



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MACHAKOS**

**APPELLATE SIDE**

**(Coram: Odunga, J)**

**CIVIL APPEAL NO. 106 OF 2021**

**BAKAKI 101 TRAVELLERS SACCO LIMITED.....APPELLANT**

**VERSUS**

**SAMUEL MWANGI WAMBUGU.....1<sup>ST</sup> RESPONDENT**

**ALBANUS KIION KIILU.....2<sup>ND</sup> RESPONDENT**

**RULING**

1. By a Motion on Notice dated 6<sup>th</sup> July, 2021, the applicant herein substantially seeks stay of execution in Mavoko CMCC Nos 1330, 1331, 1332, 1333 and 1336 all of 2018 pending the hearing and determination of this appeal.
2. Though the supporting affidavit is not very detailed as regards the proceedings before the trial court, what I can glean from the same is that there was an ex parte judgement entered against the Applicant in the said matters. The applicant upon being served with notice of entry of judgement applied for setting aside the judgement and leave to defend the same and CMCC No. 1335 of 2018 was selected as the test suit as regards the said application. However, on 3<sup>rd</sup> June, 2021, the said application was dismissed and the said decision was adopted in all the suits.
3. According to the Applicant the effect of the said dismissal is that the 1<sup>st</sup> Respondent will be at liberty to execute for the judgements and decrees in all the related matters that had proceeded to hearing and will also be at liberty to proceed with formal proof in respect of the other matters. According to the Applicant, in the event that the execution proceeds the appeal will be rendered nugatory yet the applicant has raised pertinent issues in the memorandum of appeal which has high chances of success particularly as regards the issue of service and the existence of triable issues particularly the issue of ownership of the suit motor vehicle.
4. It was averred that since the suits in question involve substantial amounts of money, the applicant stands to suffer irreparable loss and damage as he will be condemned unheard.
5. The said application was opposed by the 1<sup>st</sup> Respondent by way of a replying affidavit sworn by **Evans M. Mochama** who averred that the applicant has not demonstrated that the intended appeal has any chances of success as it lacks merit and has no arguable grounds.
6. The Respondent however, averred that should the Court be persuaded to grant the orders sought, it should be conditional upon payment of half of the decretal sum in Mavoko CMCC No. 1336 of 2018 to the plaintiff's advocates.

**Determination**

7. I have considered the application, the supporting affidavit, replying affidavit and the submissions filed as well as the authorities relied upon. Though the application seeks stay of execution, what is actually being sought is stay of proceedings.
8. It is not in doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the **Civil Procedure Rules** as well as the inherent jurisdiction reserved in section 3A of the **Civil Procedure Act**. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.**
9. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal

nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account. 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. In my view delay in making an application where the Court is expected to exercise discretion must always be a factor for consideration since it is an equitable principle that delay defeats equity as equity aids the vigilant, not the indolent.

11. 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.

12. In David Morton Silverstein vs. Atsango Chesoni Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296 the Court of Appeal citing Kenya Commercial Bank Ltd vs. Benjoh Amalgamated Ltd & Another Civil Application No NAI 50 of 2001 held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts. In Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J (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.”**

13. Similarly, the Court of Appeal in Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664 held that:

**“In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”**

14. In the present case, the appeal is challenging the decision made on 3<sup>rd</sup> June, 2021, dismissing the test suit on application seeking to set aside the default judgement. That decision clearly applied to a number of other related suits with the result that the other suits were at liberty to proceed with a process commonly referred to as formal proof otherwise, ex parte hearing or assessment of damages.

15. It arguable whether the trial court took into account or properly took into account the principles relating to setting aside default judgements.

16. In my view, considering the interest of justice and the need to avoid wastage of judicial resources, the proceedings in the lower court ought to be put on hold. As was appreciated by the Court of Appeal in Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:

**“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”**

17. Accordingly, I hereby stay the proceedings or further proceedings in Mavoko CMCC Nos 1330, 1331, 1332, 1333 and 1336 all of 2018 pending the hearing and determination of this appeal. However, as was appreciated by Platt, JSC in Henry Bukomeko & 2 Others vs. Statewide Insurance Co. Ltd Uganda Supreme Court Civil Appeal No. 13 of 1989:

**“Whereas on the authorities, if the delay is caused by the court registry, and the applicant has taken every step possible to prosecute the appeal, further time will be allowed to a blameless intending appellant, there is an overriding factor in this case, and that is that where an interlocutory appeal is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with the minimum of delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the Court of Appeal Rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible. Indeed, the court itself has a duty to see that such appeals are disposed of with special urgency.”**

18. In the premises I direct the appellant to ensure that the record of appeal is prepared and directions on the appeal taken within 30 days from the date of this ruling. In default, the orders of stay issued herein shall stand vacated.

19. The costs of the application are awarded to the 1<sup>st</sup> respondent in any event.

20. It is so ordered.

**RULING READ, SIGNED AND DELIVERED IN OPEN COURT AT MACHAKOS THIS 11TH DAY OF NOVEMBER, 2021.**

**G V ODUNGA**

**JUDGE**

**In the absence of the parties**

**CA Susan**