

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT GARISSA
CIVIL APPEAL NO. E015 OF 2025

SIMBA DRILLING COMPANY LIMITED.....1ST
APPELLANT/APPLICANT
ABDUL HAJI.....2ND /APPELLANT
APPLICANT

VS

MOHAMUD AHMED
FARAH.....RESPONDENT

RULING

1. The applicants moved this court through the notice of motion dated 09.09. 2025 pursuant to order 43 rule 1(a) and order 51 rule 1 of the civil procedure rules and section 1A,1B, and 3A of the civil Act seeking for the following prayers:
 - i. Spent.
 - ii. That pending the hearing and determination of this application this Honourable Court be pleased to issue stay of further proceedings in MCCC/E070/2024 Mohamud Ahmed Farah vs Simba Drilling Ltd & Abdul Haji.
 - iii. That pending hearing and determination of the appeal, this court be pleased to issue stay of further proceedings in MCCC/E070/2024 Mohamud Ahmed Farah vs Simba Drilling Ltd & Abdul Haji.
 - iv. That cost of this application be in the cause.

2. The application herein is anchored on twelve (12) grounds set out on its face and further supported by the affidavit of Abdul Haji,

the 2nd appellant and the director of the 1st appellant, sworn on 15.09.2025. It was deposed that on 03.04.2023, the 1st appellant entered into a written contract with the respondent for the drilling of a borehole, installation of casings, provision of gravel packing, flushing and development of the borehole, as well as obtaining water samples. That the respondent instituted Garissa MCCC/E070/2024 against the appellants for breach of contract.

3. On 31.10.2024, he filed an application before the trial court seeking to be struck out of the suit on grounds that the 1st appellant was a limited liability company and thus could be sued in its own name. That on 22.08.2025, the learned magistrate delivered a ruling dismissing his application and thereafter, the matter was been fixed for hearing on 01.12.2025. That the appellants have an arguable appeal with high chances of success hence the call to allow this application.
4. In a replying affidavit sworn on 03.10.2025, the respondent opposed the appellants' application urging that the application was frivolous and aimed at delaying the fair determination of the suit before the Chief Magistrate's Court. It was argued that the appeal seems to challenge a procedural ruling delivered by Hon. T.M. Mwangi on 22.08.2025 which retained the 2nd appellant as a party to the suit due to his direct involvement in the disputed transaction.
5. The deponent averred that the trial court rightly found that excluding Haji would lead to piecemeal litigation and potential duplication of proceedings. He emphasized that Haji, being the

sole director and signatory of Simba Drilling Company Limited, was central to the facts in issue and should remain a party to ensure a comprehensive adjudication. He further noted that the court had safeguarded against prejudice by allowing compensation through costs if Haji was wrongly joined.

6. The respondent argued that the appeal was premature and lacked merit, as there was no adverse finding against Haji. He highlighted that Simba Drilling Company had unverifiable addresses, making it necessary for a natural person to be part of the proceedings to ensure enforceability of any judgment. He averred that he had taken a loan from KCB to fund the project, which loan continued to accrue interest due to the appellants' failure to perform their contractual obligations, causing him financial loss.
7. He accused the appellants, particularly Haji for misrepresentation and breach of contract, stating that Haji personally assured him of the company's competence and received payments. Farah contended that the issue of lifting the corporate veil due to alleged fraud was a triable matter that should be determined at trial, not at an interlocutory stage.
8. He argued that the appeal did not raise substantial legal questions and that the proceedings should continue to avoid further delay and injustice. He concluded by urging the court to dismiss the application with costs, asserting that it was a tactic to frustrate his legitimate claim.
9. Parties agreed to canvass the application through submissions.

10. The appellants in their written submissions dated 15.10.2025 urged in regards to two issues for determination to wit: whether the proceedings in Garissa MCCC/E070/2024 Mohamud Ahmed Farah vs Simba Drilling Ltd & Abdul Haji should be stayed pending hearing of the present application and the entire appeal and; who bears the cost of the application.
11. Mr. Kinaro, counsel for the applicants urged that under section 63(e) of the Civil Procedure Act, this court is empowered to prevent the ends of justice from being defeated and to make such interlocutory orders as may appear to it to be just and convenient. To that end, he relied on the case of **Ngetich vs Goren & Another [2025] KECA 565 (KLR)** where the court emphasized that to succeed in an application for stay, an applicant must satisfy the twin conjunctive principles that: the appeal is arguable and that the appeal would be rendered nugatory if stay is not granted.
12. That it is not disputed that the contract forming the subject matter of the suit was entered into exclusively between the 1st appellant and the respondent. It was argued that the question falling due for determination before this court is whether the trial magistrate erred in declining to strike out the 2nd appellant as a party to the primary suit?
13. That if the stay is not granted, then the appeal would be rendered nugatory noting that the trial court has since fixed the matter for hearing on 01.12.2025. Counsel contended that should the proceedings continue, the 2nd appellant will be obliged to

