



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCA NO. E033 OF 2020

BRIAN YONGO OTUMBA.....APPELLANT

VERSUS

MWANANCHI CREDIT LIMITED.....1ST RESPONDENT

WAYAGA CONSTRUCTION COMPANY LIMITED.....2ND RESPONDENT

RULING

1. This ruling is in respect to the application dated 21st August 2020 wherein the applicant seeks orders for stay of proceedings in Milimani CMCC 10028 OF 2018 pending the hearing and determination of this appeal. The applicant also seeks the costs of the application.
2. The application is supported by the appellant/applicant's affidavit and is premised on the grounds stated on the face of the application.
3. The 1st respondent opposed the application through the replying affidavit of **Mr. Dennis Mwangeka Mombo** who avers that the application does not satisfy the conditions for grant of orders of stay of proceedings as the reasons advanced in the supporting affidavit do not have any evidential value. He further avers that the applicant's intended appeal does not have any probability of success as the grounds in the Memorandum of Appeal were already canvassed in the ruling dated 14th August 2020.
4. The application was canvassed by way of written submissions. The applicant submitted that the appeal is arguable as it relates to his right to cross examine the 1st respondent's witness and his right to adduce evidence before the trial court.
5. The 1st respondent submitted that the applicant did not give any plausible reason for his failure to attend court on 4th December 2019 despite the fact that the hearing date was taken by consent of both parties. It was further submitted that the applicant has not demonstrated that he is entitled to the orders for stay of proceedings.
6. I have carefully considered this application, the affidavit in support thereof, the submissions of both parties and the relevant statutes and case law. The main issue for determination is whether the applicant has given sufficient reasons for stay of proceedings pending the hearing and determination of the appeal.
7. The appellant's contention is that he stands to be highly prejudiced as his appeal would be rendered nugatory unless the stay sought is granted. The appellant argued that the grant of the orders sought herein will not be prejudicial to the respondent as the trial before the Lower Court is in its final stages where only the appellant's testimony is pending.
8. The threshold to be met in seeking stay of proceedings was laid out in the following passages in *Halsbury's Law of England, 4th Edition. Vol. 37* page 330 and 332, as follows: -

“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.”

9. In *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 matter, 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.”

10. The dictum in the above cited case and text is that while an order for stay of proceedings is discretionary, the applicant is under an obligation to provide sufficient reasons before the same can be granted. In the instant case, I note that the appeal revolves around the applicant’s right to cross examine the 2nd respondent’s witness. The right to a fair trial is a fundamental right that is enshrined in the Constitution. I find that rejecting the prayer for stay of proceedings pending an appeal in which the applicant challenges the decision to deny him the right to cross examine a witness would render the appeal nugatory. I therefore find that in the circumstances of this case, it will serve the interest of justice to allow the application for stay of proceedings pending the appeal. The costs of this application will abide the outcome of the appeal.

Dated, signed and delivered via Microsoft Teams at Nairobi this 1st day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Appellant present in person.

Mr. Kuloba for the Respondent.

Court Assistant: Sylvia.