



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kyania & another v Kaloki (Civil Appeal E144 of 2024)  
[2024] KEHC 16768 (KLR) (5 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 16768 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MACHAKOS  
CIVIL APPEAL E144 OF 2024  
NIO ADAGI, J  
NOVEMBER 5, 2024**

**BETWEEN**

**BRIAN KYANIA ..... 1<sup>ST</sup> APPLICANT**

**ZIPPORAH WANJIRU NJOROGE ..... 2<sup>ND</sup> APPLICANT**

**AND**

**RUTH KALOKI ..... RESPONDENT**

**RULING**

**Notice of Motion dated 07/06/2024**

1. The Applicant filed the instant Notice of Motion Application dated 07/06/2024 under Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B and 3A of the [Civil procedure Act](#) seeking Orders that;
  - a. Spent.
  - b. Spent
  - b. There be a stay of proceedings in Machakos SCCC No. E1079 of 2023, Ruth Kaloki vs Brian Kyania & Watu Nominees Company Limited pending hearing and determination of the Appeal against the ruling delivered on 13/5/2024.
  - c. Costs of the application be provided for.
2. The Application is based on the grounds thereto that are reiterated in the Supporting Affidavit of even date of Perpetual Gathoni sworn on 07/6/2024.
3. This prompted the Applicants to file the instant application and appeal challenging the said decision.



4. Opposing the application, the Respondent filed a Replying Affidavit sworn on 12/6/2024 stating that the application is frivolous, vexatious, is an abuse of court process, and lacks merit and the same ought to be dismissed on the very outset. That the grounds set out in the application and the facts stated in the supporting affidavit of Perpetual Gathoni do not warrant the grant of the orders sought in the application.
5. Parties were directed to file written submissions to canvas the application and both Parties complied. The Applicant filed their submissions dated 5/7/2024 while the Respondent's submissions are dated 5/7/2024.
6. The Applicants submit that this Honourable Court has powers and jurisdiction to stay proceedings pending appeal and that the question of whether or not to grant an order for stay of proceedings is a discretionary one which ought to be exercised by the court upon consideration of the facts and circumstances of each case. Further, that the discretion ought to be exercised judiciously and the court has to consider if it will be in the interests of justice to grant the same.
7. The Applicants further submit that the grounds for staying proceedings pending the hearing and determination of Appeal were set out in the case of Global Tours & Travels Ltd (Nairobi HC Winding Up Cause No. 43 of 2000) as follows: -

“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”.

8. That the conditions to be met for stay of proceedings pending appeal to be granted were established in the case of Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where Judge Joel Ngugi (as he then was) stated, at paragraph 18 while relying on the decision of William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR which laid down the principles as follows:-
  - a. First, there must be an appeal pending before the higher Court;
  - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
  - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
  - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;



- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
  - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
9. That the principles for a grant of stay of proceedings were summarized by the Court of Appeal in the case of Stanley Kangethe Kinyanjui vs Tony Kelter & others [2013] eKLR as follows: -

“An applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”

10. The Applicant submits that the application herein has been made without undue delay as both the Appeal and Application for Stay of proceedings were filed in good time. That the Appeal against the Ruling was filed by the Applicants on 17/5/2024, four (4) days after the said ruling and the present application was filed on 7/6/2024 after the Trial court failed to stay its own decision and gave directions on hearing despite appending appeal on record. Thus, the Applicants submit that the instant Application was filed expeditiously and without any unreasonable delay hence this Honourable Court ought to consider it.
11. On the other hand, the Respondent submits that the Applicants sought stay of proceedings in Machakos SCCC No.1079 of 2023 pending hearing and determination of this application. That an order of this nature is so grave that it contravenes the very basic and constitutional principle that justice shall not be delayed. They cite the case of MRM aka RLM *v* SMRM (*Civil Appeal 124 of 2022*) [2024]KEHC 446 (KLR) (25 January 2024) (Ruling) where the court referred to the case of Kenya Wildlife Service vs James Mutembei (2019) eKLR where Gikonyo J quoted Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue. This is a power which, has been emphasized, ought to be exercised sparingly, and only in exceptional cases. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the **case** .”

