



REPUBLIC OF KENYA



**Mwithiga & 4 others v M'Rugongo (Originating Summons 28 of 2019)
[2023] KEELC 20080 (KLR) (27 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20080 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ORIGINATING SUMMONS 28 OF 2019**

**CK YANO, J
SEPTEMBER 27, 2023**

BETWEEN

**JOSEPH KANG'OROTO MWITHIGA 1ST PLAINTIFF
EDWARD GIKUYU 2ND PLAINTIFF
SAMSON KAIGERA MWITHIGA 3RD PLAINTIFF
FREDRICK MURURU MWITHIGA 4TH PLAINTIFF
SABERA KARANYAMA M'MWITHIGA 5TH PLAINTIFF**

AND

GEOFFREY MUTUMA M'RUGONGO DEFENDANT

RULING

1. The application for determination is the notice of motion dated 1st March 2023 brought pursuant to order 42 rule 6(1) (2) & (4) of the [Civil Procedure Rules](#) seeking stay of the proceedings herein pending the hearing and determination of Nyeri Civil Appeal No. 176 of 2022. The application is supported by the affidavits of Geoffrey Mutuma M'Rugongo the defendant/applicant sworn on March 1, 2023 and July 4, 2023.
2. The applicant averred that he was aggrieved by the ruling of this court dated October 12, 2022 and lodged an appeal to the Court of Appeal being Civil Appeal No. 176 of 2022 at Nyeri. That the applicant shall suffer substantial loss and prejudice should the hearing proceed in view of his appeal, adding that it is in the interests of justice that the application is allowed. The applicant has exhibited the Record of Appeal as filed on December 9, 2022 and the attendant memorandum of appeal and argued that these proceedings have a direct bearing on the ultimate decision in the appeal. That if the proceedings herein proceed, the appeal shall be rendered nugatory. The applicant stated that the delay in bringing this application is not inordinate since he was pursuing the proceedings herein.



3. In opposing the application, the plaintiffs filed a replying affidavit sworn by Joseph Kang'aroto Mwithiga, the 1st plaintiff on April 10, 2023. It is the plaintiff's contention that the eight months delay in bringing the application has not been explained at all by the applicant. That the delay shows that the applicant is an indolent litigant who never had any interest to defend the suit and is out to delay the plaintiff's from enjoying their judgment. It is further argued that the application is an afterthought, and that that applicant has not disclosed in what manner he will suffer substantial loss as he has no arguable appeal with chances of success. It is the plaintiff's contention that the application is an afterthought brought in bad faith, is an abuse of the court process and lacks merit and should be dismissed with costs. The plaintiffs stated that if the application is allowed, the applicant be ordered to deposit security in an interest earning account.
4. The application was canvassed by way of written submissions.

Applicants Submissions

5. The applicant submitted that the annexed memorandum of appeal and the grounds demonstrated that the appeal to the Court of Appeal is arguable as the court dealt a blow to the applicant's right to ventilate his case by failing to allow his amendment and counterclaim to be able to canvass his case in the best way possible noting that the case is yet to be heard and relied on the case of [Port Florence Community Health Care v Crown Health Care Limited](#) [2022] eKLR.
6. The applicant submitted further that the appeal has high chances of success and shall be rendered nugatory if at the end of the day the case is heard and determined in his favour. The applicant submitted that he shall be locked out of the doors of Justice should the suit continue without amendments to introduce the counterclaim for the court's determination of the dispute and prayed that the application be allowed.

Respondents Submissions

7. The respondents submitted that the principles for granting stay of execution are provided for under order 42 rule 6(1) of the [Civil Procedure Rules](#). That the applicant needs to satisfy the court on the following conditions before he can be granted the stay orders:-
 - a. Substantial loss may result to the applicant unless the order is made.
 - b. The application has been made without unreasonable delay, and
 - c. Such Security as the court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant.
8. It is the respondents' submissions that the principles governing the exercise of the court's discretion are now well settled and they include that the intended appeal should not be frivolous or put another way, the applicants must show that they have an arguable appeal, and secondly the court should ensure that the appeal, if successful, should not be rendered nugatory. The respondents relied on the case of [Reliance Bank Ltd \(In Liquidation\) v Norlake Investments Ltd](#) – Civil Application No. Nai. 93/02 (UR).
9. The respondents further submitted that the question of stay pending appeal has been canvassed at length in various authorities such as in the Court of Appeal decision in [Chris Munga N. Bichange v Richard Nyagaki Tongi & 2 others](#)[2013] eKLR.



