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) (24 May 2024) (Ruling)

Neutral citation: [2024] KECA 563 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPLICATION E034 OF 2023

AK MURGOR, KI LAIBUTA & GV ODUNGA, JJA

MAY 24, 2024

BETWEEN

M/S KARSAN RAMJI & SONS LIMITED ..... APPLICANT

AND

SHABAN ATHUMANI AND ALEX FURAHA CHARO (SUING FOR AND ON BEHALF OF THE WAMWANYUNDO CLAN ..... 1ST RESPONDENT

DIRECTOR OF LANDS ADJUDICATION AND SETTLEMENT .... 2ND RESPONDENT

DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER, KILIFI ..... 3RD RESPONDENT

CHIEF LAND REGISTRAR ..... 4TH RESPONDENT

NATIONAL LAND COMMISSION ..... 5TH RESPONDENT

MINISTRY OF LAND AND URBAN DEVELOPMENT ..... 6TH RESPONDENT

ATTORNEY GENERAL ..... 7TH RESPONDENT

(Being an application for stay of proceedings pending appeal from the ruling of Malindi Environment and Land Court (M. A. Odeny, J) delivered on the 20th November, 2023 in ELC Case No. 230 of 2018)

RULING

1. Shaban Athumani and Alex Furaha Charo (Suing for and on behalf of the Wamwanyundo Clan), described in this application as the 1st respondents, instituted Malindi Environment and Land Case Number 230 of 2018 (*Shaban Athumani and Alex Furaha (Suing on behalf of Wamwanyundo Clan*

v Karsan Ramji & Sons Limited & Others) against the applicant and the 2nd to 7th respondents claiming beneficial ownership of Kilifi/Kawala (A) Kadzodzo/399 situated in Jimba/Kaliang'ombe Adjudication Section (the suit property). In its defence dated 27th March 2019, the applicant also claimed ownership of the suit property. By a Notice of Motion dated 20th March 2023, the applicant sought leave to amend its defence to include a counterclaim after the 1st respondents had given evidence.

2. On 20th November 2023, the learned Judge (M. A. Odeny, J.) dismissed the applicant's application with costs on the grounds that the applicant was aware of its line of defence against the 1st respondents since the case was filed in 2018; that the amendment sought to introduce a new cause of action, which would cause prejudice since its effect would be to cause the 1st respondents to file fresh pleadings to respond to the amendments.

3. Dissatisfied with the said decision, the applicant lodged a Notice of Appeal dated 21st November 2023 on 22nd November 2023, and filed the Notice of Motion dated 6th December 2023 seeking an order staying further proceedings in Malindi Environment and Land Case Number 230 of 2018 -*Shaban Athumani and Alex Furaha (Suing on behalf of Wamwanyundo Clan) v Karsan Ramji & Sons Limited & Others* pending hearing and determination of the intended appeal. The Motion was supported by the affidavit sworn on 6th December 2023 by Kishorkumar Dhanji Varsani, the applicant's director. According to the deponent, when M/s. Yano & Company Advocates took over the conduct of the case on its behalf on 22nd February 2023, they realised that there was need to apply for leave to amend the applicant's defence to include a counterclaim. However, the application for leave was opposed by the 1st respondents and consequently dismissed on 20th November 2023.

4. In the applicant's view, the intended appeal raises arguable issues, is meritorious and has high chances of success as evidenced by the draft memorandum of appeal attached to the supporting affidavit. However, the applicant was apprehensive that the pending suit would proceed to further hearing unless the proceedings were stayed. If that were to happen, then in the applicant's view, its intended appeal would be rendered nugatory. It was the applicant's case that the amendments were intended to enable the High Court determine the issues in dispute once and for all, and enable the applicant to fully plead its case and seek appropriate reliefs and remedies.

5. In response by way of a replying affidavit sworn on 13th December 2023, Shabani Athumani Maitha, one of the 1st respondents, averred that the application did not meet the threshold set in law and precedents; that to stay of proceedings when the intended appeal has not been filed is an affront to Article 159 of the *Constitution* on the 1st respondent's access to justice; that the trial court had already commenced the hearing and his witnesses had testified, and hence the application was meant to scuttle further hearing of the suit; that the applicant's application seeking leave to amend was filed 5 years after the suit had been filed, and that it was meant to delay the resolution of the suit contrary to Article 159(2) of the *Constitution*; that, despite the applicant being entitled to the right of appeal, the 1st respondents are also entitled to hearing and determination of their suit without unreasonable delay; and that the 1st respondents stood to suffer prejudice if stay of proceedings was granted. They prayed that the application be dismissed with costs.

