



REPUBLIC OF KENYA



KENYA LAW
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**Michira v NIC Bank Limited (Civil Appeal E374 of 2022)
[2023] KEHC 20550 (KLR) (Civ) (14 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20550 (KLR)

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

CIVIL

CIVIL APPEAL E374 OF 2022

CW MEOLI, J

JULY 14, 2023

BETWEEN

ALFRED MOFFART OMUNDI MICHIRA APPELLANT

AND

NIC BANK LIMITED RESPONDENT

RULING

1. Before the court for determination is the Notice of Motion by Alfred Moffart Omundi Michira (hereafter the Applicant) dated June 6, 2022, seeking an order to stay the proceedings in Milimani CMCC No 3062 of 2013 pending hearing and determination of the appeal herein. The application is expressed to be brought under Order 42 rules 6(2) of the *Civil Procedure Rules*.
2. The application is supported by the affidavit of the Applicant, to the effect that when the suit came up for hearing in the lower court on May 19, 2022 he was unable to participate due to technological challenges despite having logged in virtually and which matter was brought to the court's notice by his advocate. That even so, the lower court declined to allow the advocate's application for adjournment and proceeded with the trial. That he is apprehensive that unless stay is granted, the appeal will be overtaken by events and may be rendered nugatory.
3. The Motion was opposed by NIC Bank Limited (hereafter the Respondent) through the replying affidavit sworn by its Legal Counsel Jackson King'ori. The deponent averred that while it is true that the Applicant's counsel sought an adjournment on May 19, 2022 and which was declined by the lower court, the Applicant's counsel had an opportunity to cross-examine the Respondent's witness on the said date. He averred that despite having been given an opportunity to testify virtually on the said date, the Applicant did not do so, resulting in the trial court closing both the Applicant's case as well as that of the other defendants, and directing the parties to file written submissions.



4. That the failure by the Applicant to file a witness statement in advance and further failing to testify at the trial speaks to his dilatory conduct and bad faith. Hence the deponent asserts that the Applicant had not demonstrated sufficient grounds to warrant the order sought.
5. The court directed that parties file written submissions on the Motion. Counsel for the Applicant anchored his submissions on Order 42, Rule 6 of the Civil Procedure Rules and cited Peter Kariuki Mburu & another v Neema Shah [2021] eKLR on the principles for consideration in granting an order for stay of proceedings. It was argued that the Applicant has an arguable appeal because his right to be heard was infringed upon through no fault of his own, resulting in a miscarriage of justice. Counsel sought support for this submission in the cases of Republic v Simon Mango Otieno [2019] eKLR and Pinnacle Projects Limited v Presbyterian Church of East Africa, Ngong Parish & another [2019] eKLR. The court was therefore urged to allow the Motion.
6. The Respondent's counsel submitted on his part that it would not be in the interest of justice for the order sought herein to be granted, the trial court having extended an opportunity to the Applicant to be heard and given that previously, the Applicant and/or his counsel had contributed to the delay in the suit through non-compliance and/or adjournments. Counsel cited the decision in Ibrahim Mungara Kamau v Francis Ndegwa Mwangi [2014] eKLR in laying emphasis on the principles of good faith and equity. Counsel further asserted that the right of a party to be heard is not absolute and that wilful failure to participate in the hearing of a suit bars a party from claiming that his right to be heard had been violated. He relied on Mbituka Titus v Jackline Mutindi [2020] eKLR and John Onger Mariaria and 2 others v Paul Matundura [2004] 2 EA 163.
7. It was argued that the Applicant had not met the threshold for the grant of an order for stay of proceedings pursuant to Order 42, Rule 6 of the Civil Procedure Rules. Counsel cited the decision in Kenya Wildlife Service v James Mutembei [2019] eKLR on the discretionary power of the courts in granting a stay of proceedings. On those grounds, the Respondent urged the court to dismiss the Motion with costs.
8. The Court has considered the material canvassed in respect of the motion. The power of the court to stay proceedings, which is the sole prayer in the instant Motion is found under Order 42, Rule 6 (1) of the Civil Procedure Rules which reads thus:

“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”

9. In the renowned case of Re Global Tours & Travel Ltd HCWC No 43 of 2000 (UR) Ringera, J (as he then was) succinctly set out the applicable considerations in determining an application for stay of proceedings in the following manner:

“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.”(emphasis added).

See also *Christopher Ndolo Mutuku and Anor. v CFC Stanbic Bank Limited* [2015] eKLR; and *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] e KLR.

10. The need to avoid the unnecessary dissipation of judicial time would be of paramount consideration in an application of this nature, as would be the question whether the appeal will be rendered nugatory if the subject proceedings are not stayed. As observed by Onyango Otieno, J (as he then was) in the authority of *Niazsons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd*. Nairobi HCCC No 126 of 1999:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay (stay of proceedings) should be granted.”

11. Moreover, the Court of Appeal in the case of *Wachira Waruru & Anor. v Francis Oyatsi* [2002] 2 EA 664 rendered itself thus:

“In an application for stay of proceedings pending appeal where the judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

12. In this case, the instant Motion was brought without unreasonable delay, having been filed less than one (1) month from the date of delivery of the impugned ruling/order. The appeal challenges the decision by the trial court declining to grant the Applicant’s counsel an adjournment. The record shows that on the material date, i.e. the 19th day of May, 2022 the suit was scheduled for hearing and which proceeded, the Respondent adducing evidence with the participation of the Applicant’s counsel while at all material times the Applicant had logged on to the virtual court session.
13. In seeking adjournment, the Applicant’s counsel blamed technological challenges as a result of which it was alleged that the Applicant could not participate in giving his defence. The trial court noted that the Applicant had not complied with pre-trial directions pursuant to Order 11 of the *Civil Procedure Rules* by filing a witness statement and hence there was no basis upon which he could testify. Moreover, the court seemingly unconvinced by the alleged technological hitch noted that, the Applicant had made no attempts at unmuting his microphone despite having been given time to log in using an alternative device. Taking into account these circumstances and the age of the case, the trial court declined to grant an adjournment and directed the parties to file written submissions.
14. The above matters form the subject matter of the appeal. Thus, the court is of the view that it would be premature to delve into the merits thereof at this stage. For now, the court is satisfied that the Applicant has an arguable appeal premised on the fact that he may be condemned unheard if an order to stay proceedings is not granted and judgment is delivered in the suit.
15. Additionally, the lower court suit is in its final stages, and unless the proceedings are stayed, it is more probable than not that the objects of the instant application and appeal may be defeated, thereby



rendering the appeal nugatory. Besides, it would not constitute proper use of judicial time to allow two concurrent active proceedings in respect of the same matter. In any event, the Respondent has not demonstrated the manner in which it stands to be prejudiced or that any prejudice suffered cannot be compensated through an award on costs.

16. In view of the foregoing, and weighing the competing interests of the parties notwithstanding the age of the lower court suit, the court is persuaded to exercise its discretion in favour of the Applicant by granting the order sought but on condition.
17. Consequently, the Notice of Motion dated June 2, 2022 is allowed subject to two conditions, firstly, that the Applicant shall file the Record of Appeal within 45 days of today's date, and secondly, the Applicant shall fully prosecute his appeal within six (6) months of today's date. In default of any of the two conditions, the stay order shall automatically lapse and the Respondent shall be at liberty to proceed with the lower court suit to conclusion. Costs will be in the cause.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 14TH DAY OF JULY, 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Mr.Nyakiangana

For the Respondent: N/A

C/A: Carol

