

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS
CIVIL CASE NO. E023 OF 2023

PATRICK M

MAKAU.....1ST PLAINTIFF/RESPONDENT

FLORENCE M. MWANGANGI...2ND

PLAINTIFF/RESPONDENT

VERSUS

STECOL CORPORATION

.....DEFENDANT/APPLICANT

RULING

1. Before this court for determination is the Notice of Motion application dated 19th February 2025. The Application is premised upon section 1A, 1B, 3 and 3A of the Civil Procedure Code. The applicant seeks an order staying the proceedings in this suit pending the hearing and determination of the defendants intended appeal to the Court of Appeal. The appeal challenges this Court's ruling delivered on 21st January 2025 which declined to strike out the suit, directed pre-trial to proceed and ordered that the applicant deposits ksh.65 million as security.
2. The application is supported by grounds set out on its face and by affidavits sworn by Wang Xiaoxiao coordinator of the defendant company. The applicant

contends that the impugned ruling required the defendant to provide security for 65 million shillings; that a notice of appeal challenging the ruling has already been filed; that the defendant has complied by providing a bank guarantee for Ksh.65 million; that no prejudice will be occasioned to the plaintiff since the security has been provided and that granting stay will be prudent and it will save judicial time.

3. The Application is opposed through a Replying Affidavit sworn on 19th March 2025. by the 2nd plaintiff Florence M Mwangangi, sworn She reiterated the contents of the of the plaint, the plaintiffs witness statement and bundle of documents filed in the suit, as well as the affidavit filed in support of the plaintiff's application dated 13th June 2025 and the defendant application dated 25th June 2024 and their annexures.
4. She deponed that the applicants failed to move the court under the provisions of order 42 rule 6 yet they seek an order of stay of proceedings pending appeal. They urged the court to dismiss the application with costs on grounds that; it is without merit, contrary to the statute and Constitution, and does not satisfy the mandatory requirements for stay of execution. She further argued that the intended appeal has no prospects of success; that no loss has been demonstrated or would be suffered if the prayers sought are not granted; that the application was filed after inordinate and unexplained delay; and that the defendant has come to court with unclean hands, having

blatantly disregarded judicial process and breached the orders of the court. They maintained that the application is intended to delay the course of justice and to deny the plaintiffs the right to access justice.

5. The Application was canvassed by way of submissions. The applicant's submissions are dated 7th April 2025 while the plaintiff respondent submissions are dated 12th June 2025.

Applicant's Submissions

6. The applicant submitted that it was dissatisfied with the Ruling delivered on 21st January 2025 and has since filed an appeal to the court of appeal. Notwithstanding the appeal it has complied with the Court's order requiring it to provide a bank guarantee, thereby securing the plaintiff's position.
7. It was argued that the intended appeal raises arguable issues warranting consideration by the appellate court. The applicant contended that if the appeal succeeds, the proceedings undertaken in the interim would be rendered nugatory as they would have been compelled to prosecute a case that may ultimately be struck out by the Court of Appeal.
8. The applicant further submitted that the application is brought under the inherent powers of this court. Reliance was made to the case of **Harnam Singh and Others vs Mistri(1971)EA 122** to urge that the court has inherent jurisdiction to order a stay in a suit for any sufficient

reason. It was emphasized that Order 42 Rule 6 governs applications for stay of execution of a decree or order pending appeal while in contrast the applicant is seeking a stay of proceedings which is a distinct remedy by the court with inherent power to stay proceedings. To reinforce this position reference was made to the case of **William Odhiambo Ramogi vs Attorney General and three others 2019 eKLR** which sets out the principles for grant of stay of proceedings.

9. the applicant submitted that the appeal raises arguable grounds particularly challenge the Ruling that declined to strike out the suit. The grounds include; that there were previous proceedings between the same parties in Machakos ELC 466 of 2017 Patrick Makau & Another v Hon Attorney General & 3 others, concerning the same subject matter, the suit was settled pursuant to a compromise settlement; the plaintiff is seeking execution in Machakos ELC 466 of 2017 and that the applicant has filed an application seeking to set aside the consent in Machakos ELC 466 of 2017 which is still pending determination. To support the contention that the appeal is arguable, reliance was placed on the case of **University of Nairobi v Ricatti Business of East Africa (2020) eKLR**.

10. They applicant urged the court to exercise its discretion and grant the prayers sought, arguing that failure to do so risks rendering the appeal nugatory. Reference was

made to the case of **Reliance Bank Limited vs Norlake Investments Limited (2002) 1EA 227**.

11. It was further contended that they have a right of appeal is safeguarded by the Constitution and denying it a stay would in essence deny it access to justice which is guaranteed under Article 48 and 50 of the Constitution.
12. Finally, the applicant submitted that the time and resources spent in continuing with the proceeding would be wasted should the appeal succeed. They argue that no prejudice would be occasioned to the Respondent since the security in form of a bank guarantee has already been provided. In the interest of justice they urged the court to grant the order for stay of proceedings pending the determination of the appeal.

Respondent's Submissions

13. The respondent outlined the background of the case and identified two issues for determination namely; whether the application has legal basis and whether in the circumstances herein the defendant has demonstrated exceptional circumstances for a grant of order of stay of the proceedings in the suit herein.
14. On the first ground the respondent submitted that the application is not premised on Order 42 Rule 6 of the Civil Procedure Rules and therefore lacks a proper the legal basis upon which it is founded as the court's jurisdiction has not been properly invoked. Reference was made to the case of **Ndabi vs Kimotho & Another**

(2023)eKLR were the court held that the jurisdiction to stay proceedings is derived from Order 42 Rule 6(1) of the Civil Procedure Rules. The respondents emphasized that jurisdiction is not a matter of substance, not mere technicality and goes to the core of the application. It was further argued that jurisdictional effects and cannot be cured under Article 159 of the Constitution.