6. When the matter was called out for virtual hearing before us on 5th February 2024, learned counsel, Mr. Ngaira, appeared for the applicant while Mr. Gakuo appeared for the 1st respondents. There was no appearance for the other respondents despite due service of the hearing notice on their legal representatives on record. Both Mr. Ngaira and Mr. Gakuo informed the Court that they had filed their submissions which they relied on with brief oral highlights.

7. The applicant's written submissions were filed by Yano & Company Advocates on 14th December 2023. In its submissions, the applicant cited the case of *David Morton Silverstein v Atsango Chesoni* (2002) eKLR; and *Republic v Kenya Anti-Corruption Commission and 2 Others* [2009] eKLR highlighting the twin conditions required to be satisfied before stay of execution or proceedings pending an appeal can be granted. It was confirmed that the appellant had filed the requisite Notice of Appeal to invoke the jurisdiction of the Court under rule 5(2) (b) of the *Rules of this Court*, and that the applicant had annexed to its affidavit a draft Memorandum of Appeal listing several grounds of appeal. On the authority of *Retreat Villas Limited v Equatorial Commercial Bank Limited and 2 Others* Civil Application No. 40 of 2006; and *Transouth Conveyors Limited v Kenya Revenue Authority & Another* [2007] eKLR, an applicant need not establish a multiplicity of arguable grounds, and that a single issue will suffice. According to the applicant, the grounds of appeal in the Draft Memorandum of Appeal raise serious questions of law for consideration by the Court. Citing the case of *Kenya Commercial Bank Ltd v Nicholas Ombija* [2009] eKLR, the applicant submitted that an arguable appeal is not one that must necessarily succeed, but one which ought to be argued fully before the Court. In the applicant's view, the first of the two conditions had been met.

8. As regards the second ground, it was submitted that the intended appeal will be rendered nugatory if an order for stay of proceedings is not granted as the hearing of the suit will proceed thereby rendering the intended appeal an academic exercise; that, should the said hearing proceed on the basis of the pleadings before the trial court, the applicant would be denied an opportunity to ventilate all the issues in the matter; and that, should the intended appeal succeed, it would mean re-opening the suit, which would amount to wastage of useful and scares judicial time and resources, as well as convolution of the issues.

9. It was therefore submitted that the applicant had satisfied the twin principles under rule 5(2) (b) of this *Court's Rules*. We were urged to allow the application.

10. On their part, the 1st respondents relied on the submissions filed by Muturi Gakuo & Kibara Advocates dated 18th December 2023 in which it was submitted that the intended appeal is delaying tactic by the applicant, which goes against the timely, cost effective and proportionate resolution of disputes meant to ensure access to justice by parties as provided in Article 159 of the Constitution; that the decision whether or not to grant an order for stay of proceedings is a discretionary one and must be exercised judiciously, and that the court must consider if it is in the interest of justice to grant the same. In support of the application, the 1st respondents relied on the decision of Gikonyo, J. in *Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri* [2015] eKLR in which the factors to be considered in granting stay of proceedings were outlined.

11. It was submitted that an order for stay of proceedings is an equitable remedy, and that the applicant must come to court with clean hands. Relying on the decision of Ringera, J. (as he then was) in *Global Tours & Travels Limited* Nairobi HC Winding Up Cause No. 43 of 2000, the respondents submitted that stay of proceedings should not be confused with a stay of execution pending appeal; and that stay of proceedings is a grave judicial action, which seriously interferes with the right of a litigant to conduct his litigation and impinges on the right of access to justice, the right to be heard without delay and, overall, the right to fair trial. Therefore, the test ought to be high and stringent.

12. Regarding the threshold for stay of proceedings, the 1st respondents relied on passages in *Halsbury's Laws of England*, 4th Edition Vol. 37 page 330 and 332 for the opinion that stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation, and ought to be granted sparingly, and only in exceptional cases.

