



**Muku v Karl Salzmann Limited & another (Civil Application
E065 of 2023) [2024] KECA 554 (KLR) (24 May 2024) (Ruling)**

Neutral citation: [2024] KECA 554 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPLICATION E065 OF 2023
P NYAMWEYA, KI LAIBUTA & GV ODUNGA, JJA
MAY 24, 2024**

BETWEEN

LUCY WANJIKU MUKU APPLICANT

AND

KARL SALZMANN LIMITED 1ST RESPONDENT

KARL SALZMANN 2ND RESPONDENT

RULING

1. The applicant, Lucy Wanjiku Muku, and the 2nd respondent, Karl Salzmann, were at all material times shareholders and co- directors in the 1st respondent, Karl Salzmann Limited, (the company). The precis of the application before us is that the applicant filed a petition dated 14th October 2015 in the High Court of Kenya at Mombasa in Winding Up Cause No. 3 of 2015 seeking to have the company wound up mainly on the ground that, since its incorporation, the company was characterized by poor and oppressive management.
2. In response to the applicant’s petition, the respondents filed a cross-petition dated 6th December 2019 seeking: orders that the applicant’s petition be dismissed with costs; a declaration that the entry of the applicant’s name in the register as holding 51% of the shares in the company was without sufficient cause, and in breach of her fiduciary duty to the 2nd respondent; an order to compel the applicant to transfer her shares to the 2nd respondent; and an order that the applicant bears the costs of the cross-petition.
3. The respondents’ cross-petition was mainly anchored on the ground that, even though the applicant appears as the majority shareholder, such shareholding was obtained without sufficient cause and in breach of her fiduciary duty to the 2nd respondent, and through fraudulent, negligent or innocent misrepresentation.



4. The respondents' case was that it was the 2nd respondent who was solely responsible for the huge investments made to set up and acquire property for and on behalf of the 1st respondent; and that they constructed villas, which the 2nd respondent is unable to sell due to the applicant's hostility towards him, and to her absence from the country.
5. When the winding up cause came for hearing on 27th March 2023, learned counsel for the applicant, Mr. Gikandi Ngibuini, applied for an adjournment on the grounds that he was not prepared to proceed; that since the month of November 2022 to February 2023, he was unable to effectively manage his firm due to certain medical condition, which allegedly caused him excruciating pain on the right shoulder; and that, in the circumstances, counsel lost track of the petition until it came up for hearing on 27th March 2023.
6. When the court declined counsel's application for adjournment, Mr. Gikandi Ngibuini applied to withdraw the applicant's petition to the respondents, which was likewise denied with orders that the hearing of the cross-petition proceeds.
7. Counsel for the applicant then made an application for stay of proceedings in the cross-petition pending appeal against the afore-mentioned orders of the trial court, which was also dismissed. Consequently, the cross-petition proceeded to hearing.
8. Dissatisfied with the orders of the trial court, the applicant moved to this Court on appeal on 6 grounds set out in the applicant's undated memorandum of appeal, namely:

“that in rejecting the application for adjournment made by the Appellant on 27th March 2023, the trial court failed to exercise the court's discretionary powers properly hence the trial court acted erroneously both in law and in fact; that the trial court erred in law in rejecting the Appellant's application for the withdrawal of the petition with costs to the Respondents; that the trial court erred in law by treating the said Mombasa High Court Winding Up Cause No. 3 of 2015 as though that petition belonged to the court and not the parties who had filed the same; that the trial court erred in that it was openly biased against the Appellant; that the trial court erred in fact in that it failed to realize that even advocates (and for that matter even judicial officers) are just but mere human beings whose capacities are generally limited; and that the trial court erred in making a determination that was totally against the weight of the law and the evidence.”

9. By a Notice of Motion dated 14th July 2023, and made pursuant to rule 5(2) (b) of this Court's Rules, the applicant seeks stay of further proceedings in Winding Up Cause No. 3 of 2015 pending hearing and determination of the intended appeal.
10. The applicant's Motion is supported by the applicant's annexed affidavit and that of her counsel, Mr. Gikandi Ngibuini, both sworn on 14th July 2023 essentially deposing to the grounds set out on the face of the Motion narrating the factual background prompting the appeal and the Motion for the orders thereby sought. According to the applicant, the intended appeal is arguable with a good chance of success; and that, if stay of further proceedings is not granted, and the cross-petition proceeds to hearing, the applicant will suffer irreparable loss and the appeal rendered nugatory.
11. Counsel filed written submissions, a list and bundle of authorities dated 15th September 2023 citing 5 judicial decisions, namely: *Teachers Service Commission v KNUT & 3 Others* [2015] eKLR, highlighting the principle that the purpose of rule 5(2) (b) is essentially a tool for preservation of the substratum of the appeal; *Equity Bank Limited v West Link Mbo Limited* [2013] eKLR, submitting that if the subject matter of the appeal were to dissipate, an appeal would be merely academic; *Stanley*



