

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT SIAYA
CIVIL APPEAL NO. E066 OF 2025

HON. ELISHA OCHIENG ODHIAMBO.....APPELLANT

VERSUS

LEONARD OTIENO OKANDA.....RESPONDENT

RULING

1. The Appellant has filed an application dated 3rd September, 2025 seeking for the following prayers.

- i) Spent.
- ii) Spent.
- iii) That pending the hearing and determination of the Appellant's appeal herein, an order be and is hereby issued staying the continuation of the proceedings in Siaya CMCCC No. E074 of 2025, Leonard Otieno Okanda v. Hon. Elisha Ochieng Odhiambo.
- iv) Costs of this application be provided for.

2. The application is supported by the grounds set out thereunder and by the supporting affidavit of the Appellant sworn on even date. The Appellant's gravamen is inter alia; that the Applicant's right to fair hearing has been arbitrarily infringed upon despite it being settled law and principle that the right to fair hearing under Article 50(1) of the Constitution, which includes the right to be heard by an impartial and independent court, is non-derogable in nature; that vide a ruling delivered on 3/9/2025 by Hon. Mkala Jacob Punga capriciously declined to consider the Appellant's application for his recusal, filed on even date, and moved ahead to give disposal orders including a date for ruling of the Plaintiff/Appellant's application despite glaring existence of bias and conflict of interest; that Hon. Mkala Jacob Punga already reinvented the wheel on a well-trodden path on the principles of granting injunctive orders in defamatory cases set out in the locus classicus case of **Micah Cheserem v Immediate Media Services & 4 Others [2010] KEHC 4109 (KLR)** by granting exparte orders of injunction pending determination of the substantive application - a clear demonstration of bias on his part; that the Magistrate's court in Siaya unwieldly and hurriedly ordered parties to file simultaneous submissions to the Plaintiff's application in five days and immediately on the spot set a date for ruling of the application for 10/9/2025, the magistrate further declined to grant a short term stay of the proceedings to enable the Applicant herein appeal against the orders given; that the orders rendered above were given despite the Defendant's

objection and indication of their perception of real bias and seeking to be served by the Applicant before filing their own submissions in response to the application especially as the dates given were not available to the Appellant's advocate; that despite the rushed kind of orders given, the said magistrate ignored the fact that the prayers sought in the application are of a final nature, being mandatory injunctions, which if give in the interim will act to dispense with the suit prematurely and hence the Appellant herein will be prejudiced unduly; that this notwithstanding, the sad judicial officer proceeded to issue substantive orders on a day not scheduled or listed on the cause list for hearing of the impugned application further infringing on the Appellant's fundamental right to fair hearing and preparation thereof; that the Appellant herein is duly justified in their perception of conflict of interest of the magistrate handling the matter and any reasonable, objective and informed observer would be able to read the actual bias and conflicted manner in which the orders herein were issued by the judicial officer; that the Applicant is now more convinced that the rushed orders were given the way they were just to defeat the determination of the Appellant's recusal application before proceeding to the interim application half of which prayers had already been granted ex-parte and thus spent; that the Appellant is apprehensive that if the application herein is not dispensed with expeditiously, the intended appeal shall be rendered nugatory, as the magistrate's court shall have proceeded to give a ruling slated for 10/9/2025 on the

Plaintiff/Respondent's application; that in the circumstances the Appellant seeks that the proceedings in Siaya CMCC No. E074/2025 be stayed pending the hearing and determination of the application and the appeal in order not to render the appeal nugatory; that the application has been brought timeously and without delay; that it is in the interest of justice that the application be allowed.

