



Kavoo & 2 others v Lukenya Ranching and Farming Cooperative Society Limited & 3 others (Environment & Land Case 43 of 2016) [2023] KEELC 21735 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21735 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 43 OF 2016
A NYUKURI, J
NOVEMBER 22, 2023**

BETWEEN

**BENARD MBOLE KAVOO 1ST APPLICANT
MUTUNGA MUSYOKI 2ND APPLICANT
DAVID MUTUKU NZAU 3RD APPLICANT**

AND

**LUKENYA RANCHING AND FARMING COOPERATIVE SOCIETY LIMITED 1ST RESPONDENT
JOHN KIMANI MWEGA 2ND RESPONDENT
MACHAKOS DISTRICT LAND REGISTRAR 3RD RESPONDENT
JOSIAH MAKAU NZIOKA 4TH RESPONDENT**

RULING

Introduction

1. Before court is the Notice of Motion dated 17th January 2023 filed by the 3 applicants. The application seeks the following orders;
 - a) Spent.
 - b) That this court be pleased to issue an order suspending proceedings in the Environment and Land Court in ELC Case No 43 of 2016 pending the determination of the appeal in Civil Appeal No 446 of 2021.
 - c) That, the cost of the application be in suit.



2. The application is supported by the affidavit of one Benard Mbole Kavoo the 1st applicant, who stated that he had filed an appeal dated 19th July 2021 vide Civil Appeal No 446 of 2021 in the Court of Appeal against the ruling and orders of this court dated 25th June, 2021 challenging the revival of this suit. He further averred that parties had already filed submissions to the appeal. He concluded by deposing that in view of hierarchy of courts and the nature of appeal, in order to prevent the potential of getting two conflicting decisions, it is prudent that the proceedings in this suit are suspended pending the outcome of the appeal. He attached consent of the co-applicants, Memorandum of Appeal, email from the Deputy Registrar of the Court of Appeal, and submissions filed in the Court of Appeal.
3. The application is opposed. John Kimani Mweya, the 2nd Respondent, swore a replying Affidavit dated 7th February 2023 in opposition to the application. He deposed that the applicant had filed an application for stay before the Court of Appeal but that the same was not allowed. It was his averment that the prayer for suspension of proceedings is similar to the prayer for stay and that the same can only be granted upon satisfying conditions for stay. He further stated that the applicant stood to suffer no prejudice as he will have his day in court and that it is the respondent who will be prejudiced as he will be locked out of the hearing which is a violation of his fundamental rights. He deposed that there will be no conflict of decisions in any event. He attached the application filed in the Court of Appeal by the applicant.
4. The application was canvassed by way of written submissions. On record are submissions filed by the applicants on 6th March 2023.

Submissions by the applicant

5. Counsel for the applicants, relied on the case of *Re Global Tours & Travel Ltd*, HCWC No 43 of 2000 and submitted that the appeal No 446 of 2021 was arguable in that in the impugned ruling, the court had failed to consider that the judgment dated 16th November 2018 was a regular judgment duly served via a newspaper advertisement hence the doctrine of laches ought to have applied. It was also their submission that the court misinterpreted Order 5 Rules 15 and 17 since the same does not require an affidavit of service for substituted service.
6. On whether the appeal has an effect on the suit, counsel placed reliance on the cases of *Niazons (Kenya) Ltd v China Road & Bridge Corporation (Kenya) Ltd*, Milimani HCC No 126 of 1999 and *Law Society of Kenya v Attorney General & another* (2019) eKLR, and argued that should the appeal be successful, the proceedings in this court would have been rendered unnecessary and an exercise in futility. Counsel cited the decision in the case of *Muchanga Investments Ltd v Safaris Unlimited (Africa) Ltd & 2 others* [2009] eKLR, and argued that judicial time ought to be used efficiently. It was their submission that there has not been any inordinate delay in bringing the application since the proceedings in the main suit have not commenced.

Analysis and Determination

7. Having considered the application together with affidavits in support thereof, the response thereto, and the applicants' submissions, the court is of the view that the only issue that arises for determination is whether the applicant has met the threshold for staying the proceedings in this matter, pending the determination of the appeal before the court of appeal.



8. The jurisdiction of the court to order stay of proceedings is provided for in Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) as follows;

6. Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

9. Once a suit is filed in court, it is the obligation of both the parties to the suit, as well as the court to ensure that the same is tried expeditiously as demanded in Article 159 and sections 1A and 1B of the [Civil Procedure Act](#). Essentially, suits ought not be allowed to clog the justice system by orders of stay of proceedings except where the interests of justice demand that such suits be stayed. Therefore, the power to stay proceedings will only be exercised sparingly and only in exceptional circumstances where proceeding with a suit will be manifestly against the interests of justice.

10. In the case of [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR, the court held as follows;

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 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.

11. [Halsbury's Law of England](#), 4th Edition Vol 37 pages 330 and 332 states as follows;

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.

12. In the instant application, the applicant has appealed against the order of this court made on 25th June 2021, setting aside the *ex parte* judgment herein and granting the defendants leave to file defence and



counterclaim. The record shows that on 16th November 2018, this court entered judgement in favour of the plaintiff/applicant allowing the prayers sought in the plaint and declaring that title to the suit property was unlawfully procured by the defendant and ordering the cancellation of the same. The court also ordered the 2nd and 4th defendants to pay costs. The basis for seeking stay of proceedings by the applicant herein is that if this suit proceeds to trial there is a likelihood of a conflicting decision with the appellate court. There is no suggestion by the applicant that any prejudice will be suffered by them if this suit proceeds. Their concern, which in my view is a valid concern is the efficient use of judicial time.

13. While this court is alive to its obligation to ensure judicial time is efficiently used, that obligation must be done within the realm of protecting the constitutional rights of the parties. Article 159 (2) (b) of the *Constitution* of Kenya 2010 provides for the right of the parties to be heard without delay. This matter was filed in 2016. The applicant failed to disclose that they had filed a similar application for stay of proceedings before the Court of Appeal. The respondents' averment that a similar application was denied before the Court of Appeal has not been denied or challenged by the applicants. This court having already found merit in setting aside the *ex parte* judgment, and effectively having set that judgment aside, it is not for this court to determine whether or not there is a triable appeal, because this court already pronounced itself on the issues and is *functus officio* on the matters raised in the appeal. I have considered the supporting affidavit and I do not perceive any suggestion or demonstration by the applicants that these proceedings are frivolous, vexatious or amount to harassment or that there is no legal basis to proceed with the trial of this matter. It is my view that if the applicant succeeds at the Court of Appeal, then the *ex parte* judgment will revert, but if they do not succeed, they will still have been heard by this court on merit without delay. Therefore, they stand not to be prejudiced in any manner, and will have received expedited justice in any event, if the proceedings herein are not stayed. Hence it is my view that the interests of justice will in the circumstances of this case require that these proceedings are not stayed.
14. The upshot is that the application dated 17th January 2023 has no merit and the same is hereby dismissed with costs to the respondents.
15. It is so ordered.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 22ND NOVEMBER 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Chege for respondents

Ms. Wachira holding brief for Ms. Mbullo for applicants

