



Saoli (Suing on his own behalf and as an Administrator of the Estate of Leposo Ole Saoli) & 2 others v Saoli (Environment & Land Case 264 of 2017) [2023] KEELC 16899 (KLR) (25 April 2023) (Ruling)

Neutral citation: [2023] KEELC 16899 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 264 OF 2017
CG MBOGO, J
APRIL 25, 2023
FORMERLY NAKURU HCC NO. 28 OF 2010**

BETWEEN

**PAUL MOROMBI SAOLI (SUIING ON HIS OWN BEHALF AND AS AN ADMINISTRATOR OF THE ESTATE OF LEPOSO OLE SAOLI) .. 1ST PLAINTIFF
ANTONY PARSALOI SAOLI 2ND PLAINTIFF
TIMOTHY LETOLUO SAOLI 3RD PLAINTIFF

AND

SOITARA OLE SAOLI DEFENDANT**

RULING

1. Before this court for determination is a notice of motion application dated 17th February, 2023 filed by the defendant/applicant and expressed to be brought under Article 48,50 (1) and 159 (2) (d) of *the Constitution*, Sections 1A,1B,3,3A of the *Civil Procedure Act* Sections 3 & 13 (7) of the *Environment and Land Court Act*, 2011 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking the following orders: -
 1. That there be a stay of any further proceedings in this matter pending hearing and determination of an appeal preferred against the ruling of this court delivered on 7th February, 2023.
 2. That the costs of the application be provided for.
2. The application is premised on the grounds inter alia that the applicant being dissatisfied with the ruling of this court delivered on 7th February, 2023, has preferred an appeal against the whole of the



ruling and deserves an opportunity to have the Court of Appeal pronounce itself on the issues raised in the application before any further proceedings may be undertaken herein.

3. The application is supported by the affidavit of the applicant sworn on even date. The applicant deposed that this court erred in law in not pronouncing itself on his prayer to file compliance documents without giving any reason whatsoever for the decision which he believes that proceeding in the suit without him amending his defence and counter claim is highly prejudicial to him.
4. The applicant further deposed that unless the proceedings herein are stayed, his intended appeal shall be rendered nugatory and if the court proceeds with the hearing of the suit and the appeal ultimately succeeds, which is highly likely, the court will have wasted a lot of precious judicial time.
5. The applicant deposed that he is ready and willing to comply with any reasonable condition of stay of proceedings and there exists sufficient reason for the grant of the orders sought herein.
6. The application was opposed by the replying affidavit of the 1st respondent sworn on 7th March, 2023. The 1st respondent deposed that the application is bad in law, frivolous, vexatious, malicious, inept and a gross abuse of the court's process for the reason that the contents of the supporting affidavit are merely a rehash of events already on record and further, that filing a notice of appeal is itself not a ground for stay of proceedings.
7. The 1st respondent further deposed that the application is legally untenable for the reason that the applicant has failed to attach a draft memorandum of appeal to enable this court ascertain whether the intended appeal is arguable or meritorious. Further, that the applicant has not demonstrated the steps taken in setting the appeal down for hearing and as such it is prematurely lodged.
8. The 1st respondent further deposed that the applicant's right to pursue an appeal does not extend to holding this court and the respondents' hostage on account of a frivolous application. Further, that if this court is to allow the application, the respondents stand to suffer prejudice as this matter has been pending since the year 2010 and unlike stay of execution, the test of stay of proceedings is higher and stringent.
9. Further, that the applicant herein has realised that his defence raises no triable issues thus the multifarious applications in a desperate attempt to frustrate the expeditious disposal of the suit.
10. The application was canvassed by way of written submissions. The applicant filed written submissions dated 10th February, 2023 and filed in court on 16th March, 2023.
11. The applicant raised one issue for determination which is whether the court should stay further proceedings in this matter pending the hearing and determination of an appeal preferred against the ruling of this court delivered on 7th February, 2023.
12. The applicant submitted that the application before court is not novel at all as superior courts have previously pronounced themselves on this issue. The applicant relied on the following cases:-
 1. *Stepup Holdings (K) Limited versus Mt Kenya University [2012]* eKLR.
 2. Ezekiel Mule Musembi versus H. Young & Company (E.A) Limited [2019] eKLR.
 3. Benson Khwatenge Wafula versus Director of Public Prosecutions; Ethics and Anti-Corruption & 2 Others (Interested Parties) [2021] eKLR.
 4. *Port Florence Community Health Care versus Crown Health Care Limited [2022]* eKLR.



