



**Mursal & 4 others v Abdi (Environment & Land Case
126 of 2019) [2023] KEELC 17365 (KLR) (11 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17365 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 126 OF 2019**

JO MBOYA, J

MAY 11, 2023

BETWEEN

HABIBA ALI MURSAL 1ST PLAINTIFF

**ABDIAZIZ MOHAMED ADAWE & ASHA MOHAMUD ADHAWA (SUING
AS THE ADMINISTRATORS OF THE ESTATE OF AMINA SHEIKH
AHMED) 2ND PLAINTIFF**

KALI MOHAMED HASSAN 3RD PLAINTIFF

MUHUBA SHEIKH OMAR 4TH PLAINTIFF

MAYLUN AHMED AMIR 5TH PLAINTIFF

AND

MARIAM NOOR ABDI DEFENDANT

RULING

1. The matter herein is fixed for hearing of the main suit. However, when the matter was called out this morning for purposes of issuing directions towards and pertaining to time allocation, Senior Counsel Mr. Ahmed Nassir Abdullahi, made two sets of applications before the court.
2. Firstly, learned Senior Counsel urged the court to fast track the typing of the proceedings to enable the Plaintiffs whose suits were struck out to file the requisite record of appeal before the Court of Appeal.
3. Secondly, Learned Counsel urged the court to grant an order of stay of proceedings in the instant matter to enable the other appeals by the Plaintiffs whose cases were struck out to pursue the appeal before the Court of Appeal.
4. Invariably, Learned Counsel submitted that the application for stay of proceedings can be made orally and hence there was no need to file a formal application, whatsoever. Furthermore, the Learned Senior



Counsel also submitted that the Honourable court should endeavor to do substantive justice and avoid undue procedural technicalities. In this regard, Learned Counsel urged the court to be guided by the provisions of article 159 (2) (d) of *the Constitution*, 2010.

5. On his part, learned counsel for the Defendant contended that what counsel for the Plaintiff was seeking for was technically an adjournment, albeit without saying so. In any event, the counsel for the Defendant added that no reason has been advanced to warrant the adjournment.
6. Additionally, counsel for the Defendant also contended that the court has hitherto granted an order of last adjournment in the matter. In the premises, Learned Counsel has implored the court to decline the request for adjournment.
7. Lastly, the counsel for the Defendant has also stated that the Plaintiffs whose suits were struck out, have nothing to do with the prosecution of the instant matter. For coherence, the counsel has stated that those Plaintiffs are no longer parties herein and hence the pendency of their appeal before the Court of Appeal has no bearing in the matter.
8. I have anxiously considered the application at the instance of the counsel for the Plaintiff. In respect of the first limb, I wish to state that the court made an order for the Deputy Registrar to process and avail the typed proceedings to the counsel for the Plaintiffs whose suits were struck out on the 18th March 2022.
9. Having made the said order, it was incumbent upon the counsel for the Plaintiffs to follow the issues of the proceedings and thereafter to pay for the same. However, I have not seen any letter from the Plaintiffs, if at all, which has been addressed to the Deputy Registrar enquiring about the status of the proceedings. Nevertheless, in so far as there is already an order, it behooves the counsel for the Plaintiff to follow up the issue of the proceedings.
10. In a nutshell, I beg to state that the court had made the requisite order.
11. In respect of the second application, namely, the application for an order for stay of proceedings, I beg to say that such an application can only be made in a formal manner and in any event, in accordance with section 6 of the *Civil Procedure Act*, cap 21 Laws of Kenya. Furthermore, I beg to add that instances where the law allows informal applications, are clearly and expressly stipulated under the law; and hence where the law is silent, like section 6 of the *Civil Procedure Act*, chapter 21 Laws of Kenya, the obvious implication, is that such application can only be mounted vide formal application and not otherwise.
12. In the premises, the informal application seeking for stay of proceedings herein is with humility misconceived and legally untenable. Furthermore, even if, I had been minded to deal with the application for stay of proceedings informally, it is not lost on me that an order of stay of proceedings is of such a grave nature; and hence the same can only be granted in exceptional and peculiar circumstances, subject to proof on the balance of probabilities.
13. Instructively, the legal position as pertains to the circumstances where an order of stay of proceedings, can be granted and issued by the court, were canvassed and discussed by the court in the case of *Winding Up Cause: Global Tours & Travel Limited (2000)* unreported, where Hon. Justice A. Ringera, Judge, (as he then was), held as hereunder;

“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.”

14. In addition, the circumstances to be considered prior to and before grant of an order of stay of proceedings, were also espoused, articulated and underscored in *Halsbury’s Law of England*, 4th Edition. Vol. 37 page 330 and 332, 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 the 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.”

15. Invariably, the same legal position, espoused in Halsbury Law of England, was re-echoed in the case of *Kenya Wildlife service -versus- Mutembei* (2019) eKLR that:-

“The court stated; As I understand the law whether or not I 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 to order a stay of proceedings, and if it is on what terms it should be granted.

In deciding whether to order a stay, a 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 or whether it is an arguable one. The scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.... “...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 proceedings is high and stringent...”

16. Guided by the various ratio decidendi in the said cases, I am afraid that the order of stay of proceedings, which has been sought by and on behalf of the plaintiff herein, is not justifiable in the circumstances of this case. In any event, article 159 (2) (b) of *the Constitution* 2010, behooves the court to do justice without undue delay.
17. In short the application is declined.



18. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 11TH DAY OF MAY, 2023.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr. Cohen Amany holding brief for Mr. Ahmed Nassir Abdullahi SC for the the Plaintiff

Mr. Amos Wandago for the Defendant

