



**Cheruiyot v Siror (Environment & Land Case 117 of 2016)
[2023] KEELC 17007 (KLR) (25 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17007 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 117 OF 2016
FO NYAGAKA, J
APRIL 25, 2023**

BETWEEN

JEREMIAH CHERUIYOT PLAINTIFF

AND

MICHAEL BETT SIROR DEFENDANT

RULING

1. The Notice of Motion for determination before me is that of the Plaintiff. It is dated 12/08/2022 and was filed on 17/08/2022. It is hinged on Sections 1A, 1B, 3, 3A and 63 (e) of the [Civil Procedure Act](#), Order 40, Rule 4 (1), Order 42, Rule 6 and Order 51 of the [Civil Procedure Rules](#). It seeks the following reliefs:
 1. ...spent.
 2. ...spent.
 3. ...spent.
 4. That the Honorable Court be pleased to grant and hereby grants a stay the execution of the ruling and orders issued on the 07/072022, and proceedings thereon, pending the hearing and determination of the Applicant's Appeal.
 5. Tha tsuch other and/or further relief be granted as this Honorable Court might deem fit and just to grant in the circumstances of this matter.
 6. That the costs of this application be provided for.
2. The Application is supported by the grounds on the body of the Motion and by the Supporting Affidavit of the Plaintiff. In brief, they are that the Plaintiff is dissatisfied with the findings of this Court given through the ruling delivered on 07/07/2022, when his Application seeking an injunction



herein was dismissed. That in the ruling the Court further directed parties to submit before it to determine whether the present suit was res judicata. He filed a Notice of Appeal on 21/07/2022 as against the decision. He annexed the electronic mail dated 21/07/2022 submitting his Notice of Appeal, the Notice of Appeal dated 21/07/2022, receipt dated 21/07/2021, electronic mail forwarding the Application dated 22/07/2022, letter dated 22/07/2022 and the draft order marked as JC1 (i), JC1 (ii), JC1 (iii), JC1 (iv), JC1 (v) and JC1 (vi) respectively.

3. The Plaintiff deposed that he had a strong appeal with high chances of success. He annexed his proposed draft Memorandum of Appeal marked as JC2. He continued his proposition that if the orders sought are not granted, that appeal will be rendered an academic exercise condemning him to suffer substantial loss. He further defended that the Application was filed without unreasonable delay. He expressed willingness to abide by any conditions set by this court towards securing a stay of execution. Finally, he opined that the Application, if granted, will occasion no prejudice to the Defendant. In light of these reasons, the Plaintiff urged this court to allow the Application as prayed.

The Response

4. The Defendant opposes the Application. He filed a Replying Affidavit on 20/09/2022. He deposed that the instant Application was unmerited since the court ably, lawfully and blamelessly found that the Plaintiff's Application dated 24/05/2019 lacked merit and was properly dismissed. That being said, the deponent continued that the filing of a Notice of Appeal and the preparation of a Memorandum of Appeal did not guarantee an automatic right of stay.
5. The Defendant pointed out the Plaintiff's antecedent conduct as not deserving of the orders sought. In summary, he found that the Plaintiff was non-compliant with orders of the court time and again and on several occasions sought leave and extension of time on them.
6. The Defendant maintained that he was the registered proprietor of the suit premises. Consequently, he contended, if the orders sought were granted, his rights to conduct litigation, access to justice, hearing without delay and the right to a fair trial would be violated.
7. The Defendant outlined that between the parties, several litigious matters had been prosecuted and defended. He further stated that the Plaintiff lacked a proper legal foundation as his defence remained proper and cogent.
8. On whether the Plaintiff had satisfied the threshold for grant of stay of proceedings, the Defendant deposed that the Plaintiff had not met the requirements set out. Noting that a stay of proceedings will ultimately delay the determination of the matter, the Defendant urged the Application be dismissed with costs.

Rejoinder

9. Pursuant to leave granted by this court, the Plaintiff filed a Supplementary Affidavit on 16/11/2022. He maintained that he was deserving of audience at the appellate court as he had met the threshold for grant of stay. He stated that contrary to the Defendant's claims, he was interested in the determination of the present suit. He added that a stay of proceedings was necessary to preserve the subject matter. He countered the Defendant's allegations on proprietorship stating that he is the lawful owner of the suit property.
10. About eviction, the Plaintiff annexed the ruling of the Court of Appeal in Nakuru Civil Application No. 211 of 2012 (JCA) that sought to withdraw the suit. He then highlighted that the several matters



as between the parties were not res judicata for several reasons. He fortified that argument by relying on Civil Appeal No. 56 of 2016; Michael Bett Siror vs. Jackson Koech annexed and marked as JCB.

