



**Souza alias Frankline D'souza v Eugefreight Travel & Tours Limited & another (Civil Application E216 of 2024) [2025] KECA 149 (KLR) (7 February 2025) (Ruling)**

Neutral citation: [2025] KECA 149 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPLICATION E216 OF 2024  
MSA MAKHANDIA, SG KAIRU & LA ACHODE, JJA  
FEBRUARY 7, 2025**

**BETWEEN**

**FRANKLIN SUBHAS SOUZA ALIAS FRANKLINE D'SOUZA ..... APPLICANT**

**AND**

**EUGEFREIGHT TRAVEL & TOURS LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**KIPKOSGEI KORIR ..... 2<sup>ND</sup> RESPONDENT**

*(An application for stay of proceedings pending appeal from the Ruling of the Environment and Land Court of Kenya at Nairobi (Wabwoto, J.) dated 30th November 2023 in ELC Cause No. E082 of 2021)*

**RULING**

1. This ruling relates to an application dated 6<sup>th</sup> May 2024 made under Rule 5(2)(b) of the Court of Appeal Rules by the applicant, Franklin Shubhas Souza alias Franklin D'Souza. He seeks an order of stay of proceedings in ELC E082 of 2021 pending the hearing and determination of his appeal from a ruling delivered on 30<sup>th</sup> November 2023.
2. The background in brief is that the 1<sup>st</sup> respondent, Eugefreight Travel & Tours Limited, as plaintiff, instituted suit before the ELC at Nairobi, being ELC E082 of 2021 against the applicant, as 1<sup>st</sup> defendant, and against the 2<sup>nd</sup> respondent, John Kipkosgei Korir, as the 2<sup>nd</sup> defendant. When the suit was called out for hearing on the scheduled hearing date on 6<sup>th</sup> November 2023, it was indicated by counsel for the 1<sup>st</sup> respondent that John Kipkosgei Korir (who was the 1<sup>st</sup> defendant) had never entered appearance. There was no appearance for the applicant either. The hearing proceeded with Brian De Souza (PW1) and Jackton Ranguma (PW2) testifying for the 1<sup>st</sup> respondent (plaintiff). Counsel for the 1<sup>st</sup> respondent (plaintiff) made oral submissions and the learned trial Judge reserved judgment for 30<sup>th</sup> November 2023.



3. Four days after the close of the 1<sup>st</sup> respondent's case, the applicant moved the trial court with his application dated 10<sup>th</sup> November 2023 in which he sought an order to set aside the orders of the ELC given on 6<sup>th</sup> November 2013 and to re-open the suit for cross examination of the 1<sup>st</sup> respondent's witnesses who had testified in the absence of the applicant. In support of that application the advocate for the applicant swore an affidavit and exhibited a police abstract report and a medical report showing that on the morning of 6<sup>th</sup> November 2023, he was involved in a road traffic accident and sustained injuries. That application was opposed by the 1<sup>st</sup> respondent.
4. However, in partially allowing the application, the learned Judge stated that the court was "not fully persuaded by the reasons advanced...in support of the application" but that the court would "still grant a chance" to the applicant to have his day in court. Accordingly, the learned Judge ordered that "the orders issued on 6<sup>th</sup> November 2023 are varied only to the extent that the defendants' case is re-opened to allow the defendant have their day in court". The Judge further directed that the "matter shall proceed for defence hearing on 13/02/2024."
5. In a nutshell, the ELC declined the applicant's request to have the respondent's witnesses, who had testified in the absence of the applicant, recalled for cross examination.
6. The record shows that immediately upon delivery of that ruling, counsel for the applicant in addition to applying for a copy of the proceedings and ruling sought leave to appeal, which was granted. A notice of appeal dated 6<sup>th</sup> December 2023 was subsequently filed.
7. Against that background, the applicant filed the present application seeking to stay proceedings before the ELC pending the hearing and determination of the appeal. The application is opposed by 1<sup>st</sup> respondent. We heard the application on 16<sup>th</sup> July 2024 when learned counsel Mr. Kamau appeared for the applicant while Ms. Maina, learned counsel, appeared for the 1<sup>st</sup> respondent. There was no appearance for the 2<sup>nd</sup> respondent despite having been served with notice of hearing.
8. We have considered the application, the affidavit and further affidavit in support sworn by the applicant, the replying affidavit sworn by Jackton Nyanungo Ranguma, the preliminary objection dated 24<sup>th</sup> May, and the written submissions by both counsel which were orally highlighted during the hearing of the application.
9. To succeed in an application of this nature, the applicant is required to demonstrate that the appeal, or intended appeal is arguable and that should the orders sought be refused, and the appeal eventually succeeds, it will all be in vain. See Stanley Kangethe Kinyanjui v Tony Keter & Others [2013] eKLR.
10. In the memorandum of appeal, the grounds of appeal set out include complaints that the judge erred in refusing to allow the recalling, for purpose of cross examination, of the 1<sup>st</sup> respondent's witnesses who had testified; that the refusal to do so was a wrong exercise of judicial discretion as the applicant's right to fair trial is in jeopardy. We are satisfied that the intended appeal is not frivolous. It is arguable.
11. On the nugatory aspect, we are mindful that, as stated by this Court in *Meta Platforms, Inc & Another vs Samasource Kenya EPZ Limited t/a Sama & 185 Others; Central Organization of Trade Unions Kenya & 8 Others (Interested Parties)* (Civil Application E178 of 2023) [2023] KECA 999 (KLR) that an order of stay of proceedings pending hearing and determination of an appeal against an interlocutory ruling should only be allowed if the circumstances are such that the impugned order will significantly prejudice the applicant if the matter proceeds. In the same case, the Court stated as follows:

"The nature of an order of stay of proceedings and the principles, which should guide a court in exercising its discretion to grant or refuse an application for stay, were adequately



stated by the Court of Appeal of Nigeria, Abuja Division in the case of NNPC & Anor vs. Odidere Enterprises Nigeria Ltd (2008) 8 NWLR (Pt. 1090) 583 at 616-618 per Aboki JCA as follows:

“Stay of Proceedings is a serious, grave and fundamental interruption on the right of a party to conduct his litigation towards the trial on the basis of the substantive merit of his case, and therefore the general practice of the courts is that a stay of proceedings should not be granted, unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

12. In our view, and in the circumstances of this case, we are persuaded that the applicant should have an opportunity to canvass the appeal for this Court to determine whether Judge erred in denying him the right to cross examine the 1<sup>st</sup> respondent’s witnesses, a matter involving the question whether the applicant’s right to fair trial was violated. The opportunity to do so, will have been lost altogether, should we decline to allow the application, and should the appeal succeed, it will have been a pyrrhic victory.
13. As regards the preliminary objection by the 1<sup>st</sup> respondent that there is no valid appeal before this Court on grounds that no substantive appeal was filed within 60 days, we note that there is indeed a Notice of Appeal on record. We are not presently dealing with an application to strike out the same. The preliminary objection has no merit.
14. In the result, we allow the application dated 6<sup>th</sup> May 2024 and hereby grant an order of stay of proceedings before the ELC in ELC Case No. E082 of 2012 pending the hearing and determination of his appeal from a ruling delivered on 30<sup>th</sup> November 2023. As the substantive appeal is already filed, we direct that the same be fixed for hearing on basis of priority after case management before the Deputy Registrar of the Court.
15. Costs of the application shall abide the outcome of the appeal.

**DATED AND DELIVERED AT NAIROBI THIS 7<sup>TH</sup> DAY OF FEBRUARY, 2025.**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**L. ACHODE**

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**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed

**DEPUTY REGISTRAR.**

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