



Republic v Kisii County Land Registrar & another; Kebisa & another (Interested Party); SBM Bank (Kenya) Limited (Exparte) (Environment and Land Miscellaneous Application E001 of 2020) [2022] KEELC 43 (KLR) (27 April 2022) (Ruling)

Neutral citation: [2022] KEELC 43 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E001 OF 2020

JM ONYANGO, J

APRIL 27, 2022

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI TO QUASH THE GREEN CARD ILLEGALLY CONSTRUCTED BY THE KISII LAND REGISTRAR WITH RESPECT TO LAND TITLE NO. CENTRAL KITUTU/DARAJA MBILI/3960 BY WHICH A CERTIFICATE IS SHOWN TO HAVE BEEN RE-ISSUED ON 2ND MAY, 2016.

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR JUDICIAL REVIEW IN THE NATURE OF CERTIORARI TO QUASH THE CERTIFICATE OF TITLE PURPORTEDLY, ALBEIT ILLEGALLY RE-ISSUED ON 2ND MAY, 2016.

AND

IN THE MATTER OF AN APPLICATION FOR AN ORDER FOR JUDICIAL REVIEW IN THE NATURE OF MANDAMUS TO COMPEL THE KISII LAND REGISTRAR TO RECONSTRUCT A GREEN CARD SHOWING ALL THE LAWFUL BONA FIDE ENTRIES WITH RESPECT TO LAND TITLE NO. CENTRAL KITUTUT/DARAJA MBILI/3960 INCLUDING THE FIRST LEGAL CHARGE DATED 14TH DECEMBER, 2015

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTIONS ACT NO. 4 OF 2015 LAWS OF KENYA

BETWEEN

REPUBLIC APPLICANT

AND

KISII COUNTY LAND REGISTRAR 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT



AND

THOMAS OGETO KEBISA INTERESTED PARTY

RICHARD KERONGO MOTUKA INTERESTED PARTY

AND

SBM BANK (KENYA) LIMITED EXPARTE

RULING

Introduction

1. This ruling is in respect of a Notice of Motion dated 8th December, 2021 filed by the 1st and 2nd Interested Parties seeking to stay proceedings of this suit pending their Appeal against this court's ruling delivered on October 19, 2021 dismissing their Preliminary Objection to the Judicial Review application filed by the *Ex-parte* Applicant.
2. In support of their application the Interested Parties raised the grounds that:
 - i. Their intended appeal to the Court of Appeal is an arguable one and raises serious triable issues and prima facie has overwhelming chances of success and it is fair, logical and reasonable that the proceedings herein be stayed pending the hearing and determination of the Appeal;
 - ii. Should the Honourable Court not stay the proceedings in the manner sought herein and allow the proceedings herein to proceed, there is a high and imminent risk that the proceedings herein would be rendered nugatory and the Court would merely be engaging in an academic exercise and thus waste the courts precious judicial time;
 - iii. If the Court of Appeal upholds the Preliminary Objection and the dismisses the Ex Parte Applicant's Application in as far as it touches on Certiorari; and this Honourable Court goes ahead to grant prayer (b) of the Application seeking the Order of Mandamus, that would a recipe for chaos confusion as the same land parcel will have two green cards indicating different things.
 - iv. It is fair and logical for the court to grant the present application in the manner prayed and allow the Court of Appeal an opportunity to determine the issues in controversy with finality lest this the Honourable Court issues orders that might be contradictory to the orders that the Court of Appeal might issue and thus bring the administration of justice into ridicule and odium.
 - v. The application has been brought without unreasonable delay and it is in the interest of justice that the orders sought therein be granted and the grant of the orders aforesaid will not make the *Ex-parte* Applicant suffer any hardship or prejudice.
3. The application is also based on the Supporting Affidavit of Thomas Mwangi Ogeto Kebisa, the 1st Interested Party in which he reiterates the above mentioned grounds.
4. In response to the application, the *Ex-parte* Applicant filed Grounds of Opposition raising the following points;



- a. The Interested Parties did not demonstrate the prejudice they stand to suffer as the ruling of this Honourable Court of 19th October, 2021 was interlocutory and the same can be pursued even after substantive hearing of the motion before court.
 - b. The lodgment of a Notice of Appeal against the ruling of this Honorable Court did not entitle the Interested Parties to a stay of proceedings.
 - c. The Interested Parties' proposed appeal shall not be rendered nugatory should the motion before court be heard and disposed of.
 - d. This Honorable Court does not have jurisdiction to review the Grounds of Appeal set out in the Memorandum of Appeal.
 - e. Chances of the success of the Applicant's proposed appeal are not a factor to be taken into account in considering whether or not to grant an order of stay of proceedings.
 - f. From their conduct of proceedings herein the Applicants are merely interested in clogging the administration of justice.
 - g. No conceivable good/lawful purpose will be served by allowing the application.
5. The court directed that the application be canvassed by way of written submissions and from the record, both the Interested Parties and the *Ex-parte* Applicant have filed their submissions.

