



Rucha & another v Kanampiu (Suing as the Legal representative of the Estate of the Late Kiberenge Njuri the deceased on behalf of Beatrice Kiberenge) (Environment and Land Appeal E004 of 2023) [2023] KEELC 17783 (KLR) (29 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17783 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E004 OF 2023
CK YANO, J
MAY 29, 2023
APPEAL FROM RULING IN CHUKA CM ELC E061 OF 2022

BETWEEN

ASHFORD KABURU RUCHA 1ST APPELLANT
MARY AMATU DAVID NTHANG'AI (BEING SUED AS THE
LEGAL REPRESENTATIVE OF THE ESTATE OF FRED NCHALE
(DECEASED) 2ND APPELLANT

AND

NJAGI KANAMPIU (SUING AS THE LEGAL REPRESENTATIVE OF THE
ESTATE OF THE LATE KIBERENGE NJURI THE DECEASED ON BEHALF OF
BEATRICE KIBERENGE) RESPONDENT

RULING

1. This ruling is in respect of the Notice of Motion dated 2nd March, 2023 brought pursuant to the provisions of section 1A, 1B, 2(a), 3A, 63(e) of the *Civil Procedure Act*, Order 51 Rule 14 (1)(a) of the *Civil Procedure Rules* and all other enabling provisions of the law. The Appellants/Applicants seek for orders that pending the hearing and determination of the appeal herein, the Honourable Court be pleased to issue stay of proceedings in Chuka CM ELC No E061 of 2022 and that there be a stay of execution issued on 15th February, 2023 by Honourable H. I. Mwendwa (SRM) and all consequential orders issued in Chuka CM ELC No E061 of 2021 pending the hearing and determination of the said appeal.
2. The application is premised on the grounds set out on the face of the motion and the supporting affidavit of the 2nd Applicant sworn on 2nd March, 2023. It is deponed that the Respondent filed an application dated 21st November, 2022 under certificate of urgency seeking inter alia, a temporary order



of inhibition to be placed upon land parcel No Mwimbi/Kiraro/701. That when the said application came up for hearing, the trial court directed the appellants herein to file their response to the said application and the matter was fixed for mention on 15th February, 2023 to confirm filing of responses and submissions. That on 13th February, 2023, the Applicants herein filed a preliminary Objection challenging the Respondent's locus standi to bring the said application and that the same was sub judice and res judicata.

3. The Applicants aver that when the application came up on 15th February, 2023, the trial court noted that the application was undefended and proceeded to issue an order of inhibition against the suit property and that consequently, the Respondent extracted the order and duly registered it at the Lands Registry. The Applicants fault the trial court for making the impugned orders arguing that the trial court misapprehended the law on Civil Procedure specifically order 51 Rule 14 of the Civil Procedure Rules on ways of responding to an application, adding that the said orders are injurious of them as they were draconian, drove them from the seat of justice and in doing so, violated the Applicants' cardinal right to be heard as enshrined under Article 50(1) of the constitution. The Applicants further aver that the trial court violated the rule of natural justice and that had the trial court heard the preliminary objection, it would not have issued contradictory orders as the lower court in Chuka CM Civil Suit No 141 of 2022 in which the trial court differently constituted had issued orders restraining the Respondent from interring the remains of one Beatrice Kiberenge on the suit property. In the supporting affidavit, the 2nd Applicant has annexed copies of the application dated 21st November, 2022, the preliminary objection, certified proceedings and the extracted order.
4. In opposing the application, the Respondent filed a Replying Affidavit dated 13th March, 2023. Briefly, the Respondent contends inter alia, that the Applicants despite being granted time by the trial court, had not filed any response to the Respondent's application in the lower court and only filed and served a notice of appointment. The Respondent denies that the Applicants were denied their right to be heard. The Respondent further argues that the instant appeal and application are mischievous and meant to mislead this court as well as serve ill motive since the orders sought and granted by the trial court are preservative orders and not orders to inter the remains of the deceased on the suit property. The Respondent urged this to dismiss the application with costs.
5. The application was canvassed by way of written submissions which were duly filed by both parties. I have considered the application and the submissions made. I have also taken into account the authorities cited.
6. The application seeks to stay the orders of inhibition issued by the trial court and stay of proceedings in Chuka CM ELC No E061 of 2022 pending the hearing and determination of the appeal herein. The issues for determination are whether the orders sought should be granted or not. The orders issued by Hon. H. I. Mwendwa (SRM) on 15th February, 2023 were in the following terms:

