



Mbugua v Yusuf & another (Sued as the Administrators of the Estate of Ibrahim Ahmed - Deceased) (Civil Application E607 of 2024) [2025] KECA 526 (KLR) (21 March 2025) (Ruling)

Neutral citation: [2025] KECA 526 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPLICATION E607 OF 2024
DK MUSINGA, M NGUGI & F TUIYOTT, JJA
MARCH 21, 2025**

BETWEEN

SIMON MBUGUA APPLICANT

AND

SAHRA KHALIF YUSUF 1ST RESPONDENT

ABDISAMAD IBRAHIM AHMED 2ND RESPONDENT

SUED AS THE ADMINISTRATORS OF THE ESTATE OF IBRAHIM AHMED - DECEASED

(Being an application for stay of the trial court proceedings in Nairobi HC COMMIN No. E199 of 2022 and against the Ruling of the High Court of Kenya at Nairobi (J.W.W. Mong'are, J.) delivered on 19th September 2024 in HC COMMIN No. E119 of 2022)

RULING

1. Simon Mbugua, the applicant, is faced with bankruptcy proceedings and seeks the protection of this Court for stay of proceedings in Nairobi HCCOMM No. E027 of 2022 *Sabra Khalif Yusuf and Abdisamad Ibrahim Ahmed (suing as administrators of the estate of Ibrahim Ahmed (deceased) v Simon Mbugua*. It is an application anchored on the provisions of rule 5(2)(b) of the [Court of Appeal Rules, 2022](#), although the applicant also cites constitutional provisions and provisions of the [Appellate Jurisdiction Act](#).
2. In those bankruptcy proceedings, the estate of the deceased seeks, inter alia, that the applicant be declared bankrupt for having committed various bankruptcy offences. The applicant, on the other hand, moved the court in Nairobi HCCOMM No. E119 of 2022 HCCOMM No. E027 of 2022 *Sabra Khalif Yusuf and Abdisamad Ibrahim Ahmed (suing as administrators of the estate of Ibrahim Ahmed (deceased) v Simon Mbugua* (the setting aside proceedings) seeking, amongst other reliefs, that the statutory demand dated 6th August 2022 be declared to be of no legal effect because the monies



claimed by the estate had been fully paid by the applicant. These latter proceedings were dismissed on 19th September 2024 in a ruling by Mong'are, J. on the basis that the applicant had not provided sufficient evidence to show that he had settled the debt with the judgment creditor.

3. Aggrieved, the applicant filed a notice of appeal dated 2nd October 2024.
4. We are told that the two proceedings are intertwined and unless the bankruptcy proceedings are stayed, the trial court will proceed to declare the applicant bankrupt, effectively negating any opportunity for him to present evidence on appeal that the alleged debt was indeed settled. It is contended that the declaration of bankruptcy could result in irreversible consequences for the applicant, such as asset seizure and restrictions on financial and legal rights. In addition, any subsequent decision of the appellate court might be ineffective as the damage to the applicant's status and assets would have already occurred. The applicant asserts further that the respondents will not suffer any prejudice if the stay is granted as the matters before the trial court will proceed after the intended appeal is heard and determined.
5. At the plenary hearing of the motion, learned counsel, Ms. Shikali, appearing for the applicant, sought to demonstrate that the appeal is arguable because the learned judge erred in law and fact by; failing to properly consider the affidavits sworn by Peter Muchiri and Kevin Malinga on 25th July 2022, both of which were unopposed, to the effect that they delivered multiple payments to the deceased in settlement of the debt; disregarding unchallenged bank statements of the applicant which demonstrated the withdrawal of funds that were subsequently delivered to the deceased; and failing to give sufficient weight to the applicant's evidence of payment.
6. Although the respondents did not file a response to the stay application, learned counsel, Mr. Owino, representing them, rallied their opposition on the basis of two contentions. Relying on regulation 15 of the Insolvency Regulations, it was submitted that once the bankruptcy proceedings were filed, the setting aside proceedings evolved into the bankruptcy cause and the former was spent. Counsel explained that a statutory demand alone cannot be deemed as proceedings and, the setting aside application having been declined, there are no proceedings left to stay.
7. It was the position of the respondents that if the Court was minded to grant stay, then the applicant should deposit a sum of Kshs.6,183,859.25 in Court or in a joint account in the names of the advocates representing the parties.
8. The principles that guide the Court in granting stay of proceedings are well settled; that the applicant must first demonstrate that the appeal or intended appeal is arguable, that is, it is not frivolous, and that the appeal or intended appeal, if successful would, in the absence of an order of stay, be rendered nugatory. In *M/S Karsan Ramji & Sons Limited v Athumani & another (Suing for and on behalf of the Wamwanyundo Clan & 6 others)* (Civil Application E034 of 2023) [2024] KECA 563 (KLR) this Court explains why an order of stay of proceedings is only available in exceptional circumstances and the threshold to be reached:

“We agree with the respondent that whereas the considerations for granting stay of execution pending appeal are the same as those for stay of proceedings pending appeal, when it comes to the nugatory aspect, in the latter case a higher threshold is required to be met than in the former case. This must be so because an order staying proceedings has the effect of derailing the pending proceedings before a determination is made therein. It interferes with the hearing schedules of the trial court and may lead to injustice being occasioned to the respondent whose constitutional right under Articles 159(2)(d) may thereby be curtailed. In deciding whether an appeal will be rendered nugatory, the Court has to consider the



conflicting claims of both parties and each case has to be considered on its own merits in line with the overriding objective in sections 3A and 3B of the [Appellate Jurisdiction Act](#) and the need to ensure that, when exercising discretion, the principle of proportionality is taken into account. See *Kenafriic Matches Ltd v Match Masters Limited & Another* (supra). This position was restated in the case of *African Safari Club Limited v Safe Rentals Limited* [2010] eKLR, where this Court held that:

“ with the above scenario of almost equal hardship by the parties, it is incumbent upon the Court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... We think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable.”