13. It was submitted that the discretion should be exercised with a view to proper use of judicial time and resources to dispense justice to the people and guard against multiplicity of applications meant to delay the finalisation of matters, which would be contrary to the spirit of Article 159 of the Constitution. The 1st respondents cited the case of *Christopher Ndolo Mutuku & Another v CFC Stanbic Bank Ltd* (2015) eKLR for the proposition that the court ought to consider the overall impression and make out the total sum of the circumstances. According to the 1st respondents, this is a case in which proceedings are still pending before the trial court and, therefore, an order staying those proceedings would be counterproductive, and would delay finalization of this suit. Yet, no compelling reasons or prima facie case was established to persuade the court to stay proceedings. According to the 1st respondents, it would not be in the interest of justice to exercise the court's discretion and grant stay of proceedings.

14. We were urged to dismiss the application.

15. We have considered the application, the written and oral submissions and the law.

16. As both the applicant and the 1st respondents appreciate, the principles that guide the consideration of an application of this nature are now well settled. For an applicant to succeed, he or she must have a pending appeal or must have expressed an intention to appeal against the decision in question by filing a Notice of Appeal in order to properly invoke this Court's jurisdiction. It should then be demonstrated that the appeal or intended appeal, as the case may be, is arguable, or as is often said, not frivolous. The applicant must, in addition, show that the appeal would be rendered nugatory absent stay. The two conditions are considered conjunctively so that failure to satisfy either leads to dismissal of the application.

17. Explaining the rationale for these twin principles, this Court in *Peter Gathecha Gachiri v Attorney General and 4 Others* Civil Application Nai 24 of 2014 (unreported) held that:

> "Rule 5(2)(b) of the *Rules of this Court* on which the application is premised confers on us independent discretionary jurisdiction exercisable in accordance with the twin principles, namely, that the appeal must be shown to be arguable and, in addition, that the appeal, if successful, shall be rendered nugatory if stay is not granted. These principles have been developed by the court as a guide in the exercise of its discretionary power in determining an application premised on Rule 5(2)(b). The rationale in these principles is intended to balance two parallel propositions; first, that a successful litigant should not be deprived of the fruits of a judgment in his favour without just cause and; secondly that a litigant who is aggrieved by a decision must not be deprived of the right to challenge it in the next higher court (see *Butt v Rent Restriction Tribunal* [1982] KLR 417. See also *Kenya Shell Ltd v. Kibiru & Another* [1986] KLR 410..... It is imperative for an applicant seeking an order under Rule 5(2)(b) to satisfy the Court on both principles. An applicant must show that the appeal is not frivolous and is arguable. It is now settled that an applicant need not demonstrate a plethora of arguable points. It is sufficient even if there be a solitary arguable point. An applicant must further show that the appeal, if successful, will be rendered futile if stay is not granted."

18. Regarding the first principle on arguability of the appeal, this Court holds the view that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous. See *Joseph Gitahi Gachau & Another v. Pioneer Holdings (A) Ltd & 2 others*, Civil Application No. 124 of 2008. It is one that is deserving of consideration by the Court and warrants a response from the opposite party. See *Kenafric Matches Ltd v Match Masters Limited & Another* Civil Application No. E902 of 2021 (UR). However, as held in *Stanley Kang'ethe v Tony*

Keter & 5 others [2013] eKLR, it is not necessary that the applicant demonstrates a multiplicity of arguable issues since a single bonafide arguable ground of appeal if raised is sufficient for the purposes of the first condition. See *Damji Pragji Mandavia v Sara Lee Household & Body Care (K) Ltd*, Civil Application No. Nai 345 of 2004.

19. In this case, the applicant intends to argue, amongst other grounds, that the learned Judge erred in the exercise of her discretion in declining to grant it leave to amend its defence and include a counterclaim. It is not in doubt that discretion is meant to be exercised judiciously, not capriciously or whimsically. Where it is alleged that the discretion was not exercised in accordance with those principles, then the Court may interfere with that exercise of discretion. Accordingly, that allegation is a matter that this Court would be entitled to interrogate and hear both the applicant and the respondents thereon before arriving at its decision. At this stage, we are not required to and it is not desirable that we form a conclusive view on the intended appeal. As this Court held in *National Industrial Credit Bank Ltd v Aquinas Francis Wasike & another* [2006] eKLR:

> " It is to be remembered that in an application such as this the grounds are not to be argued; all an applicant is required to do is to point out to the Court the ground or grounds which he believes are arguable and leave it to the Court to decide on the issue of whether or not the matters raised are arguable."

