



**Jepkpegi v Koech (Civil Appeal E094 of 2024)
[2024] KEHC 15364 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 15364 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E094 OF 2024
E OMINDE, J
DECEMBER 5, 2024**

BETWEEN

STELLA JEPKPEGI APPELLANT

AND

BONIFACE KIPKORIR KOECH RESPONDENT

RULING

1. By a Notice of Motion dated 26/4/2024, the Appellant/Applicants seeks the following orders:
 1. Spent.
 2. Spent.
 3. That this Honourable Court be pleased to order stay of any further proceedings in Eldoret Small Claims Civil Cause No. E1110 of 2023 pending the hearing and determination of the Appellant's Applicant's Appeal on ruling dated 26/4/2024.
 4. Spent.
 5. That costs of this application abide the outcome of the Appeal.
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. The Applicant deposed that Section 34 of The *Small Claims Court Act* CAP 10A provides that Claims are required to be finalized in 60 days, that Eldoret Small Claims Civil Cause No. E1110 of 2023 was fixed for a hearing date on 17/6/ 2024, that on 26/4/2024, the Honourable Court issued a Ruling on a Notice of Preliminary Objection dated 3/3/2024, that the Court ruled that it had jurisdiction to hear and determine personal injury matters arising out of road traffic accidents deviating from Hon.



Justice Kizito's decision in *Ogwari v Hersi* (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment).

4. Being aggrieved by the said Ruling, the Applicant instructed her Advocates to Appeal before the High Court at Eldoret seeking to set aside the Ruling dated 26/4/2024 and to strike out the suit in the subordinate court being Eldoret Small Claims Civil Cause No. E1110 of 2023, that the Appeal primarily seeks the High Court's determination of whether the Small Claims Court is bound by the High Court decision in *Ogwari v Hersi* (Civil Appeal 223 of 2022) [2023] KEHC 20111 (KLR) (3 July 2023) (Judgment) and further that the Appeal has high chances of success.
5. The Applicant is apprehensive that the court may proceed to hear the suit and deliver the judgment in Eldoret Small Claims Civil Cause No. E1110 of 2023 to her detriment and that unless Stay of Proceedings in Eldoret Small Claims Civil Cause No. E1110 of 2023 is granted, and the trial court proceeds to deliver the judgment the Applicant's appeal will be rendered nugatory and she will suffer irreparable loss and damage.
6. The Applicant is ready and willing and able to furnish such reasonable security as the Honourable Court may deem fit.
7. According to the Applicant, the Application is made in good faith and will not occasion any prejudice to the Respondent that cannot in any event be compensated by the payment of costs.

The Response

8. The Application is opposed by the Respondent vide his Replying Affidavit dated 11/6/2024. The Respondent deposed that Application dated 26/4/2024 is misconceived, bereft of merits and incompetent and thus should be dismissed with costs, that the Application is made in bad faith and with the intent of denying and or depriving him from enjoying the fruits of his judgment, further that the grounds in support of the Application are spurious and untenable.
9. According to the Respondent, the mere filing of the Memorandum of Appeal does not warrant the grant of orders of stay of execution sought as no sufficient reasons have been demonstrated by the Appellant/Applicant.
10. In response to Paragraphs 8, 9 and 10 of the Applicant's Supporting Affidavit, the Applicant deposed that, the Applicant has not demonstrated what substantial loss she is likely to suffer should the orders herein be denied and that the mere filing of the Memorandum of Appeal does not warrant the grant of the orders for stay of execution sought as no sufficient reasons have been demonstrated by the Appellant/Applicant.
11. According to the Respondent, the Ruling of the Adjudicator in the Small Claims was well reasoned.
12. The Respondent contended that this matter was filed long time ago in November, 2023 and to date he is yet to enjoy the fruits of a successful litigant only because the Applicant according to the Respondent, wants to use the Court process to circumvent the wheels of justice.
13. The Respondent maintained that the Small Claims Court has a timeline of 60 days to hear and determine the matter herein and thus the Appeal will delay the matter from coming to an end.
14. The Respondent, contended that from a cursory look at the Memorandum of Appeal, it does not show any chances of success and granting the orders sought will only be an exercise in futility and that the legal practice and the current constitution encourages parties to be heard substantively without relying on procedural technicalities, hence interlocutory appeals like this instant one should be frowned upon by the Court.



