



**Wainaina (Suing on behalf of the Estate of Wainaina Kiongo Wainaina) v Mwagiru & 2 others  
(Environment & Land Case 150 of 2017) [2023] KEELC 16558 (KLR) (28 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16558 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 150 OF 2017**

**YM ANGIMA, J  
MARCH 28, 2023**

**BETWEEN**

**JOSEPH KIMANI WAINAINA (SUING ON BEHALF OF THE ESTATE OF  
WAINAINA KIONGO WAINAINA) ..... PLAINTIFF**

**AND**

**CYRUS KINYANJUI MWAGIRU ..... 1<sup>ST</sup> DEFENDANT  
OBADIAH MWANGIRU KARANJA ..... 2<sup>ND</sup> DEFENDANT  
HUMPHREY N. MWAGIRU ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**A. The Defendants' Application**

1. By a notice of motion dated November 23, 2022 based upon Article 159(2)(d) of the [Constitution](#) of Kenya, 2010, Sections 1A, 1B, 3A, 63(e) and 95 of the [Civil Procedure Act](#) (Cap 21) and Section 7 of the [Appellate Jurisdiction Act](#), the Defendants sought the following orders:
  - a. Spent;
  - b. Spent;
  - c. That the honourable court be pleased to grant an order for stay of proceedings in Nyahururu ELC 150 of 2017 pending the lodging, hearing and determination of the intended appeal in the Court of Appeal.
  - d. That this honourable court be pleased to extend time to the applicants to file their notice of appeal outside the prescribed time under Rule 77(2) of the [Court of Appeal Rules, 2022](#).



- e. That this honourable court be pleased to order that the applicants be furnished with certified typed proceedings and directions made on October 3, 2022 for purposes of preparing a record of appeal.
  - f. That the costs of this application be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Ms Ruth Kuria, the advocate on record for the Defendants. The Defendants stated that they intended to appeal against the court's refusal to grant them an adjournment on October 3, 2022 when the suit came up for hearing. They further stated that their failure to file a notice of appeal within the prescribed period was not intentional and that the court had unfettered discretion to extend time for filing it. However, the Defendants did not assign any reason or explanation for failing to comply with the timelines.
3. The Defendants further contended that the court had unfettered discretion to stay further proceedings in this suit pending the filing, hearing and determination of the intended appeal. It was further contended that the application was filed without unreasonable delay and that the Defendants stood to suffer great injustice and prejudice unless the orders sought were granted. The court was consequently urged to allow the application.

#### **B. The Plaintiff's Response**

4. The Plaintiff filed a replying affidavit sworn on February 9, 2023 in opposition to the application. It was stated that there was no medical evidence on record to demonstrate that any of the Defendants were unwell on the hearing date. It was further stated that there was undue delay in filing the instant application which had not been adequately explained. It was contended that as the Defendants had failed to seek and obtain leave to appeal on October 3, 2022 no competent notice of appeal could be filed in the absence of such leave.
5. The Plaintiff further contended that the instant application was an afterthought since the Defendants failed to lodge their notice of appeal immediately upon dismissal of their application for adjournment on October 3, 2022. It was further contended that the application was merely intended to buy time and delay the conclusion of the suit. It was further contended that the Defendants had during the pendency of the suit surrendered the suit property to the Plaintiff who was the current registered proprietor hence staying the proceedings or re-opening the suit for defence hearing would not serve any useful purpose. The Plaintiff consequently urged the court to dismiss the said application for lack of merit.

#### **C. The Defendants' Rejoinder**

6. The Defendants filed a supplementary affidavit sworn by Ms Ruth Kuria on March 8, 2023 in response to the Plaintiff's replying affidavit. It was contended that there was a prior agreement with the Plaintiff's advocates to adjourn the suit on October 3, 2022 hence the Plaintiff's advocate had dishonestly proceeded with the hearing on October 3, 2022. It was stated that the Defendant who was unwell had suffered a common cold and did not seek medical attention in a medical facility hence the reason medical evidence was not available.
7. It was the Defendants' contention that although the suit property was currently registered in the Plaintiff's name, they had a counterclaim in the nature of beneficial interest by reason of having purchased the same for valuable consideration from the Plaintiff's late father during his lifetime.



#### **D. Directions on Submissions**

8. When the application came up for inter partes hearing it was directed that the said application shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. However, by the time of preparation of the ruling none of the parties had filed submissions. The Defendants' advocate had indicated that she would rely entirely upon her two affidavits on record without filing any submissions.

#### **E. The Issues for Determination**

9. The court has considered the Defendants' notice of motion dated November 23, 2022, the Plaintiff's replying affidavit in opposition thereto as well as the Defendants' supplementary affidavit. The court is of the opinion that the following issues arise for determination herein:
  - a. Whether the Defendants have made out a case for extension of time to file a notice of appeal out of time.
  - b. Whether the Defendants have made out a case for stay of proceedings pending appeal.
  - c. Who shall bear costs of the application.

