



Paschal (Guardian ad-litem of Paschal Mule Nzyuko) v Muthoka & 2 others (Environment and Land Appeal E002 of 2023) [2023] KEELC 21730 (KLR) (15 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21730 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT AND LAND APPEAL E002 OF 2023
TW MURIGI, J
NOVEMBER 15, 2023**

BETWEEN

JOSEPHAT KILUVA PASCHAL (GUARDIAN AD-LITEM OF PASCHAL MULE NZYUKO) APPELLANT

AND

DANIEL MUTUNE MUTHOKA 1ST RESPONDENT

JOHN MUTISYA MUTHOKA 2ND RESPONDENT

JULIUS MUTINDA MUTHOKA 3RD RESPONDENT

RULING

1. Before me for determination is the Notice of Motion dated February 3, 2023 brought under sections 1A, 1B and 3A of the [Civil Procedure Act](#), section 29 of the [Land Adjudication Act](#), order 42 rule 6 and order 51 rule 1 of the [Civil Procedure Rules](#) in which the applicant seeks the following orders:-
 1. Spent.
 2. Spent.
 3. An order of stay of proceedings *vide* Tawa MCELC Case No 175 of 2019 be issued pending the hearing and determination of the main appeal.
 4. Cost of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the Supporting Affidavit of Josphat Kiluva Paschal sworn on even date.



The Applicant's Case

3. The applicant averred that *vide* a Notice of Preliminary objection dated June 28, 2022 he challenged the jurisdiction of the trial court to hear and determine Tawa MCELC No 175 of 2019. He further averred that the preliminary objection was dismissed *vide* the Ruling delivered on January 31, 2023. That being aggrieved, the applicant filed an appeal challenging the ruling of the trial court.
4. He further averred that he is apprehensive that the lower court may fix the main suit for hearing which will render his appeal nugatory. He averred that the respondents suit challenging the decision of the Minister was dismissed with costs *vide* the judgment delivered on November 12, 2019. That instead of appealing against the decision of the Minister, the respondents instituted Tawa Case No 175 of 2019 where they sought for a declaration that they are the lawful owners of land parcel No Mbooni/Utangwa/2456, Mbooni/Utangwa/2039 and Mbooni/Utangwa/2458.
5. It was contended that the decision of the Minister in regards to the suit properties is binding between the parties herein since the respondents did not appeal decision to the court of Appeal.
6. The applicant asserted that the lower court lacks jurisdiction to hear and determine the respondents suit since the issue of ownership cannot be revisited or challenged by way of plaint. He contended that the trial court erred in dismissing the Preliminary objection and urged the court to allow the application as prayed.

The Respondents Case

7. The respondents opposed the application *vide* the Replying Affidavit of Julius Mutinda Muthoka sworn on March 24, 2023 on his behalf and on behalf of the 1st and 2nd respondents.
8. The deponent averred that the trial court was correct in finding that it has the requisite jurisdiction to hear and determine the suit before it since the issue of ownership was not the subject of litigation in JR No 1 of 2017.
9. The respondents contended that the instant application is a violation of their right to be heard enshrined under the *Constitution*. It was their contention that the dispute in Tawa MCELC No 175 of 2019 is premised on the ownership of Land Parcels Nos Mbooni/Utangwa/2456, Mbooni/Utangwa/2039 and Mbooni/Utangwa/2458.
10. It was averred that the appeal as filed does not raise any triable issues. According to the respondents, the applicant has not met the conditions for the grant of stay proceedings and hence the application ought to be dismissed with costs.

The Response

11. In a supplementary Affidavit dated March 31, 2023, the applicant averred that the Memorandum of Appeal raises prima facie/arguable appeal. It was argued that the Applicant will suffer substantial loss and his appeal will be rendered nugatory if the order of stay of proceedings is not granted.
12. The parties were directed to canvass the application by way of Written Submissions.

The Applicant's Submissions

13. The applicant's submissions were filed on April 24, 2023.
14. On his behalf, counsel outlined the following issues for the court's determination:-



- i. Whether stay of proceedings should issue.
 - ii. Who should bear the costs.
15. On the first issue, Counsel submitted that the guiding law on stay of execution is anchored on order 42 rule 6 (1) and (2) and (b) of the *Civil Procedure Rules* which sets out the conditions to be met in an application for stay of execution pending appeal.
 16. On substantial loss, learned counsel submitted that the suit before Tawa law courts was ripe for hearing and if the orders of stay are not granted the applicant will be forced to incur a lot of expenses while the court will have wasted a lot of time and resources.
 17. In addition, it was submitted that if the orders of stay are not granted the respondents will be at liberty to invite the applicant to fix the matter down for hearing hence the appeal will be rendered nugatory.
 18. On whether the application has been filed without unreasonable delay, counsel submitted that there was no inordinate delay as the application was filed one month after the ruling was delivered.
 19. On the issue of costs, counsel submitted that due to the emotive nature of the case, the Applicant should be excluded from depositing costs for the due performance of the decree.
 20. To buttress his submissions, counsel relied on the authorities attached to the applicant's Written Submissions.

