Okutoyi & 11 others v Attorney General & 4 others (Environment & Land Case 18 of 2023) [2025] KEELC 187 (KLR) (29 January 2025) (Ruling)

Neutral citation: [2025] KEELC 187 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 18 OF 2023

CK NZILI, J

JANUARY 29, 2025

BETWEEN

WYCLIFFE OKUTOYI & 11 OTHERS & 11 OTHERS & 11 OTHERS ..... PLAINTIFF

AND

HON ATTORNEY GENERAL ..... 1ST DEFENDANT

CHIEF LAND REGISTRAR ..... 2ND DEFENDANT

DIRECTOR OF SURVEY ..... 3RD DEFENDANT

REGISTRAR OF COMPANIES ..... 4TH DEFENDANT

TAWAI LIMITED ..... 5TH DEFENDANT

RULING

1. Through an application dated 1/7/2024, the court is asked to stay proceedings in this matter pending hearing and determination of Eldoret Court of Appeal Civil Appeal No. E012 of 2024. The application is supported by an affidavit sworn by Mathew Juma Kisa on 1/6/2024. It is averred that initially, the suit was in this court before it was transferred to the High Court for determination on the incorporation, directorship and membership of the applicant to the company, which decision was rendered by the High Court on 23/11/2023, altering the factual directorship, a decision now the subject of the appeal.

2. In view of the judgment, the applicant avers that the respondents herein have sought to amend the pleadings before the appeal is heard and determined, which would prejudice the 5th defendant by rendering the appeal nugatory. The applicant avers that he has already lodged the record of appeal as per the annexure marked MJK '1'.

3. The applicant relies on a written submission dated 18/11/2024 that this court has the discretion to grant the reliefs sought as held in RE Global Tours & Travel Ltd NBR H.C. Winding Up Cause No. 43 of 2000 and in KWS -vs- Mutembei [2019] eKLR.

4. The applicant submits that the appeal has arguable points and that any precipitate actions to amend the pleadings will prejudice and render the appeal nugatory. The applicant submits that he has shown a prima facie case and sufficient cause why, in the interest of justice stay of proceedings should be granted. Reliance was placed on Watu Credit -vs.- Geoffrey Mokaya Aboki & Another [2022] eKLR.

5. The application is opposed by an affidavit sworn by Wycliffe Okutoyi on 3/10/2024 that an appeal per se does guarantee the orders sought; the ruling took effect immediately as no stay of its execution was sought, the effect was to nullify the changes of directorship filed on 21/2/2005 with the 4th defendant, and on any subsequent dealings over the land, by the directors other than Zakayo Chesoni and Mary Aherwa Chesoni; the Registrar of Companies was ordered to rectify the register, by removing and reverting the directorship to its original subscribers, including removal of the name of the deponent to this supporting affidavit; hence the same is sworn by a party without locus in the company.

6. The respondent avers that the suit is now 16 years old, and it is not in the interest of justice to derail it any further. The respondent avers that the applicant has not demonstrated substantial loss or how the appeal will be rendered nugatory; otherwise stay of proceedings was a grave judicial action that seriously interferes with fair hearing and the right to be heard expeditiously, unless there are exceptional circumstances.

7. The respondent relies on written submissions dated 20/11/2024 that this application should have been filed in the High Court from which the appeal arises, the affidavit in support is signed by a stranger, and should be struck out or expunged from the records, and that there is no demonstration of merits of the appeal or its rendering nugatory. Reliance was placed on David Morton Silverstein -vs.- Atsango Chesoni [2002]eKLR.

8. The parameters to consider on whether to grant a stay of proceedings were set out in Kenya Wildlife Service -vs.- James Mutembei [2019] eKLR and RE Global Tours & Travels Ltd NRB High Court Winding Up Cause No. 43 of 2000. The court has to weigh the pros and cons of granting or not granting the order while considering inter alia:

   (1) The need for expeditious disposal of suits.

   (2) Prima facie merits of the intended appeal.

   (3) Whether or not it will probably succeed.

   (4) If the appeal is arguable.

   (5) Optimum utilization of judicial time.

   (6) If the application has been made expeditiously.

9. In Lucy Waithira Kamunge & Others -vs.- John Waiganjo Gichumi [2015] eKLR, the court took the view that, as a general rule, a stay of proceedings should not be granted unless the proceedings beyond all reasonable doubt ought not to continue. In David Morton Silverstein -vs.- Atsango Chesoni [2002] eKLR, the court held that each case depends on its facts as to whether they point to rendering the appeal nugatory in the absence of a stay of proceedings.

10. In M/S Karsan Ramji & Sons Ltd -vs.- Athuman & Others (Suing for and on behalf of Ms. Wamwanyundo Clam & Others (Civil Application No. E034 of 2023) [2024] KECA (KLR) (24th May

2023 (Ruling), the court held that the rights of an appellant and those of the respondent as held in Lucy Waithera Kimanga & Others -vs- John Waiganjo Gichuri [2015] eKLR and African Safari Club Ltd -vs- Safe Rentals Ltd [2010], have to be put on a weighing scale and where there is a scenario of almost equal hardships of the parties, the court must act fairly and justly.

11. The court said that the burden is on the applicant to persuade the court that, if he succeeds, it has no avenue of pursuing its claim against the respondent. The court, guided by Stanley Kangethe Kinyanjui -vs.- Tony Ketter & Others observed that whether or not the appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, will be reversible, or if not reversible, whether damages will reasonably compensate the party aggrieved. In Christopher Ndolo Mutuku & Another -vs.- C.F.C. Stanbic Bank Ltd [2015] eKLR, the court held that it ought to consider the overall impression and make out the total sum of the circumstances.

12. Applying the foregoing case law, what the applicant is saying is that after the ruling by the High Court, the plaintiffs resorted to amending their pleadings, and that would render the appeal nugatory. From the court records a further amended plaint was filed on 24/7/2024 after leave was issued and obtained through an application dated 12/6/2024.The notice of appeal was filed on 24/11/2023 at the High Court. The record of appeal was filed at the Court of Appeal dated 12/2/2024. The application herein was filed on 3/7/2024.

13. The delay in applying for a stay of proceedings since 2023 has not been explained. Why the application was not filed either at the High Court or the Court of Appeal has not been explained. The alleged danger is that the amendment of pleadings would diminish the suit and render the appeal nugatory. Evidence of how this will happen has not been availed. The applicant has not told this court whether it has responded to the further amended plaint by way of a statement of defense. Amendments of pleadings are and cannot be termed as counterproductive to amounting to substantial loss or damage. It cannot diminish the applicant's defense to the suit.

14. The applicant has to prove substantial loss with cogent and tangible evidence. The respondents are equally entitled to a fair hearing, access to justice, and expeditious disposal of the suit. Exceptional circumstances why the suit should be stayed have not been demonstrated. The affidavit is sworn without a board resolution authorizing the deponent to do so.

15. The upshot is that the application was filed late, it lacks merits, and it is an abuse of the court process. It is dismissed with costs.

16. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 29TH DAY OF JANUARY 2025.

HON. C.K. NZILI

JUDGE, ELC KITALE.

In the presence of:

Kiarie for the Plaintiffs present

A.G. for 1st - 4th Defendants present

5th Defendant represented by Nakitale - absent