



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwilu v British Broadcasting Corporation (Civil Case E165 of 2022)  
[2025] KEHC 738 (KLR) (Civ) (30 January 2025) (Ruling)**

Neutral citation: [2025] KEHC 738 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL  
CIVIL CASE E165 OF 2022**

**JN MULWA, J  
JANUARY 30, 2025**

**BETWEEN**

**PHILOMENA MBETE MWILU ..... PLAINTIFF**

**AND**

**BRITISH BROADCASTING CORPORATION ..... DEFENDANT**

**RULING**

1. By an Application dated 22/07/2024 and premised upon Section 1A, 1B, 3A and 75 of the [Civil Procedure Act](#), Order 42 Rule 6(1), Order 43(2) and 3 of the Civil Procedure Rules 2010, the Defendant/Applicant sought Orders:
  - a. Spent
  - b. That pending the hearing and determination of this application inter-partes, this Honourable Court be pleased to grant a stay of proceedings in the suit herein.
  - c. That the defendant be granted leave to appeal against the Order of the High court made on 8<sup>th</sup> July, 2024
  - d. That pending the hearing and determination of the Defendant's intended appeal to the Civil of Appeal, this Honourable Court be pleased to grant a stay of proceedings in the suit herein.
  - e. Costs of and incidental to this application be awarded to the Defendant
2. It is further supported by an affidavit sworn on an even date by Nicholas Wilcox at London, its Director of Litigation and a further affidavit sworn on 28/08/2024 by Siobhan Allen Senior Lawyer – litigation in its corporation.



## Prayers.

3. In Opposition to the application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 31/07/2024.
4. The Defendant's/Applicant's case is that it was denied a hearing on the plaintiff's application dated 5/07/2024 contrary to Article 50 (1) of *the Constitution* of Kenya while it had filed a Notice of Appointment (under protest) and in view of the ruling and directions by the court on 27/06/2024 stating that in essence, the court sat on review and/or appeal of its own decision.
5. Further the defendant asserts that summons to enter appearance issued in the suit on 8/09/2022 had expired on 9/09/2023 and therefore could not be extended under Order 5 Rule 1 and 2 of the Civil Procedure Rules 2010, and therefore the plaintiff's twin applications dated 5/07/2024 for extension of validity and renewal of summons to enter appearance ought not to have been granted.
6. Additionally, the defendant argues that the summons had expired and having not been extended for service out of Kenyan jurisdiction during the period of their validity, the cause of action against the defendant had also lapsed, hence the renewal and extension denied the defendant its right to the defence of limitation under the *Limitation of Actions Act*.
7. It is the defendant's prayer that as a result, the proceedings herein ought to be stayed pending hearing and determination of the intended appeal stating that if the Court of Appeal were to allow the defendant's appeal, it would be uneconomical use of precious judicial time to continue the proceedings herein and would be prejudicial to the defendant as the appeal would be rendered nugatory.
8. In its further affidavit, the defendant deposes that there are sufficient issues arising from the alleged disregard of the court's directions issued on 27/06/2024 demonstrating that the intended appeal is not frivolous adding that jurisdiction of the court forms the substratum of the intended appeal and that filing of an unconditional memorandum of appearance on recent service of summons would amount to acquiescence of jurisdiction thereby rendering the intended appeal nugatory.
9. For the foregoing, the defendant urges the court to exercise its discretion, upon the exceptional circumstances to grant an order of stay of proceedings pending hearing of the intended appeal.
10. The Plaintiff's/Respondent's case is found in the Replying Affidavit she swore on 31/07/2024.  
The Plaintiff avers that the defendant's application is not only misguided but also an abuse of court process and has been overtaken by events which events are enumerated at paragraph 5 of the replying affidavit, and particularly that at paragraph 6 and 7 thereof, that by the court's ruling dated 27/06/2024 the Interlocutory Judgment against the defendant was set aside with the result that the suit as filed was returned to its original position as of 6/09/2022 with all pleadings in tow and thus the plaintiff had unfettered liberty to activate the court's jurisdiction appropriately as it did through the twin applications of 5/07/2024, which the court allowed.
11. The plaintiff in addition states that by their very nature, the twin applications were ex-parte and the defendant had no locus to either participate therein or feign grievance of any sort.
12. Further it is the plaintiff's case that for all purposes and intends the court's jurisdiction question is moot, the plaintiff having sufficiently acquired jurisdiction over the defendant on account of leave granted by the court on 5/07/2024 and subsequent service of summons effected upon the defendant on 19/07/2024, to which the defendant is yet to formally appoint a representative to speak to its interests in the suit by the unconditional appearance, hence the firm of Kaplan and Stratton have no capacity to represent the defendant as the Notice of Appointment filed on 12/04/2024 by the said



law firm no longer holds as its purpose was to challenge the court's jurisdiction which has since been resolved.

