



**Anauwawi & another v Turuku (Civil Appeal E750 of 2022)
[2023] KEHC 2008 (KLR) (Civ) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2008 (KLR)

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

CIVIL

CIVIL APPEAL E750 OF 2022

CW MEOLI, J

MARCH 9, 2023

BETWEEN

KEVIN MWAMBUCHI ANAUWAWI 1ST APPLICANT

PIUS MBUGUA NJUGUNA 2ND APPLICANT

AND

MOSES MWITA TURUKU RESPONDENT

RULING

1. The motion dated September 23, 2022 by Kevin Mwambuchi Anauwawi and Pius Mbugua Njuguna (hereafter the 1st & 2nd applicant/applicants) primarily seeks to stay proceedings in Nairobi Milimani CMCC No 3828 of 2019 (hereafter the lower court suit) pending the hearing and determination of the instant appeal. The motion is expressed to be brought under article 159 of the [Constitution of Kenya 2010](#), section 1A, 1B, 3, 3A & 75 of the [Civil Procedure Act](#), order 42 rule 6, order 43, order 51 rule 1 of the [Civil Procedure Rules](#) *inter alia*, on grounds on the face of the motion, as amplified in the supporting affidavit sworn by Robert Ogode.
2. The affidavit is sworn by counsel having conduct of the matter on behalf of the applicants and is to the following effect. That on June 22, 2022 the applicants filed a motion in the lower court suit seeking to set aside *ex parte* proceedings which was dismissed on August 26, 2022; and that aggrieved by the said ruling the applicants have appealed to this court whereas the lower judgment was slated for September 28, 2022 in the lower court, which event would render the appeal nugatory and occasioning irreparable loss to the applicants. Because they shall be condemned unheard, contrary to the rules of natural justice. Counsel further deposes that the applicants have an arguable appeal, and the instant motion was not intended to delay the matter but to secure justice for the respective parties.



3. Moses Mwita Turuku (hereafter the respondent) opposes the motion by way of grounds of opposition dated October 4, 2022 and a replying affidavit of even date deposed by Nelson Kaburu, counsel having conduct of the matter on behalf of the respondent. The respondent takes issue with the motion on grounds that an appeal from the orders in question lies with leave of the court. That no leave had been obtained, rendering the appeal and the motion anchored on it incompetent and liable for striking out with costs; that there is no evidence of substantial loss without which, stay of proceedings cannot issue; that the application before the trial court and before this court are intended to cover delinquency by counsel; that having defied express orders to pay costs before the trial court, the applicants are undeserving of discretion and therefore the instant motion and appeal are further acts of defiance and contempt of court.
4. Moreover that the applicants had not complied with order 11 of the *Civil Procedure Rules*, since 2019 by filing documents or witness statements by the date of hearing on May 30, 2022; that the parties and their counsel are duty bound to assist the court to dispense justice expeditiously and where they fail to do so, they must not be heard to lament that they have been condemned unheard. The respondent views the motion and appeal as an abuse of the court process
5. Counsel for the respondent on his part attacked the motion by deposing that the applicants have not annexed a copy of the trial court's ruling or order, making it difficult for the court to consider the appeal merits on a prima facie basis. That orders for setting aside of proceedings or re-opening of cases could only be made in the court's inherent jurisdiction and could only be appealed with leave of the court and no such leave has been demonstrated, rendering the appeal incompetent. He swore that the matters raised by the applicants herein belong to the appeal from the final decision and not an interlocutory appeal. He urged the court to strike out the motion and appeal with costs.
6. The motion was canvassed by way of written submissions. Counsel for the applicant reiterated the affidavit material of the applicants. And submitted that under order 43 rule 1(1)(x) of the *Civil Procedure Rules* an appeal in respect of the ruling in question shall lie as of right. He cited the decision in *Kenya Revenue Authority v Sidney Keitany Changole & 3 Others* [2015] eKLR to support his position. That from the memorandum of appeal, the appeal is not frivolous and raises serious issues that warrant ventilation on appeal.
7. He contended that the applicants will be prejudiced if stay of proceedings in the lower court is denied as judgment was already scheduled for delivery, which event would render the appeal herein nugatory. Counsel urged the court to exercise its discretion in furtherance of the applicants' constitutional right to be heard. In conclusion, it was submitted that the applicants have demonstrated sufficient grounds for the court to exercise its discretion in their favour.
8. On behalf of the respondent, counsel reiterated the contents of the grounds of opposition and affidavit material. In addressing the competence of the appeal, counsel relied on this court's decision in *David Kangethe & another v Dennis Nyangincha Nyairo* [2022] eKLR and the decision in *Peter Nyaga Muvake v Joseph Mutunga* [2015] eKLR to submit that leave ought to have been sought before lodging the present appeal. That without such leave the court does not have jurisdiction to entertain the instant appeal and the motion, both which are liable for striking out with costs.
9. The court has considered the material canvassed in respect of the motion. The court will first deal with the preliminary issue raised by the respondent concerning the competence of the motion and appeal. The applicants by their affidavit material explain the subject origin of the instant appeal by deposing that on June 22, 2022 they filed a motion before the lower court seeking to set aside the *ex parte* proceedings which motion was subsequently dismissed.



