

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & TAX DIVISION**  
**HCCOMM NO. E157 OF 2022**

MINT EAST AFRICA LIMITED.....PLAINTIFF/RESPONDENT

-VERSUS-

KENYA POWER & LIGHTING CO. PLC.....DEFENDANT/APPLICANT

**RULING**

1. The defendant/applicant filed a Notice of Motion application dated 20<sup>th</sup> November 2024 pursuant to the provisions of Sections 1A, 1B & 3A of the Civil Procedure Act, Order 42 Rule 6 & Order 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions. The defendant seeks an order for stay of proceedings in this matter pending the hearing and determination of the defendant/applicant's 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. Dennis Maanzo, an employee of the defendant company. Mr. Maanzo averred that the plaintiff instituted this suit through a plaint dated 10<sup>th</sup> May 2022, and in response thereto, the defendant filed a Preliminary Objection dated 16<sup>th</sup> June 2022 challenging the jurisdiction of the Court on the basis of limitation under the Limitation of Actions Act and the Public Authorities Limitation Act. He indicated that the Court directed that the Preliminary Objection would be determined by written submissions and subsequently, the Court delivered a Ruling on 23<sup>rd</sup> February 2024, and dismissed the objection.

3. He deposed that aggrieved by the said Ruling, the defendant lodged a Notice of Appeal dated 28<sup>th</sup> February 2024 and applied for certified copies of the proceedings and Ruling, which were duly paid for and served upon the plaintiff. He deposed that the typed proceedings were eventually received by the defendant on 4<sup>th</sup> November 2024, and it is in the process of compiling its Record of Appeal. Mr. Maanzo stated that the intended Appeal raises serious and triable issues with high chances of success, and unless these proceedings are stayed, the Appeal will be rendered nugatory.
4. In opposition to the application, the plaintiff filed a replying affidavit sworn on 27<sup>th</sup> February 2025 by Mr. Andrew Njoroge Mburu, a Director of the plaintiff company. Mr. Mburu averred that the instant application discloses no basis for a stay of proceedings as no Appeal has been filed against the Ruling delivered on 23<sup>rd</sup> February 2024. He further averred that the defendant has failed to demonstrate any prejudice it will suffer if these proceedings continue, and that the application herein was filed after an inordinate and unexplained delay of nine (9) months. He deposed that the defendant merely filed a Notice of Appeal and requested for typed proceedings, which Notice does not constitute an Appeal.
5. Mr. Mburu contended that this Court cannot be invited to assess the merits of an intended Appeal against its own Ruling. He emphasized that although the defendant received typed proceedings on 4<sup>th</sup> November 2024, it has failed to file an Appeal within the statutory sixty-day period, thereby extinguishing its right of Appeal. He asserted that there is no competent or existing Appeal to justify being granted an order for stay of proceedings, and any such Appeal would in any event, be time-barred. He also asserted that the application herein is fatally defective and ought to be dismissed *in limine* with costs.

6. Mr. Mburu outlined the long history of the dispute arising from a contract executed on 9<sup>th</sup> May 2008 for the supply of treated wooden poles valued at USD 4,222,500.00, which the plaintiff fully performed, but for which payment was withheld.
7. He recounted that the defendant's allegations of procurement irregularities led to a criminal prosecution that lasted over twelve (12) years, culminating in his acquittal in June 2021, after which the defendant still failed to settle the debt, prompting the filing of this suit in May 2022.
8. Mr. Mburu detailed the defendant's persistent non-compliance with Court directions following the dismissal of the Preliminary Objection, including repeated failures to file an amended defence, disobedience of Court Orders, delayed payment of costs, and only filed the instant application on the eve of a mention date as an afterthought.
9. He asserted that an order for stay of proceedings is a drastic and exceptional remedy that interferes with the right of access to justice and a fair and expeditious trial, and that the defendant has neither demonstrated exceptional circumstances nor any prejudice it will suffer if this matter proceeds for hearing. He averred that the plaintiff stands to suffer grave prejudice given the age of the claim and the substantial sums involved.
10. In a rejoinder, the defendant filed a further affidavit sworn on 25<sup>th</sup> March 2025 by Mr. Dennis Maanzo, an employee of the defendant company. Mr. Maanzo deposed that the defendant's intended Appeal raises serious and triable issues with high chances of success, as demonstrated by the draft Memorandum of Appeal annexed to the defendant's affidavit. He contended that it is in the interest of justice for the Trial Court proceedings to be stayed pending the

