



**Mwinzi v Kasyethau Noble Trading Limited & 2 others (Environment and Land Appeal E024 of 2023) [2023] KEELC 22355 (KLR) (13 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22355 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E024 OF 2023  
MAO ODENY, J  
DECEMBER 13, 2023**

**BETWEEN**

**CAROLINE MUTWA MWENDE MWINZI ..... APPELLANT**

**AND**

**KASYETHAU NOBLE TRADING LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**GEORGE NGUI KIMANZI ..... 2<sup>ND</sup> RESPONDENT**

**ANNAH MWALEH KIMANZI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 9<sup>th</sup> October 2023 by the Appellant seeking the following orders:
  - a. Spent
  - b. Spent
  - c. Spent
  - d. Pending hearing and determination of this application and the appeal, this honorable court be pleased to issue order staying proceedings in Nakuru CMELC E004 of 2022 *Kasyethau Noble Trading Limited v Caroline Mutwa Mwendu Mwinzi*.
  - e. Pending hearing and determination of this application and the appeal, this court be pleased to issue temporary orders of injunction restraining George Ngui Kimanzi and Annah Mwale Kimanzi either by themselves or in the name of Kasyethau Noble Trading Limited, their officers, servants, agents, assigns or any other person claiming under them, from interfering with the applicant's occupation and quiet possession over that property known as Apartment No. Nakuru Municipality Block 20/285/U2.



- f. The costs of this application be borne by George Ngui Kimanzi and Annah Mwale Kimanzi jointly and severally.

### **Appellant's Case**

2. The application was supported by the annexed affidavit of Caroline Mutwa Mwendu Mwinzi sworn on 9<sup>th</sup> October 2023 where she deponed that on 5<sup>th</sup> May 2021, she filed Nakuru HCC No. 12 of 2021 *Caroline Mutwa Mwinzi & Kasyethau Noble Trading Limited v George Ngui Kimanzi, Annah Mwaleh Kimanzi, the Registrar of Companies and the Hon. Attorney General*.
3. The Applicant stated that on 26<sup>th</sup> July 2021, George Ngui Kimanzi, Annah Mwaleh Kimanzi and another filed a preliminary objection as to the jurisdiction of the court which was dismissed where the court held that the dominant issue in the said matter was the question of directorship and shareholding of Kasyethau Limited and the issue of land ownership was to be determined later.
4. It was the Applicant's case that despite the said ruling, the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents filed Nakuru CMELC E004 of 2022 *Kasyethau Noble Trading Limited v Caroline Mutwa Mwendu Mwinzi* seeking for orders to control apartment No's Nakuru Municipality Block 20/285/U8 and T6.
5. The Applicant further stated that she filed a preliminary objection on 17<sup>th</sup> January 2022 on the ground that the suit was sub judice and res judicata but the same was dismissed as it did not raise pure points of law. She also stated that she filed an application on 5<sup>th</sup> May 2022 which was equally dismissed on 2<sup>nd</sup> October 2023.
6. She urged the court to allow the application for stay of proceedings in the lower court as if the same proceeds the appeal will be rendered nugatory.

### **2<sup>nd</sup> Respondent's Case**

7. The 2<sup>nd</sup> Respondent filed a replying affidavit on 6<sup>th</sup> November 2023 and deponed that granting stay of proceedings pending an appeal over interlocutory matters should be applied sparingly and only in exceptional circumstances.
8. He also deponed that the applicant has not shown that if the lower court case proceeds to hearing, the appeal will be rendered nugatory and relied on *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling).
9. He stated that prayer 5 should not be granted as it was not sought in the application dated 5<sup>th</sup> May 2022 which was dismissed and urged the court to disallow the application.

