



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT MOMBASA**

**ELC NO. 442 OF 2017**

**THOMAS SCHIERING.....PLAINTIFF**

**VERSUS**

**NEREAH MICHAEL SAID.....1<sup>ST</sup> DEFENDANT**

**GERHARD HEIDUK.....2<sup>ND</sup> DEFENDANT**

**WOLFGANG GEROG JOHANN EHGARTNER.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application for consideration is the Notice of Motion dated 22<sup>nd</sup> October, 2019 and stated to be brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 3 and 3A of the Civil Procedure Act. In the application, the 1<sup>st</sup> Defendant/Applicant seek to stay the proceedings in this matter pending hearing and determination of the intended Appeal by the Defendants against the ruling and orders of this court made on 16/9/2019. The application is supported by the affidavit of Nereah Michael Said sworn on 22/9/19, and a further affidavit sworn on 27/11/19. It is the Applicant's contention that her right of appeal will be rendered otiose if the orders sought herein are not granted and that no prejudice will be suffered by the respondent if the orders sought herein are granted. That it is in the interests of justice that the orders sought be granted. The applicant avers that the issue raised in the intended appeal touch on the very root of the suit herein and that the outcome of the same will affect the issues in this matter.

2. In opposing the application, the plaintiff filed a replying affidavit sworn by Thomas Shiering on 18<sup>th</sup> November, 2019. The plaintiff avers that the application has been made in bad faith and the sole intention is to derail the consolidation of this matter with ELC No. 411 of 2016 as sought in the application dated 24<sup>th</sup> September, 2019 which is pending. The plaintiff contends that no reason has been fronted to warrant the grant of orders of stay of proceedings in this matter.

3. I have considered the application and the submissions made. This application is for stay of proceedings in this suit pending the hearing and determination of the intended appeal. The intended appeal is against the ruling of this court which dismissed the 1<sup>st</sup> defendant's application to strike out the plaintiff's suit and the application dated 31<sup>st</sup> October 2017.

4. Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice, depending on the justice of each case. It has been stated 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 right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceedings is high and stringent.

5. In the case of Re Global Tours & Travels Limited; Nairobi HC Winding Up Cause No.43 of 2000, Ringera, J. (as he then was), persuasively stated 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, 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.”*

6. See also illumination on the threshold for stay of proceedings in the following passages in Halsbury's Law of England, 4<sup>th</sup> Edition, Vol. 37

**“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 proceedings 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 these grounds must show not merely that the Plaintiff might not, or probability would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”**

7. Has the applicant demonstrated that the intended appeal will be rendered nugatory if the orders of stay of proceedings are not granted? The court takes cognizance of the fact that an order of stay helps preserve the subject matter of the appeal so that it is not rendered nugatory if it succeeds. In the ruling delivered on 16<sup>th</sup> September, 2019 the court dismissed the application to strike out the suit and the application. In my view, there was no positive orders that are capable of being stayed. The order dismissing the application was a negative order and incapable of execution save for costs. The refusal simply meant that the parties stay in the situation they were and therefore should proceed to argue their respective cases. The parties still have a right to appeal against the decisions of this court in the substantive matter. The issue of the intended appeal being rendered otiose does not therefore arise.

8. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise the court’s discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter.

9. The upshot is that I find the Notice of Motion dated 22<sup>nd</sup> October, 2019 devoid of merits and is dismissed with costs to the plaintiff.

It is so ordered.

**DATED, SIGNED and DELIVERED at MOMBASA this 11<sup>th</sup> day of March 2020.**

---

**C.K. YANO**

**JUDGE**

**IN THE PRESENCE OF:**

Abidha for defendants/applicants

Ondieki holding brief for Ms. Mukoya for Plaintiff/Respondent

Yumna Court Assistant

**C.K. YANO**

**JUDGE**