



**Maina v Kinyua (Civil Appeal E132 of 2024)
[2024] KEHC 17048 (KLR) (13 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 17048 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E132 OF 2024
E OMINDE, J
NOVEMBER 13, 2024**

BETWEEN

NAOMI MUTHONI MAINA APPELLANT

AND

MOSES KINYUA RESPONDENT

RULING

1. By a Notice of Motion dated 24/7/2024, the Appellant/Applicant seeks the following orders:
 1. Spent.
 2. Spent.
 3. Spent.
 4. There be an order of stay of proceedings in Eldoret Small Claims Court Case No.1170 of 2023 pending the hearing and determination of this appeal.
 5. Costs of this application be in the cause.
2. The application is premised on the grounds therein and is further supported by the Affidavit sworn by the Applicant on the same date.
3. She deposed that the Respondent filed a suit against her in the Small Claims Court Case No. 1170 of 2023 and that her Advocates on record raised a preliminary Objection as regards the jurisdiction of the Court and that the Court in a ruling delivered on 24/10/2024 dismissed the Preliminary Objection. Being aggrieved with the ruling and order of the Court, the Applicant filed the instant appeal. That the appeal filed has merits, raises triable issues and has high chances of success.
4. She further deposed that the lower Court has fixed the matter for hearing on 27/6/2024 and in the event that the lower Court matter proceeds to hearing and judgment is entered against her, this appeal



will be rendered nugatory and she will suffer irreparable loss and it is therefore fair and in the interest of justice that there be an order of stay of proceedings in the lower Court pending the hearing and determination of this appeal. In conclusion, she deposed that this application has been made timeously and in utmost good faith.

The Response

5. The Application is opposed by the Respondent vide his Replying Affidavit sworn on 5/7/2024
6. He deposed that Application seeking stay of proceedings is a waste of court's judicial time, incompetent, improper and has not been brought in good faith and the same is fatally defective, that an Application seeking stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant and as such high standards and stringent test ought to be applied, that this is even peculiarly and statutorily debarring since the claim is guided and managed by the *Small Claims Court Act* CAP 10A.
7. That the preliminary objection was dismissed in the trial court and that seeking stay of proceedings on account of an appeal against that dismissal has no basis and is only meant to delay the proceedings considering the fact that the Appellant has neither offered nor met the conditions for stay of proceedings which are; an arguable Appeal, the likelihood of the Appeal being rendered nugatory, the demonstration of exceptional circumstances and the demonstration of a prima facie case with the possibility of success which would then make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up in a single Appeal.
8. The Respondent contends further that the Appellant's Appeal does not have plausible or persuasive grounds to alter the original verdict issued by the Small Claims Court that was purely based on the provisions of the *Small Claims Court Act*, which court has inherent powers to make such orders necessary for the ends of justice and to prevent abuse of court process.
9. That allowing this Application will fundamentally interrupt/interfere with the Respondent's rights to conduct his litigation on the basis of substantive justice, and that the Applicant has nothing to lose, and will not be prejudiced in any way so long as this matter continues to be delayed and/or derailed and kept pending in court to his joy, advantage and interest.
10. That the prayers sought if granted in their standing form are fatally defective unfair, and will amount to injustice, prejudice and a miscarriage of justice to the Respondent if at all issued and that nothing bars any court of law, procedurally, from taking its due course, imposing and enforcing its rules/conditions as per court record, schedules, rules, compliances.

Submissions

11. The Application was canvassed vide written submissions and both parties filed their respective submissions on 9/10/2024.

The Applicant's submissions

12. Counsel for the Applicant cited Order 42 Rule 6 of the Civil Procedure Rules, 2010. Counsel submitted that the grant of stay of proceedings is discretionary. The court has discretion to grant the same. However, the discretion must be exercised judiciously and within the confines of Order 42 Rule 6 (2) which states as follows:

“(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."

