



Mocha Hotel Ltd v Kwanza Estates Ltd (Environment & Land Case 14 of 2022) [2023] KEELC 21729 (KLR) (21 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21729 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 14 OF 2022**

**M SILA, J
NOVEMBER 21, 2023**

BETWEEN

MOCHA HOTEL LTD PLAINTIFF

AND

KWANZA ESTATES LTD DEFENDANT

RULING

(Application for stay of proceedings pending appeal; principles to be applied; applicant having filed a preliminary objection that this court does not have jurisdiction which application was dismissed; applicant proceeding to file an appeal to the Court of Appeal and now seeking stay of proceedings; court not persuaded to order stay; application dismissed with costs)

1. For determination is the application dated 21 September 2023 filed by the defendant. It is an application seeking stay of further proceedings pending hearing and disposal of Kisumu Court of Appeal, Civil Appeal No. E220 of 2023. That is an appeal against the ruling of this court delivered on 29 June 2023 which dismissed a preliminary objection raised by the applicant that this court does not have jurisdiction to entertain this suit. The application is opposed.
2. By way of background, the respondent commenced this suit through a plaint filed on 22 June 2022. He averred to have been a tenant of the applicant and complained that the applicant unlawfully levied distress on his property and eventually took them over and proceeded to evict him. In the suit, he seeks for special damages, costs and interest. The applicant filed a defence and counterclaim. She admitted that the respondent was a protected tenant but denied levying unlawful distress or taking over the business of the respondent. She contended that the goods of the respondent were sold by way of public auction upon distress. She also filed a counterclaim for the sum of Kshs. 19,124,121.60/= being the balance of rent due.



3. Subsequently, the applicant lodged a preliminary objection contending that this court has no jurisdiction to hear the dispute. I heard the preliminary objection but did not find merit in it and proceeded to dismiss it through the ruling of 29 June 2023. On the same day a hearing date of 27 November 2023 was given for the case. Thereafter, this application was lodged.
4. The application is supported by the affidavit of Geoffrey Makana Asanyo, who has described himself as the managing director of the applicant. He has averred that after the preliminary objection was dismissed, the applicant filed an appeal at the Court of Appeal in Kisumu. He believes that the appeal is arguable and that it will be a waste of scarce judicial time to proceed with the hearing of this suit and then at the end of the day the appeal is allowed.
5. The respondent has filed a replying affidavit sworn by its director, Henry Moracha, to oppose the motion. He avers that there is no stay of proceedings from the Court of Appeal and he thinks that this is a desperate attempt to delay and adjourn this case which already has a hearing date. He also asserts that this court is functus officio.
6. I invited counsel to make submissions towards the application. Mr. Konosi, learned counsel for the applicant, filed written submissions, whereas Mr. Mogeni, learned counsel for the respondent, made oral submissions. I have taken these into account before arriving at my decision.
7. What is before me is an application for stay of proceedings pending appeal. Stay pending appeal is addressed under Order 42 Rule 6 and I opt to copy the whole of the said rule. It is drawn 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.
- (2) No order for stay of execution shall be made under subrule (1) unless—
 - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.



- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms
8. From subrule 1 above, it will be observed that a court may issue a stay of proceedings after an appeal has been filed though the mere filing of an appeal does not mean that the proceedings must be stayed. Subrule 1 provides that the court must be persuaded that there is sufficient cause to do so. In addition to this, I think it is important to note that stay may be granted either by the court appealed from or the court to which the appeal is preferred, and I therefore do not find the argument of Mr. Mogeni, that this court is functus officio, as having any merit. A plain reading of subrule 1 demonstrates that one is at liberty to seek stay from the court appealed from or from the court to which the appeal is preferred. One cannot therefore be faulted for filing an application for stay in the court appealed from, which in this instance, is this court.
9. The principles for granting stay are provided in subrule 2 which prescribes three principles for grant of stay, being :-
- (i) That the application has been made without unreasonable delay;
 - (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
 - (iii) That there is provision of security as the court may order for the due performance of the decree.
10. The above principles apply to both stay of execution and stay of proceedings. In an application for stay of proceedings, it is difficult to see the place of security for the due performance of the decree, and I think what is critical is that the application has been made without unreasonable delay and the applicant demonstrates that he stands to suffer substantial loss if the order for stay is not made.
11. In our case, I wonder what loss the applicant stands to suffer if this court proceeds with hearing this suit. I have pored through the supporting affidavit and nowhere have I seen any loss that the applicant has stated she will suffer if the matter proceeds for hearing. All she has said is that there may end up being loss of precious judicial time. However, in our instance, the matter has already been allocated a hearing date and this court has already set aside time for the hearing of the case. If the case does not proceed, that time will be wasted, so there is really no loss that the parties or the court stand to suffer. In fact, the applicant has a counterclaim which is also going to be heard. I have not heard the applicant say that she will suffer any loss if her counterclaim is also heard yet stay of proceedings will also affect her counterclaim. I wonder how the applicant can complain that this court has no jurisdiction yet at the same time lodge a counterclaim before the same court and she wants it determined. If the applicant is so persuaded that this court has no jurisdiction why is she filing her counterclaim in this court? Moreover, if this court proceeds and the applicant is aggrieved by any judgment that this court will pronounce, she can as well lodge an appeal against the whole judgment, including questioning the jurisdiction of this court.
12. It is acknowledged that the order of stay of proceedings is a drastic order and needs to be given only in exceptional circumstances. This is because it restricts the right of a party to be heard. This was indeed acknowledged by Gikonyo J in Meru Civil Appeal 40 of 2018, *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR, where the judge stated thus :
- “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”.

The learned judge went further to quote *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332, where it was stated 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”.

13. In *Re Global Tours & Travels Limited*, (Nairobi High Court Winding Up Cause No. 43 of 2000), Ringera J, opined as follows :

“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”.

14. When I weigh the pros and cons of either proceeding with the matter, which already has a hearing date, or staying the proceedings, it is my view that it is more expeditious to proceed with the case rather than to stay it. I am not thus persuaded to stay the proceedings herein. Of course this court will have to down its tools if the Court of Appeal is inclined to order a stay of proceedings pending appeal, or if the Court of Appeal allows the appeal, but until then, my view that the most appropriate order to make is to have the matter proceed for hearing to its logical conclusion.

15. I thus dismiss this application with costs to the respondent.

16. Orders accordingly.

DATED AND DELIVERED AT KISII THIS 21 DAY OF NOVEMBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

In presence of:-

Mr. Konosi for the defendant/applicant

Mr. Mogeni for the plaintiff/respondent