12. In this regard, the Respondent invites the court to be led by the principles stated above that stay of proceedings is indeed a grave matter that should only be accorded to deserving matters as it interferes with a party's right to expeditious resolution of a case. The Respondent submits that the application made by Applicants has not met the threshold for granting orders of stay of proceedings. The Respondent further avers that that the application is a mere delaying tactic which goes against the



expeditious, cost-effective and proportionate resolution of disputes as provided for in Article 159(2) (b) of *the Constitution* which stipulates as follows:

“In exercising judicial authority, the courts and tribunals shall be guided by the following principles :-

- a .....
- b. justice shall not be delayed.”

13. That even the principles of equity frown upon delay in justice and submitted on the legal maxim that justice delayed is justice denied. That the continued pendency of the subject matter herein is quite prejudicial to the Respondent as the same has the effect that the matter shall not be expeditiously determined, resulting to the fact that justice shall have been delayed.

14. The Respondent submits that the provisions of Article 159(2)(a)(b)(c) and (d) of *the Constitution* of Kenya as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to Parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to Parties.

15. Again in this regard, the Respondent prays that this court to be guided by the decision in the case of *Peter Kariuki & Another v Neema Shah* (2021) eKLR where the court stated that:-

“In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit CMCC Civil Suit No. 908 of 2019 that is pending in the lower court to the detriment of the Respondent. I am therefore not satisfied that the Applicants have demonstrated that they have an arguable appeal to warrant issuance of the orders being sought (emphasis added)

16. The Respondent submits that, having gone through the Memorandum of appeal, it is her submissions and view that the appeal does not have any chance of success and that the Applicants ought to have invoked the provisions of Section 38 of the *Small Claims Court Act* by lodging an appeal instead of filing the application to set aside the judgment as provided for in Section 43 of the stated Act.

### **Brief Facts of the matter**

17. The Respondent was involved in a road traffic accident on the 17/6/2023 at lluvia Road, within Machakos town as she was on board a three-wheeler tuk tuk registration number KTWC 400Q, belonging to the Applicants herein. The matter proceeded for hearing before the Small Claims Court at Machakos in SCCC No. E1079 OF 2023 where parties took directions to dispose of the matter by way of written submissions pursuant to the provisions of Section 30 of the *Small Claims Court Act*.

18. The trial court delivered a judgment on the 4/3/2024 against the Respondent herein. In the judgement, the court dismissed the suit with costs to the Applicants herein because no document had been attached to prove that the Respondent had been involved in the road traffic accident which occurred on the 17/6/2023. This was as a result of the fact that the police abstract issued to the Respondent herein proving she had been involved in the road traffic accident had inadvertently not been attached, but another abstract belonging to a different party “Ann Kalundu” who was in the same accident had been attached thereon.

19. Consequently, after the delivery of the judgment, the Respondent through her advocates filed a Notice of Motion application dated 5/4/2024, where the Respondent’s advocates admitted to in-advertently



attaching the wrong police abstract belonging to one 'Ann Kalundu' who had also been involved in the same road accident instead of that of the Claimant- Ruth Kaloki (The Respondent herein), who had also been issued with her police abstract and sought to have the judgment set aside.

20. After hearing of the application, the trial court delivered a ruling on the 13/5/2024 where it re-opened the case by virtue of Section 43 of the Small Claims Act which grants the court the power to set aside any of its orders upon application by any of the parties and allowed the claimant to file a further list of documents with the correct abstract only.
21. Aggrieved by the decision of the trial court, the Applicants/Appellants lodged this appeal against the whole ruling claiming that the trial court erred in the interpretation of Section 43 of the Small Claims Act. Along-side the appeal, the Appellant filed the instant application seeking stay of proceedings in the trial court pending determination of this appeal.

