



**Advance Auto Import Limited v Sialo (Civil Appeal E004 of 2024)
[2024] KEHC 15640 (KLR) (9 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15640 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT SIAYA
CIVIL APPEAL E004 OF 2024
DK KEMEL, J
DECEMBER 9, 2024**

BETWEEN

ADVANCE AUTO IMPORT LIMITED APPELLANT

AND

PHILIP OTIENO SIALO RESPONDENT

RULING

1. The Appellant herein has filed an application dated 31/10/2024 seeking the following reliefs:
 1. Spent
 2. Further court proceedings in Siaya CMCC M. E057 of 2024 (*Philip Sialo v Advance Auto Import Limited*) be and are hereby stayed pending the hearing and determination of this appeal.
 3. The costs of the application be in the cause.
2. The application is predicated upon the grounds set out therein and by the affidavit of Rizwan Ali sworn on even date.
3. The Appellant's gravamen is inter alia; that it had filed a Notice of Preliminary Objection dated 15/7/2024 in which it had contested the jurisdiction of Siaya Principal Magistrate Court to hear and determine Siaya CMCC No. E057 of 2024 involving a suit that arose out of a contract executed outside its jurisdiction; that the trial vide its ruling dated 23/11/2023 dismissed the said preliminary objection on the basis that the overriding objective of the *Civil Procedure Act* and Rules thereunder is resorted to for the expeditious disposal of suits to which the Applicant is dissatisfied with; that the appeal is arguable; that there is merit in granting the stay pending the appeal; that the appeal will be rendered nugatory if the stay order is not granted.



4. The application was opposed by the Respondent who swore a replying affidavit dated 5/11/2025 wherein he averred inter alia that the Appellant has not satisfied the requisite condition namely failure to furnish security; that the Respondent's suit is on the wrongful repossession of the suit motor vehicle in Siaya and thus the cause of action arise in Siaya town and hence the appeal is not arguable; that the Applicant has approached this court with unclean hands as it has disobeyed the courts order to return the suit vehicle for preservation; that the request for stay of proceedings is a delaying tactics; that the Respondent stands to suffer prejudice if the order is granted; that the Appellant does not suffer any prejudice or loss whatsoever if the order sought is declined.
5. The application was canvassed by way of written submissions. Both parties duly complied.
6. I have considered the application, rival affidavits and submissions of the learned counsels. The issue for determination is whether the Applicant's application has merit.
7. It is noted that the Applicant's concern at this stage is an order of stay of proceedings in the lower court pending determination of the appeal herein. A perusal of the Memorandum of Appeal shows that the Appellant's grouse is the trial court's dismissal of its preliminary objection that had been raised regarding the lack of jurisdiction by the trial court to try and determine the dispute lodged by the Respondent. Hence, the question whether the trial court has jurisdiction is a germane issue for determination in this appeal and therefore the appeal herein is arguable. In any event, every party is entitled to access justice by dint of article 48 of the *Constitution*. The Respondent cannot deny the Appellant the opportunity to ventilate its appeal. At this stage, the merit or demerits of the said appeal is yet to be canvassed. It is also not in dispute that the Respondent who has lodged suit in the lower court is entitled to pursue the same to conclusion without hindrance.
8. It is noted that the Appellant's main prayer is for an order of stay of proceedings in the lower court case namely Siaya CMCC No. E057 of 2024 pending determination of the appeal herein. It is trite that stay of proceedings should be resorted to sparingly since the same has the effect of effecting or interfering with rights of litigants in the prosecution of their cases. In the case of *Global Tours & Travels Ltd (2000) LLR 1061 Ringera J*(as he then was) held thus:

“ 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, 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.”

Going by the aforesaid erudite decision of Ringera J (as then was), the key issues for consideration is whether the Appellant's application has been filed timeously and whether the Appellant ought to provide security for the due performance of the decree herein. It is noted that the impugned decision by the learned trial magistrates was delivered on 23/10/24 while the present application was lodged on 31/10/2024 which is only eight days. There was thus no inordinate delay on the part of the Appellant.

As regards the issue of security, the court notes that indeed the Respondent is likely to have some discomfiture upon the order of stay of proceedings pending determination of the appeal. I am persuaded to agree with the sentiments Ringera J (as he was then) in the *Re Global Tours & Travel Ltd*



case (*supra*) that an order for security is only applicable to applications for stay of execution of decree/ orders or judgment pending appeal and hence the issue of security in the present circumstances is not applicable as there is no mandatory requirement for the Applicant to provide security as a prerequisite for the grant of the order for stay of proceedings. This situation was aptly captured by Ochieng J (as then was) in the case of *Francis Njakwe Githiari & Another v Hon. Daniel Toroitich Arap Moi T/A Moi Educational Centre* NBI, HCC No. 596 of 2006 when he held as follows:

“But all the same, the said prejudice, when weighed against the pros and cons of a stay in these proceedings, in less than the difficulties which the judicial system would be exposed to if this court proceeded with the trial whilst the intended appeal was still outstanding. To my mind, if the trial did proceed on 27th July 2006, or at any other time whilst the intended appeal was still unresolved, there would be real danger of the court being put in disrepute due to possible inconsistent decisions on the same point in the same matter.”

Bearing in mind the diametrical rights of the parties herein, it is appropriate that the appellant be directed to speed up the hearing of the appeal so that the same can be wound up and that the lower court will proceed thereafter based on the orders arising from this appeal. That, in my view, would assuage the concerns of the respondent herein.

9. In view of the foregoing observations, I find merit in the Appellant’s application dated 31/10/2024. The same is allowed in the following terms:
- a. An order of stay of proceedings in Siaya CMCC No. E057/2024 (*Philip Otieno Sialo v Advance Auto Import Ltd*) is hereby issued pending the determination of this appeal.
 - b. The Appellant is ordered to file and serve the record of appeal within seven (7) days from the date hereof.
 - c. Mention on 19/12/2024 to confirm compliance and for further directions.
 - d. The costs of the application shall abide in the appeal.

RULING DATED AND DELIVERED AT SIAYA THIS 9TH DAY OF DECEMBER, 2024.

D. KEMEI

JUDGE

In the presence of:

Mwesigwa.....for Appellant

N/A Ochieng.....for Respondent

Ogendo.....Court Assistant