13. Flowing from the above averments, the plaintiff deposes that the Notice of Appeal lodged on 18/07/2024 having been filed by a firm of advocates (Kaplan & Stratton) lacking in capacity suffers similar fate.

It is the plaintiff's further case that there are no proceedings to be stayed whether pending the hearing and determination of the application, or pending the hearing and determination of the defendant's intended appeal as fresh service of summons and pleadings having been served upon the defendant on 19/07/2024, the suit commenced anew and the defendant is yet to respond to the service.

14. In addition, the plaintiff deposes that the defendant's brazen conduct of abuse of the court process, in that having complained of a procedural mistake in service of summons they cannot turn around to complain against the consequential remedial action the plaintiff took to remedy the mistake.
15. The plaintiff's conclusions therefore is that the instant application is made to further delay the expeditious prosecution of the suit by shielding the defendant from accountability for its impugned publication which efforts are greatly prejudicial to her interests. The court is urged to dismiss the application with costs.
16. The application was argued by way of written submissions.

On the onset, the court notes that the defendant admits having been granted leave by this court to appeal against its ruling dated 8/07/2024 granting leave to the plaintiff to serve summons to enter appearance and pleading to the defendant out of jurisdiction, upon its ex parte application dated 5/07/2024 as well as an order for enlargement and/or extension of validity and renewal of the summons to enter appearance issued by the court on 8/09/2022.

The above having been done on 8/07/2024, Prayer No. (3) in the instant application dated 22/07/2024 needs no consideration. The court will therefore consider parties submissions in respect to prayers No. (4) and (5) only.

17. The rival parties submissions by and large are in respect of one issue;-  
Whether the defendant has met the threshold for grant of an order of stay of proceedings pending hearing and determination of the intended appeal.

### **Defendant's Submissions**

18. Citing the superior courts decisions here below, it is the defendant's submissions that it has met the requisite threshold for grant of stay of proceedings which is granted at court's discretion if it is for the interest of justice upon satisfying the principles set out in the cases ; Global Tours & Travels Limited; Nairobi HC Winding up cause No. 43 of 2000 cited in Gichuhi Macharia & Another v. Kiai Mbaki & 2 Others [2016] and Lucy Waithera Kimanga & 2 others v. John Waiganjo Gichuri [2015]eKLR being demonstration of-
- a. The Prima facie merits of the intended appeal
  - b. An arguable cause (appeal)
  - c. If it is in the interest of justice
19. The defendant submits that it has demonstrated an arguable case in view of the jurisdictional issues raised, ruling of the court on 27/06/2024 granting leave to the plaintiff to serve summons out of jurisdiction citing Order 5 Rule 21 of the Civil Procedure Rules.



20. It further submits that it is not precluded by law from lodging an appeal to the court of appeal on the basis that it entered appearance under protest being a legitimate and well accepted means of challenging jurisdiction of a court – citing the following cases: Active Partners group Limited & Another v. Hassan Zubeidi Dubai Bank Kenya Limited (II) & Another [2019] eKLR and Raytheon Aircraft Credit Corporation & Another v. Air AL Faraj Limited [2005] eKLR.
21. The defendant further submits that it is in the interest of justice to stay the proceedings as the jurisdictional question forms the substratum of the intended appeal, taking guidance from the case of Misnak International (UK) Limited v. 4MB Mining Limited c/o Ministry of Mining, Juba Republic of South Sudan & 3 others [2019] eKLR.
22. Additionally, the defendant's opinion is that it is prejudicial to itself to be called upon to file pleadings on resuscitated summons that were not re-issued within its lifetime; and therefore seeks a determination of the issue by the Court of Appeal before it is called upon to proceed with the matter. Cited for the proposition is the case of Odhuno v. Housing Finance Corporation of Kenya Limited & Another [2023] eKLR.