Background Of The Case

6. The *Ex-parte* Applicant lodged a Notice of Motion for Judicial Review pursuant to Order 53 rule 1(2) and (4) of the *Civil Procedure Rules, 2010*, Articles 10, 20(3)(a), 48, 50(1) & 159(2)(d) of *the Constitution* of Kenya, 2010, leave of Court to institute Judicial Review proceedings having been granted on 29th June, 2020.
7. In its application the *Ex-parte* Applicant sought the following orders:
 - i. An Order of Judicial Review in the nature of certiorari do issue to bring into this Honourable court for purposes of quashing-
 - a. The Green Card illegally constructed by the Kisii County Land Registrar with respect to land title L.R. No. Central Kitutu/Daraja Mbili/3960 by which a Certificate of title is shown to have been re-issued on 02/05/2016.
 - b. The Certificate of title purportedly issued on 02/05/2016.
 - ii. An Order of Judicial Review in the nature of mandamus do issue to compel the 1st Respondent to reconstruct a Green Card showing all lawful and bona fide entries/encumbrances with respect to land title L.R. No. Central Kitutu/daraja Mbili/3960 (hereinafter referred to as ("the suit property") including the First Legal Charge held by the Applicant dated 14/12/2015.
 - iii. The *Ex-parte* Applicant be at liberty to apply for any or further, necessary and/or consequential orders as may be expedient in the circumstances.
 - iv. Costs of and incidental to this application do abide the substantive Notice of Motion.
8. The application is supported by the Grounds set out in the Notice of Motion and the Affidavit sworn by one Egidia Mecha sworn on 29th May, 2020. He averred that a loan facility amounting to Kshs. 11,000,000/= was extended to the 2nd Interested Party who was the *Ex-parte* Applicant's customer.



The loan facility was secured by a charge over the suit property. The charge was duly noted on the title deed as it was shown on a Certificate of Official Search dated 14/12/2015 attached to the Affidavit.

9. In the year 2019 upon an enquiry by Ex-parte Applicant's advocates, a Green Card was issued showing that a title document for the suit property had been re-issued on 02/05/2016 in favor of the 1st Interested Party. At the time, the original title deed was in the custody of the *Ex-parte* Applicant. The charge registered against the suit property was not shown as an encumbrance on the Green Card which was availed to the *Ex-parte* Applicant's advocates.
10. Mr. Mecha avers that the creation of the said Green Card was an illegality which facilitated the issuance of an illegal title deed on 2.5.2016.
11. It is his contention that the Land Registrar's actions were tainted with procedural impropriety and the same were ultra vires. It is his further contention that as a result of the aforesaid actions, the Bank's rights as a charge have been compromised.
12. In response to the application, the 1st and 2nd Interested Parties filed a Notice of Preliminary Objection dated 9th April, 2021 claiming that the application for leave was null and void as it offended Section 9(3) of the [Law Reform Act](#) as read with Order 53 of the [Civil Procedure Rules](#) as it was filed outside the 6 months stipulated in the statutory period in the said section.
13. The court considered the Preliminary Objection and delivered its ruling on 19th October, 2021 dismissing the same with costs to the *Ex-parte* Applicant.
14. It against this background that the Interested Parties have filed this application seeking the orders which I have highlighted at the introduction hereinabove.

Issues For Determination

15. From the above background, the pleadings filed by both parties and their written submission, I deduce that the main issue for determination is whether the Interested Party has met the requirements for stay of proceedings pending appeal.

Analysis And Determination

16. There is no doubt that this Court has the discretion to stay proceedings pending appeal. This discretion is meant to avoid a waste of precious judicial time and prevent the court from duplication of efforts through a multiplicity of suits and motions and where if the stay is not granted and Defendant were to succeed, it would render the appeal nugatory.
17. However, as it was emphasized in the case of [Kenya Wildlife Service v James Mutembei](#) [2019] eKLR by Gikonyo J, stay of proceedings 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 the right of access to justice, right to be heard without delay and overall, right to a fair trial.
18. The threshold for stay of proceedings is illuminated in in *Halsbury's Law of England, 4th Edition*. Vol. 37 page 330 and 332, that:

“ 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 all 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 the case.”

19. The test was also captured in the case of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 (where Ringera J. (as he then was) held 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 matter, 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.”

20. In the instant application, the Interested Parties’ learned counsel has submitted that the intended Appeal to the Court of Appeal is an arguable one which raises serious triable issues with overwhelming chances of success. He also argues that should the Court not stay the proceedings in the manner sought and allow the proceedings to proceed, there is a high and imminent risk that the appeal will be rendered nugatory.
21. In his response, learned counsel for the *Ex-parte* Applicant submitted that the Interested Party has not in any way demonstrated the loss or prejudice he stands to suffer if the proceedings go on. He contended that the mere presence of an intended appeal does not guarantee a party the right to have proceedings stayed since a party must lay a lawful basis for grant of such an order given that the order is discretionary.
22. Learned counsel further argued that apart from stating that the intended appeal would be rendered a nugatory, they have not demonstrated how the jurisdiction of the Court of Appeal will be interfered with if the Notice of Motion for Judicial Review is heard and determined nor have they shown how their ability to pursue the intended appeal will be interfered with. It was counsel’s view that the arguability of the intended appeal should not be factor to be considered since this court would have to sit on an appeal against its own ruling in order to arrive at a finding that the intended appeal is arguable. He contended that the arguability of the intended appeal can only be determined by the Court of Appeal where the appeal lies.
23. I have carefully considered the instant application and the rival submissions by the parties and the authorities cited to me that I have highlighted above and in my considered view, the application by the interested Parties falls short of the requirements for stay the proceedings of the substantive motion by the *Ex-parte* Applicant. As rightly pointed out by counsel for the *Ex-parte* Applicant, the Interested Parties have not demonstrated in any way the loss or prejudice they are likely to suffer should the



substantive motion proceed to its logical conclusion. The mere statement that there is an intended appeal which is likely to be rendered nugatory cannot be sufficient ground to warrant the grant of an order of stay of proceedings which as I have stated require more than mere statements.

24. In the final result, it is my finding that the application is not well founded and the same is dismissed with costs to the Ex-parte Applicant.

DATED, SIGNED AND DELIVERED AT KISII THIS 27TH DAY OF APRIL, 2022.

J.M ONYANGO

JUDGE

