



Saoli (Suing On his Own Behalf and as an Administrator of the Estate of Leposo Ole Saoli) & 2 others v Saoli (Environment & Land Case 264 of 2017) [2023] KEELC 22362 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22362 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 264 OF 2017
CG MBOGO, J
DECEMBER 14, 2023**

BETWEEN

**PAUL MOROMBI SAOLI (SUING ON HIS OWN BEHALF AND AS AN ADMINISTRATOR OF THE ESTATE OF LEPOSO OLE SAOLI ... 1ST PLAINTIFF
ANTONY PARSALOI SAOLI 2ND PLAINTIFF
TIMOTHY LETOLUO SAOLI 3RD PLAINTIFF
AND
SOITARA OLE SAOLI DEFENDANT**

RULING

1. Before me is the Notice of Motion Application dated 11th October, 2023 filed by the defendant/applicant and expressed to be brought under Articles 48, 50 (1) and 159 (2) (d) of *the Constitution*, Sections 1A,1B,3 and 3A of the *Civil Procedure Act*, Sections 3 and 13 (7) of the *Environment and Land Court Act* and Order 42 Rule 6(1) and Order 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -
 1. That there be a stay of any further proceedings in this matter pending hearing and determination of an appeal preferred against the ruling of this court delivered on 3rd October, 2023.
 2. That the costs of the application be provided for.
2. The application is premised on the grounds inter alia that the defendant/applicant being dissatisfied with the ruling of this court, delivered on 3rd October, 2023, has preferred an appeal against the said decision and deserves an opportunity to have the Court of Appeal pronounce itself on all the issues raised in the application dated 26th June, 2023.



3. The application is supported by the affidavit of the defendant/ applicant sworn on even date. The defendant/ applicant in his affidavit deposed that vide his application dated 26th June, 2023, this court disallowed his application in its ruling delivered on 3rd October, 2023. Further, that he has preferred an appeal against the said decision as can be seen from the letter annexed thereto.
4. The defendant/applicant further deposed that his intended appeal is meritorious and that he deserves an opportunity to have the Court of Appeal pronounce itself on the same. Further, that unless the proceedings herein are stayed, his intended appeal which has high chances of success shall be rendered nugatory. Further, that he is ready and willing to comply with any reasonable conditions of stay of proceedings.
5. The application was opposed by the replying affidavit of the 1st plaintiff/respondent sworn on 25th October, 2023. In his response, the 1st plaintiff/defendant deposed that the application is bad in law, and is an abuse of the court process for the reason that a perusal of the draft memorandum of appeal reveals that it raises no particular weighty issues for the Court of Appeal's consideration. Further, that if there is any ground of appeal, the appeal is unlikely to be rendered nugatory if the prayers sought are not granted.
6. The 1st plaintiff/respondent further deposed that unlike stay of execution, the test for stay of proceedings is higher and stringent and that the defendant's/applicant's right of appeal does not extend to holding this court and his co-plaintiffs' hostage with numerous applications. It was further deposed that the defendant/applicant filed an application at the Court of Appeal for stay of proceedings arising from the ruling delivered by this court on 25th April, 2023. The plaintiff/respondent went on to depose that the application was heard by the Court of Appeal on 11th October, 2023 and is due for ruling on 15th December, 2023. Thus, the defendant/applicant is forum shopping for a suitable avenue to obtain interim orders.
7. On 1st of November, 2023 the defendant/applicant filed a supplementary affidavit sworn on 31st October, 2023 in response thereto. The defendant/applicant deposed that an arguable appeal, is not one that must necessarily succeed, but one that is deserving of the court's consideration. Further, that the circumstances under which he made the application dated 17th February, 2023 are not the same as those obtaining herein and it is within his right to approach the Court of Appeal for an order of stay of proceedings.
8. The application was canvassed by way of written submissions. On 8th November, 2023, the defendant/ applicant filed his written submissions dated 7th November, 2023 where he raised one issue for determination which is whether the court should stay further proceedings in this matter pending the hearing and determination of an appeal preferred against the ruling of this court delivered on 3rd October, 2023.
9. While relying on the cases of Stepup Holdings (K) Limited versus Mt. Kenya University [2012]eKLR, Ezekiel Mule Musembi versus H.Young & Company (E.A) Limited [2019] eKLR, Benson Khwatenge Wafula versus Director of Public Prosecutions, Ethics and Anti-Corruption & 2 Others (Interested Parties) [2020] eKLR and Port Florence Community Health Care versus Crown Health Care Limited [2022] eKLR, the defendant/applicant submitted that the record shows that upon the court delivering its ruling herein on 3rd October, 2023, he preferred an appeal on 5th October, 2023 and as such the instant application has been brought timeously. Further, that the intended appeal raises triable issues and in the absence of an order of stay of further proceedings, the issues that fall for the Court of Appeal's determination go to the root of proceedings herein. Further, that expedition should not override justice.