### **Plaintiff's Submissions**

23. In its submissions dated 11/11/2024, the plaintiff flags the essential pre-requisites for consideration setting out principles for consideration before an order for stay of proceedings is granted, as held in the cases of William Odhiambo Ramogi & 2 Others v. The Hon. Attorney General & 3 Others [2019] eKLR & Kenya Shell Limited vs. Benjamin Karuga Kibiru & Another [1986] eKLR, among others being;
  - a. There must be an appeal pending before the higher court.
  - b. Explanation why an order of stay of proceedings has not been sought in the High Court.
  - c. Demonstration that the intended appeal raises substantial questions to be determined or is otherwise arguable
  - d. Demonstration that the intended appeal would be rendered nugatory if the proceedings are not stayed.
  - e. Demonstration of exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up in a single appeal; and
  - f. Demonstration that the application was filed expeditiously and immediately.
24. Citing the case of Global Tours & Travel Limited (supra) the plaintiff further submits that to grant or not of an order of stay of proceedings is a discretion of the court to be exercised in the interest of justice, and if granted, on what terms it should be granted and in so doing, the court should weigh the pros and cons of granting such orders bearing in mind factors as the need for expeditious disposal of cases, prima facie merits of the intended appeal and arguability of the appeal.
25. The plaintiff argues that the defendant has not met the threshold for grant of the stay orders as;
  - i. The leave to appeal granted on 23/07/2024 was unjustified
  - ii. There is no pending appeal before the Court of Appeal
  - iii. No justification for not filing the instant application before the Court of Appeal has been offered.



26. Guided by the decision in a five judge bench in *William Odhiambo Ramogi & 3 Others V. AG & 6 others* (supra) the plaintiff submits that no proper appeal has been filed at the Court of Appeal nor is there any appeal pending before the said court, and that such remedy of stay of proceedings cannot be granted merely on the speculation that a properly filed appeal may be filed but upon a confirmation that such remedy of stay of proceedings cannot be granted merely on the speculation that a properly filed appeal may be filed, but upon a confirmation that such appeal has been filed, is not sufficient to grant such orders.
27. Further the plaintiff submits that no justification has been preferred as to why the instant application was not filed at the Court of Appeal, and once again, citing the holding in the *William Odhiambo Ramogi & 3 Others* case (supra) submitted that the Court of Appeal would be best placed to make appropriate orders on such an application.
28. Submitting that the defendant has no arguable appeal, the plaintiff argued that the primary remedy sought by the defendant lay in applying to set aside the ex-parte orders issued under provisions of Order 51 Civil Procedure Rules instead of rushing to the Court of Appeal, adding that the Court (High Court) has since assumed jurisdiction by dint of the orders issued on 11/07/2024 upon which the Plaintiff complied by serving summons to the defendant in the United Kingdom, but which the defendant has neglected to enter appearance.
29. The plaintiff additionally submits that no demonstration of exceptional circumstances have been demonstrated by the defendant in the instant application, non-having been canvassed before the court to justify an appeal to the Court of Appeal, citing the holding in *Misnak International (UK) Limited* (supra).
30. The Plaintiff further submits that the defendant in its submissions having admitted that the plaintiff had since extracted renewed summons to enter appearance and together with pleadings served upon the defendant pursuant to a legitimate order of the court, and yet no entry of appearance made, such arguments impinges on its arguability of its intended appeal and the instant application.
31. On the intended appeal being rendered nugatory should the orders sought be denied, the plaintiff submits that based on the holding in the *William Odhiambo Ramogi* case (supra) that such question is impossible to be answered when there is no proper appeal in place, as is the position herein and further that:-

“...as a general matter absent exceptional circumstances appeals over interlocutory applications should be deferred until the final determination of the trial so that a single appeal is preferred...”

### **Analysis and Determination**

32. As flagged earlier, the only issue for determination herein is;-

Whether the defendant has met the threshold for grant of an order of stay of proceedings in this suit pending hearing and determination of an intended appeal.
33. Halsbury’s Law of England, 4<sup>th</sup> Edition Vol. 37 page 330 states;-

“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 courts 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 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”.

34. The above observations are powerful illumination on the approach to the subject and has been applied in Kenyan Jurisdiction in numerous decisions among them;-

Turbo Highway Eldoret Ltd v. Muniu [2022] KEHC 10197 [KLR]; William Odhiambo Ramogi & 2 Others v. AG (supra) and Kenya Shell Limited v. Benjamini Karuga Kibiru (supra).

