



**Khan v International Commercial Company (K) Ltd (Petition (Application)
E009 & E010 of 2023 (Consolidated)) [2023] KESC 84 (KLR) (3 October 2023) (Ruling)**

Neutral citation: [2023] KESC 84 (KLR)

**REPUBLIC OF KENYA
IN THE SUPREME COURT OF KENYA
PETITION (APPLICATION) E009 & E010 OF 2023 (CONSOLIDATED)
SC WANJALA, MK IBRAHIM, N NDUNGU, I LENAOLA & W OUKO, SCJJ
OCTOBER 3, 2023**

BETWEEN

KAYUM KHAN PETITIONER

AND

INTERNATIONAL COMMERCIAL COMPANY (K) LTD RESPONDENT

(eing an application for stay of further proceedings arising from the Judgment and Order(s) of the Court of Appeal in Civil Appeals No. 63 & 124 of 2018 (K. M’Inoti, Dr. K. Laibuta & M. Gachoka JJ.A delivered on 17th February 2023)

Supreme Court declines to issue an order staying proceedings since the substance of the appeal was before the court for determination.

In a case in which an applicant sought stay proceedings a week before the hearing at the Supreme Court, the court held that discretion was tilted towards not issuing interlocutory orders in the nature of stay of proceedings whose effect may not ultimately be of benefit to the parties since the substance of the appeal was before the court for determination.

Reported by John Ribia

Civil Practice and Procedure – stay of proceedings – where an applicant files an application stay of proceedings one week before the hearing of the appeal before the Supreme Court - under what circumstances would the Supreme Court issue an order staying proceedings - whether the Supreme Court could issue an order staying proceedings where the substance of the appeal was before the court for determination - section 3A, 21(2), 23A(1)(a) and 24; , rules 31(1)(6) and 32(1)(2).

Brief facts

The instant matter was mentioned on September 22, 2023 before the Deputy Registrar of the Supreme Court for compliance and was subsequently set down for hearing on October 5, 2023, for determination of all the questions raised in the appeal. One week before the hearing, the applicant sought orders setting aside the decisions by the Court of Appeal in Civil Appeals No. 63 and 124 of 2018, as well as the directions issued by the Employment and Labour Relations Court on December 1, 2017.



Issues

- i. Under what circumstances would the Supreme Court issue an order staying proceedings?
- ii. Whether the Supreme Court could issue an order staying proceedings where the substance of the appeal was before the court for determination.

Held

1. The grant of an order for stay of proceedings was to be entertained only in deserving cases as it impacted the right to expeditious trial. Such orders were discretionary in nature, exercisable by the court upon consideration of the facts and circumstances of each case.
2. The Supreme Court was mindful of the fact that the orders sought by the applicant seeking stay of proceedings orders had been sought too close to the hearing date of the applicant's appeal. The orders that the applicant sought to stay were also issued on February 17, 2023 and the court did not understand why a stay was being sought a week before the hearing of the appeal.
3. The Supreme Court's discretion was tilted towards not issuing interlocutory orders in the nature of stay of proceedings whose effect may not ultimately be of benefit to the parties since the substance of the appeal was now before the court for determination.

Applications dismissed.

Orders

No order as to costs.

Citations

Cases

1. Board of Governors, Moi High School, Kabarak & Daniel Toroitich Arap Moi v Malcolm Bell (Petition 6 & 7 of 2013; [2013] KESC 12 (KLR)) — Explained
2. Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others (Application 5 of 2014) — Mentioned

Statutes

1. Constitution of Kenya, 2010 (Const2010) — In general — Cited
2. Supreme Court Act (No. 7 of 2011) — section 3A, 21(2); 23A(1)(a); 24 — Interpreted
3. Supreme Court Rules, 2012 (No. 7 of 2011 Sub Leg) — rule 31(1)(6); 32(1)(2) — Interpreted

Advocates

Ms. Katile for Applicant

Mr. Kayum Khan for respondent

RULING

1. Upon perusing the notice of motion by Kayum Khan, the applicant, dated August 30, 2023 and filed on September 4, 2023, which application is brought pursuant to the provisions of section 3A, 21(2), 23A(1)(a) and 24 of the [Supreme Court Act](#) as well as rules 31(1) & (6), 32(1) & (2) of the [Supreme Court Rules](#) in which the applicant seeks;
 - i. That this honorable court be pleased to order for stay of further proceedings on the judgments and orders of the Court of Appeal dated February 17, 2023 in Civil Appeals No. 63 and 124 of 2018 pending the hearing and determination of this application;
 - ii. That this honorable court be pleased to order for stay of further proceedings on the judgement and orders of the Court of Appeal Nairobi of February 17, 2023 in Civil Appeals No 63 and 124 of 2018 pending the hearing and determination of SC Petitions No E009 and E010 of 2023 (Consolidated);



