



**Ndura & another v Kenya Power and Lighting Company Limited (Environment and Planning Civil Case E001 of 2023) [2025] KEELC 91 (KLR) (22 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 91 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND PLANNING CIVIL CASE E001 OF 2023**

**CK NZILI, J**

**JANUARY 22, 2025**

**BETWEEN**

**PHILIP KARANJA NDURA ..... 1<sup>ST</sup> PLAINTIFF**

**BONIFACE NDURA KOIMBURI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA POWER AND LIGHTING COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. The court is asked to stay proceedings in this matter pending hearing and determination of an intended appeal, following a dismissal of the Applicant's notice of Preliminary Objection dated 18/01/2024 through a Ruling delivered on 01/10/2024. The grounds are set out on the face of the application and in an affidavit sworn by Lynn Owano on 4/11/2024.
2. The Applicant avers that it has lodged a Notice of Appeal dated 11/10/2024 as per an annexure marked JMM '2' and was in the process of filing a substantive appeal. It has attached copies of letters seeking certified copies of proceedings and ruling which are yet to be furnished to them, save for the ruling.
3. The Applicant says that the Preliminary Objection was on jurisdiction, and since such an issue goes to the heart of every suit, there is a risk that the plaintiffs may proceed to move the court or continue to prosecute the suit, which would amount to a judicial disaster of colossal proportion if the court hears the matter when it is devoid of jurisdiction.
4. The application is opposed through grounds of opposition dated 4/11/2024 that:
  1. The Applicant has not met the threshold for a grant of stay.
  2. It would be prejudicial to stay the proceedings.
  3. There is no demonstration of imminent or irreparable harm



4. Balance of convenience favours them.
  5. Assertion of judicial disaster is speculative and baseless.
  6. A prima facie case with a probability of success if the intended appeal succeeds has not been demonstrated.
  7. It is an abuse of the court process.
  8. There are other remedies available to the Applicant instead of a stay of proceedings.
  9. It is a delaying tactic.
5. The Applicant relies on written submissions dated 8/11/2024. On whether a stay of proceedings should be granted, the Applicant submits that under Order 42 Rule 6(1) [CPR](#), the court has discretion to order for stay if it is in the interest of justice to grant the same to avoid the appeal being rendered nugatory.
  6. The Applicant urges the court to be guided by the principles on the same as per [Butt v Rent Restriction Tribunal](#) [1982] KLR 417, [David Morton Silverstein v Atsango Chesoni](#) [2002] KLR, [Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union \(K\)](#) [2015] eKLR, [Board of Management Kapletundo Secondary School v Lakeside Products Agencies](#) [2022] eKLR, [Port Florence Community Health Care v Crown Healthy Care Lab](#) [2022] eKLR, [Machange Investment Ltd v Safaris Unlimited Africa Ltd and Others](#) [2009] eKLR, [Imco Holdings Ltd v Maladi N. Nyangau](#) [2022] eKLR, [Ezekiel Mule Musembi v H. Young & Co. E.A. Ltd](#) [2019] eKLR, [Henry & Others v County Government of Vihiga](#) (Case No. 76 of 2021) [2022] KEELRC 13371 [KLR] (2<sup>nd</sup> December 2022).
  7. The respondents rely on written submissions dated 13/11/2024. It is submitted that stay of proceedings is only allowed in exceptional circumstances, which, in the instant case, the Applicant has failed to demonstrate. Reliance was placed on [Nabakwana Farmers Co-operative Society Ltd v Lois Holdings & Another](#) [2022] KEELC 13386 (KLR) (6<sup>th</sup> October, 2022) (Ruling).
  8. The respondents submit that to stay the proceedings would restrict their right to fair hearing and access to justice as held in [Kenya Wildlife Service v James Matembei](#) [2019] eKLR and *in Re Global Tours and Travel Ltd* (NRB) HC Winding Up Cause No. 43 of 2000.
  9. The respondents submit that the Judiciary has a duty to expedite the hearing of matters, and in this case, the Applicant is out to derail justice.
  10. Further, it is submitted that the Applicant has no prima facie appeal with merits at the Court of Appeal, and not so when this court has jurisdiction under the [Constitution](#) and Statutes to hear this matter.
  11. The respondents submitted that judicial time is precious and ought to be spent wisely and, in this case, the safer side is to hear the matter on merits and conclude it on time, which time is likely to be lost if the orders sought are granted. Reliance was placed on [Ferdinand Ndungu Waititu v IEBC & Others](#) [2013] eKLR. The respondents submitted that the appeal was not likely to be rendered nugatory as held in [David Morton Silverstein v Atsango Chesoni](#) [2002] eKLR.
  12. The issue calling for my determination is whether the defendant deserves a stay of proceedings. There is no dispute that the Applicant entered an appearance on 18/1/2024 and filed both a Preliminary Objection dated 18/1/2024 and Statement of Defence dated 26/1/2024. After the ruling on 1/10/2024, this court listed the matter for confirmation of compliance with Order 11 [CPR](#). The plaintiff sought and was allowed to amend the plaint on 1/10/2024. Parties are yet to comply with Order 11 [CPR](#).



