



REPUBLIC OF KENYA



**Keith & 3 others v Monari & 3 others (Civil Case E278 of 2020)  
[2021] KEHC 355 (KLR) (Commercial and Tax) (9 December 2021) (Ruling)**

Neutral citation: [2021] KEHC 355 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E278 OF 2020  
WA OKWANY, J  
DECEMBER 9, 2021**

**BETWEEN**

**KENNETH HAMISH WOOLER KEITH ..... 1<sup>ST</sup> APPLICANT  
ASHWINI BHANDARI ..... 2<sup>ND</sup> APPLICANT  
NIGEL VAUGHAN JEREMY ..... 3<sup>RD</sup> APPLICANT  
JULIUS WAKO ..... 4<sup>TH</sup> APPLICANT**

**AND**

**EVANS MONARI ..... 1<sup>ST</sup> RESPONDENT  
ANTHONY NJOGU ..... 2<sup>ND</sup> RESPONDENT  
SEAN OMONDI ..... 3<sup>RD</sup> RESPONDENT  
NJAU MUKUHA ..... 4<sup>TH</sup> RESPONDENT**

**RULING**

1. The defendants/applicants herein filed the application dated 20<sup>th</sup> April 2021 seeking the following orders; -
  1. Spent.
  2. Spent.
  3. There be a stay of proceedings in this matter, and in particular the hearing of the Notice of Motion application dated 1/03/2021 before the Learned Lady Justice W. Okwany (or any other Judge), pending the disposal of the Defendants/Applicants' Appeal dated 25/03/2021 and lodged on even date.



4. This Honourable Court be pleased to grant such further orders that are fair and just.
  5. Costs of this Application be provided for.
2. The application is brought under Article 165(6) of the Constitution, Order 42 Rule 6, Order 49 Rule 7 (2) and Order 51 rule 1 of the *Civil Procedure Rules*.
  3. The application is supported by the affidavit of the 1<sup>st</sup> defendant Mr. Kenneth Hamish Wooler Keith and is based on the grounds that: -
    1. The Defendants/Applicants are aggrieved by the Order of the Honourable Deputy Registrar of the Court made on 19/03/2021 placing their Notice of Motion dated 1/03/2021 before a Judge (the Learned Lady Justice W. Okwany) for hearing on 28/04/2021.
    2. The Defendants/Applicants consider that Order to be one that deprives them of a forum provided for under Order 49 Rule 7 rule 1(b)(iii) at which they could prosecute their Notice of Motion dated 1/03/2021.
    3. The Order above said infringes on the Defendants'/Applicants' right to a fair hearing as recognized under Article 50 of the Constitution as it not only deprives them of a statutorily recognized forum in which to agitate, in the first instance, their application but also curtails their right of appeal (bearing in mind that an appeal from a decision of the Deputy Registrar lies, at first instance, to the superior court and subsequently, to the Court of Appeal).
    4. The Defendants/Applicants have filed an Appeal seeking the setting aside of the Order of the Honourable Deputy Registrar of the Court made on 19/03/2021.
    5. Unless the orders of stay of proceedings sought herein are granted, the Appeal would be rendered nugatory as they would be forced to prosecute their Notice of Motion dated 1/03/2021 before a Judge.
    6. No prejudice will be suffered by the Plaintiffs/Respondents should the orders sought herein be granted.
    7. This Application has been filed timeously.
  4. The respondents opposed the application through the replying affidavit of Mr. Evans Monari, the 1<sup>st</sup> Plaintiff herein, who states that the application aims at frustrating the expeditious hearing and disposal of the main dispute between the parties. He contends that the appeal has no merit and will not be rendered nugatory if the matter proceeds for hearing before this court. He further states that the defendants have not demonstrated that they will suffer substantial loss and injustice should the stay not be granted.
  5. The application was canvassed by way of written submissions which I have considered. The main issue for determination is whether the applicant has made out a case for the granting of orders for stay of proceedings pending the hearing and determination of the appeal.



6. The threshold to be observed in making orders for 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.”

7. 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.”

8. The applicants’ case is that the impugned order of the Deputy Registrar has the effect of depriving of them of the forum to prosecute their application dated 1<sup>st</sup> March 2021. According to the applicants, the order infringed on their right to fair hearing as recognized under Article 50 of the Constitution. They further contended that the appeal will be rendered nugatory if this application is not allowed.

9. On their part, the respondents contended that the application is intended to frustrate the expeditious hearing and disposal of the dispute between the parties. They submitted that the appeal has no merit and that the defendants have not demonstrated that they will suffer substantial loss and injustice should the stay not be granted.

10. 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.



11. Further, 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.”

12. 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.”

13. The principle that emerges from the above cited cases is that an order for stay of proceedings is discretionary and that an applicant should provide sufficient grounds for the granting of the order. In the present case, it was not disputed that an appeal has been lodged against the impugned decision of the Deputy registrar.

14. My finding is that the applicant’s right of appeal is a fundamental right that is closely linked to the right to a fair trial that is enshrined under the Constitution. I find that, in the circumstances of this case, disallowing the instant application may render the appeal nugatory should the applicants eventually succeed on the appeal.

15. I therefore find that it will be in the interest of justice to stay the proceeding herein pending the hearing and determination of the appeal. Consequently, I allow the application dated 20<sup>th</sup> April 2021 with orders that the costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 9<sup>TH</sup> DAY OF DECEMBER 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 17<sup>TH</sup> APRIL 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of: -**

Ms Mutua for Mbalu for Plaintiffs.

Mr. Muchiri for Defendants/Applicants

Court Assistant: Margaret