“Order

Upon this matter coming up for Ruling on 15th day of February, 2023 before Honourable H. I. Mwendwa SRM

And Upon delivering said Ruling in the presence of counsel for the applicant and counsel for the Respondents;

It Is Hereby Ordered That

1. Pending the hearing and determination of the Main Suit interim orders of inhibition be and is hereby placed on land parcel No Mwimbi/Kiraro/701 restraining the Respondents either by themselves, family members, agents or



any person(s) acting on their behalf from interfering, alienating, selling or transferring the said parcel of land.

2. The Land Registered (sic) Tharaka Nithi County/OCS Chogoria Police Station be and is hereby ordered to comply with the orders issued.
3. The instant suit should be heard on priority basis as the remains of the late Beatrice Kiberenge are lying on the morgue since 6th July, 2022.”

7. In the case of *Global Tours & Travel Limited*, Nairobi HC Winding Up Cause No 43 of 2000, Ringera J (as he then was) 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.”

8. The *Halsbury's Law of England* 4th Edition Vol 37 pages 330 and 332 states that:

“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 this 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.”

9. It is therefore clear that stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his/her litigation. It impinges on the right of access to justice, right to be heard without undue delay, and overall, right to a fair trial. Accordingly, stay of proceedings can only be granted sparingly and only in exceptional cases. This is because the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined.
10. In the instant case, the Applicants argue that the trial court erred in issuing an inhibition order against the suit property. An inhibition order in my view is to preserve the subject matter of the suit. The Applicants have clearly failed to demonstrate what prejudice they would suffer if the inhibition order remains in force pending the determination of the main suit before the lower court. I note that the trial court appreciated that the suit should be heard on priority basis because the remains of one Beatrice



Kiberenge are lying in the morgue since 6th July, 2022. In this case, I am of the considered view that the Applicants have not met the test for grant of stay of proceedings in this matter. I therefore decline to stay the proceedings in Chuka CM ELC No E061 of 2022.

11. The next issue is whether stay of execution pending appeal should be granted or not. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the [Civil Procedure Rules](#) which provides as follows:

“6

- (1) 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 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.
- (2) No order for stay or execution shall be made under subrule (1) unless –
 - (a) the court is satisfied that substantial loss may result to the Applicant unless the order is made and that such application has been made without undue delay;
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.”

12. The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay, secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted, and thirdly, such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.
13. From the record, the ruling appealed against was made on 15th February, 2023 and the application herein was filed on 2nd March, 2023. This was after only two weeks. The application was therefore made timeously.
14. Regarding the second pre-requisite, that is substantial loss occurring to the applicants, I am not persuaded that the applicants will suffer substantial loss if the stay is not granted. This is because the order of inhibition appealed against was only meant to preserve the suit property pending the hearing



and determination of the main suit before the lower court. Moreover, the applicants aver that the Respondent herein extracted the said order and duly registered it at the Lands Registry. Therefore, the application has been overtaken by events. In my view there is nothing to say since the inhibition has been registered. It is trite law that courts do not issue orders in vain.

15. By reason of the foregoing, it is my finding that the notice of motion dated 2nd March, 2023 is devoid of merit and the same is dismissed with costs to the Respondent.

16. It is so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 29TH DAY OF MAY, 2023.

In the presence of:

CA: Martha

Ms. Musyimi for Respondent

Ms. Mutua for Appellant/Applicant

C. K. YANO,

JUDGE.