13. To stay or not stay proceedings is a discretion on the part of the court to be exercised judicially and on sound grounds. It is a serious, grave and fundamental interruption in the right of parties to be heard expeditiously. In *William Odhiambo Ramogi & Others v A.G. & Other, Muslim for Human Rights and Others* (IP) [2020] eKLR, the court RE *Global Tours & Travel Ltd* (Supra) and *Kenya Shell Ltd v Kibiru & Another* [1986] eKLR and *David Morton Silverstein v Atsango Chesoni* (Supra) that the principles to consider are:
- (1) If there is a pending appeal in the higher court.
  - (2) The Applicant should explain why a stay has not been sought in the higher court since the policy is to move to the said court, which is better placed to calibrate its orders.
  - (3) There must be a demonstration that the appeal raises substantial questions to be determined or is otherwise arguable.
  - (4) There must be a demonstration of the appeal being rendered nugatory.
  - (5) Exceptional circumstances must be demonstrated which make the stay of proceedings warranted as opposed to hearing the case concluded safely and all arising grievances taken up on a single appeal.
  - (6) The Applicant must demonstrate that the application was filed expeditiously and without delay.
14. Starting with the last consideration, the Applicant moved to court on 4/11/2024 which was a month after the ruling made on 1/10/2024. The delay has not been explained. Though there is no maximum or minimum delay in law, it all depends on the peculiar circumstances of each case. The court order, ruling and proceedings were certified on 14/10/2024. It is for the Applicant to collect them. They were ready before this application was filed. Therefore, the Applicant cannot blame the court for any delay.
15. The Applicant has not attached a copy of the intended Memorandum of Appeal showing the arguable points to be considered by the Court of Appeal. The prejudice or loss that is likely to be suffered if the matter is heard on merits is what the Applicant must also demonstrate. Hearing of a matter on merits cannot be termed as prejudicial, especially where the Applicant will have a second bite of the cherry and prosecute both the defence and demonstrate that the court has no jurisdiction to hear a matter on trespass.
16. Stay of proceedings, as per Gikonyo J in *KWS v Matembei* (Supra), is a grave judicial action impeding on expeditious disposal of suits, access to justice and fair hearing. The best is high and stringent. In *Christopher Ndolo Mutuku & Ano. v CFC Stanbic Bank Ltd* [2015] eKLR, the court observed that what matters in an application for a stay of proceedings pending appeal is the overall impression the court makes and if the total sum of the circumstance of each case, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice.
17. In *M/S Karsan Ramji & Son Ltd v Athuman & Another (Suing for and on behalf of the Wambwanyanzo Clan & Others)* (Civil Appl.E034 of 2023 [2024] KECA 533 [KLR] (24<sup>th</sup> May 2024) (Ruling), the court observed that stay of proceedings was an equitable remedy and the Applicant must come to court with clean hands, and that stay should not be confused with a stay of execution. Equally the court held that the Applicant has to demonstrate arguable points pending consideration on appeal as held in *NIC Bank Ltd v Aquinas Francis Wasike & Another* [2006] eKRL, and that the nugatory aspect should be given its whole meaning as held in *Reliance Bank Ltd v Norlake Investments Ltd* [2002] IEA 227.



18. The court said that the stay of proceedings when it comes to the nugatory aspect, must have a higher threshold since it has the effect of derailing court proceedings and was likely to lead to injustice to the respondents contrary to Article 159(2) of the Constitution.
19. In African Safari Club Ltd v Safe Rentals Ltd [2010] eKLR, the court said that the hardships of the two parties must be considered, and the court has to pursue the operating objective to act fairly and justly by putting the hardships on a scale.
20. In Lucy Njoki Waitbaka v Tribunal Appointed to investigate the conduct of Lady Justice Hon. Lucy Njoki Waitbaka v ISC [2020] eKLR, the court reiterated that caution must be exercised on stay of proceedings.
21. Having considered the above binding principles, I agree with the respondents that the Applicant has failed to meet the threshold under Order 42 Rule 6(1) of the Civil Procedure Rules. I think the interest of justice militates against staying the proceedings herein. The application dated 4/11/2024 is dismissed with costs.
22. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE THIS 22<sup>ND</sup> DAY OF JANUARY, 2025.**

**HON. C.K. NZILI**

**JUDGE, ELC KITALE.**