participate in the proceedings where his liability is being challenged on appeal. That in the event that the appeal later succeeds, the 2nd appellant would have been subjected to unnecessary litigation, expense and possible execution for obligations that may ultimately be found not to attach to him personally. Equally, that the application herein had been brought timeously and in good faith noting that the impugned ruling was delivered on 22.08.2025. This court was urged to allow the application as prayed noting that the respondent did not demonstrate any loss it was likely to suffer.

14. On costs, counsel urged that section 27(1) of the Civil Procedure Act vests this Honourable Court with the discretion to determine by whom and to what extent costs shall be borne, subject to the well settled principle that 'costs follow the event' unless the court, for good reason, orders otherwise. To that end, support was drawn from the case of **Haraf Tradres Limited vs Narok County Government [2019] eKLR** where Gikonyo J. citing Halsbury's Laws of England (4th Edition, Re-issue, Vol 10. Para. 16) observed that:

"The court has discretion as to whether costs are payable by one party to another, the amount of those costs, and when they are to be paid...This discretion must be exercised judicially; it must not be exercised arbitrarily but in accordance with reason and justice".

15. In the end, counsel urged that the application be allowed as prayed and the appellants be awarded costs.

16. The respondents did not file submissions but instead chose to rely on their replying affidavit fully.

17. I have considered the application together with the respondent's response and written submissions by the applicants. The issues that germinate for determination are as follows:

- i. Whether the appellants have met the threshold for stay of proceedings order to issue.
- ii. Who bears the costs of the suit?

18. Order 42 Rule 6 of the Civil Procedure Rules provides for the inherent powers of the court to stay proceedings pending appeal. For avoidance of doubt, 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”.

19. When determining an application seeking stay of proceedings, the Court is required to exercise its discretion after due consideration of the merits of the case and the likely effect that such an order may have on the need to ensure that the ends of justice are met.
20. The exercise of the court’s discretion must be grounded on judicious principles. In the case of **Kenya Wildlife Services vs Jane Mutembi (2019) eKLR**, it was held that:

“Stay of proceedings 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.”

21. On whether the application herein was timely filed, I note that the impugned ruling was delivered on 22.08.2025 and a memorandum of appeal lodged before this court on 09.09.2025 simultaneously with the current application. A simple arithmetic denotes that the appeal and the application herein were lodged and filed respectively under a period of one month. In the

circumstances therefore, it's my considered view that there was no delay in filing the application.

22. Regarding arguability of the appeal, the court has considered the memorandum of appeal annexed and the applicable law. The court notes that the appeal is grounded on the question whether the trial magistrate erred in declining to strike out the 2nd appellant as a party to the primary suit. That the foregoing notwithstanding, it was not disputed that the contract forming the subject matter of the suit was entered into exclusively between the 1st appellant and the respondent. That the trial magistrate did not appreciate the provisions of section 6 of the Companies Act, 2015 together with the Fourth Schedule of the Companies (General) Regulations, 2015 which recognize that a company is a separate legal entity from its directors.

23. Considering the ground upon which the appeal is anchored, this court shall not make any pre-determination on the matter but of importance to note is the fact 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 and one which is not frivolous. [See the case of **David v Nechesa & 2 others (Civil Appeal 51 of 2023) [2025] KEHC 5432 (KLR); Stanley Kang'ethe Kinyanjui vs Tony Ketter & 5 Others [2013] eKLR**].

24. On whether the appeal will be rendered nugatory, the court finds that whether or not an appeal will be rendered nugatory 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. In the instant case, the applicant is likely to suffer prejudice in engaging in unnecessary litigation should the appeal succeed after the lower court case would have been finalized. The appeal would therefore be rendered nugatory.

25. Having fully reviewed the lower court record and given the fact that the appellants desire to be heard [see article 50 (1) of the constitution], the said right shall not be denied and as such, this court orders that:

- i. The notice of motion dated 09.09. 2025 is meritorious and therefore allowed as prayed.**
- ii. Each party to bear its own costs.**
- iii. The hearing of this appeal to be expedited**

Dated, signed and delivered virtually this 19th day of November 2025

J.N.ONYIEGO
JUDGE