



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. APPEAL NO. 43 OF 2021

SHADRACK SILLA MUTHAMA.....APPELLANT

VERSUS

KEBASO WYCLIFFE MAENGWE.....RESPONDENT

RULING

What is before Court for determination is the Appellant's Notice of Motion application dated the 21st October, 2021 brought pursuant to Order 42 Rule 6 of the Civil Procedure Rules (2010) and Section 3 of the Environment and Land Court Act. The Appellant seeks the following orders:

a. Spent.

b. That the proceedings in MACHAKOS CHIEF MAGISTRATE'S COURT ELC CASE NO. 71 OF 2018 (SHADRACK SILLA MUTHAMA VERSUS KEBASO WYCLIFFE MAENGWE) be stayed pending the hearing of this Application inter-partes.

c. That the proceedings in MACHAKOS CHIEF MAGISTRATES' COURT ELC CASE NO. 71 OF 2018 (SHADRACK SILLA MUTHAMA VERSUS KEBASO WYCLIFFE MAENGWE) be stayed pending the hearing and determination of this Application.

d. That the proceedings in MACHAKOS CHIEF MAGISTRATE'S COURT ELC CASE NO. 71 OF 2018 (SHADRACK SILLA MUTHAMA VERSUS KEBASO WYCLIFFE MAENGWE) be stayed pending the hearing and determination of this Appeal.

e. That the costs of this Application be in the cause.

The application is premised on the grounds on the face of it and supported by the affidavit of SHADRACK SILLA MUTHAMA. The Appellant contends that on 22nd September, 2020, the Honourable Magistrates' Court rejected the Respondent's Application for adjournment. He avers that the Respondent filed MACHAKOS ELC. APPEAL NO. E05 OF 2020 against the Honourable Magistrate's Ruling made on 22nd September, 2020. Further, the said appeal (MACHAKOS ELC APPEAL NO. E05 OF 2020) is scheduled for delivery of Ruling on 30th November, 2021 before MACHAKOS ELC COURT NO. 2. He explains that Judgment in the Magistrates' court was delivered in favour of the Plaintiff on the 31st March, 2021 but the Respondent sought for review of the said Judgment which was set aside vide the Ruling delivered on 31st August, 2021. He states that during the hearing of the Respondent's Application for review of the Judgment, the Respondent misrepresented to the Magistrates' Court that he had withdrawn MACHAKOS ELC APPEAL NO. E05 OF 2020 whilst the Appeal was still pending. Further, the Appellant being dissatisfied with the said Ruling delivered on 31st August, 2021, has filed the present Appeal. He reiterates that the continuation of further proceedings in the lower court will be detrimental to his right of Appeal and therefore he stands to suffer irreparable loss and damage if the orders sought herein are not granted. Further, that stay of further proceedings in the lower court is in the interest of justice and fairness. He argues that should the Appeal succeed after the lower court concludes the proceedings before it, then this Appeal shall have been in vain and rendered nugatory. He insists the orders sought are not prejudicial to the Respondent in any way, but the lack thereof will be irredeemably prejudicial to him.

The Respondent opposed the instant application by filing Grounds of Opposition where he stated as follows:

1. The Appellant makes the application contingent upon this Honourable Court's futuristic decision/Ruling as to whether the Respondent withdrew APPEAL NO. E05 of 2020.

2. The Appellant has not demonstrated that he has an arguable appeal and in fact his appeal is not arguable for the following reasons:

a. **The Respondent effectually withdrew APPEAL NO. E05 of 2020 in accordance with Rule 1 of Order 25 of the Civil Procedure Rules.**

b. **The Ruling delivered on 31st August, 2021 by the lower court was predicated on the fundamental principle of the right to be heard and ordered the hearing of the lower suit afresh in order to allow both parties an opportunity to present their respective cases.**

c. **Appeal No. E5 of 2020 is not pending determination.**

3. The Appellant only alleges that continuation of the proceedings in the lower court shall prejudice him without demonstrating how. The Appellant has not met this condition for stay of proceedings.

4. The veracity of the Appellant's allegations against the Respondent can only be tested in the appeal itself and not prejudicial and self-serving statements by the Appellant against the Respondent at this stage.

5. Stay of proceedings of the lower court shall not advance the interest of justice and expeditious disposal of litigation.

6. Only a re-hearing of the Appellant's suit in the lower court shall accord both parties an equal opportunity to present their respective cases and enable the court to do comprehensive substantive justice for the parties and their dispute.

The application was canvassed by way of written submissions.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 21st day of October, 2021 including the supporting affidavit, Grounds of Opposition and rivaling submissions, the only issue for determination is whether the proceedings in MACHAKOS CHIEF MAGISTRATE'S COURT ELC CASE NO. 71 OF 2018 (SHADRACK SILLA MUTHAMA VERSUS KEBASO WYCLIFFE MAENGWE) should be stayed pending the hearing and determination of this Appeal.

