



Njowambu K Limited v Blue Nile Mills Limited & another (Civil Appeal E291 of 2023) [2023] KEHC 23585 (KLR) (21 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23585 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KIAMBU
CIVIL APPEAL E291 OF 2023
DO CHEPKWONY, J
SEPTEMBER 21, 2023**

BETWEEN

NJOWAMBU K LIMITED APPELLANT

AND

BLUE NILE MILLS LIMITED 1ST RESPONDENT

CHADOR ACUTIONEERS 2ND RESPONDENT

RULING

1. What is before the court is the Notice of Motion application dated 14th September, 2022 filed under Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) which seeks the following orders:
 - a. Spent;
 - b. Spent;
 - c. Spent;
 - d. Spent;
 - e. That pending the hearing and determination of this Appeal, this Honourable Court be pleased to stay the proceedings in Thika CMCC Suit No. 587 of 2020 (Blue Nile Mills Ltd vs Njowambu (K)ltd & Chador Auctioneers) in their entirety.
 - f. That the costs of this application.
2. The Application is based on the grounds set out on its face and in the Affidavit of Wangu Mburu sworn on 10th August, 2023, wherein the Applicant has stated That when the matter came up for hearing on 26th July, 2023, its advocate on record, John N. Mugambi sought an adjournment in order to pursue an



out of court settlement which the court denied and instead proceeded to hear the Respondent's case in full without giving the Applicant a chance to be heard. According to the Applicant, on the same day of 26th July, 2023 its advocate sought to have Witness Summons issued upon the Advocate who prepared the Memorandum of Understanding dated 1st September, 2015 since it goes to the root cause of the dispute but the court declined.

3. The Applicant then contends That the refusal of the court to grant adjournment was based on its decision of 8th March, 2023 to grant a last adjournment in the matter but on the contrary, on this day, the court had only granted one adjournment on account of Appellant's counsel's illness. According to the Applicant, it had actively been participating in the suit and it would be prejudicial to it if the stay orders are not granted.
4. The Applicant holds That the court has already issued directions for the filing of submissions and the court will issue a judgment date which will render its appeal nugatory. The Applicant urges the court to allow its application.
5. The 1st Respondent filed a Replying Affidavit sworn by its Director, Botu Rao on 22nd August, 2023 in opposition to the application on the basis That it is a means to delay the matter. The 1st Respondent states That it instituted the suit before the trial court vide Plaintiff's Complaint dated 12th October, 2020 but the Applicant failed to enter appearance on time, a result of which an Interlocutory Judgment was entered on 22nd January, 2021. That the Applicant then filed an application dated 2nd July, 2021 seeking to set aside the interlocutory Judgment and on 1st September, 2021, the court allowed the same on condition That security of Kshs. 300,000.00 be paid which the Applicant defaulted with the orders and the 1st Respondent reissued Warrants of Attachment which prompted the Applicant to file an application vide a Notice of Motion application in HCCA No. E177 OF 2021 which was dismissed.
6. According to the 1st Respondent, when the matter came up for Pretrial Conference on 24th October, 2022, the court granted the Applicant thirty(30) days to comply and set the date for hearing on 8th March, 2023 on which date the Applicant sought an adjournment and the matter was set for 26th July, 2023 for hearing. The 1st Respondent held That on 8th March, 2023, the court had issued a last adjournment and therefore the court was right in denying the adjournment of 26th July, 2023. The 1st Respondent has urged That the application is therefore a means to delay the matter and deny it justice, thus it should be dismissed.
7. To expand on their respective positions on the application, the counsel for the parties made oral submissions.

Analysis and Determination

8. Having read through the pleadings and oral submissions by counsel for the parties herein this Court finds the main issue for determination being whether the court should grant the orders sought.
9. It is trite law That these orders for stay of proceedings are issued at the discretion of a court which is dependent on the circumstances of a case. In the case of *Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J* (as he then was) held That:-

“...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 case, 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...”

10. In this particular case, the court has read through and considered the application, the response filed therein and particularly the proceedings of the subordinate court. As stated from the facts enumerated by the 1st Respondent, the court notes That on 28th September, 2022, the court granted the Applicant thirty days to comply with Order 11 of the Civil procedure Rules. On the same date, the court issued a hearing date of 8th March, 2023 on which date, the 1st Respondent’s Counsel informed the court That he was ready to proceed whereas the Applicant’s Counsel sought an adjournment on the basis That he was indisposed. The court issued a last adjournment and ordered the Applicant’s Counsel to pay the 1st Respondent costs of Kshs. 2,500.00 and Kshs. 500.00 being witness expenses, then set the hearing date for 26th July, 2023.
11. On the said 26th July, 2023, the 1st Respondent’s Counsel was ready to proceed with one witness but the Applicant’s Counsel sought for an adjournment indicating they would settle the matter out of court within 30days so as to come up with a payment plan which application the 1st Respondent opposed on the basis That it had not been made in good faith and neither had they made any proposal for settlement nor paid their costs as ordered. The trial court directed the matter to proceed for hearing whereby the 1st Respondent’s case was fully heard and case closed.
12. On the same date, the Applicant’s Counsel sought for Summons to Issue upon Advocate J. K. Ngaruiya to come and shed light on the Memorandum of Understanding which the 1st Respondent opposed on the basis That it had already closed its case and That it would be prejudicial to their case.
13. The subordinate court ruled That the said Memorandum of Understanding was a part of the case and hence the Applicant’s Counsel ought to have sought for the orders at the initial stage but since the 1st Respondent had already closed its case, it would have been prejudicial to it to introduce fresh evidence. The court also stated That since it had marked the last adjournment as the last, and the Applicant’s Counsel did not have any witness to call, its case was deemed as closed.
14. This court has taken into consideration the circumstances of the case in light of the justice of the case and balance of convenience and finds the same leaning towards the Respondent. And if the Applicant’s conduct in the matter is anything to go by, then this application is another tactic it has employed to further delay justice in the matter. And even then, no sound reason has been advanced by the Applicant to warrant this Court’s discretion in staying the proceedings herein.
15. In the circumstances, the court finds the Notice of Motion application dated 10th August, 2023 lacks merit and is hereby dismissed with costs to the 1st Respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 21st DAY OF SEPTEMBER, 2023.

D.O CHEPKWONY

JUDGE

In the presence of:

Mr. Okoth counsel for the Appellant/Applicant



M/S Gekonge counsel for Respondent

Court Assistant – Martin