35. Additionally, an applicant must meet the threshold and principles underpinning grant of stay of proceedings particularly the question whether it is in the interest of justice to order a stay of proceedings and if so, on what terms; the prima facie merits of the intended appeal and whether it is an arguable one as stated in the Global Tours & Travels Limited, Lucy Waithera Kimanga & 2 others (Supra)

36. A five judge bench of the High Court in the case of William Odhiambo Ramogi & 2 others (Supra) set the principles in respect of the subject matter being;-

- a. There must be an appeal pending before the higher court.
- b. 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 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 therefore in a position to calibrate any order it gives accordingly;
- c. The applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Applicant must demonstrate that the appeal would be rendered nugatory if the stay of proceedings is not granted.
- e. 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 in single appeal; and
- f. Applicant must demonstrate that the application for stay was filed expeditiously and without delay.

37. At this point, the questions therefore that beg for answers are stated herebelow:-



**a) Whether there is an appeal filed before the Court of Appeal upon which the orders sought by the defendant may be anchored on, particularly the stay of proceedings order.**

38. The defendant was granted leave by this court on 18/07/2024 to file appeal against the court orders issued on 8/07/2024. The Notice of Appeal was filed at the High Court, but the Memorandum of Appeal is yet to be filed, only a draft having been provided as an annexure to the defendant's supporting affidavit.

39. In the case of Misnak International (UK) Limited v. 4MB Mining Limited C/O Ministry of Mining (supra) the Court of Appeal observed that:-

“One prerequisite of granting leave for service of summons outside a Kenyan Court's Jurisdiction is that the court must be satisfied that the contract upon which the action is based falls within the parameters of Order 5 Rule 21”

40. Further, the court in the case of William Odhiambo Ramogi (supra) rendered clearly that:-

“The remedy of stay of proceedings cannot be granted merely on the speculation that a properly filed appeal might be in place au futuro. The court can only consider a prayer to stay its proceedings once it is confirmed that an appeal has been properly filed before the Supreme Court....” As things stand, none has been filed. The Honourable Attorney General will of course, be at liberty to approach this court once such an appeal is filed”(emphasis added).

41. In the case before the court, the only proceedings that have been undertaken in the totality of the case is service of the renewed summons to enter appearance to which no action has been taken by the defendant despite service having been effected upon the and duly acknowledged by in the supporting affidavit and defendant's submissions.

42. Further, the defendant argues that the plaintiff has not demonstrated any nexus between the defendant and Kenya as required under Order 5 Rule 21 of the civil Procedure Rules 2010, which is a prerequisite for the court to assume jurisdiction over a foreign party, citing the holding in the case of Misnak International (UK) Ltd (supra). In the courts considered view, this argument would best be discussed if the defendant had filed a defence, which it has opted not to file. The court finds no merit in such an argument.

43. The court has considered the holding in the above case that;

“one prerequisite of granting leave for service of summons outside a Kenyan Court's jurisdiction is that the court must be satisfied that the contract upon which the action is based falls within the parameters of Order 5 Rule 21”

44. By the plaintiff's twin applications dated 5/07/2024, which the court found to have been ex-parte in their nature, the plaintiff sought leave under the provisions of Order 5 Rule 21 of the Civil Procedure Rules 2010, to serve summons to enter appearance upon the defendant, a foreign corporation out of Kenyan jurisdiction.

45. In its ruling dated 8/07/2024 the court stated that upon consideration of the averments in the supporting affidavit, it was satisfied that the plaintiff's application was merited and proceeded to grant leave for service of the summons out of its jurisdiction. In essence the court assumed jurisdiction over



the case and therefore disagrees with the defendant's submission that no nexus was established for this court to assume jurisdiction.

46. The court finds that for expeditious disposal of the suit stay of proceedings at this very early stage of the suit would not be in the interest of justice as such an order, on an interlocutory intended appeal will only take back the case and further delay its progression and expeditious disposal contrary to constitutional imperatives under Article 50 of *the Constitution* to fair and just hearing and Sections 1A, 1B and 3A of the *Civil Procedure Act*.
47. Upon the above, the court finds that there is no proper appeal filed or pending before the Court of Appeal, upon which an order of stay of proceedings may be anchored.

#### **b) Justification for the Defendant for not filing the instant application before the Court of Appeal?**

48. Having rendered as above that there is no appeal filed or pending before Court of Appeal, and the Defendant not offered any explanation in respect thereof, it is this court's finding that an application for stay of proceedings ought to be filed in the higher court, the Court of Appeal in this case, adding to what the learned judges held in the William Odhiambo Ramogi case (supra) that the defendant may be at Liberty to approach the Court of Appeal for appropriate orders once it has a proper appeal filed at the Court of Appeal.