The Appellant in his submissions contends that this Court should stay the execution of the Ruling delivered by the lower court on 31st August, 2021. He reiterates that the Appellant's Application and Appeal are based on the legal principles of stay of suit, *res judicata* and misrepresentation which have been captured in the annexures to the Appellant's supporting affidavit. Further, that the issues raised by the Respondent in the lower court in his Application for review dated 21st April, 2021 (filed on 22nd April, 2021) were still pending for determination in MACHAKOS ELC APPEAL NO. E05 OF 2020 which had been filed earlier on 30th September, 2020. He submits that the issues raised by the Respondent in the lower court in his application for review dated 21st April, 2021 (filed 22nd April, 2021) had been raised previously in the Defendant's Application dated 7th October, 2020 (filed on 8th October, 2020) and were determined by the lower out in its Ruling delivered on 25th November, 2020. He confirms that MACHAKOS ELC. APPEAL NO. E05 OF 2020 was marked as withdrawn with costs to the Respondent on 30th November, 2021 (See court's Ruling delivered on 30th November, 2021). He reaffirms that the Appellant's Appeal has high chances of success. Further, that the lower court suit is scheduled for hearing on 7th December, 2021 and consequently the Appellant's Appeal herein will be rendered nugatory in the event of conclusion of the proceedings in the lower court. He is willing to abide by any directions issued by the court in furtherance of issuance of orders of stay and on security. To support his arguments, he relied on the following decisions: *Jaber Mohsen Ali & Another v Priscillah Boit & Another (2014) eKLR*; *Kiplagat Kotut v Rose Jebor Kipngok (2015) eKLR* and *Machakos ELC APPEAL NO. E005 of 2020 Kebaso Wycliffe Maengwe versus Shadrack Silla Muthama (Ruling delivered on 30th November, 2021)*.

The Respondent in his submissions insists the Appellant has not demonstrated whether stay of proceedings in the lower court is absolutely necessary. He contends that the Appellant's Application is predicated on the question as to whether the Respondent withdrew Appeal No. E05 of 2020. Further, the court found an Appeal stands withdrawn the moment it is filed in court as per Rule 1 of Order 25 of the Civil Procedure Rules; and there is no legal requirement for the court to mark an appeal as withdrawn. He explains that he effectually withdrew that appeal in accordance with Rule 1 of Order 25 of the Civil Procedure Rules. Further, the said Appeal was not pending at the time the Respondent's Application dated 21st April, 2020 was under consideration. He reiterates that the Appellant's Appeal is not arguable as it is predicated on the Respondent's appeal which had been withdrawn on 13th May, 2021 and was not pending at the time the Respondent's Application dated 21st April, 2020 was considered and determined. Further, the Ruling delivered on 31st August, 2021 by the lower court was predicated on the fundamental principle of the right to be heard and rehearing of the suit will give both parties an opportunity to present their respective cases. He further submits that the Appellant has not demonstrated what element of the appeal shall be rendered nugatory if the proceedings in the lower court are not stayed and the prejudice he stands to suffer. Further, stay of proceedings of the lower court shall only succeed in further delaying the final determination of this matter.

On the issue of stay pending Appeal, Order 42, Rule 6 of the Civil Procedure Rules provides that:

“(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.”

The Appellant has sought for stay of proceedings in **MACHAKOS CHIEF MAGISTRATE'S COURT ELC CASE NO. 71 OF 2018**

(SHADRACK SILLA MUTHAMA VERSUS KEBASO WYCLIFFE MAENGWE) pending determination of this Appeal which application has been opposed by the Respondent. The Appellant's main ground for seeking the said orders is that the trial Magistrate vide its Ruling dated 31st August, 2021 reviewed her earlier orders, set aside the judgement and directed this matter to be heard afresh.

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000 Ringera J** (as he then was) when dealing with an application for stay of proceedings had this to say:

“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)

From the evidence before me, I note the Appellant seeks to stay the proceedings herein to enable the Court make a determination of the instant Appeal. I note the impugned Order sought to be appealed from reviewed and or set aside a judgment and Court directed the matter to be heard afresh. The Appellant insists the trial Magistrate dealt with an application for review when the Respondent's Appeal was pending. However, the Respondent insists he had filed a Notice of Withdrawal of Appeal before the said Ruling was delivered. To my mind, it seems the Appellant has taken issue with the fact that the trial Magistrate failed to find that there was a pending Appeal once the Notice of Withdrawal had been filed. The Appellant has not demonstrated what prejudice he stands to suffer if the suit in the lower court was heard afresh. Order 42 of the Civil Procedure Rules is very categorical on stay and in this instance, I opine that the stay of proceedings in the lower court, sought by the Applicant would actually hamper the expeditious disposal of the said case. At this juncture I am unable to grant a stay of proceedings as requested by the Appellant.

It is against the foregoing that I find the Notice of Motion application dated 21st day of October, 2021 unmerited and will disallow it.

The costs of this application will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 17TH DAY OF MARCH, 2022

CHRISTINE OCHIENG

JUDGE