



**Aspam Energy Kenya Limited v Put Sarajevo General Engineering Co. Limited & 2 others
(Civil Appeal E817 of 2022) [2024] KEHC 1980 (KLR) (Civ) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1980 (KLR)

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

CIVIL

CIVIL APPEAL E817 OF 2022

CW MEOLI, J

FEBRUARY 29, 2024

BETWEEN

ASPAM ENERGY KENYA LIMITED APPLICANT

AND

PUT SARAJEVO GENERAL ENGINEERING CO. LIMITED . 1ST RESPONDENT

AFRICACE LIMITED 2ND RESPONDENT

HENRY KURIA KARARA T/A WESTMINISTER MERCHANTS

AUCTIONEERS 3RD RESPONDENT

RULING

1. The motion dated 14.10.2022 by Aspam Energy Kenya Limited (hereafter the Applicant) primarily seeks an order to stay proceedings in Nairobi Milimani CMCC No. 6442 of 2018 (hereafter the lower court suit) pending hearing and determination of the appeal herein. The motion is expressed to be brought under Section 1A, 1B & 3A of the *Civil Procedure Act* (CPA), Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules (CPR). It is premised on the grounds on the face of the motion, as amplified in the supporting affidavit sworn by Muthukumar Kaliamurthy, the country manager of the Applicant, assertedly familiar with the facts of the matter and duly authorized by the Applicant to depose.
2. To the effect that by a ruling delivered on 14.01.2022 in the lower court suit, the Applicant's director and supply manager were found to be in contempt of the lower court's orders issued on 08.06.2021 and subsequent directions issued requiring the said persons to appear before the lower court to show cause why they should not be punished for the said contempt. That aggrieved with the ruling, the Applicant moved the lower court by way of an application for review, which motion was dismissed pursuant to the ruling delivered on 16.09.2022.



3. He further deposes that being aggrieved by the latter ruling, the Applicant has now preferred this appeal and is apprehensive that the Applicant's officers may be summoned at any moment to appear before the lower court to show cause why they should not be punished for contempt. And therefore, it is in the interest of justice that the proceedings before the lower court be stayed pending the outcome of this appeal. In conclusion he states that neither party will be prejudiced if the order sought is granted as the motion was filed without undue delay.
4. Put Sarajevo General Engineering Co. Limited (hereafter the 1st Respondent) opposes the motion by way of grounds of opposition dated 24.05.2023. The grounds are to the effect that the Applicant has no arguable appeal; that the application and subsequent appeal are pre-mature, bad in law and should be struck out; that the Applicant has approached court with unclean hands in the eyes of the law and equity; that the Applicant's reasons for the application lack candour; that the application is a delaying tactic aimed at frustrating and curtailing the 1st Respondent's rights to expeditious access to justice in the lower court suit; that no legal material or factual evidence has been presented to support the application; that the Applicant admits being in contempt but lays blame on Henry Kuria Karara t/a West Minster Merchant Auctioneers (hereafter the 3rd Respondent) who was acting as the Applicant's agent; that the annexed affidavits disclose a response to the notice to show cause which should not be introduced on appeal but instead pleaded before the lower court; and that the Applicant has not met the legal threshold for the grant of stay of proceedings before the lower court.
5. Africace Limited (hereafter the 2nd Respondent) on its part opposes the motion by way of a replying affidavit dated 27.06.2023 sworn by Jason Savonge, the Operations Manager of the 2nd Respondent. He swore that the Applicant admits having acted in contempt by blaming the 3rd Respondent who was its agent, and he therefore views the motion and appeal as vexatious, frivolous and an abuse of the court process. He goes on to depose that the order sought impinges on the 2nd Respondent's right to access to justice and right to be heard without unreasonable delay regarding compensation and or damages for the loss suffered because of unlawful and unprocedural sale of its properties by the Applicant and 3rd Respondent.
6. Asserting the discretionary nature of orders granting stay of proceedings he asserts that the Applicant ought to demonstrate that it deserves the exercise of the said discretion in its favour. Pointing out that the Applicant has failed to demonstrate that the appeal is arguable and will be rendered nugatory unless stay of proceedings is granted. Further that, the Applicant's affidavit is not properly supported by any documentary material, whereas the Applicants had every opportunity before the lower court to show cause why they should not be punished for contempt. In conclusion, he states that it is in the interest of justice that the motion be dismissed.
7. The motion was canvassed by way of written submissions. Counsel for the Applicant anchored his submissions on the provisions of Order 42 Rule 6(1) of the CPR, and the decisions in Harnam Singh & Others v Mistri (1971) E.A, Kenya Power & Lighting Co. Ltd v Esther Wanjiru Wokabi [2014] eKLR and Re Global Tours & Travels Ltd; Nairobi HC Winding Up Cause No. 43 of 2000 regarding the factors that ought to be considered in the application. Counsel asserted that while the lower court ruling was delivered on 16.09.2022, the instant motion was timeously filed on 14.10.2022.
8. Citing the cases of Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR and R v Kenya Revenue Authority & The Commissioner General ex parte Unilever Tea Kenya Limited, Misc. Civil. App. No. 1109 of 2005, counsel contended that the Applicant has an arguable appeal with a high chance of success and ought to be allowed to first ventilate the issues raised therein. Counsel reiterated that if the proceedings before the lower court are not stayed, the Applicant's officers will be punished for contempt, an eventuality liable to defeat the purpose of the appeal and rendering it an academic