13. Counsel cited the assessment of the conditions necessary for grant of stay of proceedings as laid out by Justice Munyao in the case of Mocha Hotel Ltd v Kwanza Estates Ltd (Environment & Land Case 14 of 2022) [2023] KEELC 21729 (KLR) (21 November 2023) (Ruling) wherein the Court stated thus:

"The principles for granting stay are provided in subrule 2 which prescribes three principles for grant of stay, being:-

- (i) That the application has been made without unreasonable delay;
- (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
- (iii) That there is provision of security as the court may order for the due performance of the decree.

10. The above principles apply to both stay of execution and stay of proceedings. In an application for stay of proceedings, it is difficult to see the place of security for the due performance of the decree, and I think what is critical is that the application has been made without unreasonable delay and the applicant demonstrates that he stands to suffer substantial loss if the order for stay is not made. [Emphasis mine]

14. Regarding undue delay, Counsel submitted that the Small Claims Court delivered its ruling on the preliminary objection on 24/5/2024. The Memorandum of Appeal was filed on 21/6/2024, being less than a month after the delivery of the said ruling. The present application is dated 24/6/2024 and was filed on 26/6/2024. That within this period, after receiving the copy of the ruling from court, the instructing client had to take time to analyse the viability of an appeal before the same could be filed and consequently the present application.

15. Counsel maintained that there has therefore been no delay on the part of the applicant herein in filing both the appeal and the present application. The application was timely and without any delay. He cited the case of Jaber Mohsen Ali & another v Priscillah Boit & another E & L No. 200 OF 2012[2014] eKLR in support of this submission and therein the Court stated thus:

"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case."

16. Counsel submitted that the above-mentioned threshold has been met by the Applicant, further that there has been no inordinate delay and sufficient reasons have been given for the period taken to file both the appeal and the application.



17. In regard to substantial loss, Counsel echoed the sentiments of the court in the case of Joseph Schmaderer v Serah Njeri Ngene [2021] eKLR, the court held thus:

“ 30. On the issue of substantial loss, the Applicants argued that the Respondent is of unknown means and if the decretal sum is paid then the Applicants may be unable recover the same in the event that the appeal is successful. To that fear of the difficulty to recover the decretal sum should the appeal succeed, the Respondent has not given an answer or rebuttal.

18. He also cited the case of National Industrial Credit Bank Limited v Aquinas Francis Wasike and Another (UR) C.A.238/2005 where the Court stated as follows:-

“This Court has said before and it would bear repeating that while the legal duty is on an applicant to prove the allegation that an appeal would be rendered nugatory because a respondent would be unable to pay back the decretal sum, it is unreasonable to expect such an applicant to know in detail the resources owned by the respondent or lack of them. Once an applicant expresses that a respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge.”

19. Counsel urged that should the lower court proceed to hear and determine the matters and find in favour of the respondents, and execution is done, this court’s finding on this Appeal will be rendered nugatory, that it will occasion the Appellant Applicant great injustice if the court proceeds without jurisdiction and that such a loss cannot be quantified by money. Counsel maintained that the appeal will be rendered nugatory if stay is not granted. He relied on the holding in case Kenya Shell Ltd V Kibiru & Another [1986] KLR 410 where the court set out the principles to be considered under this head as follows:

“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.”

20. Regarding exceptional circumstances, Counsel submitted that they acknowledge that the order of stay of proceedings is a drastic order and needs to be given only in exceptional circumstances, this is because it restricts the right of a party to be heard. Counsel submits that a Court’s lack of jurisdiction is one such a grave matter and having sufficiently demonstrated that the Lower Court lacks jurisdiction it should not be allowed to continue with the matter since this is the issue that is the subject of the present appeal.

21. Counsel in support of this submission cited Meru Civil Appeal 40 of 2018, Kenya Wildlife Service Vs James Mutembei (2019) eKLR, wherein Justice Gikonyo stated as follows:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.



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, it 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".

