



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAROK

ELC APPEAL NO. 27 OF 2020

ESTATE OF THE LATE STEPHEN

LEIYAN PERTET.....1ST APPLICANT

THE PERSONAL REPRESENTATIVE OF THE LATE

STEPHEN LEIYAN PERTET..... 2ND APPLICANT

THE DISTRICT LAND REGISTRAR

NAROK NORTH/ SOUTH DISTRICTS..... 3RD APPLICANT

VERSUS

JAMES KENYUA MANCHE AKA JAMES KINYUA

PETER MANJI WAWERU (Suing as the Administrators and Personal

representatives of the estate of Samuel Waweru Manji (Deceased).....RESPONDENT

AND

ESTATE OF THE LATE FREDRICK

SIMIREN NKURUNA..... 1ST INTERESTED PARTY

PERSONAL REPRESENTATIVE OF THE ESTATE OF

FREDRICK SIMIREN NKURUNA.....2ND INTERESTED PARTY

RULING

A. INTRODUCTION

1. By Notice of Motion dated 18th January, 2021, the Applicant sought for the following orders: -

a) Spent.

b) THAT pending inter partes hearing and determination of this Application, this Honourable Court be pleased to order a stay of proceedings before the trial court in CMCC No. 138 of 2019: James Kenyua Manche aka James Kinyua Manji & Peter Manji Waweru vs Estate of the Late Stephen Leiyan.

c) THAT this Honourable Court be pleased order a stay of proceedings before the trial court in CMCC 138 of 2019: James Kenyua Manche aka James Kinyua Manji & Peter Manji Waweru vs Estate of the Late Stephen Leiyan pending the hearing and determination of this Appeal.

d) THAT the costs of this Application be provide for.

2. The application is based on the grounds thereof and the Supporting Affidavit sworn by ANNE PERTET on 19.01.2021. The applicant avers that she filed a Notice of Preliminary Objection challenging the 1st Respondent's suit instituted against them vide a Plaint dated 29.10.2019 on the ground that the cause of action raised in the said suit had already been heard and determined in Nakuru HCCC No. 416 of 1997; Samuel Waweru Manji vs Stephen Leyian Pertet vide the Order of dismissal issued on 26.02.2009. The preliminary objection was heard and Ruling issued on 15.09.2020 whose effect was to dismiss the Applicant's preliminary objection.
3. Being dissatisfied with the said ruling of 15.09.2020, she instituted the Appeal herein which is still pending for directions on hearing and determination.
4. However, she fears that despite lodging the Appeal, the trial court may proceed with the hearing of the main suit, with a hearing date having been set and further that the Respondents are taking steps to finalize the suit. She is apprehensive that should the main suit proceed for hearing in the trial court, then the present appeal may be rendered moot and a waste of the judicial time.
5. She further contends that the Memorandum of Appeal raises arguable and triable issues with high chances of appeal and therefore it is in the interest of justice that the proceedings in the trial court be stayed pending the hearing and determination of the appeal.
6. The application was opposed. The 1st Respondent filed a Replying Affidavit sworn on 25.02.2021 in response to the present Application. It is the 1st Respondent's assertion that the trial court in the ruling issued on 15.09.2020 found that the suit was not res judicata and that no valuation report had been tendered to prove the pecuniary value of the land on the issue of jurisdiction.
7. It is further his position that the application is an abuse of the court process and is an attempt to frustrate the hearing of the main suit as scheduled.
8. The 1st Respondent did also contend that the Applicant had failed to demonstrate and satisfactorily prove the principles outlined under Order 42 of Civil Procedure Rules for the grant of an order of stay of execution and further that the grounds tendered in the Memorandum of Appeal exhibits no arguable grounds. He thus urged the court to dismiss the instant application.
9. On 22.01.2021, this court issued directions that the Application be disposed of by way of written submissions. The Applicant's counsel filed her submissions dated 01.03.2021 whilst the Respondent's counsel filed his submissions dated 25.02.2021. I have read and considered the Application, the Affidavits Affidavit and the annexures thereto, the rival submissions by both parties and the various authorities cited in support of their respective cases and I have taken the same into account in arriving at my decision.

B. ANALYSIS AND DETERMINATION

10. This court is of the considered opinion that the solitary issue arising from the present Application is whether an order for stay of proceedings can issue in NAROK CMCC NO. 138 OF 2019.
11. The principles to be considered in application for stay of proceedings are well settled. The same were espoused **In Re Global Tours and Travels Ltd: Winding Up Cause No.43 of 2000** 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” (emphasis mine)

12. For this court to grant stay of proceedings, the Applicant satisfy the principles set out in the above case; to wit, that she has a prima facie arguable Appeal with high chances of success, that the instant application was filed timeously and must also demonstrate sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

13. Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice, depending on the circumstances of each case and the same ought to be exercised with caution. Even though I am mindful not to comment on the merits of the appeal lodged at this stage, I am also conscious of the fact that should the appeal be allowed, without having stayed the proceedings in NAROK CMCC NO. 138 OF 2019 then the same would amount to a waste of the valuable judicial time.

