



**Gallerius Investment Limited v The County Government of Kwale;  
Ethics and Anti Corruption Authority (Intended Interested Party) (Land  
Case 7 of 2021) [2023] KEELC 16499 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16499 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
LAND CASE 7 OF 2021  
AE DENA, J  
MARCH 28, 2023**

**BETWEEN**

**GALLERIUS INVESTMENT LIMITED ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF KWALE ..... DEFENDANT**

**AND**

**ETHICS AND ANTI CORRUPTION AUTHORITY .... INTENDED  
INTERESTED PARTY**

**RULING**

**The Application**

- 1 This ruling is subject of the plaintiff/applicants application dated October 25, 2022. The same is brought under the provisions of Order 51 Rule 1 and Order 22 Rule 25 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act*. The applicant seeks the following verbatim orders;
  1. That the application be certified urgent and service of the same be dispensed with ex parte at the first instance.
  2. That the honorable court be pleased to stay the proceedings of this court pending hearing and determination of the filed appeal No COA 14 of 2022 in the Court of Appeal of Kenya
  3. That costs of this application be provided for.
- 2 The application is premised upon grounds on its face and which have in summary been listed that there is an appeal pending at the Court of Appeal against the directions of this court in ELC No 7 of 2021 and ELC No 6 of 2021. That the proceedings of this court will jeopardize and subjudice the



proceedings in the Court of Appeal. That no one will suffer prejudice in the event that this application is allowed.

- 3 The application is supported by an affidavit sworn by Meena Bhagwanda's Patel. She reiterates the contents of the grounds of the application and states that the appeal raises very serious issues and is also highly merited. The applicant seeks that the application is allowed as prayed.

### **The Response**

- 4 The application is opposed by a replying affidavit sworn by Njoroge Mwangi Advocate for the Defendant. It is averred that from the inception the Defendant was not aware that the public access road that it was developing had been grabbed and only became aware after payment had been effected to the contractor to upgrade the road. That the suit was filed after the work began.
- 5 It is averred that given the urgency of the matter as the contractor was already on site, the ruling granting the temporary injunction required the suit was to be heard urgently as per paragraph 22 of the ruling dated February 26, 2016. That an injunction in law should not last more than 12 months which means that the injunction lapsed on February 27, 2017 as provided for in Order 40 Rule 6 of the Civil Procedure Rules.
- 6 It is deponed by the defendant that this suit is being delayed by the Plaintiff with a view of frustrating the public's right to the use of a public road and for an indefinite period of time. The respondent's prayer is that the suit is dismissed with costs as the question of injunction granted has been overtaken by time and is now an abuse of the court process.

### **Supplementary Affidavit**

- 7 In response to the defendants replying affidavit dated November 17, 2022, the Applicant filed a supplementary affidavit dated November 28, 2022. It is averred that the deponent has breached the provisions of order 9 rule 1[5] and offended the *Oaths and Statutory Declarations Act*. That the deponent has stated that the land in dispute is a lease and there is a certificate of lease issued by the government. That the deponent is keen on misleading the court since the trial judge is not well conversant with the issues in dispute. It is averred that the defendant illegally demolished the developments initiated by the applicant without any court order. The applicant states that she is entitled to damages as the defendant is still receiving ground rent for the land.

### **Submissions**

- 8 The applicant's submissions are filed before court on January 30, 2023. It is submitted that the proceedings in this matter should be stayed pending the appeal herein. That unless the proceedings are stayed, the issues raised at the Court of Appeal will be prejudiced and the same are of paramount importance. The applicant also relied on the contents of her supplementary affidavit in response to the replying affidavit sworn by Mr. Njoroge Mwangi Advocate on November 17, 2022.
- 9 This court was invited to treat the absence of a response by the intended Interested Party as a no objection to the present application. The applicant seeks that the application is allowed as prayed.
- 10 Mr. Njoroge Mwangi counsel for the respondent/defendant informed the court he would not file submissions and relied on his replying affidavit aforesaid.