The Respondents' Submissions

21. The respondents' Submissions were filed on May 26, 2023.
22. On their behalf, Counsel raised the following issues for the court's determination:-
 - i. Whether the applicant has established a *prima facie* merits in the intended appeal.
 - ii. Whether the application was filed expeditiously.
 - iii. Whether it is in the interest of justice to grant the orders sought.
23. Counsel submitted that the conditions to be met in an application for stay of proceedings were outlined in the case of *Global Tours & Travels Limited* Nairobi HC Winding up Cause No 43 of 2000 where it was held 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”.
24. On the first issue, Counsel submitted that the intended appeal is devoid of merit since the issue of ownership of the suit properties was not determined in the judicial review proceedings. Counsel submitted that suit was properly filed before Tawa Law Courts.



25. On the second issue, Counsel submitted that the instant application was filed on January 3, 2023 after delivery of the ruling in Tawa on January 31, 2023. It was submitted that the instant application is a violation of the respondents right to a fair trial and is meant to waste judicial time.
26. On the second issue, Counsel submitted that the trial Magistrate was guided correctly by the judgment of Justice Mbogo in arriving at his decision. To buttress this point, Counsel relied on the case of *Kenya Wildlife Services vs James Mutembei* (2019) eKLR where the court held that the power to stay proceedings ought to be exercised sparingly and only in exceptional cases.
27. Lastly, it was submitted that it is in the interest of justice that both parties are given a chance to be heard on the merits of their respective cases.

Analysis and Determination

28. Having considered the application, the affidavits and the rival submissions, the only issue for determination is whether the proceedings in Tawa MCELC No. 175 of 2022 should be stayed pending the hearing and determination of the Appeal.
29. In an application for stay of proceedings, the court has to rely on the provisions of order 42 rule 6 of the *Civil Procedure rules* which provides as follows:-

“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.”
30. The principles for a grant of stay of proceedings were summarized by the court of Appeal in the case of *Stanley Kangethe Kinyanjui vs Tony Ketter & others* [2013] eKLR as follows:-

“An applicant has to satisfy that he/she has an arguable appeal. However, this is not to say that it must be an appeal that will necessarily succeed, but suffice to state that it is an appeal that is not frivolous and/or idle. Secondly, an applicant has to demonstrate that unless an order of stay is granted the appeal or intended appeal would be rendered nugatory.”
31. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretion must be exercised judiciously. The court has to consider if it will be in the interest of justice to grant the same. On whether the appeal is arguable, the court ought to be very cautious not to look into the merits of the appeal. An arguable appeal is not one that must necessarily succeed but one which merits consideration by the court.
32. Upon perusal of the Memorandum of Appeal this court finds that the intended appeal is arguable and not frivolous as the question before the appellate court is whether or not the lower court has jurisdiction to hear and determine the suit before it. Although the respondents submitted that the application herein was an abuse of the court process, frivolous and vexatious, it is the finding of this court that in the event it did not grant an order for stay of proceedings and the Appeal herein was heard and was successful, the proceedings in the lower court would have been rendered unnecessary, even though an appropriate order for costs could have been made to remedy that. Judicial time is precious and scarce and must not be wasted in proceedings that would end up being an academic exercise.



33. On the nugatory aspect, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory. In the case of *UAP Insurance Company Ltd vs Michael John Beckett* [2004] eKLR, the court of Appeal held that all an Applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.
34. Further in the case of *Niazsons (K) Ltd vs China Road & Bridge Corporation (Kenya)* [2001] eKLR, it was held that:-
- “Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay.....should be granted.”
35. From the foregoing, I am satisfied that if an order of stay of proceedings in Tawa MCELC Case No 175 of 2019 is not granted, the case will be heard and determined and the substratum of the appeal pending in court shall be rendered nugatory.
36. Lastly, in considering whether or not to grant an application for stay of proceedings the court must consider whether the application has been filed expeditiously. The Ruling the Appellant intends to appeal was delivered on January 31, 2023. The Memorandum of Appeal was filed on February 15, 2023 while the present application was filed on March 3, 2023. One month cannot not be said to have been inordinate. This court is satisfied that the present application was filed without any delay.
37. In the end, I find that the application dated 3rd February, 2023 is merited and the same is allowed in the following terms:-
1. That the appellant shall file and serve his Record of Appeal within forty five (45) days from the date of this Ruling.
 2. That in the event the appellant shall default in the order given in herein above, the order of stay of proceedings will automatically lapse and the respondent will be at liberty to move the lower court as provided by the law to proceed with Tawa MCELC No 175 of 2019.
 3. Costs of the application will be in the cause.

HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF NOVEMBER, 2023.

In the presence of: -

Court Assistant – Mr. Kwemboi.

Ms Nzilani for the Respondent.