- Kang'ethe Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR and *Republic v Kenya Anti-Corruption Commission & 2 Others* [2009] eKLR on the twin principles for the grant of orders under rule 5(2) (b) of this Court's Rules. In addition, counsel cited this Court's decision in *Festus Kariuki Mate & Another v Martin Nyaga Wambora & Another* [2014] eKLR, highlighting the principle that an arguable appeal is not one that is merely frivolous or worthless.
12. The Motion was opposed vide the 2nd respondent's replying affidavit sworn on 10th November 2023 stating that the intended appeal is not arguable; that stay of proceedings will gravely and fundamentally prejudice the respondents; that, since the impugned orders were made on 27th March 2023, the applicant has not taken any steps to obtain the proceedings or lodged the record of appeal; that, even if stay of further proceedings is not granted, the applicant's intended appeal would not be rendered nugatory; and that, since the applicant's petition was dismissed, there is no petition to pursue subject to the outcome of the intended appeal; and that the cross-petition is a stand-alone suit, which stands to be determined on its own merits. They prayed that the applicant's Motion be dismissed.
 13. Learned counsel for the respondents, M/s. Muriu Mungai & Company LLP, filed written submissions, list and bundle of authorities dated 10th November 2023 citing the cases of *Pandya Memorial Hospital v Geeta Joshi* [2020] eKLR, submitting that adjournments, even for the first time, are to be granted on sound reason; *David Morton Silverstein v Atsango Chesoni* [2002] eKLR and *Standard Limited & 2 Others v Wilson Kalya & Another T/A. Kalya & Company Advocates* [2002] eKLR for the proposition that an appeal would not be rendered nugatory merely because proceedings have continued in the court below; and *RVACL & Another v Agricultural Finance Corporation & Another* [2021] eKLR, submitting that stay of proceedings is an exceptional remedy as it curtails the right to a hearing expeditiously, and that it is to be granted sparingly.
 14. Whether or not to grant the orders sought by an appellant or an intended appellant pursuant to rule 5(2) (b) of the Rules of this court pending appeal, the Court must be satisfied that the applicant has an arguable appeal and that the intended appeal, if successful, would be rendered nugatory if stay of proceedings in ELC No. E315 of 2021 is not granted.
 15. The principles that apply in applications under Rule 5(2) (b) of this Court's Rules for stay of execution or of further proceedings, or for injunctive relief pending appeal or intended appeal have long been settled. To be successful, an applicant must first show that the intended appeal or the appeal (if filed) is arguable, and not merely frivolous. Secondly, the applicant must show that the appeal, or the intended appeal, if successful, would be rendered nugatory if execution or further proceedings in the impugned judgment, decree or order were not stayed.
 16. These principles were enunciated in, among others, the following judicial pronouncements of this Court, including those cited by the parties, and to which we now turn. On the first limb of this twin principle, this Court held in *Anne Wanjiku Kibeh v Clement Kungu Waibara and IEBC* [2020] eKLR that, for stay orders to issue in similar cases, the applicants must first demonstrate that the appeal or intended appeal is arguable, i.e., not frivolous, and that the appeal or intended appeal would, in the absence of stay, be rendered nugatory (see also *Kenya Tea Growers Association and Another v Kenya Planters Agricultural Workers Union* [2012] eKLR; and *Abmed Musa Ismail v Kumba Ole Ntamorua and 4 Others* [2014] eKLR).



17. In principle, stay of proceedings pending appeal is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case. As stated by this Court in *David Morton Silverstein v Atsango Chesoni* [2002] eKLR –

“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”

18. As Gikonyo J correctly held in the High Court of Kenya at Meru in *Kenya Wildlife Service v James Mutembei* [2019] eKLR, which we hereby cite with approval –

“Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”

19. The *Halsbury’s Laws of England*, 4th Edition. Vol. 37 page 330 and 332 put it thus:

“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 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.”

20. Cognisant of the overriding principle of expedition in judicial proceedings, the determinant questions that commend themselves for our determination are: whether the applicant’s intended appeal is arguable; whether exceptional circumstances exist to warrant stay of proceedings of the respondents’ cross- petition pending appeal; whether the applicant would be unduly prejudiced if we were to decline the stay orders sought; and whether her intended appeal would be rendered nugatory.

