



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL CASE NO. 796 OF 2009**

**NGAGA ENTERPRISES LTD.....PLAINTIFF**

**VERSUS**

**PETER OPANDE.....DEFENDANT**

**R U L I N G**

1. The Application herein is a Notice of Motion dated 4<sup>th</sup> March 2016. It is brought under Order 42 Rule 6 and Order 50 Rule 1 of the Civil Procedure Rules 2010 Sections 1A and 3A of the Civil Procedure Act (Cap) 21 Laws of Kenya, and all the other enabling provisions of the Law.
2. The Applicant is seeking for Orders:
  - That, this Honourable Court be pleased to stay of further proceedings in this case pending the hearing and determination of the Defendant's Appeal against the Ruling and Order of this Honourable Court, dated and delivered on 11<sup>th</sup> February 2016,
  - That the costs of this Application be provided for.
3. The Application is based on the grounds thereof and the affidavit sworn by **PETER OPANDE** in support dated 4<sup>th</sup> March 2016.
4. The Applicant' case is that, on 11<sup>th</sup> February 2016, the Court delivered a Ruling in which it rejected and dismissed his Application dated 15<sup>th</sup> June 2015. That Application was seeking for re-amendment of Defence and a Counter-claim. The Applicant being aggrieved by the said decision has filed and served a Notice of Appeal. He depones that he has requested for, received the certified Order, and is actively pursuing the issuance of typed proceedings to enable him compile and file the requisite Record of Appeal within the stipulated time.
5. He argues that, the intended amendments are central and material to his Defence and Counterclaim, and if not allowed, the Defendant risks being irretrievably shut out of relying on key planks of his case, if the hearing is conducted and finalised on the basis of the pleadings as they stand.
6. He further submits that, the intended Appeal raises substantive and triable issues of Law and fact, and has a good chance of success. He submits that he is ready and willing to comply with terms as to security or otherwise as the Honourable Court may deem fit in the circumstances.
7. He argued that, he has brought this Application timeously and without unreasonable delay, and that the

Plaintiff will not suffer any prejudice if the Application is allowed. That, it is in the interest of Justice that the Orders sought for be granted to preserve the intended Appeal from being rendered nugatory.

8. The Application was opposed based on the grounds of objection dated and filed in Court 17<sup>th</sup> May 2016. The grounds state that:

- ***The Application is incompetent and does not lie in Law.***
- ***The Defendant is asking the superior Court to sit on an appeal of it's own decision.***
- ***There is nothing to stay.***
- ***The Application is an abuse of the Court process.***

9. The parties filed written submissions to dispose off the Application. The Applicant told the Court that, he has met the threshold for grant of stay of proceedings. He relied on the cases of:

***(i) Kenya Power & Lighting Co. Ltd vs. Esther Wokabi 2014 eKLR.***

***(ii) Re Global Tours and Travel Limited, Nairobi HC Winding up cause No. 43 of 2000 (2000 KLR 1061) and***

***(iii) James Wagelwa and Joseph Simiyu Mukenya vs Agnes Naliaka Cheseto (2012) eKLR.***

10. He further submitted that, if the pre-trial case management prerequisites are undertaken, he will be constrained to participate in the trial, and will suffer prejudice, as the resulting judgment will be based only on the issues arising from the record to the exclusion of the proposed amendments and the counter-claim.

11. That, in that case, he will suffer substantial loss as the suit and proposed amendment relate to ownership of the subject matter which is Fifty (50) acre parcel of land. He told the Court that, Section 7 of the Civil Procedure Act prohibits the Applicant from filing a parallel or fresh suit, because that is against the principles of double jeopardy. He relied on the cases of:

***(i) Selestica Ltd vs. Gold Rock Development Limited 2015 eKLR***

***(ii) Alliance Media Kenya Limited vs. World Duty Free Co. Complex Limited T/a Kenya Duty Free, Complex (2005) eKLR and***

***(iii) Dephis Bank Ltd vs Channan Singh Chatthe (2006) eKLR***

12. The Applicant also submitted that, he has a prima facie arguable Appeal. He referred to the Memorandum of Appeal filed in Court and argued that it raises weighty, substantive, triable and bona fide issues of Law and fact.