3. The application was opposed by the Respondent who filed a replying affidavit sworn on 23/9/2025 who averred inter alia; that the Applicant has not filed any competent appeal as none has been served upon the Respondent; that even if an appeal has been lodged, the same is premature, incompetent and abuse of the court's process since there is no decision of the trial magistrate capable of being appealed has been presented before the court; that the directions of the trial court being appealed against were made long before the Appellant had filed this application for recusal of the trial magistrate; that the directions appealed against were issued on 3/9/2025 in the morning while the recusal application was filed on 3/9/2025 several minutes past 4.00 pm after the court had dealt with the matter; that when the matter came up on 10/9/2025 for ruling of the Respondent's application for injunction, the trial court deferred the ruling on the ground that a recusal application had been filed and which obligated the court to consider the same and that the trial magistrate issued further directions on the disposal of the said application

and directed parties to appear in court on 2/10/2025 to confirm compliance; that it would be premature to stay proceedings yet the Appellant had been accorded an opportunity to be heard regarding the said recusal application now pending for determination before the trial magistrate and therefore the present application is premature; that it is trite law that court's should be reluctant to issue stay of proceedings as the same is an unnecessary hindrance to the expeditious disposal of the cases; that the Appellant has filed a similar application before the trial court and which is pending for determination and therefore it amounts to an abuse of court process to place two similar applications in different courts of different ranks; that the High Court is now being requested to exercise its supervisory jurisdiction prematurely and which warrants a dismissal of this application; that the Appellant who is facing a defamatory suit in the lower court is out to delay the same; that in the interest of justice and for the expeditious disposal of disputes that this application should be dismissed; that the Appellant will not suffer any prejudice if the application is dismissed since his recusal application is yet to be determined and further that granting the application will lead to delay of the matters now before the lower court.

4. The Appellant filed a further affidavit sworn on 26/9/2025 where he averred inter alia; that he duly filed a memorandum of appeal which is already in the court record; that the orders/directions issued by the trial court

are appealable as they constitute a judicial decision of a court which is subject to supervision by the High Court; that the application dated 3/9/2025 is properly and competent before this court since the recusal application ought to be heard and determined first by the trial court before any other matter; that the application for recusal was filed on the morning of 3/9/2025 and that the Appellant had no control over the court filing system; that the trial court's further directions wherein it deferred the ruling date for all applications to 15/10/2025 is a clear violation of his rights as the recusal application has not been given priority; that there are glaring biases and injustices by the trial court upon the Appellant as his Preliminary Objection dated 9/9/2025 ought to have been heard on 10/9/2025 despite the same being on record at the time the court was sitting; that there is no similar application for stay of proceedings in the trial court as alleged by the Respondent since none has been availed.

5. The application was canvassed by way of oral submissions.
6. M/s Akello for the Appellant submitted inter alia; that the Appellant's application dated 3/9/2025 mainly seeks for stay of proceedings in the lower court vide prayer Number 3; that the trial court denied the Applicant his rights as can be seen by the trial court's directions to determine the recusal application together with the other applications to which the Appellant is uncomfortable; that the Appellant needs the proceedings to be stayed until the recusal application is determined by the trial court; that the matter

relates to an emotive case of defamation; that there is a conflict of interest by the trial court and that the Appellant is apprehensive that he is not going to get justice as the trial magistrate is not likely to be objective in his deliberation of the matter. Reliance was placed on the case of **Jasbir Singh Rai vs. Tarlochan Singh Rai [2013] eKLR** and **Gachagua & Others vs. Speaker of National Assembly [2024] eKLR**. It was further submitted that the recusal application should be heard separately before other applications and that the failure by the trial court to do that has affected the right to fair hearing. Further, that the trial court is currently seized with the court file and therefore the Appellant is unable to extract the impugned orders. Further, that the Appellant was denied an order for stay of proceedings pending appeal by the trial magistrate. That the Appellant needs orders of stay of proceedings so that justice can be seen to be done and that this court should direct that the recusal application be heard first by the trial court. Finally, learned counsel pointed it out that the trial magistrate issued the new directions after the Appellant had lodged this appeal.

