



Prideinn Hotels & Investments Ltd & 3 others v Sai Holdings Limited (Civil Appeal (Application) E087 of 2022) [2023] KECA 934 (KLR) (28 July 2023) (Ruling)

Neutral citation: [2023] KECA 934 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E087 OF 2022
SG KAIRU, P NYAMWEYA & GV ODUNGA, JJA
JULY 28, 2023**

BETWEEN

**PRIDEINN HOTELS & INVESTMENTS LTD 1ST APPLICANT
SHABBIR MOHAMMED KASSAM 2ND APPLICANT
MOHAMMED HASNAIN SHABBIR NOORANI 3RD APPLICANT
GLORY HOTELS & INVESTMENTS LIMITED 4TH APPLICANT
AND
SAI HOLDINGS LIMITED RESPONDENT**

(An application for stay of all further proceedings in Mombasa ELC Cause No. 143 of 2013 pending hearing and determination of the appeal herein)

RULING

1. In a ruling delivered on July 27, 2022, the Environment and Land Court at Mombasa (NA Matheka, J) allowed two applications for amendment of pleadings. One of the applications was by respondent dated March 16, 2022 seeking amendment of the plaint while the second application was by the applicants dated April 4, 2022 for amendment of their defence. The learned Judge concluded that the amendments proposed in both applications were necessary for the purpose of determining the real question or issue in the proceedings and that no prejudice would be occasioned to either party.
2. Aggrieved by the order permitting amendment of the plaint, the applicants filed this appeal contending, among other complaints, that the Judge erred in allowing the same; wrongly permitted introduction of a new and inconsistent cause of action that is statute barred; and failed to consider established law and principles on amendment of pleading.
3. The applicants/appellants are now before us with an application dated October 12, 2022 brought under Section 3 and 3A of the Appellate Jurisdiction Act, Rule 5(2)(b) of the Court of Appeal Rules,



2022 seeking orders that there be stay of all further proceedings in Mombasa ELC Cause No 143 of 2013 pending hearing and determination of the appeal herein.

4. In the affidavit sworn by Mohammed Hasnain Shabbir Noorani, the 3rd applicant in support of the application and in the applicants written submissions orally highlighted by learned counsel Mr Muriuki, it is urged that the appeal is arguable with high chances of success and that if the orders are not granted the ELC will in due course proceed with the hearing and determination of the suit based on the amended pleadings to the detriment of the applicants in which event this appeal will be rendered nugatory.
5. The respondent on the other hand, relying on a replying affidavit sworn by Salim Sultan Moloo, a director of the respondent and written submissions orally highlighted by learned counsel Mr Kinyua Kamundi after setting out in some detail the history of the matter, including reference to arbitration, urge that the application is frivolous; that nothing stops the applicant from raising the matter of limitation before the ELC; that the nugatory test is not met as any proceedings and judgment of the ELC are reversible by this Court should the appeal succeed. Counsel added a novel argument in his oral highlight, without supporting authority, that under the Constitution of Kenya, 2010

“no court in Kenya has any power to stay proceedings as it is an affront to Article 40 and 50”.

6. We have considered the application, the affidavits, and the submissions. The applicants’ appeal is an interlocutory appeal, from a ruling allowing amendment of pleadings. It challenges the exercise of judicial discretion by the learned Judge. Based on the grounds set out in the memorandum of appeal, and bearing in mind that an arguable appeal is not one that will necessarily succeed, we are not prepared to say that it is frivolous. It is arguable.
7. We are however not satisfied that the applicants have demonstrated that the appeal will be rendered nugatory. It is premature, we think, for the appellants to take the view that the substantive judgment that will ultimately be rendered by the ELC will be adverse to them. Moreover, if the applicants will be aggrieved by the substantive judgment that will ultimately be given by the ELC, they will be at liberty to challenge it. It is premature to stop the ELC from proceeding substantively with the matter at this stage. We bear in mind what this Court stated in Lucy Njoki Waitbaka v Tribunal Appointed to Investigate the Conduct of the Honourable Lady Justice Lucy Njoki Waitbaka & 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 Gitbiari 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.”

8. We decline to grant the orders sought. The application dated October 12, 2022 fails and is dismissed with costs to the respondent.

DATED AND DELIVERED AT MOMBASA THIS 28TH 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

