



**Sunrise Orthopaedic & Trauma Hospital Ltd & another v Lelei
& another; Chemai (Interested Party) (Environment & Land Case
56A of 2013) [2023] KEELC 20243 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20243 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 56A OF 2013
JM ONYANGO, J
SEPTEMBER 28, 2023**

BETWEEN

SUNRISE ORTHOPAEDIC & TRAUMA HOSPITAL LTD 1ST PLAINTIFF

DAVID LANGAT 2ND PLAINTIFF

AND

DR LECTARY KIBOR KEIYO LELEI 1ST DEFENDANT

ST LUKES ORTHOPAEDIC & TRAUMA HOSPITAL 2ND DEFENDANT

AND

MARY CHEMAI INTERESTED PARTY

RULING

1. Following the delivery of the ruling dated 23rd November, 2022 in which the court granted leave to the Plaintiffs to further amend their Plaint, the 1st Defendant filed an appeal against the said ruling in the Court of Appeal. He then filed a Notice of Motion dated 31st January, 2023 brought pursuant to Articles 25 (d), 48, 50(1) and 159 of the Constitution of Kenya, Section 3A and 63(e) of the Civil Procedure Act and Order 42 Rule 6 and Order 51 of the Civil Procedure Rules, 2010 as well as section 3 and 19 of the Environment and Land Court Act seeking a stay of proceedings. I must point out that Article 25 (d) of the Constitution of Kenya has nothing to do with the present application but I shall not dwell on this technical slip as I believe the Applicant must have intended to refer to Article 25(c) of the Constitution.
2. The application is based on the grounds set out on the face of the Notice of Motion and the 1st Defendant's supporting affidavit sworn on the 31st January 2023. The gist of the application is that the documents in the Plaintiff's Further, Further Amended Plaint filed by the Plaintiff pursuant to the



- ruling delivered by this court on 23.11.22 form the substratum of Eldoret Civil Appeal No. E005 of 2023 Dr. Lectary Kibor Keiyo Lelei v David Langat & 3 Others and that it is in the interest of justice that these proceedings be stayed pending determination of the application and appeal.
3. In opposing the application, the Plaintiff filed Grounds of Opposition dated 17th February, 2023 and a Replying Affidavit sworn by David Langat on the same date.
 4. In the Grounds of Opposition, the Plaintiff raises three main issues: Firstly, that the applicant is guilty of laches as the application was filed 80 days after the ruling was delivered yet the Applicant was aware that the case had been fixed for hearing on 6th February, 2023, Secondly, that the Applicant has not demonstrated that he would suffer substantial loss if the order for stay of proceedings is not granted and lastly, that staying the proceedings of this case that was filed way back in 2011 would contradict the policy of the Judicial Service Commission that all cases that are more than 5 years old should be heard and determined without further delay.
 5. The Plaintiff's Replying affidavit reiterated the Grounds of Opposition.
 6. In response to the Plaintiff's Replying Affidavit, the 1st Defendant filed a Further Affidavit sworn on 19th April, 2023 explaining that the delay in filing the application was occasioned by the fact that Miss Karen Chesoo Advocate, who was seized of the matter on his behalf was unwell for some time between December 2022 and January 2023. He further states that his advocates had written to the Registrar of the Court of Appeal requesting him to fix a date for Case Management of the appeal so as to expedite the hearing of the appeal and the same was fixed for Case Management on 17.05 2023. It is his deposition that if the proceedings are not stayed, the appeal will be rendered nugatory.
 7. The 2nd Defendant did not file any Replying Affidavit.

Parties' Submissions

8. The application was argued by way of written submissions. The 1st Defendant/Applicant filed his submissions dated 19.4.2023 in which he submits that the court has inherent powers under section 3A of the Civil Procedure Rules to stay the present proceedings. He relies on the case of *Harman Singh and Others v Mистри* [1971] EA 122.
9. He urges the court to rely on the principles laid down in *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 where Ringera J 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 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.”
10. He further submits that he has an arguable appeal. It is his contention that in its ruling dated 23.11.22 the court allowed the Plaintiffs to further amend their plaint and file further documents. He states that this decision is the subject of Eldoret Civil Appeal No. E005 of 2023 Dr. Lectary Kibor Keiyo Lelei v