7. Mr. Otieno, learned counsel for the Respondent, submitted inter alia; that the Appellant has veered off from the issues raised in the memorandum of appeal and hence the court is now being called upon to deal with conjectures; that the request for stay of proceedings by the Appellant is an exercise of forum shopping; that the application is premature and further seeks to compel the trial magistrate

to admit his recusal application for hearing yet the same has since been listed for hearing and now under active consideration by the trial court; that the trial magistrate gave directions on the filing of the recusal application on the morning of 3/9/2025 and that the Appellant filed the Application around 4.00 pm; that the trial court suo moto issued directions on the disposal of all the applications and scheduled a ruling thereon on 15/10/2025; that this appeal lacks substance as it seeks to appeal against directions of the trial court; that stay of proceedings will lead to delay of the disposal of the pending recusal application and the other applications; that if the stay is allowed and the appeal succeeds, then the recusal application will not have served its purpose yet the same is under consideration by the trial court; that the fact that the trial court issued directions regarding the disposal of the recusal application means that there is no decision from the court capable of being appealed against. Reliance was placed in the case of **Turbo Highway Eldoret Ltd vs. Munir, Civil Appeal No. 40 of 2021** where the court held that interlocutory appeals must be properly presented by an Applicant to warrant an order for stay of proceedings. It was further submitted that the Appellant herein has not demonstrated sufficient reasons to warrant for orders of stay of proceedings since what is being appealed is under active consideration by the trial court. Learned counsel urged the court to dismiss the application with costs.

8. I have given due consideration to the application, rival affidavits and the oral submissions of learned counsels. It is not in dispute that the parties herein were litigating over an injunction application that had been filed by the Respondent and that the trial court did issue directions thereon as well as the non-filing of a recusal application by the Appellant on the 3/9/2025 wherein the Appellant was dissatisfied and sought for the recusal of the trial magistrate. It is also not in dispute that the trial court has since issued directions regarding all the pending applications including the one seeking recusal of the trial magistrate and scheduled the same for ruling on the 15/10/2025. It is also not in dispute that the Appellant's singular prayer vide his Memorandum of Appeal dated 3/9/2025 is for an order compelling the trial magistrate to admit the recusal application dated 3/9/2025. I find the issue for determination is whether the Appellant's application dated 3/9/2025 has merit.

9. It is noted that none of the parties herein has favoured this court with a copy of the lower court proceedings or the impugned order. The excuse that has been given is that the trial court file is currently in possession of the learned trial magistrate for purposes of writing the ruling. Hence, this court has been left out to pore through the rival affidavits to get the issues in controversy.

10. The Respondent has claimed that the Appellant has lodged the present application yet he had already filed a similar application before the trial court seeking similar

orders of stay of proceedings. The Appellant has vociferously denied the claim and put the Respondent to strict proof and averred that no such application has been annexed vide replying affidavit. I have perused the entire pleadings herein and note that indeed there a copy of an application dated 3/8/2025 filed by the Appellant before the trial court seeking for an order of stay of proceedings in addition to a prayer for recusal of the trial magistrate. During the oral submissions of learned counsel for the Appellant, she categorically maintained that no such prayer exists while counsel for the Respondent contended that the Appellant is abusing the court process by seeking similar orders before courts of different ranks and further that the said recusal application is currently pending consideration before the trial court. Learned counsel for the Appellant has further maintained that her client is not forum shopping as claimed by the Respondent and urged this court to compel the trial court to deal with the pending recusal application first before the other applications.

11. It is trite that stay proceedings is a discretion on the part of the court to be exercised judiciously and on sound grounds because the same 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, Re Global Tours & Travel Ltd Nbi High Court Winding up Cause No. 43 of 2000** and **Kenya Shell Ltd v Kibiru & Another [1986] eKLR** the

courts laid down the principles for consideration regarding grant of orders of stay of proceedings and which are inter alia; that there is a pending appeal in the higher court; that the Applicant should file such an application in the higher court since the policy is to move to the said court, which is better placed to calibrate its orders; that there must be a demonstration that the appeal raises substantial questions to be determined or is otherwise arguable; that there must be a demonstration of the appeal being rendered nugatory if the order for stay is not granted; that there are exceptional circumstances which must be demonstrated and which make the stay of proceedings warranted as opposed to hearing the case up to conclusion safely as well as all arising grievances taken up on a single appeal; that the Applicant must demonstrate that the application was filed expeditiously and without delay.

12. The issue of stay of proceedings was also considered by Gikonyo J in **Kenya Wildlife Service Vs Matembei [2019] eKLR** as a grave judicial action impeding on expeditious disposal of suits, access to justice and fair hearing. Indeed, the test for such an order is high and stringent in order to prevent abuse of court process by litigants. 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.

