



**Five Star Agencies Limited & another v Mutua & another (Suing on their own and as Administrators of the Estate of the Late Dennis Kioko Mutisya alias Denis Kioko Mutisya) (Civil Appeal E013 of 2025) [2025] KEHC 14255 (KLR) (9 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 14255 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT GARISSA  
CIVIL APPEAL E013 OF 2025  
JN ONYIEGO, J  
OCTOBER 9, 2025**

**BETWEEN**

**FIVE STAR AGENCIES LIMITED ..... 1<sup>ST</sup> APPELLANT**

**ABDULLAHI SAGON MUHAMMED ..... 2<sup>ND</sup> APPELLANT**

**AND**

**JOY TATU MUTUA ..... 1<sup>ST</sup> RESPONDENT**

**ANGELA NUNDU MUTISYA ..... 2<sup>ND</sup> RESPONDENT**

**SUING ON THEIR OWN AND AS ADMINISTRATORS OF THE ESTATE OF  
THE LATE DENNIS KIOKO MUTISYA ALIAS DENIS KIOKO MUTISYA**

**RULING**

1. Before this Court for determination is the appellants'/applicants' notice of motion dated 04.09.2025 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 42 Rule 6, Order 40 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules seeking the following reliefs:
  - i. Spent.
  - ii. That this Honourable Court be pleased to grant an order to stay the hearing scheduled for 15.09.2025 and 22.09.2025 in CMCC Garissa Civil Suit No. 15 of 2020 Angela Nundu vs Ahmed Seikh, Nasib Bus Services Ltd and 2 Others, pending the hearing and the determination of the appellants'/applicants' application.
  - iii. That this Honourable Court be pleased to grant an order to stay of any further proceedings in CMCC Garissa Civil Suit No. 15 of 2020 Angela Nundu vs Ahmed Seikh, Nasib Bus Services Ltd and 2 Others, pending the hearing and the determination of the appellants'/applicants' appeal against the ruling of the Hon. T.M. Mwangi – CM- delivered on 11.08.2025.



- iv. That the costs of this application be provided for.
2. The motion is based on the grounds out set on the face of it and supported by the affidavit of Abdulsalam Sharrif sworn on 04.09.2025 deposing that on 06.03.2020, the respondent commenced proceedings in the lower court against the appellants/applicants. That the respondent failed and/or neglected to collect and/or serve summons to enter appearance upon the appellants/applicants as required under Order 5 Rules (1) and (2) of the Civil Procedure Rules.
  3. According to them, the suit abated by operation of the law and further to that, on 30.03.2021, a year after the plaint was filed, the respondent purported to amend the plaint, which in law had abated and therefore incapable of being amended. That 2 years after filing the amended plaint, the respondent on 05.11.2023 purported to irregularly take out summons contrary to Order 5 Rule 1(6) of the Civil Procedure Rules.
  4. It was deposed that the respondent's indolence and lack of interest in pursuing the matter led to the trial court dismissing the suit on 22.06.2023 for want of prosecution. That the respondent in an attempt to revive the suit filed an application dated 27.11.2023 seeking to reinstate the suit and be issued with fresh summons. The trial court via a ruling delivered on 14.12.2023 allowed the said application but the respondent instead of taking out the fresh summons, only served upon the appellants/applicants the rest of the pleadings. The foregoing act prompted the appellants/applicants to file an application seeking to strike out the respondent's pleadings for being an abuse of the court process.
  5. The application thus was heard and a ruling delivered on 11.08.2025 dismissing the appellants'/ applicants' application and allowing an incurably defective suit to continue. Being dissatisfied by the ruling of the trial court, the appellants/applicants filed before this court an appeal on the ground that the trial magistrate erred in law and fact by not finding that the respondents' suit had since abated. This court was therefore urged to allow the prayers sought herein.
  6. Despite being served, the respondents failed to file a response and as such, the application is unopposed. The foregoing notwithstanding, the application shall be determined on its own merits.
  7. Having carefully considered the motion, it is my view that the main issue for determination is whether the appellants/applicants have discharged the conditions warranting the grant of stay of proceedings pending appeal?
  8. In the case of *Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2013] eKLR the court stated thus:

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see *Black's Law Dictionary*). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court's discretion.”
  9. In the same breadth, Order 42 Rule 6 of the Civil Procedure Rules provides for the inherent powers of the court to stay proceedings.
  10. Order 42, Rule 6(1) of the Civil Procedure Rules under the head stay pending in case of appeal provides:



1. “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”.
11. In the case of *William Odhiambo Ramogi & 2 Others vs the Honourable Attorney General & 3 Others* [2020] eKLR, a 5-judge Bench of the High Court, laid out the principles establishing the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher court. They laid down the following six principles:

“First, there must be an appeal pending before the higher Court; Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly; Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable; Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted; Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”
12. From the above, it follows thus that the court in making this determination must remain alive to the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined.
13. Beginning with the issue of timelines, the impugned ruling was delivered on the 11.08.2025 whereas the present motion was filed on 04.09.2025. This constitutes a period of approximately one month. In the circumstances therefore, it is my view that there was no delay in filing the application.
14. Regarding arguability, the court has considered the memorandum of appeal annexed herein and it notes that in as much as the same is premised on several grounds, the main ground that turns out is the fact that the trial magistrate erroneously found that there was valid summons issued by the court dated 05.04.2024 when in fact, the only summons on record are dated 05.04 2023 which summons had already expired.
15. The appellants/applicants argue that they have since filed an appeal before this court on the ground that the trial magistrate erred in law and fact by not finding that the respondent’s suit had since abated. Additionally, that the trial magistrate erred in law and fact in finding that the respondent extracted and served the appellants/applicants with valid summons to enter appearance despite there being no evidence on record to support such a finding.



16. Considering the foregoing, and without making any pre-determination on the matter, the court opines that there is no doubt that the appeal is arguable. It is trite that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. One which is not frivolous. [ See the case of Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 others [2013] eKLR]. In the circumstances the appeal is arguable.
17. On whether the appeal will be rendered nugatory, it depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. The foregoing notwithstanding, the respondent did not oppose the application and therefore, I find that the application is thus merited. The same is allowed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF OCTOBER 2025**

.....

**J.N.ONYIEGO**

**JUDGE**

