



**Labib Hospital Limited v Stivfrank Traders (Civil Appeal  
E460 of 2022) [2023] KEHC 19763 (KLR) (Civ) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 19763 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E460 OF 2022**

**CW MEOLI, J**

**JULY 6, 2023**

**BETWEEN**

**LABIB HOSPITAL LIMITED ..... APPELLANT**

**AND**

**STIVFRANK TRADERS ..... RESPONDENT**

**RULING**

1. The Notice of Motion dated June 27, 2022 brought by Labib Hospital Limited (hereafter the Applicant) is supported by the grounds set out on its body and the depositions in the affidavit of the Applicant's Managing Director, Samuel Kamau Njoroge. The motion primarily seeks to stay, pending the hearing and determination of the appeal herein, the proceedings and execution of the judgment delivered on March 14, 2022 in favour of Stivfrank Traders (hereafter the Respondent) in Milimani SCCC No 1280/2021.
2. The gist of the supporting affidavit is that the Applicant being aggrieved by the judgment intends to challenge it on appeal. That the Respondent does not stand to be gravely prejudiced, while the balance of convenience and the interest of justice tilts in favour of the Applicant, who is also willing to comply with any conditions imposed by the court in granting the prayers in the motion.
3. The Respondent resisted the Motion by filing the notice of preliminary objection dated September 8, 2022 bearing the following grounds:
  1. "That the application offends the sub judice and res judicata rules under sections 6 and 7 of the *Civil Procedure Act* as the same application was filed simultaneously before the Small Claims Court and the lower court already determined the matter.



2. That the Respondent was granted stay on condition that it deposits the decretal sum within 21 days which timeline lapsed on 2<sup>nd</sup> of September 2022 without compliance.
3. That the application is a waste of court's time is frivolous filed to defeat the judgment of this honourable court.”
4. The court directed that the preliminary objection and the Motion be heard together, by way of written submissions. Regarding the preliminary objection, the Applicant through its counsel submitted that the questions of sub judice/res judicata pursuant to sections 6 and 7 of the *Civil Procedure Act* (CPA) do not arise here because this court is empowered to compel the lower court to stay its proceedings and that the lower court was due to deliver its ruling on the Applicant's application for stay of execution on December 23, 2022.
5. That the application previously filed before the lower court does not offend the principle of res judicata. Counsel cited the decision in *Suleiman Said Shabbal v Independent Electoral and Boundaries Commission & 3 others* [2014] eKLR. Concerning the objection pertaining to security, he submitted that the ruling on security was issued by the trial court on August 14, 2022 without the participation of the Applicant. That the Applicant is in any case ready and willing to comply with the conditions which will be set by the court on the provision of security by providing a bank guarantee. Here counsel relying on the decision in *Justin Mutinga David v China Road & Bridge Corporation (K) Limited* [2019] eKLR where it was held that a bank guarantee is an acceptable way of furnishing security. The court was therefore urged to dismiss the preliminary objection with costs.
6. Submitting in support of the Motion, the Applicant's counsel anchored his submissions on the argument that unless an order for a stay of execution is granted, the Applicant is likely to suffer substantial loss because the Respondent has not demonstrated that it is able to refund the decretal amount if the appeal succeeds, and its means of income are unknown. In this respect, counsel cited the decisions in *Edward Kamau & another; v Hannab Mukui Gichuki & another* [2015] eKLR and *G.N Muema P/A(Sic) Mt View Maternity & Nursing Home v Miriam Maalim Bisbar & another* (2018) eKLR. It was further argued that the appeal raises arguable points of fact and law and has reasonable chances of success. The court was therefore urged to allow the Motion.
7. On behalf of the Respondent, counsel contended that the Applicant did not seek leave of the court before filing the appeal out of time in line with the proviso to section 79G of the CPA and hence the court lacks the jurisdiction to determine the Motion, citing *Owners Of Motor Vessel Lilian v Caltex Oil (K) Ltd* (1989) KLR. It was also contended that the principles on extension of time to file an appeal set out in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2013] eKLR have not been satisfied by the applicant. Counsel submitted that if the court is satisfied to grant the order sought, then the monies deposited in court as security should be retained and the Applicant ordered to expedite the prosecution of the appeal. Else, the court was urged to dismiss the Motion.
8. The court has considered the material canvassed in respect of the motion and preliminary objection. Starting with the preliminary objection, the court notes that the Respondent while essentially challenging the Motion on the grounds of res judicata/sub judice, raised a totally separate ground by way of its written submissions, namely that, the appeal was filed out of time and without leave of the court and hence the court has no jurisdiction to entertain the Motion and/or the appeal.