hearing and determination of the Appeal on the issue of jurisdiction, failing which the Appeal would be rendered nugatory.

11. The application herein was canvassed by way of written submissions. The defendant's submissions were filed on 25<sup>th</sup> March 2025 by Justus Ododa, Advocate, while the plaintiff's submissions were filed by the law firm of Mbugua Ng'ang'a & Company Advocates on 4<sup>th</sup> April 2025.
12. Mr. Ododa, learned Counsel for the defendant cited the case of **Re Global Tours & Travels Limited** Nairobi HC Winding Up Cause No. 43 of 2000 and submitted that a stay of proceedings is a grave and exceptional remedy that should only be granted sparingly and in the clearest of cases, guided by judicial discretion and exercised in the interest of justice. He stated that the applicable principles, as distilled from precedent, require the Court to consider whether the intended Appeal is arguable, whether the application was filed expeditiously, and whether sufficient cause has been shown to warrant stay of proceedings in the interest of justice.
13. Counsel contended that the defendant has an arguable Appeal as it challenges the jurisdiction of this Court, the suit being allegedly time-barred. He referred to the case of the **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [1989] KLR 1, and argued that jurisdiction being fundamental, must be determined at the earliest opportunity, and where it is lacking, a Court must down its tools.
14. Mr. Ododa stated that the Ruling delivered on 23<sup>rd</sup> February 2024 dismissed the defendant's Preliminary Objection and assumed jurisdiction, prompting the filing of a Notice of Appeal dated 28<sup>th</sup> February 2024, which remains pending. He submitted that unless these proceedings are stayed, this Court may proceed to hear the substantive suit, thereby rendering the appeal on jurisdiction

nugatory, should it succeed. Counsel cited the case of **Port Florence Community Health Care v Crown Health Care Limited** [2022] KEHC 2848 (KLR) and stated that the instant application was filed timeously having been filed approximately one month after receipt of the certified proceedings. He relied on the case of **Adrec Limited v Nation Media Group Limited** [2017] KECA 106 (KLR) and submitted that sufficient cause has been demonstrated to justify stay of proceedings in the interest of justice, given the centrality of jurisdiction and the risk of rendering the intended Appeal academic.

15. Mr. Ng'ang'a, learned Counsel for the plaintiff cited the case of **Turbo Highway Eldoret Ltd v Muniu** (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) and submitted that a stay of proceedings is an exceptional and drastic remedy only granted where grave injustice would otherwise occur. He submitted that the defendant has not demonstrated the existence of any exceptional circumstances. Relying on the case of **William Odhiambo Ramogi & 2 others v The Honourable Attorney General & 3 others** [2019] eKLR, Counsel contended that the defendant has failed to satisfy the mandatory principles governing stay of proceedings, including the existence of a pending Appeal, arguability of the Appeal, expeditious filing of the application herein, and demonstration of prejudice or that the Appeal would be rendered nugatory.
16. He maintained that no Appeal has been filed at the Court of Appeal more than a year after delivery of the impugned Ruling. He argued that a Notice of Appeal and a request for typed proceedings do not constitute an Appeal. He relied on the Court of Appeal cases of **Lebo & 331 others v Kenya Power & Lighting Limited** (Civil Appeal (Application) E033 of 2023) [2024] KECA 1518 (KLR) and **Mae Properties Limited v Joseph Kibe & another** [2017] KECA 238 (KLR), and argued that despite admittedly receiving the typed proceedings on

4<sup>th</sup> November 2024, the defendant failed to lodge an Appeal within the statutory sixty-day period, thereby extinguishing its right of Appeal. He contended that no leave to appeal out of time has been sought or granted, rendering any intended Appeal incompetent and incapable of forming a basis for stay of proceedings. He asserted that the instant application is premised on a non-existent and time-barred Appeal and amounts to an abuse of the Court process.

