Wetangula v British Broadcasting Corporation (Civil Case 444 of 2015)
[2024] KEHC 14784 (KLR) (Civ) (21 November 2024) (Ruling)

Neutral citation: [2024] KEHC 14784 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CIVIL

CIVIL CASE 444 OF 2015

CW MEOLI, J

NOVEMBER 21, 2024

BETWEEN

SENATOR MOSES MASIKA WETANGULA ..... PLAINTIFF

AND

BRITISH BROADCASTING CORPORATION ..... DEFENDANT

RULING

1. The Notice of Motion dated 24.06.2024 (the Motion) was brought by British Broadcasting Corporation (hereafter the Applicant). Therein, the Applicant seeks an order to stay the proceedings herein. Pending hearing and determination of an intended appeal to the Court of Appeal, against the ruling delivered by this court on 5.10.2023. The Motion is expressed to be brought under Sections 1A, 1B and 3A of the *Civil Procedure Act* (CPA); Order 42, Rule 6(1) and (4) of the Civil Procedure Rules (CPR); and Articles 35(1)(b), 50 and 159(2) of *the Constitution*.

2. The Motion is supported by the grounds set out on its face and the affidavit of the Applicant's advocate Samir Inamdar. To the effect that the court by its ruling of 5.10.2023 , dismissed the Applicant's motion dated 13.07.2022 which had sought an order directing that a letter of request be sent to the High Court of England requesting it to conduct an examination of the relevant witnesses and to obtain all relevant information and documentation for return to the High Court of Kenya; and a further order staying the proceedings in the present suit pending the outcome of the stated examination and receipt of the requisite documents. The advocate stated that the Applicant being aggrieved by the court's ruling, intends to challenge it by way of an appeal to the Court of Appeal, and therefore lodged a notice of appeal dated 17.10.2023.

3. Further, the advocate deposes that unless the order sought is granted, the Applicant will be greatly prejudiced as it may be compelled to participate in two concurrent proceedings compromising its right to a fair hearing and rendering the appeal nugatory. That since the hearing of the suit is yet to

commence, no prejudice will be visited upon any of the parties. The advocate adding that it would be a proper use of judicial time for the suit proceedings to be stayed pending hearing and determination of the intended appeal. That in the circumstances, it would serve the interest of justice for the Motion to be allowed.

4. The Motion was opposed by Senator Moses Masika Wetangula (hereafter the Respondent) who swore a replying affidavit on 8.07.2024. Therein, he averred inter alia, that there has been an inordinate and inexcusable delay of over nine (9) months on the part of the Applicant, in bringing the Motion since lodging the notice of appeal on 17.10.2023. The Respondent further averred that the instant Motion, if allowed, will prevent him from prosecuting the suit without delay. That the British American Tobacco (BAT) investigation report which the Applicant deems relevant to its defence case and which is said to form the basis for the intended appeal, ought to have been obtained at the earliest opportunity. The Respondent views the intended appeal as frivolous, vexatious and inarguable.

5. Further to the foregoing, the Respondent is of the view that this court is functus officio, by virtue of the fact that it declined to grant a similar prayer for stay of proceedings, by the ruling delivered on 5.10.2023. The Respondent also stated that the Applicant has not demonstrated the manner in which it stands to be prejudiced if the order sought is denied, adding that he has already suffered prejudice, through delay occasioned by the Applicant's previous application which gave rise to the ruling of 5.10.2023. The Respondent ultimately averred that no exceptional circumstances have been demonstrated to warrant granting of the stay order sought. Thus urging the court to exercise its discretion by dismissing the Motion with costs.

6. The Motion was canvassed via written submissions.

7. On his part, the Applicant's counsel anchored his submissions on the decision in Harnam Singh v Mistri [1971] EA 122) and Order 42, Rule 6(1) of the CPR on the discretionary power of the court to grant stay of proceedings, pending appeal. Further citing the decision in Kenya Commercial Bank Limited v Kenya Pipeline Company Limited [2017] KEHC 10096 (KLR) where it was held that such discretion ought to be exercised judiciously. Counsel also drew support from the renowned case of Re Global Tours & Travel Ltd HCWC No. 43 of 2000 (UR) where the court set out the key principles for consideration in determining an application seeking to stay proceedings.

