

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND TAX DIVISION
COMM. CASE NO. E336 OF 2019

BETWEEN

THE INTERNATIONAL AIR TRANSPORT ASSOCIATION.....
1ST PLAINTIFF
SAHAM ASSURANCE COMPANY KENYA LIMITED.....2ND
PLAINTIFF

AND

SAFA AGENCIES LIMITED.....1ST
DEFENDANT
TAQUIDIN HASSAN AFFEY.....2ND
DEFENDANT
MUKTAR BILLOW SALAT.....3RD
DEFENDANT

RULING

Introduction & Background

1. By the Notice of Motion dated 7th May 2025, the Plaintiffs seek to stay this proceedings pending the hearing and determination of their appeal currently before the Court of Appeal. The application is supported by the grounds on its face and the supporting affidavit of Sarah Weru, the 2nd Plaintiff's Company Secretary sworn on 7th May

2025 and it is opposed by the 1st and 2nd Defendants through the replying affidavit of the 2nd Defendant sworn on 13th May 2025. The application has been canvassed by way of written submissions which are on record and I will be making relevant references to the same in my analysis and determination below.

Analysis and Determination

2. The principles governing the grant of stay of proceedings are well settled. **Order 42 Rule 6 (1)** of the **Civil Procedure Rules** provides that an appeal shall not operate as stay unless the Court so orders and provides as follows:

No Appeal or second Appeal shall operate as a stay of execution or proceeding 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.

(2) No order for stay of execution shall be made under subrule (1) unless -

(a) the Court is satisfied that substantial loss may result to the Applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

3. I am in agreement with the parties’ submissions that unlike stay of execution under **Rule 6 (2)** above, stay of proceedings is governed by broader judicial discretion and is exercised sparingly. This court has laid out various principles that guide its determination of an application to stay proceedings and I am persuaded by a 3-judge bench ruling of this court in **William Odhiambo Ramogi v Attorney General and three others 2019 eKLR** where five guiding principles were set out as follows:

- 1. There must be a pending Appeal.*
- 2. The application must be made expeditiously.*
- 3. The Appeal must risk being rendered nugatory.*
- 4. Exceptional circumstances must exist.*
- 5. The prejudice must be irreparable or incapable of being compensated by damages.*

4. All these factors must be considered for an order of stay of proceedings to be granted. **Halsbury’s Laws of England,**

4th Ed. Vol. 37 (Practice and Procedure) at p.330 states that
“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 Court’s general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed to continue....This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases...It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The Applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of this case.” (see **Sigat v Sigat [2025] KEELC 5808 (KLR)**)

5. Whereas I can agree that an appeal has been filed and that the present application has been filed without unreasonable delay, I find that the Plaintiffs have not demonstrated that continuing this suit would cause exceptional or irreparable harm that cannot be compensated by way of damages. The Plaintiffs aver that if the trial proceeds without the 3rd Defendant and their appeal succeeds, the

substratum of the appeal will be lost. However, I am in agreement with the Defendants' position that if this suit proceeds to judgment and the Plaintiffs win, their appeal is not rendered useless and that if the Court of Appeal later rules that the 3rd Defendant was wrongly struck out, the judgment can be set aside, and the 3rd Defendant can be included in a new trial and the liability could potentially be revisited.

6. The appeal is not nugatory because the legal questions being raised, that is, the nature of the guarantee, can still be determined by the Court of Appeal, and any consequential orders can still be made even if the main suit has progressed. A successful appeal would simply mean the trial was partially a nullity and would have to be done again, which is precisely why this court has always been hesitant to grant stays as it wastes judicial time to pause a case now, only to potentially restart it later.
7. The Plaintiffs have also stated that this court grossly misapprehended the legal principles regarding the guarantee but disagreement with the court's interpretation of the law, and even filing an appeal on that basis, does not constitute an "exceptional circumstance." As submitted by both parties, Ringera J., in the winding up cause of ***Global Tours & Travels Limited, HCCC No. 43 of 2000***, held that the court must look at the *prima*

facie merits, but here, the Plaintiffs' argument hinges on a factual distinction between a personal guarantee *vis a vis* a director's guarantee that was already considered and ruled upon by this court. The court's position and that of the Defendants remains that the 3rd Defendant is no longer affiliated with the 1st Defendant, and the primary contract is with the 1st Defendant alone. The Plaintiffs have not shown that the continuation of the trial is frivolous or vexatious or that the Defendants could not possibly succeed with this position.

8. Lastly, I note that the Plaintiffs vaguely claim that they will suffer irreparable loss but they have not specified what this loss is. In any event, the primary loss would be a monetary judgment against the 1st and 2nd Defendants, which is compensable by damages. As the Defendants' submissions highlight, the real, ongoing prejudice is being suffered by the Defendants. This suit was filed in 2019 and they have a constitutional right to have their case heard and determined without unreasonable delay. Granting a stay would further infringe on that right for an indefinite period while the appeal is pending. Therefore, the balance of prejudice tilts heavily in favor of the Defendants.
9. In summary, it is my finding that the Plaintiffs have failed to surmount the high and stringent test for a stay of proceedings.

They have only proven they have an appeal but they have not proven the appeal would be nugatory, they have not proven exceptional circumstances, and they have not proven irreparable harm that outweighs the Defendants' right to an expeditious trial.

Conclusion & Disposition

10. The upshot is that the Plaintiffs' application dated 7th May 2025 fails and the same is dismissed. costs will be in the cause.

DATED SIGNED AND DELIVERED virtually at NAIROBI this

8th DAY of MAY 2026

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J.W.W. MONGARE
JUDGE

IN THE PRESENCE OF

1. N/A for the Plaintiffs
2. Ms. Nyamukuru holding brief for Mr. Khaemba for the Defendants
3. Amos- Court Assistant

ORIGINAL