21. On the 1st question, we take note of the fact that the applicant’s intended appeal was prompted by the trial court’s denial of her counsel’s application for adjournment, and of his ensuing application to withdraw her petition, all in exercise of its discretionary powers. The applicant’s intended appeal raises the question as to whether that discretion was properly exercised, considering the effect of his order to dismiss her petition instead of allowing its withdrawal. While a voluntary withdrawal would not have stood in the way of possible future petition on the same or other grounds, outright dismissal might have barred such action on the basis that the petition was res judicata. While a cursory look at the applicant’s grievance might turn in little difference, it is nonetheless arguable on appeal as to whether the learned Judge’s decision was properly exercised in the circumstances of the case.



22. On the 2nd issue, we take to mind the hallowed principle that “to whom much is given, much is required.” One of the latitudes given to judges and judicial officers in the course of their work is judicial discretion. Black’s Law Dictionary, 10th Edition defines judicial discretion as:

“The exercise of judgment by a judge or court based on what is fair under the circumstances and guided by the rules and principles of law; a court’s power to act or not act when a litigant is not entitled to demand the act as a matter of right.”

23. Madan JA (as he then was) in *United India Insurance Co. Ltd v East African Underwriters (Kenya) Ltd* [1985] E.A had this to say on the matter:

“The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong.”

24. The question here is whether this is a case in which it would be correct to say that the trial Judge’s decision was plainly wrong. It is not clear to us from the record what became of the petition other than the respondents’ submission that it was dismissed with orders that their cross-petition proceeds to hearing, and it did albeit in part. The dismissal of the petition, if that was the case, would explain the intent of the applicant’s Motion styled as “... an application for stay of further proceedings pending appeal from the Judgment and Decree of the High Court of Kenya at Mombasa (Magare Kizito, J.) delivered on 27th March 2023,” even though no formal “judgment” or “decree” accompanies the Motion as presented to us.

25. Be that as it may, we find that there is a difference between the effect of the withdrawal sought by counsel and the ensuing dismissal of the petition, either of which could have implications on the applicant’s rights going forward, and on costs either way, but which is not in issue for our consideration. In the absence of submissions on this matter of fact, we can only conclude that the outcome of the applicant’s petition, whether withdrawn or dismissed, made a difference at law, and ought to have been accorded due consideration. That said, the intended appeal is, in our considered view, arguable on this score.

26. It is also noteworthy that 9 or so months have passed since the applicant’s request for adjournment was declined. The time gone by has invariably allowed the applicant the sufficient time previously sought to prepare and participate in further proceedings in the trial, which we believe was her counsel’s genuine reason for which the adjournment was sought. In the circumstances, we form the view that the applicant’s application for adjournment has been overtaken by events. In view of our finding on the manner in which the learned Judge exercised his discretion to deny withdrawal and, instead, dismissed the applicant’s petition, we conclude that special circumstances exist for stay of further proceedings pending the intended appeal.

27. Turning to the 3rd question, we find that the applicant stands to be prejudiced by further proceedings in the cross-petition before hearing and determination of her intended appeal. Such an eventuality would bar her from litigating on the issues raised in her petition in the event that the respondents invoke the doctrine of *res judicata*. In effect, the substantive merits of the parties’ conflicting claims would be compromised by further proceedings in the cross-petition. On the other hand, if the applicant’s



petition was not dismissed as claimed by the respondents, the applicant's claim that it was raises yet another issue for determination in the intended appeal.

28. In view of our findings on the foregoing three questions, we reach the inescapable conclusion that the applicant's intended appeal would be rendered nugatory if the stay orders sought were not granted. In conclusion, the applicant has satisfied the settled principles for grant of orders under rule 5(2) (b) of this Court's Rules.
29. Having carefully examined the applicant's Motion, the affidavits in support and in reply, the rival submissions and the law, we reach the inescapable conclusion that the applicant's Motion dated 14th July 2023 succeeds and is hereby allowed with orders that:
 - a. The proceedings in the High Court of Kenya at Mombasa in Winding Up Cause No. 3 of 2015 be and are hereby stayed pending hearing and determination of the intended appeal;
 - b. The applicant do file and serve her record of appeal within forty-five (45) days from the date hereof; and
 - c. The costs of this application do abide the outcome of the intended appeal.

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

P. NYAMWEYA

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JUDGE OF APPEAL

DR. K. I. LAIBUTA

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JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

