



REPUBLIC OF KENYA



Sidian Bank Ltd v Olitunya & 4 others (Environment & Land Case 397 of 2017) [2024] KEELC 4959 (KLR) (20 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4959 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 397 OF 2017
LC KOMINGOI, J
JUNE 20, 2024**

BETWEEN

SIDIAN BANK LTD PLAINTIFF

AND

ALICE OLWALO OLITUNYA 1ST DEFENDANT

ZENITH PHARMACEUTICALS 2ND DEFENDANT

GREGORY KIVUVA MUINDE 3RD DEFENDANT

JANET MUNYIVA NZOMO 4TH DEFENDANT

THE LAND REGISTRAR KAJIADO 5TH DEFENDANT

RULING

1. This is the Notice of Motion dated 9th January 2024 brought under;
(Under Order 51, rule 1 and 2 of the [Civil Procedure Rules](#), Sections 1A, 1B and 63 (e) of the [Civil Procedure Act](#) and all enabling provisions of the law)
2. It seeks Orders;
 - i. Spent
 - ii. Spent.
 - iii. That there be a stay of proceedings in Kajiado ELC No. 397 of 2017 (*Sidian Bank Ltd vs Alice Olwalo Olitunya & 4 others*) pending the hearing and determination of the intended appeal to the Court of Appeal.
 - iv. Any other or further orders that this court may deem fit and just to grant.



- v. Costs of this application be in the cause.
3. This application supported by Affidavit of Gregory Kivuva Muinde. It is premised on the grounds that the Applicant intends to appeal this Court's ruling delivered on 9th November 2023. In that ruling, the Court dismissed the Applicants' preliminary objection and affirmed its jurisdiction in hearing and determining the suit herein. The Applicants contend that if the proceedings in this suit is not stayed, then the intended appeal which has high chances of success will be rendered nugatory.
 4. The Plaintiff in the Replying Affidavit sworn by Jackline Ndung'u, the Legal Officer contested the application on grounds that the Defendants were out to delay the suit which has substantially been heard and it should be dismissed with costs. She also pointed that should the suit be determined and heard, the Defendants' have a right of appeal and therefore the claim that hearing and determining the suit will render the appeal nugatory is invalid. Additionally, should this suit be stayed and the Defendants' intended appeal at the Court of Appeal fails, then the stay would only serve as a further delay to the determination of the suit. Finally, the Plaintiff deponed that the Defendants had the right to seek stay of proceedings at the Court of Appeal and there was no indication why that had not been done.
 5. This application was canvassed by way of written submissions.

The 2nd 4th Defendants' submissions

6. Counsel submitted that the intended appeal meets the threshold for grant of stay of proceedings as articulated in *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 where Ringera J. held "that stay of proceedings was a matter of judicial discretion in the interests of justice, prima facie merits of the intended appeal and whether it was arguable." Counsel further submitted that the intended appeal was arguable, had been filed expeditiously and that these proceedings should be stayed to allow the substratum of the appeal to be heard. To support this, reference was made to the following cases: *Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi* [2014] eKLR; *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others* (2017) eKLR (Court of Appeal); and *Jasbir Singh Rai & 3 others v. Tarlochan Singh Rai & 4 others* [2014] eKLR (Supreme Court).

The Plaintiff's Submissions

7. In determining whether to grant the stay, Counsel urged this court to make reference to the three bench High Court case of *William Odhiambo Ramogi & 3 others vs Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR. Counsel submitted that if the stay is not granted and the matter is concluded, the intended appeal will not be rendered nugatory because the Defendants have an opportunity to appeal against the judgement. And that if at the appeal, the Court of Appeal determines that this court did not have jurisdiction to determine the suit, then the judgement would be set aside as held in *Mocha Hotel Ltd vs Kwanza Esrares Ltd* [2023] KEELC 21729 (KLR). Additionally, this suit has considerably been heard and only hearing of two Plaintiff witnesses and one Defence witness is pending. Therefore, staying these proceedings would further delay this suit which would be prejudicial to the parties and not in line with section 1A of the *Civil Procedure Act* as the suit has been pending since 2017. He cited the case of *Global Tours & Travels Limited (supra)*. Counsel also questioned why the Defendants had not filed this application at the Court of Appeal and that it has been brought after an inordinate delay because the ruling was delivered on 9th November, 2023 a notice of appeal filed on 23rd November, 2023 and this application filed on 15th January 2024. The application should thus be dismissed and suit be heard expeditiously.



Analysis and Determination

8. I have considered the Notice of Motion, the Affidavit in support, the response thereto and the authorities cited. The issues for determination are:
- i. Whether the hearing and determination of this suit should be stayed pending the intended appeal to the Court of Appeal of the Ruling dated 9th November 2023.
 - ii. Who should bear costs of this application?
9. The Defendants have moved this court seeking stay of proceedings of the suit pending their intended appeal at the Court of Appeal on the question of this court's jurisdiction. While the power to grant a stay of proceedings is discretionary, it should be exercised sparingly and only in exceptional circumstances where it is necessary to prevent an injustice. Courts should be guided by principles of equity and justice; should balance the interests of all parties, ensuring that justice is served without causing undue hardship or prejudice; and take into consideration that the stay of proceedings is not an abuse to the court proceedings. The three bench Judge High Court case of *William Odbiambo Ramogi & 3 others v Attorney General & 6 others; Muslims for Human Rights & 2 others (Interested Parties)* [2020] eKLR enunciated that the following conditions that have to be met in determining whether stay of proceedings should be granted or not:
- a. First, there must be an appeal pending before the higher Court;
 - b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay."
10. Further, the Court of Appeal in *Nairobi City Council v Tom Ojienda & Associates* [2022] KECA 1326 (KLR) held:
- "... for an order of stay of execution or proceedings to issue, 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 would in the absence of an order of stay be rendered nugatory..."



11. On the first ground that there must be an appeal pending at a higher court, the Defendants filed a draft memorandum of appeal together with the application. There is also a Notice of Appeal filed in this court on 23rd November 2023. But other than that, there is no evidence that the Notice of Appeal was filed at the Court of Appeal court as outlined under Rule 77 of the Court of Appeal Rules. I take cognisance that there is correspondence in the file seeking certified copy of proceedings, but while waiting for the said proceedings nothing stopped the Defendants from filing the Appeal, together with a letter requesting for proceedings and a certificate of delay as outlined in the Court of Appeals Registry Manual.
12. On whether the appeal is arguable and if these proceedings are not stayed will be rendered nugatory, I am not persuaded that this is the case. As averred by the Plaintiff, if this suit is heard and determined, the Defendants have a right of Appeal at the Court of Appeal. Should the Court of Appeal find that this court did not have jurisdiction to hear and determine the suit, the judgement would be stayed. This is in no way prejudicial to them. What is prejudicial however, is halting proceedings of the suit awaiting the Defendants' filing of the appeal. Moreover, once the appeal is filed, the Court of Appeal has the discretion and jurisdiction to stay these proceedings if it deems fit.
13. I therefore find this application unmerited and is hereby dismissed with costs to the Plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 20TH DAY OF JUNE 2024.

L. KOMINGOI

JUDGE.

In the presence of:

Ms. C. Mwai for Mr. Muthama for the Plaintiff.

Mr. Okeyo for Mr. J. Nyaribo for the 2nd – 4th Defendants.

Court Assistant – Mutisya.