8. The Applicant's counsel then proceeded to address the preliminary issue raised by the Respondent, to the effect that this court is functus officio. Counsel relied on the cases of Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf of 996 Former Employees of Telkom Kenya Limited) [2014] KECA 600 (KLR) and Lawrence Ong'eni Mokaya v Alice Onserio [2020] KEHC 849 (KLR) defining the term. And argued that the stay previously sought related to entirely different circumstances and grounds from those set out in the present instance. Counsel therefore urged this court to find the claims by the Respondent unsubstantiated.

9. On the merits of the Motion, counsel for the Applicant submitted that the intended appeal raises arguable grounds and therefore urged this court to take into consideration the decisions rendered in Mwananchi Credit Limited v Onyango & another [2023] KEHC 21253 (KLR) and Daniel Walter Rasugu Omariba v Johana Nyokwoyo Buti & Joseph Ondimu Oendo [2010] KEHC 2674 (KLR) where the respective courts considered what constitutes an arguable appeal.

10. Counsel further submitted that it is imperative that the stay of proceedings order sought be granted, since the Applicant intends to obtain crucial evidence to support its defence case. Contending that the delay in bringing the instant Motion is not inordinate and has been adequately explained in the material supporting the Motion. Counsel urged the court to consider the decisions in Kenya Commercial Bank Limited v Kenya Pipeline Company Limited (supra) and MIO (A minor suing through MIO as next

friend and guardian) v Vinayak & 2 others [2024] KEHC 215 (KLR) in that regard. On those grounds, the court was urged to allow the Motion.

11. Counsel for the Respondent firstly submitted that the supporting affidavit to the Motion is incompetent for having been sworn by the Applicant's advocate, concerning disputed facts as found at paragraph *6*. Counsel here citing the case of Homboyz Entertainment Limited v Secretary National Building Inspectorat, Kenya Airports Authority & Attorney General [2022] KEELC 390 (KLR) where the court found an affidavit sworn by the Plaintiff's counsel incompetent on the grounds that it touched on contentious evidential issues and/or matters, and proceeded to strike it out as a result.

12. Further citing the decision in Uhuru Highway Development Limited v Central Bank of Kenya, Exchange Bank Ltd (Involuntary Liquidation) & Kamlesh Mansukhlal Pattni [1996] KECA 102 (KLR) to support his argument that the instant Motion is res judicata by virtue of the fact that the Applicant had previously sought a similar order to stay of proceedings before this court, with the relevant application being dismissed by way of the ruling delivered on 5.10.2023.

13. On the merits, it is the argument by counsel for the Respondent that there has been inordinate delay on the part of the Applicant in bringing its Motion considering the time that has passed since filing the notice of appeal. Counsel relied on Order 42, Rule 6 (2)(a) of the CPR which sets out the conditions for consideration in applications seeking a stay of execution or proceedings, as well as the decision rendered in Karanja (Suing as the legal representative of the Estate of Karanja Gaturu) v Kambi & 7 others [2024] KEELC 83 (KLR).

14. He asserted that the intended appeal is frivolous as it is aimed at assisting the Respondent in gathering evidence it ought to have obtained long before, in a bid to defeat the suit. Reliance was placed on the decisions in Titus Ngenye Muthama & Anne Ndunge Ngenye v Angelina Nzioka [2018] KEELC 1779 (KLR) and Atek Otech Richard & 11 others v Stelco Properties; M-Oriental Bank Limited (Interested Party) [2022] KEELC 1596 (KLR) where the respective courts found the respective intended appeals to be frivolous on similar grounds.

15. Finally, counsel contended that the Motion does not satisfy the threshold on substantial loss and prejudice to be suffered by the Respondent, in order to justify a grant of the order sought. On those grounds, counsel urged the court to dismiss the Motion, with costs.

16. By way of his supplementary submissions, the Respondent's counsel reiterated that the intended appeal as frivolous, vexatious and non-arguable in nature, since it is primarily aimed at obtaining evidentiary material. Which ought to have been within the knowledge and access of the Applicant at all material times to the cause of action arising here. That in the premises, the court ought to decline to grant the stay order sought in the Motion. In this regard, counsel cited the case of Peter Kirika Githaiga & Lucy Wanja Kangethe v Betty Rashid [2016] KECA 100 (KLR) where it was held that the Appellants therein were essentially seeking the assistance of the court in fishing for or otherwise gathering evidence, by way of the appeal and dismissed the appeal.

