



**Macharia & another v Michieka (Commercial Appeal E126 of 2024)
[2025] KEHC 15471 (KLR) (Commercial and Tax) (24 October 2025) (Ruling)**

Neutral citation: [2025] KEHC 15471 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL APPEAL E126 OF 2024**

**MN MWANGI, J
OCTOBER 24, 2025**

BETWEEN

NAHASHON MACHARIA 1ST APPELLANT

REAL CONSULT AGENCIES LIMITED 2ND APPELLANT

AND

JOEL ONAMI MICHIEKA RESPONDENT

RULING

1. The appellants filed a Notice of Motion application dated 31st May 2024 pursuant to the provisions of Sections 1A, 1B, 3A, 6 & 75(1) of the *Civil Procedure Act*, Order 51 Rule 1 of the Civil Procedure Rules, 2010 and all other enabling provisions of the law. The appellants pray for an order for stay of proceedings in Nairobi CMCC No. E8938 of 2021 before Hon. T. E. Marienga, pending the hearing and determination of this Appeal.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Nahashon Macharia, the 1st appellant and a Director of the 2nd appellant. Mr. Macharia averred that after he and his co-director in the 2nd appellant company had testified and after being cross-examined before the Trial Court, their Counsel made an oral application for the Court to visit the suit premises, but the request was denied and that the Trial Court erroneously recorded that an application for adjournment by the appellants had also been denied, despite no such application having been made.
3. Mr. Macharia contended that the Trial Court thereafter closed the appellants' case and directed the filing of submissions. He maintained that the question of whether the appellants carried out renovations and repairs is a central issue in dispute, noting that the respondent in his testimony on 26th



September 2023 denied that any such works had been undertaken. He emphasized that for the said reason a visit to the premises is essential to ascertain the truth.

4. In opposition to the application, the respondent filed a replying affidavit sworn on 26th June 2024 by Mr. Joel Onami Michieka, the respondent herein. Mr. Onami averred that the appellants owe him Kshs.2,807,000/= in rent arrears as outlined in his suit filed on 4th June 2021. He denied the appellants' counterclaim for Kshs.1,750,000/= in alleged renovations, insisting that no such works were done and no approvals, receipts, or written agreements exist as required by the lease. He contended that a site visit is not necessary asserting that the burden is on the appellants to prove their claims through documentary evidence. Mr. Onami averred that the appellants have a history of default, delaying tactics and misleading claims meant to stall judgment. Furthermore, that previous applications for similar reliefs were dismissed.
5. In a rejoinder, the appellants filed a further affidavit sworn on 22nd October 2024 by Mr. Nahashon Macharia, the 1st appellant and a Director of the 2nd appellant. He averred that his Advocates on record requested for transcripts and Court recordings for proceedings before Hon. Tessa Marienga on 5th September 2023 and 11th April 2024, but were informed that the said recordings could not be found.
6. The respondent also filed a further replying affidavit sworn on 30th October 2024 by Mr. Joel Onami Michieka, the respondent herein. He contended that the multiple applications filed by the appellants are aimed at delaying justice. He averred that all the parties have already testified and had their cases before the Trial Court closed, but the appellants declined to file submissions and instead sought for more time to recall him and for a site visit, an application that had already been heard and determined.
7. The application herein was canvassed by way of written submissions. From the Court record and the Judiciary Case Tracking System, the appellants did not file written submissions. They did not make any oral submissions in Court in support of the instant application. The respondent's submissions were filed on 11th September 2024 by the law firm of Omwenga-Arasa & Company Advocates.
8. Mrs. Arasa, learned Counsel for the respondent submitted that the appellants failed to produce any documentary proof such as receipts, City Council approvals, or a written landlord consent to substantiate their claim of renovations. She argued that the lease agreement expressly prohibits tenants from making structural changes without prior written consent, which was never obtained or demonstrated.
9. Mrs. Arasa relied on the case of Beatrice Ngonyo Ndungu & another v Samuel K. Kanyoro & 2 others [2017] eKLR, and submitted that a site visit is only warranted where it would yield admissible evidence, which is not the case herein. She asserted that such a visit would serve no purpose in the absence of documentary evidence. Counsel contended that in seeking to re-open the case before the Trial Court, the appellants are merely seeking to cure gaps exposed during trial, and to compel the respondent to answer questions already addressed in his cross-examination.

