trial Magistrate dismissing the application dated 23rd August 2022 and setting down the matter for further pretrial directions.
11. It is averred that the Appellant is aggrieved by the Ruling by the trial Court dated 23rd December 2022, and has lodged a Memorandum of Appeal in this Court against the same filed simultaneously with the Application for stay dated 17th January 2023. The Appellant believes that if the stay of proceedings order does not issue the trial Court will issue pre-trial directions and the appeal will be rendered nugatory and will suffer irreparable loss. He contends that the application will not occasion any prejudice to the Respondent that cannot be compensated with payment of reasonable costs.
12. In opposition, the Respondent filed grounds of opposition dated 28th February, 2023 as follows: -
 - i. That the notice of motion is fatally defective, bad in law and an abuse of the process of this Court;
 - ii. That the notice of motion cannot stand having been overtaken by events;
 - iii. That the orders sought are otiose in nature and a waste of the Courts Precious time;
 - iv. That the Applicant failed to satisfy the conditions for staying proceedings;
 - v. That the Application has not met the minimum threshold to grant the prayers sought; and
 - vi. That the Court is functus officio on the issue raised by the applicant and the only remedy is dismissal of the Notice of Motion Application hereinabove.
13. The Applicant and Respondent were directed to file submissions on the 28th February 2023 the 2nd Respondent had filed his Grounds of opposition on this date, however by the 28th March 2023 none of the parties had complied so the Court fixed the same for ruling.



Analysis and Determination

14. I have carefully considered the application, the supporting affidavits thereto, and the 2nd Respondent's grounds of opposition. The only issue for determination is whether the Appellant has met the conditions necessary for the grant of stay of proceedings.
15. Stay of proceedings is governed by order 42 rule 6(1) of the *Civil Procedure Rules* which provides that: -

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”
16. From the foregoing, it is evident that the power to grant stay of proceedings is an exercise of the discretion of the Court on sufficient cause being shown by an Applicant.
17. In the Case of *Re Global Tours & Travel Limited* (Nairobi) H.C. Winding up Cause No. 43 of 2000 quoted with approval in Meru Civil Appeal 40 of 2018 Kenya Wildlife service -versus- Mutembei (2019) eKLR that: -

“The court stated; As I understand the law whether or not I 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 to order a stay of proceedings, and if it is on what terms it should be granted.

In deciding whether to order a stay, a 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 or whether it is an arguable one. The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.... “...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”
18. Therefore, the test from the above authorities is one that sets out the following parameters for a Courts exercise in discretion, in deciding whether or not to grant a stay of proceedings as sought in this application: -
 - a. Whether the Applicant has established that he/she has a prima facie arguable case; and
 - b. Whether the Applicant has established sufficient cause to the satisfaction of the court, that it is in the interest of justice to grant the orders sought.
19. In an application for stay of proceedings, the Court must consider the overriding objective, and balance the interests of the parties to the suit, since the Court is enjoined to always place the parties on equal footing. Since the overriding objective aims, inter alia, to facilitate the just, expeditious, proportionate,



and affordable resolution of the civil disputes governed by the Act, the balancing of the parties' interest is paramount in an application for stay of Proceedings pending appeal.

20. In this instance the 1st Respondent had obtained default judgment and was executing the same, before the Applicant successfully convinced the trial Court to set aside the judgment for him to be heard and the stay of proceedings now sought shall leave the 1st and 2nd Respondent in a state of limbo, awaiting determination of the appeal I am of the view that staying the proceedings in Nakuru Chief Magistrate's Court MCCC No.780 of 2019 shall adversely affect the interests of the 1st and 2nd Respondents which interests ought to be considered.
21. On the limb as to whether the Applicant has established that he/she has a prima facie arguable case, the Applicant has not offered any explanation of how the Lower Court has derogated from exercising its discretion judiciously or which principles if any have been applied incorrectly. In the case of *Ibrahim Ahmed V Halima Guteti* High Court at Mwanza Number 128 of 1967) 1968 THCD, the Court held, inter alia: -

“The question for a court on appeal is whether the decision below is reasonable and can be rationally supported if so the lower court should be affirmed. The appeal judge may not in effect try the case de novo, and decide for the party he thinks should win...”
22. A cursory look at the memorandum of appeal by Mr James Mungai Ndabi, Civil Appeal No. E016 of 2023, filed on the 25th January 2023, he appeals from the ruling of the Honorable Y.I Khatambi, Principal Magistrate, delivered, on the 23rd December 2022 in the CMCC No780 of 2019 the appeal against the decision of the following grounds: -
 - a. That the learned magistrate, erred in law and in fact, in dismissing the Applicant's application dated 23rd August 2022.
 - b. That the learned magistrate, erred in law and in fact, by disregarding the Appellant's overwhelming evidence on record, that the prior to the accident in question he had disposed of, the suit motor vehicle registration number KBW 689G, had no proprietary and beneficial interest in it and was not in possession of the same motor vehicle and thus not a proper party to the suit.
 - c. That the learned magistrate, erred by disregarding the principles applicable under rule order 1 rule 10 (2) and thus came to the wrong conclusion;
 - d. That the learned magistrate, erred by disregarding the principles applicable in interpretation of section 8 of the traffic Act CAP 403 laws of Kenya and hence came to the wrong conclusion
 - e. That the learned magistrate, completely disregarded the appellants evidence adduced in support of the Application, submissions and the authorities cited against the doctrine of stare decisis and thus fell in error
 - f. That the learned magistrate, erred in law and in fact, by finding that the Appellant was challenging the issue of liability, while the real issue was whether the appellant was a proper party to the suit; and
 - g. That the learned magistrate, ruling and Orders were against the weight of evidence on record therefore bad in law.
23. I have also had the opportunity to consider Notice of Motion for stay of proceedings pending the appeal, and in my quest to determine whether there has been demonstration of a prima facie appeal



with sufficient cause that is arguable, to warrant staying of the proceedings in the subordinate Court however I'm afraid that, while the application seeks to stay ongoing proceedings, it only alludes in the ground that, it is apprehensive that if stay of proceedings is not issued, it will render the appeal nugatory. It only mentions on the grounds that, it honestly believes, that the Applicant's appeal is arguable with high chances of success.

24. Lastly, as to whether the Applicant has established sufficient cause, to the satisfaction of the Court, that it is in the interest of justice, to grant the orders sought, no compelling reason has been offered on the misapplication of the law or disregard of a particular principle, as the ruling is in the discretion of the lower court, informed by the subject matter before it.
25. This Court is persuaded that, it is in the interests of justice, that the proceedings in Nakuru Chief Magistrate's Court MCCC No.780 of 2019 pending pre-trial direction, hearing and determination proceed and that the Applicant may tender his evidence in a hearing as is provided for in the law.
26. From the foregoing, it is no doubt the Notice of Motion dated 18th January, 2023 lacks merit and does not meet the threshold for grant of the prayers sought. The same is accordingly dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 19TH DAY OF MAY, 2023

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MOHOCHI S.M

JUDGE