9. Submissions do not constitute evidence and hence a party cannot be heard to argue its case or present its evidence through submissions. This was succinctly stated by the Court of Appeal in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR when it held that:
- “Submissions cannot take the place of evidence...Submissions are generally parties’ “marketing language”, each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all.”
10. In view of the foregoing position, the Respondent cannot be heard to challenge the competency of the appeal through its submissions.
11. That said, in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 the court defined a preliminary objection in the following manner:
- “A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
12. The above definition was further advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:
- “It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
13. Upon reading the grounds raised in the preliminary objection, the court noted that ground (2) raises the argument that the Applicant did not comply with the condition attached to stay by the lower court for the provision of security. The ground does not constitute a pure point of law as it would require the court to delve into the facts and circumstances before the lower court. Hence, this ground fails.
14. As pertains to the remaining preliminary issue touching on whether the Motion is sub judice/res judicata pursuant to sections 6 and 7 of the CPA, the former section provides that:
- “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
15. Section 6 of the CPA was considered by the Supreme Court in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties)* [2020] eKLR as follows:
- “The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject



matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.”

16. As regards the defence or bar of res judicata, the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR stated:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from section 7 of the *Civil Procedure Act*, 2010.

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

17. In the present instance, it is noted that none of the parties availed a copy of the application purportedly filed before the lower court and/or the proceedings of the lower court in that respect, to assist this court in making a clear determination on the question raised. Nevertheless so far as applications for stay of execution are concerned, a party may seek stay of execution before the High Court even after such application has been declined by the the lower court. Order 42 Rule 6(1) of the *Civil Procedure Rules* provides that:

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.”

18. In view of all the foregoing, the preliminary objection must fail.



19. On the merits of the Motion, it is appropriate to state that at this stage, the court is not concerned with the merits of the appeal and hence the question on whether the appeal raises arguable grounds does not arise here. Moreover, while the court notes that the Applicant sought for an order of stay of proceedings, it is apparent that judgment was delivered in the suit and none of the parties have disclosed any proceedings which are pending and therefore liable to be stayed.
20. Courts possess the discretionary power to grant an order for a stay of execution of a decree or order pending appeal, but the discretion ought to be exercised judicially. See *Butt v Rent Restriction Tribunal* (supra). The applicable provision surrounding a stay of execution is Order 42, Rule 6 of the CPR which stipulates that:
- “(1) 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.
- (2) No order for stay of execution shall be made under subrule (1) unless—
- (a) the court is satisfied that substantial loss may result to the Applicant unless the order is made, and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant”.
21. Concerning the condition on whether the application has been brought without unreasonable delay, it is apparent that the judgment which prompted the instant Motion was delivered on March 14, 2022 and the instant Motion was filed close to three (3) months thereafter, on June 27, 2022. The application has therefore been timeously filed.
22. On the second condition, the relevance of substantial loss in any application for a stay of execution was aptly addressed by the Court of Appeal case in the renowned case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410 when it held that:
- “Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented...”
23. The Court proceeded to set out the following on the matter of substantial loss:
- “1. ....
2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.



3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.
  4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid.”
24. The decision of Platt Ag JA (as he then was), in the Shell case, in my humble view set out two different circumstances when substantial loss could arise, and therefore giving context to the 4<sup>th</sup> holding above. The learned Judge stated inter alia that:
- “The appeal is to be taken against a judgment in which it was held that the present Respondents were entitled to claim damages. It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the High Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the Civil Procedure Rules was not met. There was no evidence of substantial loss to the Applicant, either in the matter of paying the damages awarded which would cause difficulty to the Applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts.”
25. The learned Judge continued to observe that:
- “It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money.”
26. Earlier on, Hancox JA in his ruling observed that:
- “It is true to say that in consideration [sic] an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory. This is shown by the following passage of Cotton LJ in *Wilson v Church (No 2)* (1879) 12ChD 454 at page 458 where he said:-‘I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not rendered nugatory. As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.’”
27. The Applicant stated that it has a right to appeal and that the balance of interest and convenience tilts in its favour. Through its submissions, it attempted to introduce the element of substantial loss by asserting the Respondent’s inability to refund the decretal sum if it is paid and the appeal succeeds. The court reiterates its earlier finding that submissions do not constitute evidence and hence a party cannot purport to bring additional evidence or facts at the submissions stage. Execution in satisfaction of a decree is a lawful process and hence the Applicant was duty bound to demonstrate how substantial loss would arise in this instance, by showing, either that if the appeal were to succeed, the Respondent



would be unable to refund any monies paid to him under the decree, or that payments in satisfaction of the decree would occasion difficulty to the Applicant. The affidavit is silent on these pertinent matters.

28. In the present case, the court finds that the Applicant has not discharged its duty to demonstrate substantial loss. As stated in the Shell case, without a demonstration of substantial loss, it would be rare that any other event would render the appeal nugatory and justify keeping a decree holder out of his or her money. The upshot therefore is that the Notice of Motion dated June 27, 2022 is devoid of merit and it is hereby dismissed with costs. The notice of preliminary objection dated September 8, 2022 is similarly dismissed with no order on costs.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 6<sup>th</sup> DAY OF JULY 2023.**

**C.MEOLI**

**JUDGE**

**In the presence of:**

For the Applicant: Ms. Omondi

For the Respondent: Mr. Njuguna

C/A: Carol