13. He outlined the said issues to include but are not limited to:

***(i) Failure of the Judge to consider in his Ruling that the hearing/trial of the case had not yet commenced and the matter was still at its infancy, hence the need to freely allow the amendments;***

***(ii) The fact that the Judge overlooked the Defendant's bona fide explanation on why it took time/long to seek the amendments;***

***(iii) The failure of the trial Court to appreciate that under the Rules of Court, amendments are permissible even if they introduce a new cause of action;***

***(iv) Failure by the Judge to relate his findings/holdings to specific proposed amendments and thereby failing to substantiate what part parts of the amendments would blur/muddle the issues***

*in dispute or cause a delay herein and how.*

*(v) Failure of the Learned Judge to consider whether the Plaintiff can adequately be compensated in costs or otherwise.*

*(vi) Wrong exercise of judicial discretion.*

14. He reiterated that there has been no delay in making this Application, and he is ready to abide by any order for security for the due performance of orders. Finally, he argued that ground 4 of the grounds of objection is clearly non-factual mistaken, and incongruous within the circumstances of this Appeal. He prayed that the Application be allowed as in the interest of Justice and as it has merit. He also prayed for costs.

15. The Respondents in its submission relied on the case of **Butt vs. Rent restriction tribunal**, where Madan, Miller and Porter JJA (as they then were), held that while considering an Application for stay, the Court should have regard to the fact that, the power of the Court to grant or refuse an Application for stay of execution is a discretionary power. The discretion should be exercised in such a way not to prevent an appeal and the Court has to consider the special circumstances of the case and its unique requirements.

16. The Respondent argued that, the Application herein does not satisfy the conditions set out under Order 42 Rule 6 (1) and (2) of the Civil procedure rules 2010. That, there must be proof the Applicant will suffer substantial loss. They relied on the case of **James Wangelwa & Another vs Agnes Naliaka Cheseto**.

17. That, the Application be made without delay and such security as to costs has been given by the Applicant. They relied on the case of **John Mwangi Ndiritu vs Joseph Ndiritu Wamathai (2016) eKLR**.

18. They submitted that the Application be dismissed with costs to the Respondent. However, in the unlikely event the Court grants the stay, and then it must come with the terms as provided by the Rules

19. From the above decisions and many others governing the grant of an Order for stay of proceeding, the following legal principles arise:

*(i) The Power of Courts to grant or refuse to grant such a stay discretionary*

*(ii) It should be exercised in such a way that it should not render the appeal nugatory.*

*(iii) A stay may be granted if there are good grounds even where there is an alternative remedy available to the Applicant.*

*(iv) In granting or refusing to grant the stay, the special and unique circumstances of each case must be considered.*

*(v) The Applicant must demonstrate that he/she will suffer substantial loss if the order for stay is not granted and that such substantial loss will render the Appeal nugatory.*

*(vi) The Applicant must be ready to offer or provide security.*

*(vii) The protection of the party who is entitled to enjoy the fruits of his judgment or any stage must be provided for.*

*(viii) The Court must aim at upholding the principles of overriding objective, that is, to do justice in accordance with the law and prevent the abuse of the Court process.*

20. I have considered the Application, the grounds and affidavit in support, the grounds of objection and

the submissions filed by the parties. I find that, the Applicant filed his Application without delay. The Ruling was delivered on 11<sup>th</sup> February 2016, and the Application on filed on 4<sup>th</sup> March 2016. The Appeal was lodged on 1<sup>st</sup> April 2016.

21. I have also considered the reasons advanced by the Applicant for the stay of further proceedings and I am of the view that, I can only consider whether on the face value, the Intended appeal has any arguable issues and or chance or possibility of success.

22. I agree with the Respondent that, if I were to indulge in the merit of the proposed amendments, I will be sitting on Appeal or review of Orders of a Court of equal Jurisdiction. Power that I don't have.

23. However, based on the spirit and provisions of Article 48 and 50 of the Constitution 2010, which freely allow access to Justice and fair hearing, am inclined to allow the Applicant an opportunity to prosecute the intended Appeal. That can only be achieved if the proceedings herein are stayed.

24. However, the Court must protect the Respondent from any delay that may be occasioned by the stay of proceedings. That it is supported by Article 159 of the Constitution of Kenya 2010 that requires the Court to hear matters expeditiously.

25. Again in view of the fact that the main hearing has not commenced, the Respondent can be compensated with costs for any delay that may be occasioned. However, if the stay of proceedings is not granted the Applicant will suffer serious prejudice as the Appeal may be rendered nugatory.

26. Similarly the issue of Security may not arise as the outcome of the main suit is still unknown.

27. In summation and based on all facts herein I find that the Application has merits. I allow the same on the following conditions;

**(i) There be a stay of proceedings herein for a period of sixty (60 days of this date.**

**(ii) The matter will be mentioned on 21<sup>st</sup> October 2016 for a report on the progress of the Appeal.**

**(iii) The costs to await the outcome of the Appeal**

Those then are the Orders of the Court

**DATED AND DELIVERED IN OPEN COURT ON THIS 19<sup>TH</sup> JULY 2016.**

**G. L. NZIOKA**

**JUDGE**

Delivered before:

Mr Odongo for Maweu for the Applicant

Mr Chege for the Respondent

MS Teresia Court Clerk