



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MERU**

**CIVIL APPEAL NO. 40 OF 2018**

**KENYA WILDLIFE SERVICE.....APPELLANT**

**VERSUS**

**JAMES MUTEMBEI.....RESPONDENT**

**RULING**

[1] Jurisdiction is everything. This is the sweetest canticle that was formulated by Nyarangi JA in the famous **LILIAN ‘S’** case. Although the Notice of Motion dated 25<sup>th</sup> May 2018 is seeking stay of proceedings in **MAUA CMCC NO. 46 OF 2017 JAMES MUTEMBEI vs. KENYA WILDLIFE SERVICE** its foundation is that the trial court does not have jurisdiction to try the case and so continuation with the case will render the appeal nugatory.

[2] The application is expressed to be brought pursuant to the provisions of Order 42 Rule 6 of the Civil Procedure Rules and Sections 1A and 1B of the Civil Procedure Act. It rests on the grounds on the application and affidavit sworn by Doreen Mutunga. The major complaint is that their application dated 6<sup>th</sup> November 2017 to strike out Maua CMCC 46 OF 2017 James Mutembei v Kenya Wildlife Service was dismissed in a ruling delivered on 27<sup>th</sup> March 2018. They now fear that the suit may be set down for hearing anytime to the detriment of this appeal. Therefore, they apply for stay of that suit pending determination of this appeal.

[3] The Respondent opposed the application via a Replying Affidavit filed in court on 11<sup>th</sup> July 2018, deposing inter alia:-

1. That the points raised in the motion had already been determined by the Supreme Court and
2. That stay of proceedings was a serious grave and fundamental interference in the right of any party to conduct litigation and should be denied.

[4] On 19<sup>th</sup> July 2018, the parties proposed to file written submissions. Briefly, the Applicant reiterated the grounds et out above and emphasized that there is a sufficient cause to stay the proceedings in the lower court lest the appeal should be rendered nugatory. The Applicant relied on the case of ***Francis N Githiari v Njama Limited (2006) eklr***. They argued that the order should be granted in the interest of justice.

[3] On the other hand, it was submitted for the Respondent that the Applicant has not met the test for grant of stay of proceedings as captured under Order 42 Rule 6 of the Civil Procedure Rules and that further the appeal and the intended application was only meant to delay the hearing of the instant case.

**ANALYSIS AND DETERMINATION**

[5] I have carefully considered the instant application and the rival submissions by the parties. This is essentially an application for stay of proceedings in Maua CMCC 46 of 2017 James Mutembei v Kenya Wildlife Service pending the hearing and determination of this appeal. 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 proceeding is high and stringent. See Ringera J in the case of ***Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*** persuasively 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**” (emphasis added)

[5] See also illumination on the threshold for stay of proceedings in the following passages 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.”**

[6] In the instant case it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is pending in the lower court. I am not satisfied that the Applicants have demonstrated that they have an arguable appeal to warrant issuance of the orders being sought. The issues that the Applicant is now raising have been fully canvassed and settled by the Court of Appeal in the case of *Kenya Wildlife Service v Joseph Musyoki Kalonzo [2017] eKLR*. I need not say more.

[6] Accordingly the application is devoid of merits and is dismissed. Given the circumstance of the application, I order each party to bear own costs.

Dated, signed and delivered in open court at Meru this 31<sup>st</sup> day of January, 2019

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F.M GIKONYO

JUDGE

In presence of

H.H.M for appellants – absent

M/S Ojiambo for Otieno C for respondent

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F.M GIKONYO

JUDGE