14. In **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J** (as he then 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.”

15. I will now proceed to address each of the 3 main principles to be established by the Applicant. The first limb is that the Applicant must demonstrate that she has a prima facie arguable case. I am cognizant that an prima facie arguable appeal needs only raise a single *bona fide* point/ triable issue worthy of consideration by the court that will hear the appeal and it need not be one that must necessarily succeed. See **CO-OPERATIVE BANK OF KENYA LTD vs. BANKING INSURANCE OF FINANCE UNION (KENYA) [2015] eKLR.**

16. I have carefully looked at the Memorandum of Appeal and the grounds of appeal therein. The Applicant seeks to challenge the decision of the trial court issued on 15.09.2020 whose effect was to dismiss the Applicant's preliminary objection. The foundation of the said Preliminary Objection is that the trial court does not have jurisdiction to determine the suit and so continuation with the case may render the appeal lodged nugatory. It is the Applicant's position (and correctly so) that should the appeal be allowed then it has the effect of terminating the suit in the trial court.

17. Thus, it is my considered view that from a perusal of the grounds in memorandum of appeal, some of the issues raised are pertinent and triable issues which in my opinion falls within the threshold of a prima facie case and therefore leads us to the conclusion that the appeal is arguable.

18. I have also noted that the 1st Respondent in his submissions has maintained that there are active orders which by the trial court issued on 15.09.2020 and which the Applicant has never been stayed and thus the orders sought in the instant application cannot issue. It is not lost to this court that the trial court did not issue any orders capable of being stayed which might explain why the applicant has never made an application for stay of execution of the ruling and orders issued on 15.09.2020. The trial court dismissed the Applicant's Notice of Preliminary Objection which sought to have the suit struck out. That being a negative order is incapable of being stayed.

19. Secondly, the application seeking the stay of proceedings must be filed expeditiously. The trial court issued its ruling on the preliminary objection on the 15.09.2020 while the instant Application was filed on the 18.01.2021. This in my view is not inordinate or unreasonable delay owing to the prevailing circumstances in the year 2020. I therefore find that the instant Application was filed expeditiously.

20. The third limb is that the Applicant must establish sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought. This court while considering whether there is a sufficient cause or not, must bear in mind the object of doing substantial justice to all the parties of the case. It must consider whether or not the appeal is frivolous so as to satisfy itself that it is not being asked to suspend the proceedings in the trial court in order to frustrate the hearing and delay the expeditious disposal of the matter on the one hand, and the rights of the Appellant on the other hand.

21. I have carefully considered the Application and the grounds therein together with the Supporting Affidavit; it is my view that the said grounds raise bonafide claim, triable issues, there has not been any demonstration of ill motive or negligence on the part of the Applicant whatsoever.

22. Applying the above considerations, I would say that the applicant's draft appeal is not a frivolous one. It is one which is arguable and triable. An arguable appeal is not one that, prima facie, has overwhelming chances of success; but one which raises contestable and triable issues. Therefore, this court is of the considered view that it is in the interest of justice to have the lower court proceedings in NAROK CMCC No. 138 of 2019 stayed, in the spirit of optimum utilization of the scarce judicial time.

23. As was appreciated by the Court of Appeal in **Muchanga Investments Limited vs. Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No. 25 of 2002 [2009] KLR 229:**

“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.”

24. In the end, I find that the Application for stay of proceedings in Narok CMCC NO. 138 of 2019 has merit and in the interest of justice, I hereby proceed to stay the proceedings pending hearing and determination of the intended Appeal.

CONCLUSION

25. In the upshot, I accordingly find that the Application dated 18th January, 2021 is merited and I hereby proceed to allow the same on the following terms: -

- i. **There be an Interim Stay of Proceedings in NAROK CMCC No. 138 of 2019 pending the hearing and determination of the Appeal.**
- ii. **That the Appellant is hereby directed to file the Record of Appeal within 45 days from the date of this ruling.**
- iii. **Costs of the Application to abide the Appeal.**

DATED, SIGNED AND DELIVERED AT MIGORI ON 16TH DAY OF MARCH, 2022 VIA EMAIL

MOHAMMED N. KULLOW

JUDGE