15. In view of the foregoing, the Respondent deposed that, it is only prudent and just that the Applicant's instant Application be dismissed with costs to the Respondent.

Submissions

16. The Application was canvassed vide written submissions. The Applicant filed submissions dated 11/5/2024 while the Respondent filed submissions dated 28/10/2024.

The Applicant's Submissions

17. Counsel submitted that the Applicant submitted this Court in exercising its discretion on whether to grant an application for stay of proceedings ought to consider special circumstances and unique fundamental principles as laid out under Order 42 of the Civil Procedure Rules. Counsel cited the case of Ezekiel Mule Musembi -vs- H. Young & Company (E.A) limited [2019] eKLR where it was stated that the Court's discretion in deciding whether or not to grant stay of 'proceedings as sought in this application is guided by the following principles;
- a) Whether the Application was lodged timely and expeditiously,
 - b) Whether the Appeal is arguable bearing the circumstances to therefore warrant a stay of proceedings
18. Counsel added that such jurisdiction is derived from of Order 42 rule 6 (1) of the Civil Procedure Rules as well as the inherent jurisdiction reserved in Section 3A of the [Civil Procedure Act](#) and that the same principles were echoed 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...”
19. In regard to whether the application has been brought without undue delay, Counsel submitted that this application has been brought expeditiously and without undue delay, that the initial Ruling was rendered on 19/04/2024, the Memorandum of Appeal was lodged on 19/04/2024 and the Application herein was lodged on 19/04/2024. Counsel contended that the period within which the ruling was delivered and when the application was lodged is not inordinate as the instant application was filed within 30 days following the delivery of the ruling and the same was therefore filed timely and expeditiously.
20. On whether the appeal is arguable, Counsel submitted that whereas the Court in such an application may be entitled to look at the intended appeal and see whether or not the intended appeal is not frivolous so as to satisfy itself that it is not being asked to suspend the proceedings so as to frustrate the hearing and delay the expeditious disposal of the matter, care must, however, be taken to ensure that the Court does not purport to preside over the intended appeal so as to avoid usurping the powers of



the appellate Court. Counsel relied on the decision in *Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No.126 of 1999 Onyango Otieno*, (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

21. Counsel further submitted that in the present case, the appeal is challenging the decision made on 19/4/2024 of which ruling was delivered in relation to the competence of the Small Claims Court to handle Road Traffic Accident Matter.

22. That Hon. Justice DKN Magare in *Jerusha Auma Ogwari V Ibrahim Aisha Hersi Alias Aisha Hersi Ibrahim (Civil Appeal 223 Of 2022) [2023]Kehc 20111 (Klr)* held that it is not practicable for matters relating to Road Traffic Accidents to be determined in the Small Claims Court. The learned judge pressed on to state that,

“in breach of contract, that the claim was neither pleaded as a claim in negligence nor as a claim in breach.”

23. The Appellant holds the position that by dint of Section 38 of *Small Claims Court Act* the High Court is the final Appellate Court.

24. Counsel maintained that a decision made by the High Court is binding to the Small Claims Court being subordinate to the High Court. On the exercise of jurisdiction, the Appellant is guided by the Principles of Judicial Authority of the High Court prescribed under Article 165(6) of *The Constitution* of Kenya which article expressly provides that

“The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

25. Further, Counsel submitted that the Respondent in her Statement of Claim filed in the lower court pleaded negligence and failed to plead the particulars of the said negligence, that the Hon. Justice Magare in the above highlighted case went further to state that

“The claim was filed without particulars of negligence and as such it was fatally defective and untenable in law. The 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. Personal injury for assault and allied causes can still be filed.”

26. According to Counsel therefore, the 1st Respondent in pleading negligence digressed from the set out Standard form of the Statement of Claim to modify his Statement of Claim.