10. The respondents submitted that to grant or refuse an application for stay of execution pending appeal is discretionary in that the court when granting stay has to balance the interests of the appellant with those of the respondents.
11. On whether the appeal has satisfied the conditions set the respondents submitted that the condition that the applicant will suffer substantial loss if stay is not granted is an issue that was aptly discussed in *Silverstein v Chesoni* [2002] 1 KLR 867.
12. The respondents stated that judgment was entered against the applicant vide a ruling dated October 12, 2022 in which the court dismissed the applicant's application which sought to amend the defence and include a counterclaim for eviction and mesne profits against the plaintiffs/respondents herein. The respondents argued that the application for amendment was made 3 years after the filing of the suit with no explanation to justify the inordinate delay.
13. The respondents submitted that the applicant has not disclosed in what manner he will suffer substantial loss in the nature of rendering the appeal nugatory and dealing a blow to his right to a fair hearing if stay is not granted.
14. The respondents submitted that the application for stay has also been filed 8 months after the ruling which is outside the limited time and that the same delay has not been explained. The respondents further submitted that the delay shows that the applicant is an indolent litigant who never had any interest to defend the suit and is only out to delay the plaintiffs/respondents enjoyment of a regular judgment and that the application is just an afterthought.
15. The respondents submitted that they have lived for a long time on the said parcel of land that is extensively developed and the same is where their families reside and therefore it is them that will suffer substantial loss and not the applicant.
16. On the issue of security the respondents submitted that order 42 rule 6(1) (2) of the *Civil Procedure Rules* stipulates that a party seeking a stay must offer such security for the due performance of the orders as may be ultimately binding on the appellant and submitted that the applicant has been silent on the issue of security in the matter. Further that the issue of security should come from the applicant and the same should not be inferred or implied or left for the court to make an order for security for due performance as that would amount to stepping into the arena of the dispute.
17. The respondents submitted that the applicant has failed to meet the four mandatory tenets under which the application is brought and further that the applicant has failed to satisfy any of the mandatory tenets under which stay of execution can be granted and hence the application is not merited and should be dismissed with costs.

Analysis and Determination

18. I have considered the application, the submissions by the parties and the authorities. The issue for determination is whether the applicant has met the threshold for the grant of stay of proceedings pending the hearing and determination of appeal.
19. The grant of an application to stay proceedings is within the discretion of the court. I am also aware that any exercise of such discretion has to be done in the interest of justice of each case and must be judicious.



20. In the case of *Global Tours & Travels Limited* 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 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...”

21. In *Christopher Ndolo Mutuku & another v CFC Stanbic Bank Ltd* [2015] eKLR it was held that-;

“But 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.

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.

That explains why the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings...”

22. In applying the foregoing test, I have looked at the appeal and the record. This suit was filed in the year 2019 and the defendant/applicant filed a replying affidavit sworn on August 19, 2019. Thereafter, the court directed the parties to file compliance documents but only the plaintiffs complied. The defendant filed an application dated 24th June 2022 seeking leave to amend his pleadings and include a counterclaim. The court found that there was inordinate delay which was not explained as the application was made after 3 years, and dismissed the application. Being dissatisfied, the defendant has now lodged an appeal in the court of appeal against that ruling dated October 12, 2022. Considering the nature of the appeal, which is interlocutory, I am not persuaded that the interest of justice in this case will be served by staying the proceedings in this case.

23. In the case of *Kenya Wildlife service v James Mutembei* [2019] eKLR it was held that-;

“stay of proceedings 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 the right of access for justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent...”



24. It is my finding that it would be unfair and prejudicial to the respondents if I grant the orders sought. The provisions of article 159 of the Constitution as read with sections 1A and 1B of the Civil Procedure Act enjoin this court to foster and facilitate the overriding objective to render justice to parties in all civil proceedings in a just, expeditious, proportional and affordable cost. In this case, it is my considered opinion that it would not be in the interest of justice to exercise the court's discretion and grant stay of proceedings as sought as this would delay the matter which is fairly old.
25. The upshot is that the application dated March 1, 2023 does not fit the legal thresholds and is dismissed with costs to the plaintiffs.

DATED, SIGNED AND DELIVERED AT MERU THIS 27TH DAY OF SEPTEMBER, 2023

IN THE PRESENCE OF

Court Assistant- V. Kiragu/Lena

Kaimenyi for plaintiff/respondent

Mrs Muia for defendant/applicant

C.K YANO

JUDGE

