



REPUBLIC OF KENYA



Ethics & Anticorruption Commission v Kongo alias Daniel Kongo & 2 others (Environment & Land Case E315 of 2021) [2023] KEELC 16818 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16818 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E315 OF 2021**

MD MWANGI, J

MARCH 23, 2023

BETWEEN

ETHICS & ANTICORRUPTION COMMISSION PLAINTIFF

AND

HABIB OMAR KONGO ALIAS DANIEL KONGO 1ST DEFENDANT

KURIA GATHONI 2ND DEFENDANT

ROSE WAMBUI KURIA 3RD DEFENDANT

((Application dated 12th September 2022 by the 2nd Defendant/Applicant seeking an order of stay of all proceedings in this matter pending hearing and determination of an intended appeal to the Court of Appeal.))

RULING

Background

1. The 2nd defendant/applicant herein seeks an order staying all proceedings in this suit pending hearing and determination of his intended appeal, to the Court of Appeal under order 42 rule 6 of the [Civil Procedure Rules](#). The application is supported by the affidavit of the plaintiff/applicant sworn on the September 12, 2022. The main argument by the applicant is that the intended appeal will be rendered nugatory.
2. The application was opposed by the plaintiff/respondent by way of grounds of opposition dated 18th October. The plaintiff termed the application *inter alia* as an abuse of the process of court and prayed for its dismissal with costs.



Issues for Determination

3. The sole issue for determination as rightly framed by the applicant is whether the applicant is entitled to the orders of stay of proceedings sought in the application.

Analysis and Determination

4. In the case of *KWS v James Mutembei* (2019) eKLR, the court pointed out that stay of execution should not be confused with stay of proceedings. Stay of proceedings is a grave judicial action. I say so because, in his submissions, the 2nd defendant/applicant cited the case of *KICC Co-operative Bank of Kenya Ltd & another (garnishee)* (2019) eKLR. The court in the said case enumerated the grounds for stay of execution. However, what is before the court is an application for stay of proceedings.
5. In making this ruling I am guided by the holding of Ringera J (as he then was) in the case of *Re Global Tours & Travel Ltd*, High Court Winding Up Cause No 43 of 2000. In the said case, Ringera J (as he then was) was categorical that the sole consideration for the court in exercising its discretion in an application for stay of proceedings should be whether it is in the interest of justice to stay proceedings. Ringera J 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 for 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.”

6. Article 159 of the *Constitution* enjoin this court to render justice in a just, expeditious, proportionate and affordable cost to parties. In this case, I am not convinced that it is in the interest of justice to grant the order of stay of proceedings sought by the 2nd defendant/applicant. The applicant has not demonstrated the injustice or prejudice it would suffer if the orders sought were not granted nor the special circumstances in this case to justify the granting of the orders of stay of proceedings.
7. I must point out that the applicant herein had filed a similar application before the Court of Appeal dated May 24, 2022. He did not disclose this to the court. It was brought out by the plaintiff/respondent.
8. In my opinion, where a party opts to file his/her application before the court appealed to, he cannot simultaneously file a similar application before the court appealed from. The party has a choice of forum but cannot maintain two applications pari pasu. This is deliberately setting the courts on a collision course. It is abuse of the process of court.
9. I agree with the holding in the case of *Satya Bhama Gandhi v DPP & 3 others* (2018) eKLR where the court stated that: -

“It is settled law that a litigant has no right to pursue pari pasu two processes which will have the same effect in two courts either at the same time or at different times with a view of obtaining victory in one of the processes or in both. Litigation is not a game of chess where



players outsmart themselves by dexterity of purpose and traps. On the contrary, litigation is a contest by judicial process where parties place on the table of justice their different positions clearly, plainly and without tricks.”

10. The 2nd defendant/applicant having made his choice of forum must live with the consequences of her choice.
11. In any event, the Court of Appeal has already dealt with the application dismissing it on March 3, 2023.
12. Likewise, this court dismisses 2nd defendant’s application with costs for want of merits and being an abuse of the process of court.

Dated, Signed and Delivered at Nairobi this 23rd day of March 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Muriithi for the 2nd Defendant/Applicant.

Ms Ng’ethe for the Plaintiff/Respondent.

Ms. Kiiru holding brief for Mr. Thuita for the 1st Defendant.

No appearance for the 3rd Defendant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

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