22. Counsel also cited the Court of Appeal case of *The Owners of Motor Vessel Lillian S v Caltex Oil (Kenya) Limited* [1989] KLR 1 where the court held thus:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

23. Counsel maintained that should this appeal then succeed, the lower court matter will be deemed to have been void ab initio for lack of jurisdiction. Counsel urged that allowing the proceedings to continue to their completion before the appeal is heard will prejudice the Appellant Applicant. According to Counsel the Applicant has demonstrated exceptional circumstances necessary for grant of an order of stay of proceedings.

24. Counsel submitted that they have also sufficiently demonstrated that their appeal is arguable as held by the Court of Appeal decision in the case of *University of Nairobi v Ricatti Business of East Africa* (2020) eKLR where the court held thus:

"An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous".

25. Lastly, Counsel submitted that the Appellant's Preliminary objection which was dismissed, and which is the subject of the current appeal, is based on the judgment of the High Court in the case of *Jerusha Auma Ogwari v Ibrahim Aisha Hersi (Civil Appeal 223 of 2022)* [2023] KEHC 20111 (KLR) which declared that the Small Claims Court lacks jurisdiction to handle unliquidated road traffic accident (personal injury) matters. That therein, Justice Magare held thus:

"a claim for personal injury for accident cases, in view of the notices to be served after filing under Cap 405 and the particulars of negligence which must be proved in common law, is singularly unsuited for the small claims court" and, secondly, that "a claim that has no monetary value, that is a claim at large, where damages have to be assessed is not a small claim.

26. Counsel therefore submits that in light of the above decision, at the risk of delving into the appeal, he has sufficiently demonstrated that the appeal is at the very least arguable.

The Respondent's Submissions

27. Counsel for the Respondent submitted that for this court to grant stay of proceedings, the Appellant/Applicant ought to show that she has an arguable Appeal with high chances of success such that if stay of proceedings is not granted the Appeal will be rendered nugatory.



28. On whether the appeal is arguable, Counsel submitted that the issue raised on the face of the Appeal, challenging jurisdiction of the small courts in handling personal injury claims, is an issue that has been well provided for by the *Small claims court Act* and thus not worth staying proceedings for.
29. Counsel invited this honourable court to be guided by the High Court decision in Nyeri to wit HCCA E037 of 2024, Naomi Wanjiru Irungu vs Francis Kimani Karanja in which the Honourable judge held that the Small Claims Court is possessed with jurisdiction to hear and determine cases for compensation for injuries provided that compensation is within its pecuniary limit.
30. Counsel for the respondent too, relying on the above cited case of Kenya Wildlife Service-vs-James Mutembei /2019/eKLR, urged that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation and so should be granted only in very deserving cases. Counsel also referred the court to the persuasive authority in the case of Re Global Tours & Travel Ltd HCWC No.43 of 2000
31. Counsel submitted that above authorities lay down the clear principles that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of David Morton Silverstein VS. Atsango Chesoni (2002) eKLR:-

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.
32. Counsel urged that the stay of proceedings as sought by the Appellant/Applicant is seemingly a delay tactic and submitted that what is critical is that the application has been made without unreasonable delay and the applicant demonstrates that he stands to suffer substantial loss if the order for stay is not made.
33. Counsel submitted that in the instant case, the supporting affidavit does not indicate any loss that the applicant has stated he will suffer if the matter proceeds for hearing and determination in the trial court. All he has said is that the trial court may proceed to hear the suit and deliver judgment and the Appellant's Appeal will be rendered nugatory and the Applicant will suffer irreparable loss. That the matter has already been allocated a hearing date by the trial court being 22/5/2024. If the case does not proceed, that time will be wasted, so there is really no loss that the parties or the court stand to suffer if the matter proceeds in the trial court as scheduled.
34. Counsel added that decision on whether or not to grant stay of proceedings is discretionary and this even though the court has powers to stay proceedings pending an appeal as provided under Order 42 rule 6 (1) of the Civil Procedure Rules, Counsel urged that the provisions of Article 159(2)(a)(b)(c) and (d) of *the Constitution* of Kenya as read with Sections IA and IB of the *Civil Procedure Act*, Cap 21 enjoins the court to foster and facilitate the overriding objective of the Act which is to render justice to parties in all Civil Proceedings in a just ,expeditious, proportionate and affordable cost to parties.
35. In the instant case, Counsel submitted 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 SCCE No. E1170 of 2023 which already has a hearing date, or staying the proceedings because it is



more expeditious to proceed with the case rather than to stay it since neither party will be prejudiced in any way.

