



Owino t/a SO Owino & Associates Advocates v Yongo & another (Civil Appeal E631 of 2021) [2023] KEHC 4060 (KLR) (5 May 2023) (Ruling)

Neutral citation: [2023] KEHC 4060 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CIVIL APPEAL E631 OF 2021**

AN ONGERI, J

MAY 5, 2023

BETWEEN

**STEPHEN OWINO T/A SO OWINO & ASSOCIATES
ADVOCATES APPELLANT**

AND

BRIAN YONGO 1ST RESPONDENT

HARIT SHETH ADVOCATES 2ND RESPONDENT

RULING

1. The application coming for consideration in this ruling is the one dated 23/9/2022 brought under order 42 rule 6, order 51 rule 1 *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* seeking for stay of further proceedings in Milimani CMCC no. E573 of 2021 pending the hearing and determination of the appeal against a ruling delivered on 09/09/2021.
2. The 2nd respondent did not oppose the application and did not file any replying affidavit or submissions.
3. The 1st respondent filed grounds of opposition and a replying affidavit dated 19/10/2022 in opposition to the application in which he deponed that the application and the Memorandum of Appeal as filed lack merit, is an exercise in frivolity, is incompetent, is an abuse of the court process, a non-starter and solely intended to vex the court and also delay the hearing of the suit in the lower court.
4. The Applicant and the 1st Respondent filed written submissions as follows; the applicant in its submission argued that the applicant herein discloses arguable grounds of appeal which include the following;
 - a. Whether the decision of the lower court in failing to strike out the 1st respondent/plaintiff's suit was legally tenable noting that the same was seeking to enforce a decree of the High Court.



- b. Whether a non-professional can benefit from a Professional undertaking between two advocates.
 - c. The enforceability of a consent that is against public policy.
 - d. Whether a tort brought after the lapse of period prescribed by the *Limitation of actions Act* can be entertained.
5. The applicant further indicated that it endeavored to expeditiously move the court noting that the Memorandum of Appeal was lodged on 30th September 2021 and the present application filed on 23rd September 2022 as the matter was scheduled for trial on 22nd November 2022; the matter is now partly heard and is likely to be concluded prior to the determination of this application and appeal.
 6. The 1st respondent submitted that the Application has not complied with the Mandatory provision of section 75 of the *Civil Procedure Act* and order 42 of the *Civil Procedure Rules*. That further this Honorable court lacks jurisdiction to hear and determine both the Memorandum of Appeal dated the February 9, 2022 and the Appellant's Notice of Motion dated 21st March 2022.
 7. The 1st respondent indicated the ruling in the lower court was delivered on 29th July 2022 and there has therefore been unreasonable delay by the applicant by filing the application herein.
 8. That the appellant has failed to demonstrate that he has an arguable appeal with high chances of success and that he stands to suffer substantial loss if the orders sought are not granted.
 9. The 1st respondent argued that this is a matter is still pending before the magistrate's court for hearing and the pretrials have been conducted and indeed at the 1st hearing, the Appellant sought an adjournment on the basis that he was not served with a hearing notice which was a lie and did not intimate to the court his intention to file the instant application. So that an order staying these proceedings would be counterproductive and would delay the finalization of this case. No compelling reason or prima facie case has been established to warrant the court to stay the proceedings and the delay that would be occasioned by the stay of the proceedings in the lower court would defeat the purpose of expeditious disposal of matters as espoused by article 50 of *the constitution*.
 10. The 1st respondent submitted further that no sufficient cause has been provided as to why proceedings in the lower court should be stayed. That the consent dated April 27, 2016 in HCC No. 187 of 2015 (O.S) was between Nzioka & Co. Advocates the 1st respondent became an interested party in the said matter. The 1st respondent was to be paid a sum of Kshs 25,000,000 within 7 days of filing the consent. The letter dated 3rd May 2016 by the 2nd respondent to the appellant had thus no basis to vitiate the clear terms of the afore mentioned consent.
 11. It was averred further that the appeal will not be rendered nugatory by the mere fact that the trial may proceed and judgement on merits given. That the judgement given will be capable of being stayed.
 12. The sole issue for determination in this ruling is whether the Applicant should be granted stay of proceedings in Milimani CMCC No. E573 of 2021 pending the hearing of the interlocutory appeal.
 13. The Applicant submitted that he has an arguable appeal that will be rendered nugatory unless the stay is granted.
 14. I find that the ruling was delivered on 09/09/2021.
 15. There has been inordinate delay in filing this application which is dated 23/9/2022 which is more than a year after the impugned ruling was delivered.



16. I also find that the rules for stay of execution of a judgment as provided for under order 42 rule 6 do not apply in the current case since this is an interlocutory appeal.
17. The mere fact that a court renders a judgment does not render an appeal nugatory since the Applicant has an opportunity to proceed with an appeal against the entire judgment.
18. The intended appeal would only serve the purpose of obstructing the trial of the original suit and the Applicant is directed to proceed with the trial of the same and to consider a single appeal at the conclusion of the trial. In *Lucy Waitthera Kimanga & 2 others v John Waiganjo Gichuri* [2015] eKLR it was stated that;

- “(16) Are the reasons given sufficient for this court to impose a stay of proceedings? As a general rule, stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. The mere fact that an appeal is arguable alone does not fit the constitutional yardstick used to gauge whether a stay of proceedings should or not be imposed. That is only one of the factors which the court should consider. There are other equally important factors to consider namely;
- i. The need for expeditious disposal of cases and the impediment the stay would place on the right of the Respondent to have the case determined expeditiously;
 - ii. The interest of justice in the case; the pros and cons of granting or not granting the order;
 - iii. 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,
 - iv. The scarcity and optimum utilization of judicial time and
 - v. Whether the application has been brought expeditiously.”

19. I find that there are no exceptional circumstances to warrant orders of stay of the proceedings. The stay would amount to micro managing the trial court.
20. I dismiss the application dated 23/9/2022 with costs to the respondent.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 5TH DAY OF MAY, 2023.

A. N. ONGERI

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the 1st Respondent

.....for the 2nd Respondent