27. Counsel added that an arguable appeal is not one that will necessarily succeed but it's one that raises tenable positions and this appeal raises legitimate issues. On Whether the Applicant's Appeal is arguable, Counsel relied on the case *Kenya Tea Growers Association & Another vs Kenya Planters & Agricultural Workers Union Civil Appeal Nairobi No 72 of 2001* where it was stated that



"He (the Appellant) need not to show that the appeal is likely to succeed. It is enough for him to show that there is at least one issue in which the court shall pronounce its decision".

28. Counsel also cited the case of David Omwenga & John Tkeleyio in Kisii High Court No. 149 of 2005 eKLR wherein the court cited Butt vs Rent Restriction Tribunal (1982) in which the court stated that-

"If there is no overwhelming hindrance, a stay ought to be granted so that an appeal is not rendered nugatory should the appeal succeed"

29. Counsel further maintained that an arguable appeal is not one that will necessarily succeed but it's one that raises triable issues and the Appeal subject of this application, Eldoret HCCA E094 of 2024 raises legitimate points.

The Respondent's Submissions

30. In regard to whether Small Claims Court has jurisdiction to hear and determine Eldoret SCCC No. E1110 of 2023, Counsel for the Respondent submitted that a Court's jurisdiction flows from either *the Constitution* or legislation. It has been held in several judicial decisions that Courts cannot arrogate to themselves jurisdiction exceeding that which is conferred upon them by law. As such the Small Claims Court derives, its mandate from the provisions of Section 12(1) of the *Small Claims Court Act* which provides as follows:

12. Nature of claims and pecuniary jurisdiction

(1) Subject to this Act, the Rules and any other law, the Court has jurisdiction to determine any civil claim relating to-

- (a) a contract for sale and supply of goods or services;
- (b) a contract relating to money held and received;
- (c) liability in tort in respect of loss or damage caused to any property or for the delivery or recovery of movable property;
- (d) compensation for personal injuries; and
- (e) set-off and counterclaim under any contract

31. Counsel further submitted that the facts that this case arose from a Road Traffic accident involving the Appellant's Motor Vehicle from which the Respondent sustained personal body injuries. Counsel added that Appellant was sued for being negligent while handling the suit motor vehicle which occasioned the accident. As such the personal injuries sustained by the Respondent due to Appellant's negligence fall perfectly within the ambit of Section 12(1)(d) of the Act which provision the jurisdiction of the Court has been properly invoked.

32. Counsel submitted that Appellant's Application was solely based on the above decision of Justice Magare Kizito in the case of Ogwari vs Hersi (2023) KEHC 2011 eKLR. Counsel noted that whereas he is aware that this Court is bound by the decision of the superior Court through the doctrine of Stare Decisis he submitted that there are some instances where the Court is allowed to disregard the doctrine and form an independent opinion on the issue at hand, that one such exception to the Doctrine of Stare Decisis is where the decision has been made "per-incurium" and if a decision has been given in



ignorance of law or any statute or any binding authority, the doctrine of "per-incurium" may be invoked by Subordinate Court to cure the defect to avoid a miscarriage of justice.

33. Counsel submitted that the decision of Justice Magare Kizito in the case of *Ogwari vs Hersi* was discussed extensively in the case of *Naomi Wanjiru Irungu v Francis Kimani Karanja (2024)* eKLR where the Court overruled the finding by Justice Magare and held that the Small Claims Court had jurisdiction to handle matters of personal injury due to Road Traffic Accident pursuant to Section 12(1) d of the Act.
34. Counsel submitted that the decision in *Ogwari vs Hersi* having been overruled by the more recent decision of *Naomi Wanjiru Irungu v Francis Kimani Karanja* by a Court of concurrent decision, the decision of Justice Magare was made per-incurium and so the Small Claims Court in Eldoret SCCC No. E1110 of 2023 is not bound by the same as proposed by the Appellant in their application. Counsel urged that the Court is obligated to make an independent finding based on the facts presented to it.
35. To this end and taking into account the Provisions of Section 12(1) d of the *Small Claims Court Act*, Counsel submitted that the Court is entitled to make an independent interpretation of the Act and ascertain whether it has jurisdiction or not. It has been held in several decisions of the Superior Courts that when interpretation statute, the words should be interpreted in a literal manner giving words their ordinary meaning.
36. Counsel cited the case of *Law Society of Kenya v Kenya Revenue Authority (2017)* eKLR and further cited the case of *Naomi Wanjiru Irungu v Francis Kimani Karanja (supra)* where it was held thus;

