

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
HCCOMM NO. E680 OF 2024

ANTHONY KIBANDI WATUKU.....PLAINTIFF/RESPONDENT

VERSUS

SHANGIYA ENTERPRISES LIMITED.DEFENDANT/APPLICANT

RULING

1. This ruling concerns the Notice of Motion dated 22nd January 2025 by the Defendant/Applicant under Sections 1A, 1B, 3A and 6 of the Civil Procedure Act, Order 51, Rule 1 of the Civil Procedure Rules. The Applicant seeks an order to stay this suit while the court hears *Milimani CMCC No. E088 of 2024, Anthony Kibandi Watuku v Shangiya Enterprises Limited*, currently before the Chief Magistrate's Court in Nairobi.
2. The application is supported by an affidavit from Mr. Dejun Cui, sworn on January 22, 2025. He states that the lower court case was filed first and that the Defendant's counterclaim for Kshs. 4,094,616.10 is still pending before the Magistrate's Court. He claims that both suits stem from the same principal-agency relationship and involve similar facts and issues.
3. That allowing the High Court case to proceed would lead to duplicated efforts, conflicting decisions, and go against the overriding objectives in Sections 1A and 1B of the Civil Procedure Act. The Applicant argues that the Plaintiff will not

suffer any harm if the proceedings are stayed and that it serves justice and an orderly process in commercial litigation to pause this suit pending the lower court's decision.

4. The Plaintiff/Respondent opposes the application through a Replying Affidavit sworn on February 18, 2025. He claims that the application is flawed, pointless, and intended in bad faith to delay the main suit filed on November 15, 2024. He also argues that the supporting affidavit simply repeats statements made in an earlier replying affidavit dated December 3, 2024, without presenting new issues.
5. The Plaintiff asserts that he withdrew *Milimani CMCC No. E088 of 2024* on April 2, 2024, by consent, and that the file was closed. He claims there is no active suit to warrant a stay of proceedings. He further contends that the Defendant is using its own counterclaim in the Magistrate's Court as a tactic to delay the High Court case and points out that no court order has been issued to stay the current proceedings.
6. The Plaintiff also outlines the procedural history, including various interim applications, the Defendant's Preliminary Objection dated November 28, 2024, which was not pursued, and a Supplementary Affidavit filed on December 17, 2024, addressing the same issues raised in this application. He claims that the Defendant has engaged in repetitive applications and strategic maneuvers to obstruct the swift resolution of the main commercial dispute.
7. The parties filed written submissions. The Defendant's submissions are dated 19th March 2025 while the Plaintiff's

submissions are dated 4th March 2025, along with Supplementary Written Submissions dated 1st April 2025.

Analysis and determination

8. I have carefully reviewed the application, the affidavits on record, the opposing submissions, and the attached documents. The issue for determination is whether the application is merited.

9. The application primarily relies on **Section 6** of the **Civil Procedure Act**, which outlines the doctrine of sub judice. This section states:

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

10. The Supreme Court in **Kenya National Commission on Human Rights v Attorney General & Another [2020] eKLR** highlighted that the doctrine aims to prevent multiple lawsuits, avoid abuse of the court process, and prevent conflicting judicial decisions.

11. For Section 6 to apply, the Applicant must show that: a previously instituted suit exists, the matters in issue are directly and substantially the same, the parties involved are the same

or are litigating under the same title, and the earlier suit is pending before a court with the authority to grant the requested relief.

12. The main question in this application is whether *Milimani CMCC No. E088 of 2024* qualifies as a previously instituted suit that is currently pending under Section 6. The evidence before this Court indicates that CMCC No. E088 of 2024 was withdrawn by consent on April 2, 2024, and the file was closed. This fact is uncontested. What remains in the Magistrate's Court is the Defendant's counterclaim dated March 20, 2024.
13. The legal status of a counterclaim is defined by Order 7 Rule 3 of the Civil Procedure Rules. A counterclaim acts as an independent case and can proceed even if the original suit has been withdrawn.
14. The Court of Appeal in Kenya **Commercial Bank Ltd v Benjoh Amalgamated Ltd [2017] eKLR** confirmed that a counterclaim is a separate and independent cause of action. However, merely having a counterclaim does not alone satisfy the requirements under Section 6. The Court must determine whether the issues at stake in this High Court suit are directly and substantially the same as those raised in the counterclaim and whether the lower court can provide the relief sought here.
15. The counterclaim before the Magistrate's Court aims to recover Kshs. 4,094,616.10 allegedly owed for goods supplied on credit. The current High Court suit involves broader commercial claims, including claims of wrongful termination of a principal-agency relationship, breach of contract, and requests

for declaratory and injunctive relief. While both disputes arise from the same commercial relationship, the causes of action and reliefs sought are not identical. The High Court suit goes beyond a straightforward liquidated claim and presents issues that cannot be fully resolved through the counterclaim alone.