10. In the Respondent’s affidavit material, the motion before the lower court dated June 22, 2022 is annexed as “exhibit A”. The same was expressed to be brought pursuant to “article 159 (2) of the Constitution of Kenya 2010, section 1A, 1B, 3, 3A & 80 of the Civil Procedure Act (CPA), order 45 rule 6, order 51 rule 1, & 10 of the Civil Procedure Rules (CPR) and section 3A & 3B of the Insurance (Motor Vehicle Third Party Risks) Amendment Act, 2013”. The motion sought that;-
- “2. That the honorable court be pleased to stay the proceedings in this matter pending the hearing and determination of this application.
 3. That the honorable court be pleased to set aside the proceedings of May 30, 2022.
 4. That the honorable court be pleased to re-open the plaintiff case and allow the matter to start de-novo.” (sic)
11. The impugned ruling in the lower court has not been attached for this court’s benefit. Nonetheless, it is evident from a perfunctory perusal of “exhibit A” above, that the lower court suit was slated for hearing on May 30, 2022. It proceeded ex parte in the absence of the applicants to conclusion and judgment was scheduled for September 28, 2022. The motion dated June 22, 2022 sought to set aside the ex parte proceedings. Order 12 rule 2(a) of the Civil Procedure Provides that;-
- “If on the day fixed for hearing, after the suit has been called on for hearing outside the court, only the plaintiff attends, if the court is satisfied—
- (a) that notice of hearing was duly served, it may proceed ex parte;.....”
12. The respondent contends that an appeal from the orders appealed from lies with leave of court and that no such leave has been obtained, rendering the instant appeal and the motion incompetent. Evidently, the applicants’ motion before the lower court “exhibit A”, invoked the wrong provisions of the law because on account of the reliefs sought therein, the motion ought to have been anchored on the provisions of order 12 of the Civil Procedure Rules, entitled “Hearing and consequence of non-attendance”. The relevant provision for the setting aside of the judgment or order resulting from an ex-parte hearing due to non-attendance is order 12 rule 7 which provides that: -
- “Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon such terms as may be just.”
13. Judgment in the lower court is yet to be delivered and the instant motion was an attempt to arrest the delivery of the same. Further, it is trite the motion by the applicants before the lower court involved judicial discretion and the court’s inherent jurisdiction pursuant to order 12 rule 2(a) as read with rule 7 of the Civil Procedure Rules. That said, order 43 rule 1(1)h provides that an order emanating from the provisions of order 12 rule 7 of the Civil Procedure Rules shall lie as of right. Thus, in this case leave was not required before presenting the instant motion. The respondent’s preliminary point is not well taken.
14. On the substance of the present motion, 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 for stay of proceedings pending appeal 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. If judgment were delivered in the lower court before this appeal is heard, and the appeal succeeds, there is a likelihood of further dissipation of time by both courts. Not to mention the awkwardness of two essentially conflicting outcomes by two courts. For good order and efficient utilization of the court’s resources it appears more attractive for good order that the appeal be first determined. Ultimately, the rights of the parties will be determined conclusively by the trial court, depending on the outcome of the appeal.

19. I am, in saying so alive to the exhortation of the Court of Appeal in *Raymond Ruto & 5 Others v Stephen Kibowen* [2021] eKLR :-

“We acknowledge at the outset, that a court will sparingly and only in exceptional circumstances will it grant an order to stay of proceedings which essentially is an interruption of the other parties right to conduct their hearing.” (sic)

20. The court proceeded to state that ;

“The learned authors of; Halsbury’s Law of England, 4th Edition Vol 37 page 330 and 332, have also given some principles to bring to bear while considering whether or not a court should stay proceedings as follows: -

“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 court’s 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 a 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.”



21. A casual perusal of the memorandum of appeal reveals issues serious enough to require the court's consideration on appeal or that are prima facie arguable. The Court of Appeal in *Vishva Stone Suppliers Company Limited v RSR Stone (2006) Limited* [2020] eKLR stated that an arguable appeal "need not succeed so long as it raises a bona fide issue for determination by the court."
22. In *Vishva's* case, the court emphasized the right of appeal in the following terms:
- "Turning to the request to allow the applicant to exercise his now undoubted constitutionally underpinned right of appeal, the position is.... crystalized in the case of Richard Ncharpi Leiyagu vs IEBC & 2 others (supra); Mbaki & Others vs Macharia & Another [2005] 2EA 206; and the Tanzanian case of Abbas Sherally & Another vs Abdul Fazaiboy, Civil Application No 33 of 2003; for the holding *inter alia* that:
- (i) the right to a hearing is not only constitutionally entrenched but it is also the corner stone of the Rule of law;
 - (ii) the right to be heard is a valued right; and
 - (iii) that the right of a party to be heard before adverse action or decision is taken against such a party is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice..."
23. On whether the motion was filed expeditiously, the impugned ruling was delivered on August 26, 2022 whereas the instant appeal and motion was filed a month later. Thus, the Applicants moved with alacrity. This is an important issue as the period of delay as well as explanation thereof is a key consideration in an application of this nature. See the Court of Appeal decision in *Patrick Wanyonyi Khaemba v Teachers Service Commission & 2 Others* [2019] EKLR.
24. Further, it is this court's view that any prejudice visited on the respondent by the motion being allowed can be compensated through an award on costs. Therefore, reviewing all the material before it, the court is persuaded that the justice of the matter lies in allowing the motion dated September 23, 2022, with costs to the respondent in any event.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 9TH MARCH 2023.

C.MEOLI

JUDGE

In the presence of:

For the Applicants: Mr. Ogede

For the Respondent: Mr. Kaburu