17. Mr. Ng'ang'a submitted that the application herein was filed after an inordinate and unexplained delay, having been lodged nine (9) months after the impugned Ruling. He contended that the said delay demonstrates complacency and bad faith, particularly given that the defendant participated in multiple pre-trial mentions without indicating any intention to seek a stay, only filing the application herein as an afterthought to derail the proceedings. He stated that the attempt to justify the delay on account of awaiting typed proceedings should be dismissed as disingenuous, since such proceedings were not required for the filing of either an Appeal or an application for stay of execution. Counsel further submitted that the application herein was filed before the wrong forum, as issues of arguability of an Appeal ought to be determined by the Court of Appeal and not the Court whose Ruling is under challenge.

#### **ANALYSIS AND DETERMINATION.**

18. Upon consideration of the instant application, the grounds on the face of it and the affidavits filed in support thereof, the replying affidavit by the plaintiff and the written submissions by Counsel for the parties, the issue that arises for determination is whether an order for stay of proceedings should issue.
19. The **Halsbury's Laws of England, 4<sup>th</sup> Edition, Volume 37** at pages 330–332, provides as follows on the principles governing 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.*

20. The principles to be considered by a Court when dealing with an application for stay of proceedings were considered by the Court in **Re Global Tours & Travel Ltd** (supra), where Ringera J., 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.*

21. Further, in the often cited case of **William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others** (supra) , the Court comprising a five Judge bench laid out the following principles for consideration in 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.*

22. It is trite that this Court has the jurisdiction to grant orders for stay of proceedings. However, as is evident from the foregoing authorities, the exercise of the discretion is strictly circumscribed and may only be invoked where the applicant satisfies the principles enunciated by the Court in the cases of **Re Global Tours & Travel Ltd** (supra) and **William Odhiambo Ramogi** (supra). An application for stay of proceedings pending Appeal is ordinarily made

before the appellate Court, since one of the key considerations is whether the intended Appeal is arguable and/or has reasonable prospects of success.

23. It is trite that a Court is barred from re-evaluating or sitting on appeal against its own decision, save where an application for review has been properly brought. In order for this Court to interrogate the arguability of the defendant's intended Appeal, it would inevitably require it to re-examine its own decision, an exercise that would offend both the law and the principles of natural justice.
24. In this case, the defendant averred that it has since filed an Appeal against this Court's Ruling delivered on 23<sup>rd</sup> February 2024 at the Court of Appeal. For that reason, the instant application ought to have been filed at the Court of Appeal pursuant to the provisions of Rule 5(2)(b) of the Court of Appeal Rules, which states that –

***Subject to sub rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may -***

***a) ...***

***b) in any civil proceedings where a notice of appeal has been lodged in accordance with rule 77, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.***

25. In view of the above, and in the absence of an explanation by the defendant as to why the instant application was filed before this Court as opposed to the Court of Appeal, it is my finding that the application herein has been filed before the wrong forum.
26. This Court therefore finds that the defendant's application dated 20<sup>th</sup> November 2024 is incompetent. It is hereby struck out with costs to the plaintiff.

It is so ordered.

**DELIVERED, DATED and SIGNED at NAIROBI on this 23<sup>rd</sup> day of January 2025. Ruling delivered through Microsoft Teams Online Platform.**

**NJOKI MWANGI**

**JUDGE**

**In the presence of:-**

Ms Mwenda h/b for Mr. Ododa for the defendant/applicant

Mr. Shammah h/b for Mr. Ng'ang'a for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

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