- David Langat and 3 others. He contends that the plaint has been amended and additional documents filed and if the hearing proceeds on 6th February, 2023, the appeal shall be rendered nugatory.
11. Relying on the decisions of *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR and *Niazsons (K) Limited v China Road and Bridge Corporation (Kenya)* he submitted that appeal raises points of fact and law and has overwhelming chances of success therefore if the proceedings are not stayed, the appeal shall be rendered nugatory. He further contends that judicial time is precious and it should not be wasted on an appeal that is purely academic.
 12. With regard to the issue of delay he submits that in the Port Florence Community Health Care case a delay of two months was held not to be inordinate. Lastly He argues that in *Selestica Limited v Gold Rock Development Limited* [2015] eKLR the court granted an order for stay even though there was inordinate delay.
 13. The Plaintiff filed his submissions dated 5th May, 2023 and List of Authorities dated 4th May, 2023. Submitting on whether the Applicant has established a prima facie case, he urges that the Memorandum of Appeal does not advance any ground that would make the court depart from the established law on amendment of pleadings set out under Order 8(3) Rule 1-5 of the Civil Procedure Rules which provides that the court may allow amendments at any stage of the proceedings, notwithstanding that the amendments substitute a new cause of action so long as the new cause of action arises from the same facts. See the case of *Sanyu v International Commercial Bank Ltd* [2021] eKLR.
 14. He further relies on the case of *Eastern Bakery v Castellino* [1958] EA 461 and *Halsbury's Laws of England* for the proposition that the purpose of amendments is to facilitate the determination of all issues in controversy and that amendments should be allowed at any stage of the proceedings.
 15. He contends that the additional documents will enable the court to determine the question of who bought and paid for the materials used to construct the development on the suit property and that the applicant has not demonstrated how this would prejudice his case. He adds that even if the 1st defendant had demonstrated such prejudice, the court has the power to allow the defendant to produce further documents to counter the plaintiff's documents.
 16. On the question of delay, he argues that the fact that Miss Chesoo Advocate was sick did not stop Mr. Kalya Advocate who has been appearing alongside Miss Chesoo from filing the appeal in good time.
 17. Regarding substantial loss, he contends that this has not been demonstrated by the 1st Defendant as both parties have complied with the orders issued on 23rd November, 2022 by filing the necessary documents.
 18. It is the 1st Defendant's contention that a stay of proceedings would delay the matter and prejudice the Plaintiff's right to a fair trial as enshrined in Article 50 (1) of the *Constitution* and it would frustrate the judiciary's efforts to clear case backlog.
 19. The 2nd Defendant associates himself with the 1st Defendant's submissions and contends that the 1st Defendant has an arguable appeal.
 20. Having considered the application, the submissions filed by the parties and the relevant law and cases cited by counsel, the singular issue for determination is whether the 1st Defendant/ Applicant has met the conditions for stay of proceedings.
 21. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, cited in the case of *Turbo Highway Eldoret Ltd v Domonic Njenga Muniu* a 5-judge Bench of



the High Court authoritatively laid out the principles our Courts have established for the grant stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
 - b. 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;
 - c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
 - d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
 - e. 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
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
22. Applying the above-mentioned principles to the present case, I will now determine whether the Applicant has met the conditions for stay of proceedings. First, there is no doubt that the Applicant has filed an appeal in the Court of Appeal.
23. Secondly, the Applicant has not explained why he chose to file the application for stay of proceedings in this Court and not the Appellate Court. Could it be a strategy to ensure that he gets a chance to appeal in case the court fails to grant his application? If so then there is a likelihood of having multiple piecemeal appeals which will only serve to delay the hearing of the main case.
24. Thirdly, on the arguability of the Appeal, this court is not the right forum to determine if an appeal against its decision is arguable. Suffice is to say that the law on amendment of pleadings is fairly straightforward and whether or not this court exercised its discretion judiciously is a matter for the appellate court to determine.
25. Fourthly, on the question as to whether the appeal would be rendered nugatory if proceedings are not stayed, I am not persuaded that proceeding with the case would render the appeal nugatory. In the event that the Court of Appeal holds that, the plaint should not have been amended to bring out all the issues in controversy and that additional documents should not have been filed then it would issue the necessary directions with regard to the new documents filed pursuant to the ruling of this court.
26. Fifthly, as concisely expressed in *Halsbury's Laws of England*, 4th Edition, Vol. 37 at p. 330:

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 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 this case.

27. In the present case, no exceptional circumstances have been disclosed to warrant the proceedings being interrupted.
28. Lastly, even though the delay in filing the application has been explained by Miss Chesoo's illness, I cannot help wondering why the application was eventually filed just a couple of days before the hearing that had been scheduled for 6th February, 2023.
29. Taking all the above factors into consideration, and bearing in mind that this is an old matter which was filed in court in 2011, and being alive to Article 159 2 (c) of the Constitution which provides that justice should not be delayed, coupled with the sections 1A and 1B of the Civil Procedure Rules which enjoin this court to facilitate the just, expeditious proportionate and affordable resolution of disputes, I decline to exercise my discretion in favour of the Applicant.
30. The upshot is that the application lacks merit and it is hereby dismissed with costs to the Plaintiff/ Respondent.

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF SEPTEMBER 2023

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J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Ondego for the Plaintiff

2. Miss Chesoo for the 1st Defendant and holding brief for Mr. Njuguna for the 2nd Defendant and Mr. Kamau for the Interested Party

Court Assistant: A.Oniala

