



Nurani & another (Suing as the legal administrators of the Estate of Sadrudin Shmsudin Ismail Nurani) v Gulam & 2 others (Environment & Land Case 596 of 2014) [2023] KEELC 17730 (KLR) (25 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17730 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 596 OF 2014**

**OA ANGOTE, J
MAY 25, 2023**

BETWEEN

**FARAH SADRUDIN NURANI 1ST PLAINTIFF
FEISAL SADRUDIN NURANI 2ND PLAINTIFF
SUING AS THE LEGAL ADMINISTRATORS OF THE ESTATE OF SADRUDIN
SHMSUDIN ISMAIL NURANI**

AND

**GALEB GULAM 1ST DEFENDANT
SUNSHINE COTTAGES LIMITED 2ND DEFENDANT
DIAMOND TRUST BANK 3RD DEFENDANT**

RULING

1. Before this Court for determination is the 2nd Defendant's/Applicant's Notice of Motion application dated March 31, 2023 brought pursuant to the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and Orders 42 Rule 6 and Order 51 rule 1 of the [Civil Procedure Rules](#) seeking the following reliefs;
 - i. That pending the hearing and determination of the Intended Appeal, this Honourable Court be pleased to grant an order to stay any further proceedings in this matter.
 - ii. That the costs of and incidental to this Application be costs in the Cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Singh Manku Jaswant, a Director of the 2nd Defendant, who deponed that on June 22, 2022, the 2nd



Defendant filed an application seeking the recusal of this Court which application was dismissed on February 23, 2023.

3. It was deposed by the 2nd Defendant's Director that on March 3, 2023, the 2nd Defendant filed a Notice of Appeal signaling its intention to Appeal against the aforesaid Ruling; that the case is part heard and scheduled to proceed for further hearing on July 17, 2023 and that the 2nd Defendant is apprehensive that the matter will have substantively proceeded before determination by the Court of Appeal rendering the same an academic exercise.
4. The 1st Plaintiff responded by way of Grounds of Opposition in which he averred that the application is made in bad faith and is an attempt to delay the resolution of the matter; that the Appeal is an afterthought and does not disclose any triable issues; that the purported Notice of Appeal was not served on the 1st Plaintiff pursuant to rule 77 (2) of the [Court of Appeal Rules, 2022](#) and that if the application is allowed, it will cause great injustice to the 1st Plaintiff who has been prosecuting the matter for over 10 years.
5. The 2nd Plaintiff also filed Grounds of Opposition in which she averred that no grounds have been disclosed warranting the grant of the orders sought in the application and that the application is an attack on the decision of February 23, 2023 and is an attempt at forum shopping and delaying the matters with respect to the Estate of the deceased Sadrudin Shamsudin Nurani who passed away on the November 22, 1986.
6. The 2nd Plaintiff averred that the application contravenes the consent order recorded by the parties in which the hearing and disposal of the suit was to be on priority basis; that the 2nd Defendant does not have an arguable Appeal; that the application seeks to delay the further defence hearing scheduled to take place on July 17, 2023 where the 2nd and 3rd Defendants are expected to present their case and that greater injustice will be occasioned in staying the proceedings in this fairly old matter.
7. In his Further Affidavit, the 2nd Defendant's Director deposed that he had inadvertently omitted to include the draft Memorandum of Appeal in the affidavit in support of the Motion, which he has now adduced and that the application raises bona-fide grounds of Appeal and ought to be allowed so as not to render the Appeal an academic exercise.
8. The 1st and 3rd Defendants did not file any documents with respect to the application. Other than the 1st and 3rd Defendants, the Plaintiffs and the 2nd Defendant's advocates made oral submissions which I have considered.

Analysis and Determination

9. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is whether the 2nd Defendant/Applicant has satisfactorily discharged the conditions warranting the grant of stay of proceedings pending Appeal.
10. The general principles which guide the courts whenever they are invited to exercise the jurisdiction to stay proceedings are best summarized in [Halsbury's Law of England](#), 4th Edition, Vol 37 at pages 330 and 332 as follows:

“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 proceedings beyond all reasonable doubt ought not to be allowed to continue.”

11. This was affirmed by the Court in *Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2013] eKLR which persuasively stated thus;

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black’s Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court’s discretion.”

12. The powers of this Court to stay proceedings pending appeal and its jurisdiction in this regard is derived from Order 42 rule 6 of the *Civil Procedure Rules* as well as the inherent jurisdiction of the court reserved in Section 3A of the *Civil Procedure Act*. Order 42, rule 6(1) of the *Civil Procedure Rules* provides as follows:

“(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 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.”

13. In the case of *Global Tours & Travels Limited*, Nairobi HC Winding Up Cause No.43 of 2000, the Court laid down the factors that ought to be considered on whether or not to stay proceedings 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 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” (emphasis added).”

14. Similarly, the Court in the case of *Christopher Ndolo Mutuku & another vs CFC Stanbic Bank Ltd* [2015] eKLR, held as follows;

“What matters in an application for 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.”



15. In *William Odhiambo Ramogi & 2 Others vs the Honourable Attorney General & 3 Others* [2020] eKLR, a five judge Bench of the High Court, authoritatively laid out the principles for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. They laid down the following six principles

“First, there must be an appeal pending before the higher Court;

Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;

Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;

Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;

Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and

Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay”

16. It is apparent from the foregoing that the grant of a stay of proceedings pending the hearing of an interlocutory appeal in civil matters is a rare and exceptional remedy. The Court in making this determination must remain alive to the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined.
17. This position has a constitutional backing in Article 50 of the *Constitution* which guarantees every person the right to a fair trial, which includes the right to have the trial begin and conclude without unreasonable delay, as well as the principle that justice delayed is justice denied.
18. Whereas it is difficult to determine with mathematical precision when the Court can stay its own proceedings pending the hearing of an interlocutory application by a higher court, it is trite that the order to stay proceedings should be issue sparingly, and in very exceptional circumstance, especially where grave injustice might otherwise result or where justice might not be attained unless the orders are issued.
19. The 2nd Defendant, vide an application dated June 22, 2023, sought to have this Court recuse itself. The Court dismissed the application for recusal. Having looked at the draft Memorandum of Appeal, the Court is not persuaded that the Appeal will be rendered nugatory by the mere fact that the trial proceeds and a judgment on merits given.
20. The judgment given by this court is capable of being stayed by the Court of Appeal and indeed set aside on the ground that the application for recusal was merited. Indeed, no special circumstances have been demonstrated as to why this court should stay its proceedings, especially in a matter in which the Plaintiffs have already closed their cases.



21. Taking into account the circumstances of the case, in particular the age of the matter and the stage at which it has reached, the court is of the view that a stay of these proceedings will be extremely prejudicial to the Plaintiffs and the other Defendants who have not seen it fit to support the 2nd Defendant's application.
22. The 2nd Defendant will still have his day in the Court of Appeal on his appeal on the question of recusal, and if he succeeds, the Court of Appeal will set aside the proceedings of this court. The 2nd Defendant will therefore not be prejudiced in any way if this matter proceeds to its logical conclusion, neither will the appeal be rendered an academic exercise as alleged.
23. Consequently, the Court finds the application dated March 31, 2023 to be unmeritorious. The application is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH MAY, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Opiyo for Gachuhi for 2nd Defendant

Mr Koech for 1st Defendant

Ms Inimah holding brief for Luseno for 2nd Plaintiff

Mr. Oyendo holding brief for Ms Mutindi for 1st Plaintiff

Court Assistant - Tracy