“...the most important rule is the rule dealing with the statute in plain language...in the absence of an expressed legislative intention in the contrary, the language must ordinarily be taken as conclusive. Thus, when the words of a state are unambiguous, then this fist canon is also the last, judicial inquiry is complete.”
37. Counsel contended that it is trite practice that Courts should not enlarge the scope of legislation and where the language used is plain and unambiguous, the Court should strive to give the words used their ordinary meaning. In this case therefore, Counsel submitted that is it possible to claim that the language used in Section 12(1)(d) is ambiguous? Do the words "personal injury" so ambiguous that it will require a Court to construe the injury based on how it was occasioned/caused and therefore limit certain class of personal injury?
38. In answering some of the questions posed above, Counsel submitted that the High Court in the Case of the *Naomi Wanjiru Irungu (supra)* case stated as follows;

“...the wording of Section 12(1) d of the Act in my view is plain, precise and unambiguous. It would not be correct to say that the provisions of the law includes or excludes specific classes of personal injuries.”
39. Counsel added that had Section 12(1)(d) intended to exclude certain classes of personal injury, it would have expressly said so and further that the said section has not been declared unconstitutional and or invalidated and that it still forms part of our laws and should be given its literal meaning as intended by the Legislature.
40. In regard to whether the Applicant has satisfied the legal requirements for grant of the orders sought, Counsel submitted that the major issue for determination before this Honourable court is whether the Appellants have tendered convincing reasons to warrant them be granted the sought orders of stay



of proceedings in Eldoret SCCC No. E1110 of 2023 pending the hearing and determination of this application and their filed appeal to wit Eldoret HCCA No. 94 OF 2024, and he answered in the negative.

41. Counsel contended that stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. He quoted the words of Ringera J. In the case of Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000):

“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.”

42. Counsel further submitted that the Appellant herein filed a Preliminary Objection dated 3/3/2024 on grounds that the trial Magistrate lacked jurisdiction to hear and determine Eldoret SCCC No. E1110 of 2023 and the trial Magistrate dismissed the Preliminary Objection on 26/4/2024 citing it had jurisdiction to hear and determine the suit.

43. Counsel added that one exceptional circumstance when granting orders for stay of proceedings is that the Court has to bear in mind the need for expeditious disposal of cases. Which was the cardinal reason for the establishment of the Small Claims Court as provided under Section 34 of the Small Claims Act as follows;

“All proceedings before the Court on any particular day so far as is practicable shall be heard and determined on the same day or on a day to day basis until final determination of the matter which shall be within sixty days from the date of filing the claim”.

44. Counsel contended that to date it's been more than sixty days since filing of Eldoret SCCC No. E1110 of 2023, which basically has delayed the Respondent herein the justice deserved.

Analysis and Determination

45. 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.

46. 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.
47. In the case of *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR, 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”.
48. Further, the Court finds is very well persuaded by the finding of Ringera J in in the case of *Global Tours & Travels Limited; Nairobi HC Winding up Cause No. 43 of 2000* (Supra) herein above cited.
49. 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
50. In light of the principle of *starre 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.
51. However, while noting that requirement of the principle of *starre 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.
52. This court sitting at Nyeri is of a concurrent jurisdiction to the Hon Mr. Justice Magare who gave the decision in the *Jerusha Ouma Ogwari* (Supra) case. Its decision however on the very same issue of the jurisdiction of the Small Claims Court in matters involving personal injury claims. Its decision that the Small Claims Court has jurisdiction over these cases is in sharp contrast to Justice Magare’s decision that they do not.
53. In this regard, this Court cannot 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.

54. This means therefore that a decision on this issue of the jurisdiction of the Small Claims Court 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.
55. 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.
56. 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 the Applicant's right of appeal against whatever final decision the Small Claims Court may render is still preserved.
57. 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 5TH DECEMBER 2024

E. OMINDE

JUDGE

