



**Allmed Healthcare Ltd v ABC Pharmacy Ltd; Goodlife  
Pharmacy Ltd (Interested Party) (Civil Appeal E028 of 2024)  
[2024] KEHC 12151 (KLR) (Commercial and Tax) (11 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 12151 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL APPEAL E028 OF 2024  
FG MUGAMBI, J  
OCTOBER 11, 2024**

**BETWEEN**

**ALLMED HEALTHCARE LTD ..... APPELLANT**

**AND**

**ABC PHARMACY LTD ..... RESPONDENT**

**AND**

**GOODLIFE PHARMACY LTD ..... INTERESTED PARTY**

**RULING**

**Introduction And Background**

1. This ruling determines the appellant's application dated 9/2/2024, and brought under Order 12 Rule 7, Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A and 3A of the *Civil Procedure Act*. The application seeks the setting aside of the ex parte proceedings, Ruling and Order issued on 25/1/2024 and a stay of proceedings in Milimani Commercial Magistrate's Court Civil Case No. E1441 of 2023, pending the hearing and determination of this appeal.
2. The application is supported by an affidavit sworn by Patricia Njeri Guchu, the Head of Operations, at the appellant company. The appellant contends that it filed a suit before the lower court which is pending hearing. The suit arises from a dispute over money it owes the respondent and the respondent's illegal attempts to attach the appellant's goods. The matter was scheduled for hearing on 10/6/2024.
3. It is further contended that before the matter was heard, the respondent filed an application dated 24/1/2024 in the intervening period. The application sought to enjoin the interested party to the



application and to stop the interested party from making a payment of Kshs. 2,000,000/= to the appellant.

4. The appellant objects to the ex parte orders issued by the trial magistrate, which enjoined the interested party and restrained a pending commercial transaction between the appellant and the interested party, all without hearing any of the parties involved. It is the appellant's case that the joinder of the interested party was in effect a joinder of a party unrelated to the suit and the restraining of an unrelated transaction.

According to the appellant, these orders violated the principles of fair hearing as outlined under Article 50 of the *Constitution*. It is these actions that form the basis of this appeal.

5. The application is opposed by way of a replying affidavit sworn by the respondent's Managing Director, John Muturi Nderitu on 19/6/2024. According to the respondent, the application was allowed and the orders granted on 20/2/2024, in the absence of the appellant, when the matter came up for inter partes hearing of the application.
6. The respondent contends that the said application was filed under certificate of urgency and the Court had discretion to make ex parte orders as the respondent was at risk of losing Kshs. 2,000,000/- for unpaid medical goods and equipment supplied to the appellant and sold to the interested party. The respondent takes issue with the appellant for failing to disclose to the court that the said medical goods and equipment are the subject of litigation before the lower court and the decision to sell off its business to the interested party was to disenfranchise the respondent.
7. The respondent further contends that the trial court enjoined the interested party to the suit purely for purposes of that application.

### **Analysis and Determination**

8. I have carefully considered the pleadings, submissions, evidence and authorities cited by the parties. I note that the application seeks to set aside the impugned ex-parte proceedings, Ruling and Order of the trial court. This plea by the appellant is premature and cannot be addressed at this stage. It is a matter that should be determined at the hearing of the substantive appeal. Any determination at this point would render the appeal otiose, depriving the court of the benefit of considering the evidence from both parties.
9. The only issue for determination, therefore, is whether the applicant has made a case for stay of proceedings at the lower court pending the hearing and determination of the appeal. Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* stipulates in part that:

“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 ... 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. ...”
10. Flowing from the above as well as numerous judicial pronouncements, in order to succeed in an application for a stay of proceedings, an applicant must prove the following three requirements:
  - i. That the application has been filed without delay.
  - ii. That the intended appeal is arguable.
  - iii. That the intended appeal, if successful, will render the ongoing proceedings nugatory.



11. It is also a crystalized position that a much higher standard and stringent test ought to be applied in such applications. The court in *Kenya Wildlife Services V James Mutembei*, [2019] eKLR, cited with approval from the *Halsbury's Law of England* 4<sup>th</sup> Edition. Vol. 37 page 330 and 332 and observed that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent ... 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.”

12. On the first of the three requirements, there is no doubt that the application was filed without delay, having been filed less than a month after the ruling of 25/1/2024.
13. Regarding whether the intended appeal is arguable, I note that the appellant’s main bone of contention is that the impugned orders were issued ex parte. This raises the question as to whether granting an ex parte order has the effect of extinguishing substantive rights without the due process of the law. Ex parte proceedings resulting in ex parte orders are exceptions to the basic court procedure which requires that both parties be present to canvass their respective positions before the court.
14. While underscoring this right of both parties to be heard, the court in *Abraham Lenauia Lenken V Charles Katekeyo Nkaru*, [2016] eKLR held that:

“The law demands of justice that in allowing ex parte proceedings courts balance the right of individuals to receive fair notice against the need for the interest of justice for the court to step in to prevent imminent and irreparable harm. That is the basis upon which to maintain the integrity of the justice system, where a court order resulting from ex parte hearing should be quickly followed with a full hearing inter partes.”

15. That said, an ex parte order will not automatically be discharged in every instance. In determining whether such an order should be discharged, this court must consider whether the respondent’s application presented pressing circumstances that justified its issuance. Additionally, the court will assess whether granting the ex parte order caused any injustice or prejudice to the parties, particularly the appellant.
16. On the face of it, I note that the trial magistrate scheduled the matter for inter partes hearing two weeks after issuing the impugned orders. This raises the question of whether the period was reasonable for the parties to adequately address their issues, and whether the hearing ultimately proceeded as planned. It is clear that the appeal raises substantive issues that require further interrogation and is therefore arguable.
17. Finally, as to whether the intended appeal, if successful, will render the ongoing proceedings at the lower court nugatory, I am alive to the fact that the mere filing of an appeal is not, by itself, a reason to stay proceedings, I align myself with the decision of this court in *Turbo Highway Eldoret Ltd V*



*Muniri*, [2022] KEHC 10197 (KLR). The court observed that an appeal is not automatically rendered nugatory merely because the trial may proceed and a judgment on merits given, as such a judgment would still be subject to a potential stay.

18. The evidence before me clearly shows that the joinder of the interested party was solely for the purpose of attaching the Kshs. 2,000,000/= due to the appellant from the interested party. The court did not enjoin the interested party as a party to the suit.
19. The orders sought in this appeal can therefore be litigated without affecting the proceedings between the plaintiff and defendant in the lower court. Consequently, I find that the intended appeal, even if successful, will not render the ongoing proceedings nugatory. The subject matter of the impugned orders can be restored to the interested party, if need be, and the liability between the appellant and respondent will still be determined.

### **Disposition**

20. Accordingly, the application dated 9/2/2024 is dismissed. The costs of the application shall await the outcome of the appeal.

**DATED, SIGNED AND DELIVERED IN NAIROBI THIS 11<sup>TH</sup> DAY OF OCTOBER 2024.**

**F. MUGAMBI**

**JUDGE**