- iii. That this honorable court be pleased to order the withdrawal of posting of the Judgments of the Court of Appeal Nairobi in Civil Appeals No 63 and 124 of 2018 from the website of Kenyalaw, until any further orders of this honourable court and these orders be forwarded to the Chief Executive Officer of Kenyalaw and the Court Librarian, through the Court Registrar for implementation accordingly;
 - iv. That in alternate to Prayer No 3, the posting of Judgments in the Court of Appeal Nairobi in Civil Appeals No 63 and 124 of 2018 on the website of Kenyalaw, be prominently marked as suspended until any further orders of this honourable court and these orders be forwarded to the Chief Executive Officer of Kenyalaw and the Court Librarian, through the Court Registrar for implementation accordingly;
 - v. That this honourable court be pleased to permit admittance of the petitioner's submissions in reply dated August 31, 2023; and
2. Upon reading the affidavit in support of the application sworn by the applicant on August 30, 2023 and filed on September 4, 2023; and
 3. Upon considering the grounds in support of the application and the written submissions by the applicant dated August 30, 2023 and filed on September 4, 2023 where he claims that his appeal is arguable, not frivolous and worthy of the court's consideration; that the application raises issues on dictates of the Constitution binding on courts as State Organs, construing the Constitution in a manner that promotes its values and principles, protection of underogable fundamental rights under the Bill of Rights, the exercise of impartiality and maintenance of law in the administration of justice and cognizance of limits of jurisdiction;
 4. Also considering the applicant's further submission that the appeal will be rendered nugatory since the Court of Appeal delivered its judgment upholding the decisions of the trial courts, meaning the trial courts will proceed to hear and determine his claim and impose trial proceedings upon the applicant; and that it is in the public interest that the stay orders are granted;
 5. Further noting that during the pre-trial conference held on September 22, 2023 before the Deputy Registrar, the respondent informed the court that it was not opposed to the granting of the orders staying the proceedings before the Employment and Labour Relations Court, while also subjecting the determination of the other prayers sought in the application to this court's directions; and
 6. Being cognizant of this court's findings on its jurisdiction to grant interlocutory orders and/or reliefs in the nature of stay of proceedings as well as guiding principles of granting of such stay orders as was set out in Board of Governors, Moi High School, Kabarak & another v Malcolm Bell; Petition Nos 6 & 7 of 2013; [2013] eKLR and Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others, SC Application No 5 of 2014; [2014] eKLR;
 7. WE have considered the application, the supporting affidavit, and the submissions in support thereof. We remain alive to the fact that the grant of an order for stay of proceedings is to be entertained only in deserving cases as it impacts the right to expeditious trial. Such orders are discretionary in nature, exercisable by the court upon consideration of the facts and circumstances of each case. In Board of Governors, Moi High School, Kabarak & another v Malcolm Bell [2013] eKLR, we specifically held:

“But in addition to this foundation, it now emerges that the court, in its exercise of discretion, may consider the convenience of interlocutory orders within the context of the appeal itself..



Where necessary, this court may also exercise its discretion to decline to grant interlocutory relief, if the same may imperil the ultimate function of the court – to render justice in accordance with the Constitution and the ordinary law.”

8. We note in the above context that, as a matter of fact, this matter was mentioned on September 22, 2023 before the Deputy Registrar of this court for compliance and was subsequently set down for hearing on October 5, 2023, for determination of all the questions raised in the appeal and where the applicant ultimately seeks orders setting aside the decisions by the Court of Appeal in Civil Appeals No 63 and 124 of 2018, as well as the Directions issued by the ELRC on December 1, 2017. This court, in its judicial setting, is in that regard mindful of the fact that the orders sought by the applicant seeking stay of proceedings orders have been sought too close to the hearing date of the applicant’s appeal. The orders that the applicant seeks to stay were also issued on February 17, 2023 and we do not understand why a stay is being sought a week before the hearing of the appeal. Granted, the appeal is set for hearing on October 5, 2023. From a purely practical level, our discretion is tilted towards not issuing interlocutory orders in the nature of stay of proceedings whose effect may not ultimately be of benefit to the parties since the substance of the appeal is now before us for determination.
9. Having declined to grant the main prayer seeking stay, the remaining prayers -(iii), (iv), and (v) -of the application would naturally collapse as they are consequential or alternatives to that main prayer. In any event, we have seen no proper basis to enter into the realm of publication of court decisions in a matter where the issue is not germane to the appeal before us.
10. We therefore find that the applicant has not established, to the satisfaction of the court, that it is in the interest of justice that the prayers sought in his application should be granted. In the end, we exercise our discretion and do hold that the application is without merit and is one for dismissal.
11. Consequently, and for the reasons aforesaid, we make the following orders:
Orders:
 - i. The notice of motion dated August 30, 2023 and filed on September 4, 2023 be and is hereby dismissed;
 - ii. There shall be no order as to costs.
12. Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF OCTOBER, 2023

.....
M.K. IBRAHIM

JUSTICE OF THE SUPREME COURT
.....

S.C. WANJALA

JUSTICE OF THE SUPREME COURT
.....

NJOKI NDUNGU

JUSTICE OF THE SUPREME COURT
.....



I. LENAOLA

JUSTICE OF THE SUPREME COURT

.....

W. OUKO

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR,

SUPREME COURT OF KENYA