16. Additionally, Section 6 requires that the prior suit be pending before a court with the authority to grant the requested relief. If the reliefs sought in the High Court surpass the monetary jurisdiction of the Magistrate's Court or involve declaratory and injunctive remedies beyond its scope, the doctrine of *sub judice* cannot prevent the High Court from exercising its jurisdiction.

17. In **Thiba Min Hydro Co. Ltd v Josphat Karu Ndwiga [2015] eKLR**, the Court of Appeal stated that the doctrine applies only when the earlier suit can resolve the issues in the later suit. This is not the case here, as the Magistrate's Court counterclaim for a liquidated sum cannot conclusively determine the broader contractual and declaratory issues raised in this High Court matter.

18. In the circumstances, I am not satisfied that the threshold under Section 6 of the Civil Procedure Act has been met. The elements of *sub judice* have not been established.

On whether the court should stay the proceedings

19. This Court retains inherent jurisdiction to regulate its own proceedings and, where appropriate, to stay proceedings where the ends of justice so require. That jurisdiction is anchored in Article 159(2)(b) of the Constitution which enjoins courts to

ensure that justice shall not be delayed, and in Sections 1A, 1B and 3A of the Civil Procedure Act which embody the overriding objective and preserve the Court's inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the court process.

20. Nonetheless, a stay of proceedings is a grave judicial remedy. It has the effect of suspending a litigant's right to prosecute his claim and therefore interferes with the constitutional guarantee of access to justice under Article 48 of the Constitution. For that reason, such an order ought only to be granted where the applicant demonstrates sufficient cause. The Court of Appeal in **Kenya Wildlife Service v James Mutembei [2019] eKLR** underscored that a stay of proceedings is a serious matter which should not be granted lightly.

21. It is equally settled that the grant of a stay of proceedings is discretionary. In **Global Tours & Travels Ltd, Nairobi HC Winding Up Cause No. 43 of 2000**, Ringera J (as he then was) observed:

“As I understand the law, whether or not to grant a stay of proceedings...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 a 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.”

22. The learned Judge further emphasized that in exercising that discretion, the Court must bear in mind factors such as the need for expeditious disposal of cases, the *prima facie* merits of the proceedings, the scarcity and optimal utilization of judicial time, and whether the application has been brought promptly.
23. The jurisprudence is therefore clear that a stay of proceedings constitutes a serious, grave and fundamental interruption in a party's right to conduct litigation towards trial on the merits. The general practice of the Court is that such an order should not be granted unless it is demonstrated, beyond reasonable doubt, that the proceedings ought not to continue. The Court must guard against the use of interlocutory applications as instruments for stalling substantive adjudication.
24. In the present case, the Applicant has not demonstrated that continuation of these proceedings will occasion irreparable or undue prejudice. The mere existence of a counterclaim before the Magistrate's Court does not, without more, render the proceedings before this Court oppressive, vexatious or duplicative in a manner that would justify suspending the High Court suit. Commercial disputes arising from a common business relationship do not automatically warrant paralyzing one forum in favour of another.
25. On the contrary, the material placed before this Court shows that the lower court suit was withdrawn by consent and the file marked closed. What remains before the Magistrate's

Court is a counterclaim limited to recovery of a liquidated sum. The present High Court suit, however, raises broader commercial questions, including alleged unlawful termination of a principal-agency relationship and claims for declaratory and injunctive relief.

26. The Defendant shall still be permitted to pursue their counterclaim at the Magistrate's Court through the proceedings currently being conducted in this Court without interference from either party. When the possibility of conflicting results on overlapping factual issues actually exists, the best course of action would be to coordinate the two actions, consolidate them when such consolidation is allowed in law or rely on principles like *res judicata* where appropriate, rather than paralyzing one action completely.
27. When balancing the competing interests, I find that the prejudice to the Plaintiff in stopping him from proceeding with his claim is greater than any theoretical duplication risk as proposed by the Applicant. Even if it were assumed, for the sake of argument, that Section 6 of the Civil Procedure Act does not apply, the Applicant has not met the threshold required to have a stay of proceedings exercised in this Court.
28. For these reasons, the Application dated 22nd January 2025 is dismissed for lack of substance.
29. Costs of the application shall abide by the outcome of the main suit.

RULING delivered virtually, dated and signed at **NAIROBI**

This **12th** day of **March** 2026.

P.M. MULWA
JUDGE

In the presence of:

Plaintiff (in person) - *present*

Ms. Muthoni for Defendant/Applicant

Court Assistant: *Carlos*