20. While the applicant may well fail to persuade the Court at the hearing of the intended appeal that its appeal is merited, we find, without saying more, lest we embarrass the bench that will be seized of the main appeal, that the intended appeal is not frivolous. It is arguable. The issues raised are deserving of consideration by the Court and warrants a response from the opposite party.

21. On the nugatory aspect, which an applicant must also demonstrate, this Court in *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227 held that:

> " .... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

22. As to what amounts to trifling, the Court in the case of *Permanent Secretary Ministry of Roads & another v Fleur Investments Limited* [2014] eKLR it was held that:

> " A trifling appeal is one of very little importance, one whose determination is of little or no legal consequence because of a past event(s) or an earlier finding by a court of law."

23. In this case, the applicants' argument is that that since it intends to amend its defence in order to introduce a counterclaim, should the matter proceed before its appeal is allowed, its counterclaim will be locked out from consideration by the trial court and that the appeal, even if it were to succeed, will be rendered nugatory. 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 *Kenafric 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."

24. We bear in mind what this Court stated in *Lucy Njoki Waithaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commission; Kenya Magistrates & Judges Association (Interested Party)* [2020] eKLR that:

> " 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:
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> > " 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.'"

25. We agree with Gikonyo, J's holding in the case of *Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri* (*supra*) in which he held that:

> " The Court is aware the Defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay.
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> That constitutional desire demands proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of the *Constitution* which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner. That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of s and cons of granting or not granting the order. It will also consider 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."

26. In arriving at his decision in the above cited case, the learned Judge cited a passage in *Halsbury's Laws of England*, 4th Edn. Vo. 37 page 330 and 332, 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 proceeding beyond all 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 not 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 the case."

27. In this case, the applicants are appealing against an exercise of discretion by the dismissal of its application for leave to amend its defence to include a counterclaim. A counterclaim by its nature is a separate suit, and is only incorporated in the defence as a matter of convenience in the suit so that all matters may be disposed of at the same time. Otherwise, being a separate suit, it may stand on its own. See *Samaki Industries (Nairobi) Ltd v Samaki Industries (K) Ltd* (2) [1995-98] 2 EA 369.

28. Without attempting to deal with the issues in the intended appeal, it is our view that the applicant has not persuaded us that, if its intended appeal succeeds, that success will be pyrrhic. In applications of this nature, the burden is on the applicant to persuade the Court that, if it succeeds, it has no avenue of pursuing its claim against the respondents. We bear in mind the pronouncement by the Court in *Stanley Kangethe Kinyanjui v Tony Ketter & others* (*supra*) that:

> " Whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed if allowed to happen will be reversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved."

29. This Court in *David Morton Silverstein v Atsango Chesoni* Civil Application No. Nai. 189 of 2001 [2002] 1 KLR 867; [2002] 1 EA 296 expressed itself as follows:

> " On this aspect of the matter we think we must follow the decision of this Court in the case of *Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd & Another*, Civil Application No. NAI 50 of 2001 (29/2001 UR), (Unreported). That was also an application to stay the proceedings in the High Court pending the hearing and determination of an intended appeal to this Court. In its ruling regarding whether the intended appeal's success would be rendered nugatory if a stay was not granted, the Court stated as follows:
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> > " ... The onus of satisfying us on the second condition, that un less stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the

superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless"

These remarks aptly apply to the application before us. What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.

The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5(2)(b) of the *Court's own rules*. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay."

30. We are not saying that under no circumstances should proceedings be stayed. Each case must be considered on its own facts and circumstances. Where a deserving case is made, the Court may well issue the order staying proceedings pending an appeal or an intended appeal. In this case, we have not been told what impediment the applicant stands to face in lodging its claim against the applicant even if by the time the appeal is heard and determined the suit in the trial court will have been determined.

31. In the premises, we are not persuaded that the intended appeal, if successful, will be rendered nugatory absent stay of proceedings. As the applicant has failed to surmount the second hurdle, this Motion fails and is hereby dismissed with costs.

32. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF MAY, 2024.

A. K. MURGOR

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JUDGE OF APPEAL

DR. K. I. LAIBUTA C.Arb, FCIArb.

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JUDGE OF APPEAL

G.V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

Signed

DEPUTY REGISTRAR