13. Again, in the case of **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] (24th May 2024) (Ruling), the court observed that stay of proceedings was an equitable remedy and that an Applicant must come to court with clean hands and further 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] eKLR**, and that the nugatory aspect should be given its whole meaning as held in **Reliance Bank Ltd v Norlake Investments Ltd [2002] IEA 227**.

14. As noted from the foregoing authorities, stay of proceedings must have a higher threshold since it has the effect of derailing and forestalling court proceedings and is likely to lead to injustice to the adverse parties who are also entitled to access justice as guaranteed by Article 48 of the Constitution. In **African Safari Club Ltd v Safe Rentals Ltd [2010] eKLR**, the court held that the hardships of the two parties must be considered and that the court has to pursue the operating objective to act fairly and justly by putting the hardships on a scale. Again, in **Lucy Njoki Waithaka v Tribunal Appointed to**

investigate the conduct of Lady Justice Hon. Lucy Njoki Waithaka v JSC [2020] eKLR, the court reiterated that caution must be exercised on stay of proceedings.

15. Having considered the foregoing authorities and their binding principles as juxtaposed with the Appellant's application, I am satisfied that the Appellant has not managed to surmount the requisite threshold for the reason that his pending application for recusal dated 3/8/2025 also seeks similar prayer for stay of proceedings as in the present application and further that the trial court has already admitted the said application and issued directions regarding the disposal of the said application as well as others before it. It is clear that the Appellant is seeking similar reliefs from two separate courts and which amounts to an abuse of the court process. It is also noted that the main prayer in this appeal seeks for an order to compel the trial court to admit the Appellant's recusal application yet the same has already been attended to by the trial court and is currently pending consideration. It is common ground that every court is vested with decisional independence in the manner it conducts its business and issues out directions to parties and that appellate courts only interfere when sufficient reasons have been given. I am not persuaded by the Appellant's counsel's request that this court should compel the trial court to give preference to the recusal application yet it is within the discretion of the trial court to decide the appropriate directions regarding matters placed before it. This court

must take note of the fact that it should not micro manage the trial court but to leave it conduct its duties. In any event, the trial court has already admitted the Appellant's recusal application and issued directions thereto and thus the Appellant's concerns have already been attended to. It is noted that the trial court has already issued directions regarding the Appellant's recusal application and that the same is scheduled for ruling on the 15/10/2025 and thus it would appear to me that the aforesaid prayer has been overtaken by events as the recusal application has been admitted and given a date for determination. I find that the Appellant has not given sufficient reasons to warrant an order of stay of proceedings. The parties herein should therefore proceed and wait for the trial court to determine the matters placed before it. It is noted that going by the tenor of the Appellant in this application and the Memorandum of Appeal that his recusal application had not yet been placed before the trial magistrate as at 3/9/2025 as against the Respondent's claim that the said application was lodged on the same day at 4.00 PM and which thus compelled the trial magistrate to issue directions thereon suo moto and informed the parties accordingly, it is clear that the Appellant might not have lodged his recusal application when the parties appeared before the trial court on 3/9/2025 for directions and must have filed it afterwards. As the said application has been admitted for determination, i find the Appellant's present application to have been overtaken by events. Consequently, iam in agreement with the Respondent that

the Appellant/Applicant has failed to meet the threshold for an order of stay of proceedings. I find that the interest of justice militates against staying the proceedings herein as the matter before the trial court is likely to be unduly delayed to the prejudice of both parties herein. It is appropriate for the parties to proceed and comply with the directions of the lower court and ventilate their issues in that court.

16. In view of the foregoing observations, it is my finding that the Appellant's application dated 3/9/2025 lacks merit. The same is dismissed with costs to the Respondent. The interim orders earlier granted are hereby discharged.

Orders accordingly.

Dated and delivered at Siaya on 8th day October 2025.

D. KEMEI

JUDGE

In the presence of:

M/s Akello & Ochieng.....for Appellant/Applicant

Otieno.....for Respondent

Kimaiyo/Kevin.....Court Assistant

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