exercise. The decision in *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR was cited in that regard, counsel concluding by asserting that the Respondents will not be prejudiced if motion is allowed.

9. On behalf of the 1st Respondent, counsel reiterated the contents of the grounds of opposition and regarding the Applicant's affidavit material to assert that the motion was without merit. Dismissing it as dilatory, and against the principles of timely, cost effective and proportionate resolution of disputes under Article 159 of *the Constitution*. Citing the principles as espoused in *Kenya Shell Limited v Kibiru & Another* [1986] eKLR, *Re Global* (supra) and *David Morton Silverstein v Atsango Chesoni* [2002] eKLR as cited in *Turbo Highway Eldoret Ltd v Muniu* [2022] KEHC 10197 KLR, counsel posited that the motion does not demonstrate a potentially successful appeal.
10. It was further submitted that the grant of stay of proceedings pending appeal on the basis of a motion bereft of material evidence in support amounts miscarriage of justice to the 1st Respondent. Additionally, that the Applicant has not demonstrated exceptional circumstances to warrant the granting of the orders sought, as opposed to having the lower court matter concluded. The provisions of Section 1A & 1B of the CPA, the decisions in *Kenya Wildlife Service v James Mutembei* [2019] eKLR, *Bai Lin (K) Ltd & 2 Others v Zingo Investments Limited & Another* [2014] eKLR and *Lucy Waithera Kimanga & 2 Others v John Waiganjo Gichuri* [2015] eKLR were called to aid. In summation, counsel asserted that the Applicant has not demonstrated what prejudice it would suffer if the motion is not allowed, urging the court to dismiss it with costs to the 1st Respondent.
11. The 2nd Respondent on his part set out the pertinent events before adopting in toto the 1st Respondent's submissions. Further asserting that copies of the order dated 08.06.2021 and ruling of 14.01.2022 have not been exhibited in the application, rendering it difficult for this court to gauge the arguability of the Applicant's appeal. Reiterating its affidavit material and citing the decision in *Kenya Wildlife Services* (supra) the 2nd Respondent argued that the Applicant has not sufficiently demonstrated that the appeal would be rendered nugatory if stay of proceedings is not granted. Further asserting that allowing the motion would mean that the Applicant would have successfully used this court to shield itself from consequences of its unlawful actions. That the court should reject the Applicant's invitation to upend its role in the administration of justice by dismissing the motion, brought in bad faith and as an attempt to dissipate precious judicial time.
12. The 3rd Respondent did not file any response to the motion.
13. The court has considered the material canvassed in respect of the motion. The 1st Respondent having opted to file grounds of opposition in response to the application pursuant to Order 51 Rule 14 (1) of the CPR confined themselves to canvassing issues of law and legal arguments only. See the Court of Appeal case of *Blue Thaitian SRL (Owners of the Motor Yacht 'Sea Jaguar') v Alpha Logistics Services (EPZ) Limited (Civil Appeal (Application) E012 of 2020)* [2022] KECA 1240 (KLR). Even so, it is the duty of the court to satisfy itself upon relevant principles and on the basis of material presented by the Applicant, whether the motion is meritorious.
14. The power of the court to stay proceedings pending appeal is donated by Order 42 Rule 6 (1) of the Civil Procedure Rule. Further, Section 3A of the *Civil Procedure Act*, also invoked by the Applicant grants the court inherent power to make such orders as maybe deemed necessary to meet the ends of justice. Order 42 Rule 6 (1) of the Civil Procedure Rules provides that;-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order



stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.”

15. Whereas Section 3A of the *Civil Procedure Act* provides that:-

“Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

16. As to what constitutes inherent jurisdiction of the court, the Court of Appeal in *Rose Njoki King’au & Another v Shaba Trustees Limited & Another* [2018] eKLR rendered itself as follows; -

“Also cited was Section 3A of the *Civil Procedure Act* which enshrines the inherent power of the Court to make such orders as may be necessary for ends of justice or to prevent abuse of the process of the Court. In *Equity Bank Ltd versus West Link Mbo Limited* [2013], eKLR, Musinga, JA stated inter alia, that, by “inherent power” it means that

“Courts of law exist to administer justice and in so doing, they must of necessity balance between competing rights and interests of different parties but within the confines of law, to ensure that the ends of justice are met. Inherent power is the authority possessed by a Court implicitly without its being derived from *the Constitution* or statute. Such power enables the judiciary to deliver on their constitutional mandate.....inherent power is therefore the natural or essential power conferred upon the court irrespective of any conferment of discretion.”

The Supreme Court went further in *Board of Governors, Moi High School Kabarak and another versus Malolm Bell* [2013] eKLR, to add the following:-

“Inherent powers are endowments to the court as will enable it to remain standing as a constitutional authority and to ensure its internal mechanisms are functional. It includes such powers as enable the Court to regulate its intended conduct, to safeguard itself against contemplation or descriptive intrusion from elsewhere and to ensure that its mode of disclosure or duty is consumable, fair and just.” (sic)

17. Ringera, J (as he then was) in *Re Global Tours & Travel Ltd Nairobi HCCC No. 43 of 2000 (UR)* spelt out the applicable considerations in determining an application seeking the stay of proceedings pending appeal. The learned Judge stating 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



not whether it 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.”

18. A related consideration is the need to avoid unnecessary proliferation of proceedings which needlessly dissipate the court’s limited time resource. That said, staying proceedings “is a serious, grave and fundamental interruption in the right that a party....should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.” See the decision of the Court of Appeal in *Raymond Ruto & 5 Others v Stephen Kibowen* [2021] eKLR.
19. It is useful to first restate the events pertinent to the motion, as gathered from the respective affidavit material before the court. The Applicant was the plaintiff before the lower court and having obtained a decree on 29.04.2019 against the 1st Respondent, which was the defendant therein, proceeded to instruct the 3rd Respondent to levy execution in satisfaction of the decree. In response, the 2nd Respondent filed objection proceedings against execution by attachment of its asserted property, upon which the trial court granted interim orders. In a subsequent ruling, the court ordered the release of specific attached vehicles to the 2nd Respondent. It appears that some of the 2nd Respondent’s attached vehicles had in the intervening period been sold, prompting the contempt motion brought against the Applicant’s directors and supply chain manager and the 3rd Respondent.
20. The motion was allowed, further prompting the Applicant to file a motion seeking review in respect of which a ruling was delivered on 16.09.2022. That ruling is the subject of the instant appeal.
21. Evidently, the motion herein brought within 30 days of the ruling was expeditiously filed. The memorandum of appeal herein challenges the trial court’s ruling on the Applicant’s motion seeking review and or setting aside of the contempt order. Ex facie, the grounds of appeal appear to raise issues serious enough to warrant consideration by the court on appeal, or that are prima facie arguable.
22. In *Stanley Kang’ethe Kinyanjui V Tony Keter & 5 Others* [2013] eKLR the Court of Appeal stated:

“The first issue for our consideration is whether the intended appeal is arguable. This court has often stated that an arguable ground of appeal is not one which must succeed but it should be one which is not frivolous, a single arguable ground of appeal would suffice to meet the threshold that an intended appeal is arguable”.

See also *Denis Mogambi Mong’are V. Attorney General & 3 Others* Civil Appeal No. Nairobi 265 of 2011 (UR 175/2011) where the Court of Appeal stated that:

“An arguable appeal is not one that must necessarily succeed, it is simply one that is deserving of the court’s consideration.”
23. Thus, if the Notice to Show Cause (NTSC) against the contemnors in the lower court were to proceed before this appeal is determined, and the appeal subsequently succeeds, the Applicant’s apprehension that the appeal may be rendered academic does not seem farfetched. It may well be that if stay is denied, the contemnors would have irreversibly paid the penalty for their contempt, which may include



committal to civil jail, by the time the appeal is concluded. In *George Gathura Karanja v George Gathuru Thuo & 2 Others* [2019] e KLR, the Court of Appeal stated that:

“[A]n appeal/intended appeal is said to be rendered nugatory where the resulting effect is likely to be irreversible. See the case of *Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others*, Civil Appeal No. 31 of 2012 where this Court stated inter alia thus:

“Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the aggrieved party.”

24. Conversely, and without demeaning the importance of the contempt proceedings in the administration of justice, and the 2nd Respondent’s right to expedited resolution of their grievance before the lower court, the 2nd Respondent’s ultimate remedy of restitution in respect of its property may not entirely hinge on the outcome of the contempt application. That is not to say that the 2nd Respondent’s pursuit of the contempt proceedings is peripheral. The ultimate purpose of the contempt process is the vindication of the rule of law.
25. Moreover, the court must guard against the dissipation of its time arising from the prospect of two different courts entertaining parallel and related proceedings. Not to mention the possibility of potentially conflicting outcomes. For good order and efficient utilization of the court’s resources, it appears more prudent that the appeal ought to be determined as a priority. Depending on the outcome of the appeal, one of the courts will ultimately determine the contempt proceedings with finality.
26. Any prejudice to the Respondents arising from delay can be curbed through appropriate conditions, especially because the matter touches on the rule of law aspect of observance of court orders. Equally, an award of costs would adequately compensate the Respondents for any delay and inconvenience caused. Balancing the rights of the respective parties, the court is persuaded that the justice of the matter lies in allowing the motion upon conditions.
27. Therefore, the motion dated 14.10.2022 is granted upon the following conditions:
 - a. The Applicant shall within 45 days of today’s date file and serve the record of appeal.
 - b. The Applicant shall fully prosecute the appeal within six (6) months of filing the record of appeal.
 - c. The Applicant shall within 21 (twenty-one) days of today’s date deposit into court the sum of KShs. 300,000/- (Three Hundred Thousand) as security for costs.
 - d. In default of any of the above conditions, the stay order shall automatically lapse.
28. The costs of the motion are awarded to the 1st and 2nd Respondents in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 29TH DAY OF FEBRUARY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: N/A

For the 1st Respondent: Ms Kanini h/b for Ms. Mathia



For the 2nd Respondent: N/A

For the 3rd Respondent: Mr. Kabue

C/A: Carol