#### **F. Analysis and Determination**

##### **Whether the Defendants have made out a case for extension of time to file a notice of appeal out of time**

10. The court has considered the affidavits and material on record on this issue. It is evident from the material on record that the Defendants intended to challenge the ruling and order of the court made on October 3, 2022 declining to adjourn the suit at their instance. The material on record shows that the instant application although dated November 23, 2022 was not filed until January 19, 2023 when it was paid for and stamped by the court. There was no explanation rendered by the Defendants either in their supporting affidavit or supplementary affidavit for the delay of about 3 and a half months in filing the application.
11. The factors to be considered in an application for extension of time to appeal out of time were considered by the Court of Appeal in the case of *Thuita Mwangi -vs- Kenya Airways Ltd [2003] eKLR* where the court quoted the following passage from the earlier case of *Mutiso -vs- Mwangi [1997] KLR 630*:

' It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that generally the matters which this court takes into account in deciding whether to grant an extension of time are; firstly, the length of the delay; secondly, the reason for the delay; third (possibly) the chances of that appeal succeeding if the application is granted; and fourthly, the degree of prejudice to the Respondent if the application is granted.'
12. The court has noted that the period of delay was about 3 ½ months and that there was no explanation or plausible explanation for the delay in filing the instant application. The court is not satisfied that the Defendants were serious in pursuing an interlocutory appeal on the issue of denial of adjournment. A diligent litigant who is denied an adjournment on October 3, 2022 cannot wait until January 19,



2023 to file an application for extension of time to lodge a notice of appeal out of time. The said notice ought to have been lodged within 14 days with effect from October 3, 2022. A diligent litigant ought also to have provided at least a reasonable explanation for the delay.

13. The court is also of the view that given the history and age of the suit the Plaintiff is likely to suffer some prejudice bearing in mind that the suit was filed in 2014 hence it has been pending for 9 years now. The Defendants could be merely out of delay the conclusion of this suit by filing the instant application belatedly.
14. In view of the foregoing, the court is not inclined to grant the extension of time sought. It is also doubtful whether the Defendants would be able to mount a competent interlocutory appeal on the denial of an adjournment in the absence of leave granted for that purpose. An order declining an adjournment is not one of the matters on which an appeal is allowed as of right under the provisions of Section 75 of the Civil Procedure Act (Cap 21).

### **Whether the Defendants have made out a case for stay of proceedings pending appeal**

15. The prayer for stay of proceedings or further proceedings was dependent upon the Defendants' application for extension of time to appeal out of time succeeding. Since the Defendants have failed to obtain an extension of time it is not strictly necessary to consider the prayer for stay of proceedings.
16. Even if the court had granted an extension of time sought by the Defendants it is doubtful if they could obtain a stay of further proceedings to pursue the intended appeal. There are many suits in court in which adjournments are denied on a daily basis. If all such suits were to be stayed as a matter of course it would create a serious disruption to the wheels of justice. An applicant must demonstrate good grounds for staying pending proceedings.
17. In the case of *Global Tours and Travels Limited Nairobi HC Winding - up Cause No 43 of 2000* Ringera J (as he then was) stated that:

' 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. Similarly, in the case of *Kenya Wildlife Service -vs- James Mutembei [2019] eKLR* Gikonyo J considered the applicable principles for stay of proceedings by quoting the following passages from *Halsbury's Laws of England, 4<sup>th</sup> Edition Vol 37* pages 330 and 332:

' 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.'

19. The court is not satisfied on the basis of the material on record that there are exceptional circumstances to justify a stay of further proceedings in this suit. There is no evidence to demonstrate that the Plaintiff's suit is frivolous, vexatious or groundless. The court is not satisfied that there is any compelling reason to stay the proceedings in this suit which has been pending in court for about 9 years. The interest of justice would require that the suit be heard and concluded as soon as is reasonably practicable. The overriding objective of the *Civil Procedure Act* (Cap 21) as stipulated in Sections 1A and 1B of the Act requires that suits should be heard and determined in a just, expeditious, proportionate and affordable manner.

#### **Who shall bear costs of the application**

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons -vs- Twentsche Overseas Trading Co Ltd [1967] EA 287*. The court finds no good reason why the successful party should not be awarded costs of the application. Consequently, the Plaintiff shall be awarded costs of the application.

#### **G. Conclusion and Disposal Order**

21. The upshot of the foregoing is that the court finds no merit in the Defendants' instant application. The court does not find it necessary to deal with the issue of furnishing the Defendants with copies of typed proceedings since that is an administrative issue to be handled by the Deputy Registrar of the court. Accordingly, the Defendants' notice of motion dated November 23, 2022 is hereby dismissed in its entirety with costs to the Plaintiff.

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU THIS 28<sup>TH</sup> DAY OF MARCH, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Mr. Gichigi for the Plaintiff

Ms. Ng'ang'a holding brief for Ms. Wangui for the Defendants

C/A - Carol

.....

**Y. M. ANGIMA**

**JUDGE**