#### **c) Arguability of the Intended Appeal.**

49. The defendant argues that it has an arguable appeal based on the question of jurisdiction and whether it was just and proper to allow the plaintiff's twin applications for leave to serve summons on a foreign entity and whether it was proper for the court to renew what it deems to have been expired summons.
50. The court in its orders issued on 8/07/2024, on the plaintiff's motion dated 5/07/2024 brought under a certificate of urgency the court being guided by provisions of Order 5 Rule 21 of the Civil Procedure Rules, 2010 stated that by their very nature, the motions were ex parte and upon consideration, allowed the prayers thereto. By the said orders, the court assumed jurisdiction over the suit and upon service upon the defendant on the 19/07/2024, the defendant opted not to enter appearance on the basis of the fresh service of the renewed summons.
51. Citing the case of Kenya Airports Authority v. Mith Bell Welfare Society & Another [2014] eKLR, the defendant argues that an arguable appeal is no more than one that raises a legitimate point or points deserving judicial determination, which this court fully concurs with. However, it is noted that the orders sought to be appealed against were issued ex-parte. It would have been for the interest of justice, if the Defendant was not satisfied to move the court that issued the said ex-parte orders for an order to set aside or variation, or review of the same. Had this option been taken by the defendant, the issues would by all means have been determined as a way of expeditious disposal of the same by the court.
52. Thus when the plaintiff submits that the instant application is but a further delay of the progression of the case to its final conclusion, the court argues with the said sediments. In addition, to buttress the submission, the court in the case of Misnak International (UK) Limited the Court of Appeal failed to entertain matters that had not been raised before the trial court, and were being raised before it for the first time. It declined the invitation to interrogate the issues.

To that extent therefore, the court finds no arguable grounds nor that any prejudice would be caused to it should the orders of stay of proceedings be denied.



**d) Existence of any exceptional circumstances to warrant grant of stay of proceedings orders?**

53. Stay of proceedings is undoubtedly a grave and serious interruption of a party's right to have its case heard and concluded expeditiously on substantive merits. It is trite that proceedings in a suit should not be stayed or interrupted unless the proceedings beyond all reasonable doubt ought not to be allowed to continue as evidently observed at Halsbury's law of England, 4<sup>th</sup> Edition, Vol 37 page 330 (supra).

54. On the above principle, the court in the William Odhiambo Ramogi held that;

“... in absence of exceptional circumstances, appeals over interlocutory applications should be deferred until the final determination of the trial so that a single appeal is preferred, and that an appeal over an interlocutory appeal would not usually be rendered nugatory if stay is not granted since the dissatisfied party retains the right to pursue the appeal on the point at the conclusion of the case.”

55. The court notes that this case has not progressed at all from its date of filing, September 2022. Interlocutory judgment was set aside by this court for lack of proper service of summons to enter appearance upon the defendant, a foreign entity for non-compliance with provisions of Order 5 Rule 21 of the Civil Procedure Rules by an order dated 27<sup>th</sup> June, 2024.

The case was thereby returned to its original status as at the date of filing of the suit. Upon application, the plaintiff was granted leave to serve summons out of jurisdiction which was done. Further progression of the suit has been interrupted by the defendant's application under review and subject of this ruling.

56. In the circumstances,

**e) Would it be in the interest of justice to further delay progress of the suit by granting to the defendant a stay of proceedings order?**

57. It is this court's considered opinion that further delay by granting the orders sought will prejudice the plaintiff more than would a denial prejudice the defendant.

58. Ngugi J, (as he then was) in the case Turbo highway Eldoret Ltd v. Dominic Njenga Muniu [2022] KEHC 10197(KLR) held that;-

“...the grant of a stay of proceedings pending hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy; and as a general matter, an appellate court will only exercise its discretion to grant a stay of proceedings pending an appeal over an interlocutory matter only in very exceptional circumstances.”

59. Upon consideration of arguments by the rival parties and the legal underpinnings, the court finds that in its totality, the defendant has not demonstrated sufficient grounds upon which the court may be persuaded to grant an order staying further proceedings in the case, nor that there is an appeal filed or pending before the court of appeal to anchor the orders sought. Additionally, the court finds no exceptional circumstances to warrant grant of the orders which by their nature are grave and serious and interrupt a party's right to have its case heard and concluded on substantive merits.

60. For the foregoing, the court is not persuaded that the Defendant has made out a case for grant of an order of stay of proceedings it seeks in its Application dated 22/07/2024.

It is dismissed with costs to the Plaintiff.



**DELIVERED DATED AND SIGNED AT NAIROBI THIS 30<sup>TH</sup> DAY OF JANUARY 2025.**

**JANET MULWA**

**JUDGE**