17. Counsel also reiterated earlier submissions on the exercise of the court's discretion in an application of this nature; that this court is functus officio in the matter, by virtue of the fact that a similar order for a stay of proceedings was sought by the Applicant vide the application dated 13.07.2022; and that the instant Motion deserves of a dismissal.

18. The court has considered the rival affidavit material and the submissions on record together with the authorities cited in respect of the Motion. Which seeks the sole order to stay proceedings in the suit pending hearing and determination of the intended appeal. However, before considering the merits thereof, the court will first address two (2) key preliminary issued raised by the Respondent.

19. Regarding the first objection to the supporting affidavit sworn by the Applicant's advocate, the court observed that the supporting affidavit sworn by the Respondent did not identify the alleged contentious matters in the impugned supporting affidavit.

20. In Ibrahim & another v Zumzum Investment Limited & another (Civil Application E058 of 2024) [2024] KECA 862 (KLR) Odunga JA while addressing a similar objection stated as follows:-

> " The first objection taken by the 1st respondent is that the affidavit in support of the application is incompetent, having been sworn by an advocate in respect of contested issues. This objection is based on rule 9 of the Advocates Practice Rules which provides that:
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> No advocate may appear as such before any court or tribunal in any matter in which he has reason to believe that he may be required as a witness to give evidence, whether verbally or by declaration or affidavit; and if, while appearing in any matter, it becomes apparent that he will be required as a witness to give evidence whether verbally or by declaration or affidavit, he shall not continue to appear:
>
> Provided that this rule does not prevent an advocate from giving evidence whether verbally or by declaration or affidavit on formal or non- contentious matter of fact in any matter in which he acts or appears".

21. Odunga J A proceeded to explain the import of the Rule above as follows:

> " The general rule is that advocates should not swear affidavits in contested matters. Where the client is available to swear to the disputed facts, the depositions in the affidavit of the advocate, may amount to hearsay unless their sources and grounds for belief are disclosed. More importantly, an advocate who swears an affidavit in contested matters potentially exposes himself to playing the role of both advocate and witness should they be called upon to take the witness stand in order to be cross-examined on the said affidavits. That was the opinion in the case of Magnolia Pvt Limited Vs Synermed Pharmaceuticals (K) Ltd (2018) eKLR in which advocates were cautioned from swearing affidavits on their clients' behalf, the court stating that:
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> > "Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deponed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an officer of the court, from the vagaries of litigation which, on occasions may be very unpleasant. By swearing an affidavit on such issues an advocate subjects himself to the process of cross-examination thus removing him from his role of legal counsel to that of a witness, a scenario which should be avoided like plague. In my view, however innocent an averment may be, counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

22. The learned Judge of Appeal further observed that:

> " This Court however explained in Hakika Transporters Services Ltd v Albert Chulah Wamimitaire [2016] eKLR, citing its decision in Salama Beach Ltd v Mario Rossi, CA. No. 10 of 2015 that:
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> > "As regards the appellant's objection regarding the affidavit supporting the application, it is clear that Mr. Munyithya has deponed only to matters within his personal knowledge as counsel acting in this matter both in the High Court and in this Court. Ordinarily counsel is obliged to refrain from swearing affidavits on contentious issues, particularly where he may have to be subjected to cross-examination (See Pattni v.Ali & 2 Others, CA. No. 354 of 2004 (UR 183/04). Rule 9 of the Advocates (Practice) Rules however permits an advocate to swear an affidavit on formal or non-contentious matters."

23. In concluding Odunga JA stated that:

> " This Court in Pattni v Ali and Others [2005] 1 EA 339; [2005] 1 KLR 269 held that:
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> > "Whereas it is right that advocates should not swear affidavits on behalf of their clients when their clients are readily available to do so as this accords with the spirit of the best evidence rule and in view of the provisions of Order 18 rule 2, with common sense and it would be embarrassing to apply those provisions to an advocate who may have to relinquish his role as one to become a witness, there is otherwise no express prohibition against an advocate who on his own knowledge can prove some facts, to state them in an affidavit on behalf of his client. So too an advocate who cannot find his client but has information, the sources of which he can disclose and state the grounds for believing the information."