### **Analysis and determination**

22. I have considered the brief facts above, the instant application, the supporting affidavit, the replying affidavit, the rival submissions and cited authorities by Parties Counsel as well as the applicable law. I find three issues herein arising for determination: -
  - i. Whether an order of stay of proceedings of the Small Claims Court ought to be granted;
  - ii. Whether the Memorandum of appeal raises substantial questions to be determined or is otherwise arguable;
  - iii. Who bears the costs of the application.

#### **i. Whether an order of stay of proceedings of the Small Claims Court ought to be granted.**

23. The Small Claims Court is governed by its own rules of procedure.

Section 17 of the Small Claims Act provide for the procedure of Small Claims Court. It provides that:-

“Subject to this Act and Rules, the Court shall have control of its own procedure in the determination of claims before it and, in the exercise of that control, the Court shall have regard to the principles of natural justice”

Section 43 of the *Small Claims Court Act* provide for setting aside of Court orders. It provides that:-

“The Court may on the application of any Party to the proceedings set aside any of its orders and make such orders as it thinks just.

24. Unlike the Civil Procedure Rules, which are detailed and strict, the Small Claims Court Rules, 2019 lack in detail and are intended to ensure that small claims are dealt with efficiently without the burden of strict rules and at minimum cost to the Parties.

Rule 31 of the Small Claims Court Rules, 2019 provides that:-

“In the conduct of any proceedings before it, the Court shall not be bound by the strict rules of procedure or evidence.

25. Having considered the above provisions of the *Small Claims Court Act* and the applicable Rules, it is my finding that the Adjudicator rightly gave the Claimant/Respondent another chance to remedy the situation because in my opinion that is an issue of procedure or rather it could have been as stated by



the Respondent an honest and inadvertent mistake on the part of the Respondent's advocate in terms of arranging of the documents whereby he wrongly filed a police abstract of another victim who is said to have been involved in the same accident and this inadvertent mistake only came to the light after the delivery of the judgment.

26. There is no doubt that the Adjudicator was alive to the fact that misfiling of the Respondent's Police Abstract was a procedural issue and she had the latitude of allowing the same to pass by giving the Respondent another opportunity to produce the Police Abstract which had inadvertently been left out and thus rightly exercised her discretion under Section 43 of the Small Claims Court Act to proceed to set aside the order in the judgment that dismissed the Respondent's claim.
27. In my view, the Applicants will suffer no prejudice if the case is re-opened and the Respondent allowed to produce the Police Abstract since the Applicants will have an opportunity to cross-examine the Respondent on the same and make submissions on it at the close of the case. The Adjudicator in fact awarded the Applicants throw away costs which the Respondent is said to have settled.
28. On the foregoing, it is my finding that the Applicants prayer for a stay of proceedings in Machakos SCCC No. E1079 of 2023, Ruth Kaloki vs Brian Kyania & Watu Nominees Company Limited pending hearing and determination of the Appeal against the ruling delivered on 13/5/2024 is declined.

**ii. Whether the Memorandum of appeal raises substantial questions to be determined or is otherwise arguable;**

29. Having declined to stay proceedings in Machakos SCCC No. E1079 of 2023, Ruth Kaloki vs Brian Kyania & Watu Nominees Company Limited it follows that the appeal does not raise substantial questions to be determined or is otherwise not arguable.
30. The Applicants have not demonstrated that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal. The Applicants can wait for the case to concluded then take up any grievances arising is a single appeal.
31. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise court's discretion and grant stay of proceedings as the same will only serve the purpose of delaying the Claim in Machakos SCCC No. E1079 of 2023 that is pending in the Small Claims Court to the detriment of the Respondent. I am therefore not satisfied that the Applicants have demonstrated that they have an arguable Appeal to warrant issuance of the orders being sought.
32. For the above reasons, the application dated June 7, 2024 is dismissed with costs to the Respondent.
33. I further direct that the Respondent to set the Claim for hearing before the Small Claims Court within 14 days of this Ruling.

It is hereby so ordered.

**DATED, SIGNED & DELIVERED VIRTUALLY AT MACHAKOS on 5TH NOVEMBER 2024**

**NOEL I. ADAGI**

**JUDGE**