15. On the second issue, the respondent made reference to the case of **William Odhiambo Ramogi vs Attorney General and three others 2019 eKLR**, to urge that the application does not meet the threshold for the grant of orders for stay for reasons that the defendant failed to demonstrate that the appeal raises substantial or arguable questions; that the appeal would be rendered negatory if they stay is not granted; that no exceptional circumstances exists to justify staying the proceedings.
16. The respondent further submitted that it is not enough to attach a notice of appeal to the Court of Appeal, particularly since the application was not brought under Rule 52b of the Court of Appeal Rules. They urged that continued delay continues to prejudice the plaintiffs. It was contended that the application was not filed expeditiously and court was urged to find that there was inordinate delay which has not been explained. Lastly, they urged the court to find that the defendant has not come to court with clean hands and does not deserve the grant of the order sought.

Analysis and Determination

17. The sole issue for determination is whether this court should grant a stay of the proceedings pending hearing of the appeal filed before the Court of Appeal. In considering this issue the court is being called upon to exercise its discretionary powers, which must be exercised judiciously and in accordance with the established principles.
18. The respondent objected to the Application on the basis that it was not brought under Order 42 Rule 6 of the Civil Procedure Rules citing jurisprudence that jurisdiction must be derived from the statute.
19. This Court notes the distinction between an application for stay of execution, which is largely governed by Order 42 Rule 6, and an application for stay of proceeding. The Civil Procedure Act expressly provides that the institution of an appeal shall not operate as a stay of execution or proceedings except insofar as the court appealed from may order.
20. The Applicant correctly submitted that the power to stay proceedings is distinct and is properly sought under the Court's inherent jurisdiction preserved by Section 3A of the Civil Procedure Act. This provision empowers the Court to make such orders as are necessary to meet the ends of justice and prevent the abuse of process.
21. Accordingly, this Court confirms it possesses the inherent jurisdiction to entertain this Application,

provided that such power is exercised judiciously and within established judicial guidelines. In the Case of **Re Global Tours & Travel Limited (Nairobi) H.C. Winding up Cause No. 43 of 2000** quoted with approval in **Meru Civil Appeal 40 of 2018 Kenya Wildlife service -versus- Mutembei (2019) eKLR that:** - “The court stated; “...Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”

22.The principles guiding the grant of a stay of proceedings are well-established, see case of **William Odongo Ramogi v Attorney General and three others (supra)**. The determination rests on a cumulative assessment of several factors.

23.It is uncontroverted that the Applicant has filed a Notice of Appeal challenging the Ruling of 21st January 2025.This satisfies the initial threshold requirement.

24. However, it is also a requirement that the Applicant explains why the order for stay was not sought directly from the Court of Appeal under Rule 5(2)(b) of the Court of Appeal Rules. The Appellate Court is the primary

forum best positioned to assess the arguable nature of the appeal it will ultimately determine.

25. In the present case, the Applicant failed to provide reason as to why the stay was not sought from the higher court. This omission constitutes a significant procedural lapse, weighing heavily against the favorable exercise of this Court's discretion.

26. On the arguability test, upon assessment, this Court is not persuaded that the appeal meets the requisite threshold. This court finds that the application for stay of proceedings was filed prematurely and as a matter of good order and procedure, the applicant should have awaited the substantive determination of the main suit by way of merit determination since stay of proceedings can only be granted in exceptional circumstances which in this instance has not been demonstrated. Moreover, this court takes note that the ELC court already delivered a ruling declining to set aside a consent.

27. The Applicant contended that if the proceedings continue, it will be a waste of the judicial time as the appeal will be rendered nugatory. However, the court emphasizes that the timely and final conclusion of a matter is a priority. This Court finds that the appeal will not be rendered nugatory if the proceedings continue to conclusion. The issues will be determined, and it may not even be necessary to prosecute the appeal. Moreover, the Applicant retains the fundamental

right to be heard on appeal once the matter is concluded. It therefore saves more time to allow the matter conclude.

28. At all times, this Court is duty bound to balance the rights of both parties and the interests of justice, as mandated by the Overriding Objective set out in Sections 1A and 1B of the Civil Procedure Act which prioritize the just and timely disposal of proceedings.

17. While the Applicant has complied with order requiring provision of security by providing a bank guarantee for Ksh 65 Million, this compliance alone is insufficient to override the substantial procedural defects and the failure to satisfy the substantive criteria for halting an ongoing trial.

18. Having considered the parties submissions, the relevant statutory provisions, and the established jurisprudence on the stay of proceedings, this Court finds that the Applicant has failed to provide a compelling basis for the exercise of this Court's inherent jurisdiction. Consequently, the Notice of Motion Application dated 19th February 2025 seeking a stay of proceedings be and is hereby dismissed with costs.

19. Orders accordingly.

Signed, dated and delivered at Machakos this 20th day of November, 2025.

RHODA RUTTO

JUDGE

In the presence of;

.....for 1st plaintiff

.....for 2nd Plaintiff

.....for Defendant

Selina Court Assistant

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