24. In the present case, it is not stated in the supporting affidavit or otherwise that the appropriate person in the Applicant was unavailable to swear the supporting affidavit. However, at paragraph 2 of the supporting affidavit counsel cites the source of his information to be inter alia, personal knowledge, or knowledge derived from documents in his possession or advice received, and which he believed to be true to the best of his knowledge and belief. The bulk of the affidavit is taken up with matters related to this court's earlier ruling of 17.10.2023, which matters must properly be deemed within counsel's knowledge.

25. The balance of depositions comprising about five paragraphs (10-14) address the possibility of meting higher prejudice to the Applicant than to the Respondent if the motion were declined. In my view, these are essentially legal considerations addressing the subject of the right to fair hearing and well within the remit of the advocate to depose in supporting the motion. Inasmuch as it was more desirable for the Applicant to have directly deposed to these matters, the court is not persuaded that they qualify as contentious facts which render the supporting affidavit incompetent and liable for striking out. The first objection is therefore rejected.

26. The second objection raises the plea of functus officio. The Court of Appeal in the case of Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited) [2014] eKLR held as follows regarding the principle:

> " Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon...
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> The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions..."

27. The Supreme Court in Raila Odinga & 2 Others v Independent Electoral & Boundaries Commission & 3 Others [2013] eKLR further illuminated the matter as follows:- :

> " The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

28. In this case, the Respondent's argument is that the court is functus officio by virtue of the court rendering a verdict by way of the ruling delivered on 5.10.2023 in respect to the application dated 13.07.2022 previously filed by the Applicant and seeking similar orders. Upon perusal of the record, it is noted that in the former application, the Applicant sought orders directing that a letter of request be sent to the High Court of England requesting it to conduct an examination of the relevant witnesses and to obtain all relevant information and documentation for return to the High Court of Kenya; and a further order staying the proceedings in the present suit pending the outcome of the examination and receipt of the requisite documents. By its ruling, the court declined to grant the foremost prayer and on that premise did not deem it necessary to consider the second prayer seeking to stay the proceedings.

29. Evidently therefore, the court did not consider the merits of the order for a stay of proceedings, sought previously. Nor was the stay order predicated on an appeal, as the stay now sought; the context was different. In the circumstances, the court finds that the plea of functus officio has not been properly invoked here.

30. On the merits of the instant Motion, the power of the court to stay proceedings 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"

31. 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).
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> 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.

32. Evidently, the grant or refusal of an order staying the proceedings in a matter lies purely with the court's discretion, upon considering the interest of justice.

33. First, from the record and material presented, it is apparent that the ruling sought to be challenged on appeal was delivered on 5.10.2023. Subsequently, the Applicant subsequently lodged a notice of appeal dated 17.10.2023 (marked as Exhibit A). The Applicant, for undisclosed reasons waited until 24.06.2024 to move the court by way of the present Motion. No credible explanation or explanation was provided for the delay of close to nine (9) months. In the court's view, this constitutes both inordinate and unreasonable delay on the part of the Applicant, especially given the nature of the orders sought in the Motion. Stay of proceedings essentially bars a plaintiff from prosecuting his case, and ought to be granted in the clearest of cases.

34. Secondly, it is apparent from the record that the Applicant has to date not filed a memorandum of appeal before the Court of Appeal, subsequent to the notice of appeal. What was annexed to the instant Motion is a draft memorandum of appeal (marked as Exhibit B). Once again, no credible explanation has been given for the inordinate delay in filing the intended appeal.

35. Thirdly, the question whether the intended appeal raises any arguable grounds lies with the Court of Appeal, if indeed a viable appeal exists before that court. Concerning whether the staying of proceedings will serve the interest of justice, the court upon considering the rival positions taken by the respective parties, is not convinced that it would be in the interest of justice for the stay sought to be granted. As earlier mentioned, the suit has been pending close to nine years now, and there is no concrete demonstration of an existing appeal against the decision rendered by this court on 5.10.2023; stay of proceedings cannot issue on the basis of what could well be a non-existent appeal. Furthermore, if granted, the stay order will only serve to further delay the progress of the suit even.

36. Having considered all the foregoing factors, more so the inordinate and unexplained delay generally, the court is not persuaded to grant the stay order sought. Consequently, the Notice of Motion dated 24.06.2024 is hereby dismissed, with costs to the Plaintiff/Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 21ST DAY OF NOVEMBER 2024.

C. MEOLI

JUDGE

In the presence of

Mr. Ng'ethe for the Plaintiff/respondent

Ms Wangare for the Defendant/Applicant

C/A: Erick