Submissions

11. The parties canvassed the Application by way of written submissions. The Plaintiff filed his submissions dated 16/11/2022 on that day. He argued that under Order 42, Rule 6 (2) of the Civil Procedure Rules, this court was clothed with discretion to grant the orders sought. He submitted that he sought to stay the orders directing parties to file submissions on whether or not the matter is res judicata. He was apprehensive that since the issue of res judicata was not pleaded by parties, he stood to suffer a miscarriage of justice if the court finds in the affirmative.
12. The Plaintiff submitted that the Application was filed timeously. He stated that after the decision of 07/07/2022, he orally applied for stay on 28/07/2022. Pursuant to the court's directions, the Application was filed on 12/08/2022. Finally, he stated that he was willing to abide by the court orders for provision of security for the due performance. He thus prayed that the Application be allowed.
13. Again, before the ruling could be delivered in the morning of 18/04/2023 when it was due, learned counsel for the Plaintiff/ Applicant moved the Court that it does not deliver the ruling until it either expunges five paragraphs, being 14-19, that were added to the Replying Affidavit on which he did not have chance to submit since the Affidavit containing them was filed after he had submitted. Having listened to both counsel on the issue, the Court exercised its discretion not to expunge the paragraphs but permit the applicant to submit on them. He did so on 24/04/2023.
14. He submitted that the Court takes into account the ruling of the Court of Appeal in Nakuru in Civil Application No. NAI 211 of 2002 which was annexed as JC-A to his Supplementary Affidavit sworn on 16/11/2022. In it the Court stated that there was no counterclaim which could be said to have been made by the Respondent in the Originating Summons through a Replying Affidavit since directions had not been taken to deem the supporting affidavit and replies as pleadings.
15. Also, he submitted that to the extent that the Replying Affidavit was in reference to Kitale HCCC No. 129 of 2015 [2001] which was between Jackson Koech and the Defendant, the aspect of *res judicata* did not arise. He maintained still that since *res judicata* was not a main issue in the initial application it should not take precedence and that for the Court to rely on submissions alone without evidentially facts it would be prejudicial.
16. The Defendant on his part filed written submissions that were purportedly amended on 20/02/2023. They were filed on that day. He submitted that since commencement of the suit in 2016, the Plaintiff had failed to take positive steps to have the same prosecuted to its logical conclusion. He outlined that several suits as between the parties, previously heard and determined, rendered the present suit *res judicata*. Looking at the chequered litigious history, the Defendant lamented that several suits had been in court for over forty one (41) years condemning an injustice to the Defendant having suits hanging over his head.
17. The Defendant observed that the Plaintiff filed the Application for injunction, the subject of the intended appeal, three (3) years after the suit was instituted. He further noted that he had failed to file the appeal within sixty (60) days. As such, he was locked out by his own laches since an appeal had not been filed within the statutory required timelines.
18. On stay of proceedings, the Defendant cited several authorities to conclude that the Plaintiff had failed to establish the reasons for grant of those orders. Furthermore, the Application ought to fail because



the Plaintiff's complaints were frivolous yet there was need to facilitate efficacious disposal of suits in line with the *Constitution* and statute.

19. The Defendant argued that the intended appeal was not arguable since subdivision of the suit land lawfully took place between 2013 and 2015. Additionally, the Plaintiff had failed to demonstrate that he will suffer irreparable damage or that the appeal will be rendered nugatory if stay is declined.
20. In conclusion, the Defendant submitted that the Plaintiff's previous conduct demonstrated that he did not act in good faith as it was meant to occasion further delay towards the disposition of the present suit. He urged this Court to implore the same formula to conclude that the present motion was an abuse of the process of the court. In the interest of public policy, the Defendant urged this Court to dismiss the Application with costs.