### **Appellant's Submissions**

10. Counsel for the Appellant submitted extensively on the issues of locus standi, sub judice and res judicata and relied on the cases of *James Kigen & another v China Hanan International Co-operation Group Co. Ltd; National Land Commission & 2 others (Interested Parties)* [2021] eKLR, *Christopher Mutiembu Machimbo & 3 others v County Surveyor, Trans-Nzoia & 4 others* [2022] eKLR.
11. Counsel relied on Order 2 Rule 15(1)(d) of the *Civil Procedure Rules* and submitted that if the court is not inclined to strike out the lower court case, then it should be stayed. Counsel admitted that the prayer for an injunction was not sought before the trial court and relied on Order 42 Rule 6(6) of the *Civil Procedure Act*, the case of *Raphael Mulinge Muthusi & 2 others v Mary Ndila Nyolo* and sought that the appellant's application be allowed.



## Respondents' submissions

12. Counsel for the Respondents filed submissions and reiterated the contents of the 2<sup>nd</sup> respondent's replying affidavit and relied on a South African case of *Walhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113A at 120D; *Western Areas Ltd & others* 2005 (5) SA 214 (SCA) at 224 D and submitted that the court only grants stay of proceedings pending an appeal in exceptional circumstances and urged the court to dismiss the application with costs.
13. Mr. Karanja also relied on the case of *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal E040 of 2021) [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where the court held that an appeal will not be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given. That a judgment given is capable of being stayed.

## Analysis and Determination

14. The issues for determination are whether the court should order stay of proceedings in Nakuru CMELC E004 of 2022 pending the hearing and determination of this appeal and whether an order of injunction should issue restraining the 2<sup>nd</sup> and 3<sup>rd</sup> defendants and anyone claiming under them from interfering with the appellant's occupation of apartment No. Nakuru Municipality Block 20/285/U2.
15. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR the court held that:

“ ... Stay of proceeding 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 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...”
16. Grant of stay of proceedings is discretionary as was held in the case of *Re Global Tours & Travel Ltd* HCWC No.43 of 2000 Ringera, J that:

“ .... 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 case, 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...”
17. A party seeking stay of proceedings must bear in mind that this is a draconian step if allowed has the effect of impeding or delaying access to justice. There must be cogent reasons why a court should stay proceedings.
18. A five Judge Bench of the High Court laid down the principles in the case of *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, while relying on the cases of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR; *Global Tours &*



*Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR and stated as follows:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.”

19. The Applicant has not demonstrated that there is any exceptional circumstance to warrant the grant of stay of proceedings. In fact, the Applicant argued the Appeal instead of addressing the issue of stay of proceedings. The issues that the Applicant raised like *res judicata*, sub judice and locus standi are not issues to be addressed in this application for stay of proceedings. The Applicant even urged the court to strike out the lower court case, if the lower court case if struck out, then which proceedings would the court be staying.

20. The appellant is also seeking for an order of injunction to restrain the respondents from interfering with her occupation of Apartment No. Nakuru Municipality Block 20/285/U2. The respondents opposed the application for injunction on the ground that the same was not sought in the application that was dismissed which is the basis of the present appeal.

21. This court notes that in addition to seeking for an order of stay of proceedings before the lower court, the appellant sought to have the 2<sup>nd</sup> and 3<sup>rd</sup> respondents joined in Nakuru CMELC E004 of 2022 as defendants. The trial court in dismissing the said prayer held as follows:

“That on the prayer that George Ngui Kimanzi and Annah Mwaleh Kimanzi be joined in this suit as 2<sup>nd</sup> and 3<sup>rd</sup> defendants respectively, this to me can only occur where the person entirely has a claim over the proposed defendant”

22. Since the trial court declined to join the 2<sup>nd</sup> and 3<sup>rd</sup> respondents as the defendants in Nakuru CM ELC E004 of 2022, it is not possible to grant orders against parties who were never joined to the suit.



23. I therefore find that the application dated 9<sup>th</sup> October 2023 lacks merit and is hereby dismissed with costs to the Respondents.

**DATED, SIGNED AND DELIVERED AT NAKURU THIS 13<sup>TH</sup> DAY OF DECEMBER 2023.**

**M. A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the [Civil Procedure Rules](#).