Analysis And Determination.

10. Upon consideration of the instant application, the grounds on the face of it and the affidavits filed in support thereof, as well as the replying affidavits by the respondent and the written submissions by Counsel for the parties, the issue that arises for determination is whether the appellants have made out a case to warrant issuance of an order for stay of proceedings in Nairobi CMCC No. E8938 of 2021.



11. Stay of proceedings is provided for under Order 42 Rule 6(1) of the Civil Procedure Rules, 2010, which provides that –

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.

12. The Halsbury's Laws of England 4th Edition Volume 37, pages 330 to 332, states as hereunder in respect to stay of proceedings –

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 courts 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.

13. The principles to be considered by a Court when dealing with an application for stay of proceedings were considered by the Court in the oft cited case of *Re Global Tours & Travel Ltd*, High Court Winding up Cause No.43 of 2000, where Hon. Justice Ringera (as he then was), held that –

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 for 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.

14. Further, in the case of *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* [2019] eKLR, the High Court comprising a five Judge bench laid out the following principles for consideration when dealing with an application for stay of proceedings pending appeal -

- a. First, there must be an appeal pending before the higher Court;
- b. 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;



- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. 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
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
15. Vide a Memorandum of Appeal dated 9th May 2024, the appellants lodged an Appeal against the Ruling of the Trial Court delivered on 11th April 2024. Accordingly, in considering whether or not an order for stay of proceedings should be granted, this Court must first determine whether the Appeal raises arguable issues sufficient to warrant the exercise of this Court's discretion in the appellants' favour.
 16. A review of the said Memorandum of Appeal reveals that the appellants' Appeal is founded on grounds that the Trial Court erred by failing to determine their application made on 11th April 2024 for a locus in quo visit to the suit premises on merits, by incorrectly recording that they had sought an adjournment on that date when no such application was made, and by declaring the appellants' case closed. The appellants contended that the question of whether they carried out renovations and repairs is a central issue in dispute, especially noting that the respondent in his testimony on 26th September 2023 denied that any such works had been undertaken. For that reason, the appellants asserted that a visit to the premises is essential to ascertain the truth.
 17. From the record, it is clear that the respondent's claim in the lower Court is for payment of rent arrears. In response thereto, the appellants filed a defence and counterclaim asserting that they undertook repairs of the suit premises, which sum they now claim from the respondent. In the premise, I agree with Counsel for the appellants that the issue of whether or not the appellants carried out renovations and repairs on the suit premises is a central issue in dispute and a site visit might materially affect its determination. Therefore, given that both the appellants' and respondent's cases before the Trial Court have already been closed and parties directed to file submissions, it is evident that in the event that the orders being sought herein are not granted, the Trial Court is likely to proceed and render a Judgment on the dispute before this Appeal is heard and determined, thereby rendering the Appeal nugatory. I am therefore persuaded that the Appeal herein raises arguable issues.
 18. Although the appellants have neither alleged nor demonstrated any specific loss, substantial or otherwise that they may suffer in the event that the instant application is not allowed, I am nonetheless persuaded that having found that this Appeal is arguable, it would be in the interest of justice to stay the proceedings in Nairobi CMCC No. E8938 of 2021 pending the hearing and determination of this Appeal, to preserve the subject matter of the suit and to avoid undermining the appellate process. In the circumstances, I am persuaded that there exists exceptional circumstances to warrant granting the appellants the orders being sought herein.
 19. The application herein was filed on 3rd June 2024, approximately fifty three (53) days after delivery of the Ruling of the Trial Court that the appellants seek to appeal against. In the premise, I am persuaded that the application was filed timeously.



20. In the end, I find that the appellants have made out a case to warrant being granted an order for stay of proceedings pending Appeal.
21. The upshot is that the application herein is merited. It is hereby allowed in the following terms -
- i. I hereby grant an order staying proceedings in Nairobi CMCC No. E8938 of 2021 before Hon. T. E. Marienga, pending the hearing and determination of the Appeal between the parties herein; and
 - ii. Costs of the application herein shall abide the outcome of the Appeal.

It is so ordered.

**DELIVERED DATED, SIGNED AND AT NAIROBI ON THIS 24TH DAY OF OCTOBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Omondi holding brief for Mr. Muturi for the appellants/applicants

Mrs. Arasa for the respondent

Ms. B. Wokabi – Court Assistant.