Analysis and Disposition

21. I have considered the Application, the Affidavits in support and the annexures thereto. I have also given consideration to the Defendant's response, examined the parties' submissions, including the further submissions filed on 24/04/2023 and analyzed the relevant law. I must, however, comment and state that submissions cannot take the form of pleadings and as such do not enjoy the benefit of an amendment as purported to be done by the Defendants. I caution parties against adopting such practice that is not supported in law or in fact. Needless to state also that since submissions do not take the place of pleadings and evidence of parties as was stated in the case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, where the Court of Appeal held that "Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented," the apprehension of the applicant herein in his Further Submissions that this Court would rely on submissions hence prejudice the applicant is neither here nor there. It is farfetched. Again, the issue before the Court in relation to the Application is that the parties address the Court on whether the suit is or is not res judicata at the appropriate time. Should that form a basis to stay the proceedings or have a basis to determine whether or not there was a counterclaim filed and to which the Court of Appeal pronounced itself in Nakuru Civil Applicant NAI No. 112 of 2002? I think not.
22. The Application seeks two twin (2) orders; a stay of execution of the ruling and orders issued on 07/07/2022 and a stay of proceedings pending the hearing and determination of the Plaintiff's Appeal. The Plaintiff's Application cited Order 42, Rule 6 (1) of the *Civil Procedure Rules which* gives this court wide discretionary powers to stay execution and/or proceedings. But the Rule also provides that the filing of the appeal does not confer on a party an automatic right to orders of stay of execution of the orders or decree of the Court or the proceedings subsequent thereto.
23. To properly determine the present Application, I postulate that the issues for determination will each formulate the sub-heads of themes for analysis in the forthcoming paragraphs towards making my final orders. They are as follows:

a. Whether there is a pending Appeal

24. According to the Defendant, the present Application is frivolous as no Appeal has been filed. He contended that the Plaintiff has to date, failed to file an Appeal within the sixty (60) day time period. My understanding of the Defendant's argument is that the Plaintiff did not file his Memorandum and Record of Appeal within sixty (60) days. Consequently, no stay of proceedings and/or execution could issue since they were sought pending the hearing and determination of an appeal that did not exist. Put differently, he argued that an appeal, only existed, once a party filed his Memorandum and Record



of Appeal within the stipulated time period. This Court is called upon to juxtapose the argument in comparison with the Ruling delivered on 07/07/2022.

25. Without the intention of belaboring, Order 42, Rule 6 of the [Civil Procedure Rules](#) governs Applications for stay of proceedings and stay of execution. Special scrutiny has led this court to interpret the wordings of Order 42, Rule 6 (4) of the Rules. It states: “For the purposes of this rule, an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”
26. A plain reading of that provision means that as long as a notice of appeal has been issued, an appeal shall be deemed to have been duly filed. It is instructive to note that these wordings gravitated towards disposal of an Application as the present one for stay. It is thus not open to interpretation in any instance other than the one set in Order 42, Rule 6 of the [Civil Procedure Rules](#) unless otherwise expressly stated.
27. In the present case, I do observe that the Plaintiff filed a Notice of Appeal on 21/07/2022 of his intention to appeal against the decision of the trial court delivered on 07/07/2022. I thus find that there is on record an appeal, for the purpose of the determining the present Application.

b. Whether the Applicant is deserving of orders for stay of execution of the ruling and orders of 07/07/2022

28. In considering an application for stay of execution, Order 42, Rule 6 (2) of the Rules provides that stay shall not be granted unless:
 - i. The Application has been made without unreasonable delay;
 - ii. Substantial loss may result to the Applicant unless the order is made; and
 - iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.
29. The Plaintiff seeks to stay execution of the orders arising out of the ruling of 07/07/2022. At paragraph 45 of the ruling, this court found that the Application by the Plaintiff lacked merit and was dismissed with costs to the Defendant. The court thereafter directed parties to address it on whether the suit was duplicitous on account of previous matters filed and determined by the court. The issue that was before the Court was that the Applicant therein sought an injunction: the application was dismissed. The costs of the Application followed the event of dismissal. Thus, what was to be stayed? The failure to grant an injunction, or the proceedings only?
30. A plain purposive reading of the above orders demonstrate that they are in their nature negative. The impugned orders under appeal did not positively ask parties to conduct themselves in a certain way or refrain from doing something. As such, I find that, save for costs, the orders of the court remain incapable of execution. The failure to grant an injunction could not be stayed. The Learned Judges in [Western College of Arts and Applied Sciences v EP Oranga & 3 Others](#) [1976] eKLR held as follows regarding negative orders:

“What is there to be executed under the judgment, the subject of the intended appeal” The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is



nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered.”

