



**Munyaka v Rising Star Commodities Limited (Civil Application E054 of 2021) [2023] KECA 985 (KLR) (28 July 2023) (Ruling)**

Neutral citation: [2023] KECA 985 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT MOMBASA  
CIVIL APPLICATION E054 OF 2021  
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA  
JULY 28, 2023**

**BETWEEN**

**VICTOR KIOKO MUNYAKA ..... APPLICANT**

**AND**

**RISING STAR COMMODITIES LIMITED ..... RESPONDENT**

*(An application for stay of proceedings pending the hearing and determination of an intended appeal from the ruling of the High Court of Kenya at Mombasa (P.J.O. Otieno, J.) dated 9th December 2019 in Bankruptcy Petition No. 9 of 2014)*

**RULING**

1. The applicant, Dr Victor Kioko Munyaka, intends to appeal against a ruling delivered on December 6, 2019 by which the High Court at Mombasa (P J O Otieno, J) partially allowed his application dated August 11, 2014 in which the applicant had applied for an order to stay any steps pursuant to a bankruptcy notice dated May 19, 2014; an order that bankruptcy notice to be set aside, and for the bankruptcy proceedings instituted against him by Rising Star Commodities Limited, the respondent, to be dismissed.
2. In the said ruling, the High Court found as a fact that the statutory bankruptcy notice on which the bankruptcy proceedings were founded had not been served. The court however declined to strike out the respondent's petition. In doing so, the learned judge took a dim view of the applicant's "less admirable conduct" and directed that "steps be taken to prosecute this petition with some promptitude." The learned judge stated:

"I take it that since 29 September 2011, the debtor has been all aware of the debt, failed to pay same by evasion and he was in fact being misleading, if not mischievous, to assert at paragraphs 14 and 15 of the affidavit in support that he was unaware of any debt. In my view, knowledge of a court decree and failing to pay it, by a person whose duty to Kenyans



is to make law, is a glaring act of bankruptcy conducted brazenly and what would be called elsewhere, with impunity. It is, for that reason that I decline to strike out the petition and direct the steps be taken to prosecute this petition with some promptitude.”

3. Over a year later, the applicant filed a notice of appeal dated April 7, 2021 on which the present application dated March 7, 2023 is hinged. In that application made under rules 1(2), 5(2)(b) of the Court of Appeal Rules and section 3A and 3B of the Appellate Jurisdiction Act, the applicant seeks an order for stay of proceedings in the High Court in Bankruptcy Petition No 9 of 2014. He also seeks “directions on the expeditious filing and hearing of the intended appeal.”
4. Based on the grounds appearing on the face of the application, the depositions in the applicant’s supporting affidavit, and the written and oral submissions by Mr W Nyamu presented before us during the hearing of the application on June 5, 2023, it is the applicant’s case that the intended appeal is arguable and that unless the orders sought are granted, the High Court will proceed with the hearing of the bankruptcy petition, which if granted, will have dire consequences on him if he is declared bankrupt, including losing his position of Cabinet Assistant Secretary (CAS) to which he was nominated. It was submitted that it was a serious error on the part of the learned judge to have allowed the petition to go ahead despite having found that the bankruptcy notice on which the petition was based had not been served.
5. Although the respondent had notice of the hearing of the application, there was no appearance during the hearing and neither had the respondent filed any response to the application.
6. The principles on which this court exercises its discretion in applications of this nature are settled. The applicant is required to demonstrate that the intended appeal is arguable and that unless the orders sought are stayed, the appeal or intended appeal will be rendered nugatory. See Stanley Kang’ethe Kinyanjui v Tony Keter & 5 others, (2013) eKLR. It may well be that the intended appeal is not frivolous. But the apprehension that the applicant will be declared bankrupt, and the appeal rendered nugatory, is premature as the bankruptcy petition is yet to be heard and determined.
7. We bear in mind that the applicant is seeking to stay proceedings in the lower court. As this court stated in the case of Lucy Njoki Waithaka vs Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waithaka & Judicial Service Commissions; Kenya Magistrates & Judges Association (Interested Party) [2020] eKLR “stay of proceedings is a serious, grave and fundamental judicial action which interferes with the right of any party to conduct litigation”. In the same case, the court adopted with approval the judgment of Ringera J, as he then was, in the case of Global Tours & Travels Limited; Nairobi Winding Up Cause No 43 of 2000 as follows:

“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.”
8. With those principles in mind, the impugned ruling of the High Court was delivered on December 6, 2019. The notice of appeal is dated April 7, 2021. Effectively over a year and some months had



lapsed before it was filed. Counsel for the applicant informed us from the bar that there is a pending application before this court for extension of time to regularize that notice of appeal.

9. The present application is dated March 7, 2023 and it is not clear why it took the applicant over four years and some months to make this application. As already noted, the learned judge of the High Court remarked in the impugned ruling that the applicant has been aware of the debt the basis of the bankruptcy proceedings, since September 29, 2011. Given the background, the dilatory conduct of the applicant is not one that favours the exercise its judicial discretion in his favour.
10. Consequently, not being satisfied that the intended appeal will be rendered nugatory if the orders sought are not granted and given the dilatory conduct of the applicant, the application fails and is dismissed. As the respondent did not participate in the application, we make no orders as to costs.

**DATED AND DELIVERED AT MOMBASA THIS 28<sup>TH</sup> DAY OF JULY 2023.**

**S. GATEMBU KAIRU, FCIArb**

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**JUDGE OF APPEAL**

**P. NYAMWEYA**

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**JUDGE OF APPEAL**

**G.V. ODUNGA**

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**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**