Analysis and Determination

36. I have carefully considered the Application, the Supporting Affidavit thereto, the Replying Affidavit and the Submissions filed by the respective parties. Having addressed my mind to all these at length, it is my well-considered opinion that the only issue for determination is

Whether the Appellant/Applicant has met the conditions necessary for the grant of stay of proceedings.

37. Stay of proceedings is governed by Order 42 rule 6(1) of the Civil Procedure Rules as already herein above reproduced. The principles guiding stay of proceedings were laid down by a 5-judge Bench of the High Court in the case of William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others [2019] eKLR 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.

In the same vein, in Halsbury's Laws of England, 4th Edition, Vol. 37 at p. 330:

“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 proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it 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 this case.”



38. In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR, (Supra) Gikonyo J held that:
- “Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent”.
39. Further, in the persuasive authority in Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000 (Supra) Ringera J, (as he then was) stated 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 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”.
40. The Appellant/Applicant is challenging the jurisdiction of the Small Claims Court to handle Road Traffic Accident matters pursuant to the decision in Jerusha Auma Ogwari v Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim (Civil Appeal 223 of 2022) (2023) KEHC 20111 (KLR) herein above cited
41. In light of the principle of stare decisis which requires that, although not bound to do so, the Court should follow a decision of a judge of equal jurisdiction unless the decision appears to be clearly wrong. Further, under the Doctrine of precedent, a Lower Court is bound by the decisions of a Court that is superior to it.
42. However, while noting that requirement of the principle of stare decisis, the court also notes that there is a more recent decision in the case of HCCA E037 of 2024, Naomi Wanjiru Irungu vs Francis Kimani Karanja herein above cited which was made by the High Court sitting in Nyeri. This court is of a concurrent jurisdiction to the court that gave the decision in the Jerusha Ouma Ogwari (Supra) case which decision is in sharp contrast to the decision given in the Nyeri case on the very same issue of the jurisdiction of the Small Claims Court in matters involving personal injury claims.
43. The Court cannot therefore close its eyes to this existing scenario wherein there are two contrasting decisions over the same issue by two different courts of concurrent jurisdiction. Until the issue is settled by a Superior Court to the High Court, then the issue of the jurisdiction of the Small Claims Court is not as open and shut as it was before a differing decision was rendered by the High Court sitting in Nyeri.
44. This means therefore that a decision on this issue could go either way depending on which of the authorities cited the court would find to be more persuasive. This then would render the appeal filed by the applicant arguable yes but reduces the chances of the same being rendered nugatory if the Applicant’s instant Application is not granted.
45. Further, I note that what is sought to be appealed against is a Ruling of the Court on an interlocutory objection. Considering that the Lower Court rendered a negative verdict on the Preliminary Objection



the subject matter of this Application, then the hearing of the main suit is still ongoing before the Small Claims Court. This means therefore the Applicant still has the opportunity to defend the case in the Lower Court. In this regard then I see no injury that is so irreparable, or at all, that will be occasioned to the Applicant in the event that the Lower Court proceedings are not stayed and more particularly because her right of appeal against whatever final decision the Court may render is preserved.

46. Lastly, as already emphasised in the various decisions of the Courts herein above cited, stay of proceedings is a drastic step that ought to be exercised by the courts extremely sparingly and only in the very deserving of cases. All considered, it is my very well considered opinion that this is not one such case for the reasons herein above stated and I now hereby so find. The upshot therefore is that the application lacks merit and is accordingly dismissed in its entirety with costs to the Respondents.

READ DATED AND SIGNED AT ELDORET ON 13TH NOVEMBER 2024

E. OMINDE

JUDGE