13. While relying on the above authorities, the applicant submitted that the application was filed less than 14 days following the delivery of the ruling on 7th February, 2023 and as such it was brought timeously. Further, that it is trite law that an arguable appeal does not necessarily mean that the appeal or intended appeal must be one that ought to succeed but rather one that raises a serious question of law or a reasonable argument deserving consideration by the court as was held in the cases of Dennis Mogambi Mang'are versus Attorney General & 3 Others Civil Application No. NAI 265 of 2011 (UR 175/2011 and [Stanley Kangethe Kinyanjui versus Tony Ketter & 5 Others\[2013\]](#)eKLR.
14. The applicant further submitted that while it is not for this court to determine the merits of the intended appeal, the tentative grounds of appeal set out in paragraph 16 of his submissions demonstrate that the appeal is arguable.
15. The applicant further submitted that the issues raised in the appeal go to the root of the proceedings herein and if the application is not allowed, the appeal will be rendered nugatory. As such, the court ought to hold the proceedings and have those issues determined first. The applicant submitted that expedition should not override justice as it will serve no purpose to hear the parties and render a judgment only for the Court of Appeal to overturn the ruling delivered.
16. Further, that in the unlikely event that this court dismisses the application and proceeds with the hearing of the suit, the applicant will simply renew the application at the Court of Appeal and if the said court allows it, its precious judicial time will have been lost before this court and the Court of Appeal.
17. By the time of writing this ruling the plaintiffs/respondents had not filed their written submissions. Be that as it may, I have analysed and considered the application, replying affidavit and the written submissions of the applicant and the issue for determination is whether this court ought to stay further proceedings in this suit pending hearing and determination of the intended appeal.
18. The decision on whether or not to grant stay of proceedings is discretionary and this court has powers to stay proceedings pending an appeal. This jurisdiction is derived from Order 42 rule 6 (1) of the [Civil Procedures Rules](#) which states 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 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.”
19. In the case of Re Global Tours & Travel Ltd HCWC No.43 of 2000 Ringera, J (as he then was) held 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 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...”

20. For this court to grant stay of proceedings, the applicant ought to have shown that it has an arguable appeal with high chances of success such that if stay of proceedings is not granted the appeal will be rendered nugatory. In the case of *PKM versus RPM [2015]* eKLR, the court explained an arguable appeal as follows: -

“As stated by this Court on many occasions, an arguable appeal does not mean an appeal which would ultimately succeed. The authorities show that an applicant is only required to show that the grounds raise a serious question of fact or law which can go either way for consideration by the Court on appeal.”

21. I have read the application and the supporting affidavit annexed thereto and I do note that the applicant has not attached a draft memorandum of appeal intended to be filed or already filed at the Court of Appeal. I do agree with the applicant that the instant application has been brought timeously save the seemingly underlying intentions. However, this court is unable to comment on whether the grounds raised in the appeal are arguable or not since the applicant has not provided a draft. What the applicant has done is attempt to outline his grounds of appeal in paragraph 16 of his written submissions which is unprocedural. Let me state that this court will not entertain such an act.

22. It is also important to note that this matter was filed in the year 2010 and it was not until 8th February, 2022 when the plaintiffs’/respondents’ case proceeded for hearing. It is evident that the stay of proceedings as sought is seemingly a delaying tactic as issues raised by the applicant have been previously dealt with vide the rulings dated 5th July, 2022 and 7th February, 2023 respectively.

23. In the case of *Kenya Wildlife Service versus James Mutembei [2019]* eKLR, it was held that: -

“...Stay of proceeding should not be confused with stay of execution pending appeal. 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...” (emphasis mine)

24. Whereas this court appreciates that the applicant has a right of appeal, such right cannot be exercised at the expense of justice. The provisions of Article 159(2) (a) (b)(c) and (d) of *the Constitution* of Kenya as read with Sections 1A and 1B of the *Civil Procedure Act*, Cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in a just, expeditious, proportionate and affordable manner. I place reliance in the case of *Christopher Ndolo Mutuku versus CFC Stanbic Bank Limited [2015]* eKLR where it was held: -

“... what matters in an application of stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

“The Court is aware the Defendant has unfettered right of appeal which it has sought to exercise. But that right has to be balanced against the right of the Plaintiff to equal treatment in law and to have his case determined without unreasonable delay. That constitutional desire demands that proceedings should not be hindered without just and sufficient cause. That position of the law is informed by the principle of justice in Article 159 of *the*



Constitution which expresses the now commonly principle of law known as the overriding objective of the law; that cases should be disposed of in a just, proportionate, expeditious and affordable manner.”

25. Let me also add that it would be unfair for the respondents who have been present to prosecute this suit to be tied down at this stage taking into consideration that they filed the suit in the year 2010.
26. Arising from the above, the notice of motion application dated 17th February, 2023 lacks merit and it is hereby dismissed. Each party to bear its own costs. This matter is fixed for mention on 3rd May, 2023 for parties to fix a date for defence hearing. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 25TH DAY OF APRIL, 2023.

MBOGO C.G.

JUDGE

25/4/2023

In the presence of:

CA:Chuma