31. Taking cue from the above decision, I find that the application for stay is untenable for the reasons deciphered above. I must also add that the directions of the court as to filing submissions cannot also be stayed from execution because they are not final orders in their character. Execution proceedings are in their nature a culmination of final orders of the court. They serve the purpose of recovering what a party has been granted by the court. As such, those directions could not be stayed from any form of execution.

c. Whether the suit ought to be stayed pending Appeal

32. As stated earlier on, Order 42, Rule 6 (1) of the *Civil Procedure Rules* empowers this court with discretion to stay proceedings pending appeal. In ascertaining whether or not to grant that relief, I take great guidance from the wisdom of Ringera J (as he then was) sitting in *Re Global Tours & Travel Ltd HCWC No.43 of 2000*, where the Learned Judge held 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 case, 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...”

33. Has the instant application met the threshold set out as above? The Plaintiff seeks to stay proceedings with a view to appealing against the orders of the court of 07/07/2022. One of the arguments advanced by the Plaintiff is that since *res judicata* was not pleaded, the Plaintiff will suffer a miscarriage of justice.
34. In analyzing the Application the substratum of the impugned ruling, the court found that several issues, including one on duplicity of the suit had been raised. Instead of determining that issue without hearing the Plaintiff, the court in its wisdom, urged parties to submit before him on the doctrine of *res judicata* and whether it was applicable to the facts and circumstances of this case.
35. The misdirection I find with the argument by the Plaintiff is that this court cannot make any orders as may appear just and expedient for disposal of suits. Section 13 (7) of the *Environment and Land Court Act* gives this court power to make any orders as the court deems just and fit. Furthermore, Section 3A of the *Civil Procedure* grants this Court similar power as the preceding cited provision. What prejudice is there to the Plaintiff, if upon an injunction that he never sought for three years, actually seven, was not granted and the parties were invited by the Court to address the issues of duplicity of the suits and *res judicata*, as to warrant the grant of orders of stay of proceedings herein? I see none other than mischief by the Plaintiff aimed at delaying the conclusion of this matter.
36. It would be foolhardy for the court to ignore glaring issues raised in the course of proceedings for the meagre reason that it was not pleaded. In any event pleadings can be amended any time, if need be, to include the issue. Without entering into the arena of the appellate court, as long as the court is dispensing justice, as was the case herein, where it directed parties to submit on the issue of *res judicata*, the orders were discharged judiciously. Suffice to add that the Plaintiff has in the present Application



presented arguments to negate that the suit is res judicata, which defeats logic in the need to stay the proceedings that would address the issue substantively. The question to ask is: wouldn't it then be in his interests that the court hears and determines that issue properly as he seems interested in submitting on the same? I think so.

37. The Plaintiff, in my comprehension, wants, for his own hidden agenda, this court not to jot its judicial pen on whether the present issue is res judicata. He has already predetermined the direction the issue will be decided upon without submitting on the same. It appears that he already is aware of the direction the court will take before it has even taken it. Again, I do not want to venture as an appellate court and will thus refrain from commenting on the substance in depth.
38. Ultimately, I am not satisfied to hold that the Plaintiff has laid a foundation for stay of proceedings. This suit was instituted in 2016. No steps have ever been taken by the Plaintiff to prosecute the suit. The Application, the substance of the appeal, was only filed three (3) years after the suit was filed, and prosecuted about two (2) years later.
39. Furthermore, I have carefully analyzed the grounds of appeal in the proposed memorandum of appeal annexed to the application, though not filed. I see none that is arguable. I therefore find that the appeal as filed by the Plaintiff is not arguable.
40. In any event, the antecedent conduct of the Plaintiff compels me to conclude that the stay of proceedings sought is simply a delaying tactic. Such an order will not be in the interest of justice. It has not been demonstrated what further concrete steps have been taken by the Plaintiff in prosecuting his Appeal; the absence of it a corollary, demonstrates that the Plaintiff is not interested in proceeding with the Appeal. After filing the Notice of Appeal, I have seen nothing further to show that the Plaintiff is a diligent Appellant.
41. As such, a stay of proceedings if granted, will further delay the prosecution of the matter. Although the Application was filed one (1) month after the decision was, I am not satisfied to hold that its pros outweighs its cons. In the end thus, I find that the Application dated 12/08/2022 and was filed on 17/08/2022 lacks merit. It consequently fails and is hereby dismissed with costs to the Defendant.
42. This matter shall be mentioned virtually on 08/05/2023 at 8.30 am for further directions as was contemplated in the Ruling delivered on 07/07/2022.
43. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 25TH DAY OF APRIL 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

