



**Kenya Forest Service & another v Ongai (Appeal 17B of 2022)  
[2023] KEELC 21083 (KLR) (25 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21083 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
APPEAL 17B OF 2022  
M SILA, J  
OCTOBER 25, 2023**

**BETWEEN**

**KENYA FOREST SERVICE ..... 1<sup>ST</sup> APPELLANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 2<sup>ND</sup> APPELLANT**

**AND**

**LEAH MAGOMA ONGAI ..... RESPONDENT**

**RULING**

1. The application before me is that dated and filed on 30 May 2023. It is an application seeking stay of further proceedings in the suit Kisii Chief Magistrate's Court Civil Case (ELC) No. 138 of 2021, pending hearing and determination of this appeal. The application is opposed.
2. To put matters into perspective, the applicants/appellants are defendants in the suit before the Magistrates' Court. They raised a preliminary objection that the suit was res judicata citing the case Kisii ELC No. 40 of 2012 as being the predetermined suit. The preliminary objection was contested by the respondent/plaintiff. In a ruling delivered on 26 July 2022, the preliminary objection was dismissed. Aggrieved, the applicants filed an appeal to this court on 19 August 2022. Through this application, they seek a stay of the proceedings in the Magistrates' Court pending hearing of the appeal. The respondent filed Grounds of Opposition inter alia stating that the appeal does not disclose an arguable case; that there has been delay of more than 10 months and the trial case has undergone pre-trial motions and certified ready for hearing; that the applicants have not served the Memorandum of Appeal and have not taken steps to compile the record of appeal; that the applicants can still raise the issue after the suit is heard.
3. The application was canvassed by way of written submissions and I have taken account of the same. I observe that quite a bit of the submissions of counsel for the respondent address the issue of whether



or not the suit is res judicata but I cannot go into that as it is an issue to be argued on appeal. All I need to deal with is whether it is just to stay the proceedings while I deal with this appeal.

4. I am persuaded that the proper thing to do is to stay the proceedings. It will be recalled that what the appellants are contending is that the dispute before the Magistrate has already been decided in a prior suit. If that is the case, then if the suit before the Magistrate proceeds, there is risk that an order that conflicts with an existing judgment may be made, which has potential to embarrass the administration of justice. I am aware that the issue of delay has been raised. It is a valid point, and indeed, the appellants did not need to wait for 10 months before filing this application. In other circumstances, that would have militated against this court granting the order of stay. However, I see no prejudice to the respondent as there is no indication that the matter before the Magistrate's Court has proceeded. It was also raised that the issue of res judicata can still be raised after the case has proceeded. That may be so, but why put the trial court to hearing the whole matter and making judgment, if there is a possibility that whatever the court may decide is res judicata? I think prudent use of judicial resources would invite the court to stay the suit before the Magistrates' Court as the question whether the suit is res judicata is first resolved. If I had thought that hearing this appeal would take a considerable amount of time so that there is prejudice to the respondent in not hearing the suit expeditiously, or that the suit before the Magistrate has already been heard, I would probably have declined the application but this is an appeal that can quickly be disposed within the next 6 months.
5. For the above reasons, it will be seen that I am persuaded to allow this application and it is hereby allowed. I stay the proceedings in the case Kisii CMCC (ELC) No. 138 of 2021, pending hearing and determination of this appeal.
6. The costs of this application shall be costs in the appeal.
7. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 25 DAY OF OCTOBER 2023**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT**