## Determination

- 11 The present application is brought under the provisions of Order 51 Rule 1 and Order 22 Rule 25 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act*. It has therefore been substantively brought under the provisions of Order 22. The said Order is on Execution of Orders and decrees. Rule 25 is on stay of execution pending suit between decree holder and judgement debtor. I will for expedience ignore the technicalities since the gist of the application before this court is clear, it is not for stay of execution.
- 12 The applicant seeks orders for stay of execution of these proceedings pending appeal. In her submissions she states that the proceedings in this matter should be stayed pending the appeal herein. That unless the proceedings are stayed, the issues raised at the Court of Appeal will be prejudiced and the same are of paramount importance. Clearly the applicant is desirous of stopping these proceedings as the court awaits the outcome of an intended appeal filed at the Court of Appeal in Mombasa.
- 13 The main issue that commends for determination is whether the application meets the threshold for the grant of orders for stay of proceedings. I will be guided by the provisions of order 42 rule 6 and judicial decisions. Order 42, rule 6. (1) which provides;-

‘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.’

- 14 The grant for order of stay of proceedings is discretionary. The threshold for stay of proceedings was affirmed in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR where an excerpt from the *Halsbury’s Law of England*, 4th Edition. Vol. 37 page 330 and 332, was quoted 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 not 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.

- 15 In the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 the court persuasively stated thus;

“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”

- 16 Guided by the law and above judicial decisions this court will therefore apply itself to whether the reasons or grounds advanced by the applicant in support of the application are sufficient, whether it would be in the interest of justice to grant such orders which will necessitate weighing the pros and cons of granting or denying the same. The circumstances of the case and its history would also be considered in this regard vis a vis the overriding objectives of the [Civil Procedure Act](#) and [Environment and Land Court Act](#).
- 17 The main ground stated for the application herein is the existence of the appeal No COA 14 of 2022 in the Court of Appeal of Kenya, which appeal is stated to be against the directions of this court in ELC No 7 of 2021 and ELC No 6 of 2021. That the proceedings of this court will jeopardize and subjudice the proceedings in the Court of Appeal. A keen look at the supporting affidavit of the Applicant no explanation is given as to how the progression of the present proceedings will be jeopardized or to put it in other words whether the appeal would be rendered nugatory. It is not stated why it will be prudent enough for this court to await the outcome of the appeal and why it would not augur well to proceed with this suit during the pendency of the appeal. The threshold in my view is high requiring convincing reasoning yet all the applicant has done is to make averments which are not substantiated.
- 18 This court is aware that the substance of the right of appeal is premised on the notion that the appeal should not be rendered nugatory. Looking at the grounds of appeal annexed to the supporting affidavit, in my view the merits of the case shall not be determined at appellate level. The appeal is an interlocutory appeal and not an appeal on the final determination of the court. Should the directions of this court be vacated, this court will be obliged. As to the arguability of the appeal I will steer off the Applicants submissions that the appeal raises serious issues and is highly merited. This court cannot be seen to evaluate the grounds raised against its own directions. This is a matter for the Court of Appeal to render itself on.
- 19 I have already weighed the pros and cons of granting or not granting the application. However, I must consider the totality of the facts and history of the suit. This suit commenced in the year 2015 and has not progressed for the reasons of numerous applications filed in the suit. In my view granting the orders sought will only delay the determination of the matter further.
- 20 The upshot is that this court finds that no sufficient reasons or justification have been tendered by the applicant to warrant the grant of the orders of stay of these proceedings. I find the application dated October 25, 2022 is devoid of merit and the same is hereby dismissed. Costs shall follow the event.
- 21 Leave to appeal this decision is granted if required.

Orders accordingly.

**THE RULING IS DELIVERED ELECTRONICALLY THROUGH EMAIL WITH APPROVAL OF THE PARTIES.**

**DELIVERED AND DATED AT KWALE THIS 28<sup>TH</sup> DAY OF MARCH, 2023**

**A.E. DENA**

**JUDGE**