9. Similarly, in [Waitbaka v Tribunal appointed to investigate the conduct of the Honourable Lady Justice Lucy Njoki Waitbaka & another; Kenya Magistrates & Judges Association \(Interested Party\)](#) [2020] KECA 571 (KLR) this Court further expressed itself as follows:

“We note that stay of proceedings is a serious, grave and fundamental judicial action which interferes with the right of any party to conduct litigation. (See: *Francis N. Githiari v Njama Limited* [2006] eKLR). It impinges on the right of access to justice, right to be heard without delay and the right to a fair trial. While addressing the issue of stay of proceedings in the persuasive case of *Global Tours & Travels Limited* (supra), Ringera, J as he then was stated thus:

“ 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 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. 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 whether or not the intended appeal 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.”

10. From the impugned ruling in the setting aside application, it is clear that it was in respect to proceedings under regulation 17(3),(5),(4),and (6) of [Insolvency Regulations](#) which reads:

“ 17. Hearing of application to set aside statutory demand

3. If the application is not dismissed under paragraph (1), the Court shall fix a date and venue for it to be heard, and shall give at least seven days’ notice to—
 - a. the debtor or, if the debtor’s application was made by an advocate acting for him, to the advocate,
 - b. the creditor; and



- c. any other person who is named in the statutory demand as the person whom the debtor may enter into communication with in reference to the statutory demand or, if more than one person is named, the first person to be named.
4. Where the creditor responds to the application, the creditor shall serve the response upon the debtor and the Court at least three days before the date of hearing of the application.
5. On the hearing of the application, the Court shall consider the evidence before it, and may either summarily determine the application or adjourn it, and shall give such directions as it considers appropriate.
6. The Court may grant the application if—
 - a. the debtor appears to have a counterclaim, set-off or cross-demand which equals or exceeds the amount of the debt or debts specified in the statutory demand;
 - b. the debt is disputed on grounds which appear to the Court to be substantial;
 - c. it appears that the creditor holds some security in respect of the debt claimed by the demand, and either paragraph (6) is not complied with in respect of the demand, or the Court is satisfied that the value of the security equals or exceeds the full amount of the debt; or
 - d. the Court is satisfied, on other grounds, that the demand ought to be set aside.”

11. In dismissing the applicant’s application, the insolvency court held:

“At present, the Judgment Debtor’s position is that it has fully settled the amount owing through cash payments made directly to the Judgment Creditor or sent through their errand persons when he was still alive. He produced bank statements to show that monies which were paid were withdrawn from his bank accounts on the dates that the payments were made. He also produced affidavits sworn by his errand persons, Peter Muchiri and Kevin Malinga on 25th July 2022. However, the evidence is not sufficient to ascertain that the Judgment Creditor received the amounts. Hence, I am not persuaded that the Judgment Debtor has fully offset the debt.”

12. It may be an arguable point that the insolvency court failed to carry out an exhaustive analysis of the evidence before reaching the conclusion that “the evidence is not sufficient to ascertain that the judgment creditor received the amounts”. This, on its own, is an argument worthy of interrogation at the hearing of the intended appeal. The intended appeal is therefore arguable.



13. Regarding whether we should make the exceptional order of stay of proceedings in the related bankruptcy proceedings, we start by observing that while the intended appeal does not arise from those pending proceedings, there was concession by counsel for the respondents that upon the dismissal of the application to set aside the statutory demand, the setting aside evolved into a bankruptcy cause. In a sense, the two proceedings are intimately connected. While the dismissal of the application was a negative order and could not be stayed, the consequence of that order is that it paves way for the making of a bankruptcy order as is sought in the bankruptcy proceedings.
14. It is such eventuality that the applicant says will render the intended appeal nugatory because a presumption of insolvency will negate any opportunity for him to present evidence on appeal as to payment of the alleged debt. We are not sure we follow this first argument as we are not aware of any law that would prevent him from pursuing his right of appeal.
15. There is a second matter raised. We are told that a declaration of bankruptcy would result in irreversible consequences for him, such as asset seizures, restrictions on financial and legal rights and irreversible damage to his reputation. If this Court was to grant stay only for those reasons, then it would mean that an automatic stay of bankruptcy proceedings would be deserved once a dismissal of an application to set aside a statutory demand has been challenged by way of appeal. The debt involved is a sum of Kshs.6,183,359.25. Although the applicant still disputes it, to be borne in mind is that there is a court determination that he has not proved settlement of the debt, in addition to the right of the respondents to pursue the bankruptcy proceedings to conclusion. In balancing these competing positions, we observe that the applicant does not allege that payment of the contested amount is beyond his reach or will cripple him financially. It has not been explained why payment cannot be made under protest even as the applicant pursues his appeal so that the dire consequences of a bankruptcy order can be avoided.
16. In a word, the applicant has not done enough to persuade us that he is deserving of the exceptional relief of stay of proceedings. We dismiss the notice of motion dated 12th November 2024 with costs to the respondents.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF MARCH 2025.

D. K. MUSINGA, (PRESIDENT)

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JUDGE OF APPEAL

MUMBI NGUGI

.....

JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

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

signed

DEPUTY REGISTRAR.