10. The defendant/applicant relied on the cases of Dennis Mogambi Mang'are versus Attorney General & 3 Others, Civil Application No. NAI 265 of 2011 (UR 175/2011), Stanley Kang'ethe Kinyanjui versus Tony Ketter & 5 Others [2013] eKLR and Rajab Ahmed Karume versus The Chief Land Registrar & Others, Civil Application No. E390 of 2020.
11. On the 15th November, 2023 the plaintiffs/respondents filed their written submissions dated 14th November, 2023 where they raised two issues for determination as follows: -
 1. Whether the defendant/applicant has met the threshold for stay of proceedings in this matter pending the hearing and determination of the appeal preferred against the ruling of the court delivered on 3rd October, 2023.
 2. Who should bear the costs of this application.
12. On the first issue, the plaintiffs/respondents submitted that the defendant/applicant is undeserving of the exercise of this court's discretion since this is a matter that has already been determined vide the ruling of this court delivered on 7th February, 2023. Further, in light of the history and the multiplicity of applications and the outcomes thereof, the application is an abuse of the court process and made in bad faith. The plaintiff/respondent further submitted that for the application to succeed, the same must satisfy the two-limb test of whether the appeal is arguable and whether it will be rendered nugatory if not granted. The plaintiff/respondent relied on the cases of Kenya Wildlife Service versus James Mutembei [2019] eKLR, Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, Watu Credit versus Geoffrey Mokaya Aboki & Karen Chepkurui [2022] eKLR and Chris Munga N. Bichage versus Richard Nyagaka Tongi & 2 Others [2013] eKLR.
13. The plaintiff/respondent submitted that a perusal of the draft memorandum of appeal reveals that it raises no particular weighty issue for the Court of Appeal's consideration but it is aimed at trifling the defence hearing of this matter. Further, that the appeal will not be rendered nugatory if stay is not granted. Reliance was placed in the cases of Africa Eco Camps Limited versus Exclusive African Treasures Limited [2014] eKLR and Stanley Kange'the versus Tony Keter & 5 Others [2013] eKLR.
14. I have considered the application, the replying affidavit thereof as well as the rival submissions filed by both parties and, in my view, the issue for determination is whether the defendant/applicant is entitled to stay of proceedings of this matter pending the hearing and determination of the ruling of this court delivered on 3rd October, 2023.
15. A stay of proceedings is a radical remedy which is only granted in very exceptional circumstances. In the words of Ringera, J in Global Tours & Travels Limited (Nairobi HC Winding Up Cause No. 43 of 2000):

“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” (emphasis added)



16. The defendant/applicant submitted that if the proceedings before this court are not stayed, the appeal preferred against the ruling of this court delivered on 3rd October, 2023 will be rendered nugatory. The term “nugatory” was defined in *Reliance Bank Ltd V Norlake Investments Ltd* (2002) 1 EA p.227 at p.232 thus: “it does not only mean worthless, futile or invalid. It also means trifling.” The Court also expressed the view that what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. I am persuaded by the decision of JM Ngugi J (as he was then) in *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where he held as follows: -

“I am not persuaded, however, that the appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given. A judgment given is capable of being stayed. Whether the fact that a party had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the trial court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the trial court and then seek stay of proceedings in the trial court.” Emphasis mine

17. Also, in *Halsbury’s Laws of England*, 4th Edition, Vol. 37 at p. 330:

“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 proceedings, beyond 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 this case.”

18. On whether the draft Memorandum of Appeal is arguable and has high chances of success, let me say that in such an application, the defendant/applicant is only required to demonstrate the arguability of his appeal – not the fact that the appeal has a high probability of success. The requirement is for the defendant/applicant to demonstrate that he has plausible and conceivably persuasive grounds of either facts or law to overturn or vary the original verdict. The defendant/applicant need not persuade the court that his appeal is certain to succeed. See *William Odhiambo Ramogi & 3 others versus Attorney General & 6 others; Muslims for Human Rights & 2 others* (Interested Parties) [2020] Eklr. I however wish to point out that it is not within the province of this court to determine whether or not the appeal pending at the Court of Appeal is arguable and has high chance of success.

19. It is clear from the defendant’s/applicant’s submissions and the application that the application has been brought without delay. However, prima facie, the right to a fair hearing is arguable in this case, for the reason that the interest of both parties must be balanced. I have said before in the ruling delivered on 7th February, 2023 that this is an old matter that requires to be disposed off expeditiously and I need not repeat myself. Let me add that due regard must be given to time in order to avoid delaying this



matter any further. See the case of Muchanga Investments Limited versus Safaris Unlimited (Africa) Ltd & 2 Others [2009] eKLR, where the Court of Appeal stated that:

“Judicial time is the only resource the courts have at their disposal and its management does positively or adversely affect the entire system of the administration of justice.”

20. In my view, a full and speedy hearing on merit of this case will do justice to both parties as opposed to what is sought in the instant application. As such, there is no merit in the Notice of Motion Application dated 11th October, 2023 and it is hereby dismissed. Costs to abide the outcome of the main suit. Further mention on 20th February, 2024 for fixing a date for defence hearing.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 14TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

