



**Afyare Enterprises Company Limited v Mugambi & 2 others;  
Mugambi (Interested Party) (Environment and Land Case Civil Suit  
1626 of 2016) [2022] KEELC 3682 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3682 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 1626 OF 2016  
EK WABWOTO, J  
MAY 31, 2022**

**BETWEEN**

**AFYARE ENTERPRISES COMPANY LIMITED ..... PLAINTIFF**

**AND**

**GIDEON KIREMAH MUGAMBI ..... 1<sup>ST</sup> DEFENDANT**

**MAX GAS AND LOGISTICS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**CHIEF LAND REGISTRAR, NAIROBI ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**GLADYS KALUYU MUGAMBI ..... INTERESTED PARTY**

**RULING**

1. This ruling is in respect to the plaintiff's notice of motion dated December 9, 2021. The application seeks the following orders:
  - i. That the Honourable Court be pleased to stay the proceedings in this matter pending the hearing and determination of Nairobi Court of Appeal Civil Appeal No. 354 of 2018.
  - ii. That the costs of this application be costs in the cause.
2. The application is premised on nine (9) grounds on its face which are explicated in the supporting affidavit of Hassan Abdi Warsame, an Officer of the 2<sup>nd</sup> appellant/applicant and sworn on December 9, 2021.
3. The 1<sup>st</sup>, 2<sup>nd</sup> defendants and the interested party are opposed to the application. The application was heard by oral submissions from the counsel present for the respective parties. During the hearing of the application on April 25, 2022, Learned Counsel Mr. Sumba submitted on behalf of the Plaintiff,



while Learned Counsel Mr. Gichuru submitted on behalf of the 1<sup>st</sup> defendant, Mr. Omondi Learned Counsel on behalf of the 2<sup>nd</sup> defendant and Learned Counsel Ms. Ndirangu made her submissions on behalf of the Interested party.

4. Mr. Sumba relied on the grounds and supporting affidavit sworn in support of the application. Counsel submitted that there was an appeal pending before the Court of Appeal in respect to Nairobi Civil Appeal No 132 of 2018 *Afyare Enterprises Company Limited vs Gideon Kiremah Mugambi & 3 others*. It was submitted that the appeal was against the ruling delivered by Justice B. Eboso on October 11, 2019 in which the learned judge had made a final finding of fact which would bound the subsequent proceedings herein and ultimately affect the final outcome.
5. Counsel argued that based on the ruling by Justice B. Eboso and the pending appeal at the Court of Appeal, it would be embarrassing to have conflicting decisions in the same file. It was submitted that the Justice Eboso had also stated in his ruling that there was no prima facie case which was a wrong position since there were two conflicting interest in the matter and that was a prejudicial finding.
6. On the delay in filing the application, Counsel submitted that the same was filed late because there was an assumption that the Court of Appeal would grant them the earliest hearing opportunity which turned out not to be the case. It was also contended that in the ruling delivered by the Court of Appeal, the Court had found that substantial loss and irreparable damage would be occasioned to the Plaintiff since the value of the land was Ksh 100,000,000 Million.
7. Counsel conclude his submissions by urging the court to allow the application and stay the proceedings since no prejudice will be occasioned to the defendants as the 2<sup>nd</sup> defendant was already enjoying in possession of the suit property and enjoying the rent from it. It was also stated that the plaintiff was ready and willing to abide by whatever terms of security that would be imposed by the court.
8. Learned Counsel Mr. Gichuru in opposing the application on behalf of the 1<sup>st</sup> defendant, relied entirely on the replying affidavit sworn by the 1<sup>st</sup> defendant on February 8, 2022. Counsel stated that it would be absurd for the plaintiff to imagine that the court will find itself in an awkward position since there were already three court orders on record. On the issue of substantial loss, Counsel argued that no such loss had been established nor proven since the Plaintiff has never been in possession of the suit property and hence therefor substantial loss doesn't exist.
9. It was also argued that there was unreasonable delay in filling the application and no cogent reasons had been given for the said delay and hence there was no basis for staying the suit. Counsel concluded his submissions by urging the court to dismiss the application.
10. Learned Counsel Mr. Omondi made oral submissions on behalf of the 2<sup>nd</sup> Defendant. He submitted associated himself with the submissions made by the 1<sup>st</sup> Defendant's counsel. He submitted that the application was an afterthought meant to delay the hearing of the suit. He contended that the contrary to the averments by the Plaintiff, the Court of Appeal had not made any final findings but just some highlights on the ruling from Justice Eboso and on that basis counsel urged the court to dismiss the Application.
11. The oral submissions by the Interested party were highlighted by Ms. Ndirangu learned counsel. She equally associated herself with the submissions made by the 1<sup>st</sup> and 2<sup>nd</sup> Defendant and further relied on the grounds of opposition dated February 8, 2022 that was filed in opposition to the application. Counsel submitted that the ruling by the Court of Appeal had been delivered on October 11, 2019 and the Plaintiff had not taken any active steps in the matter. It was further submitted that in its ruling, the Court of Appeal had already preserved the suit property and the plaintiff had never been in occupation



of the same. Counsel equally submitted that the application was an afterthought which should be dismissed. For the said reasons, the Court was urged to dismiss the application with.

12. I have considered the application, the affidavits filed and the oral submissions made by the respective counsel for the parties. The single issue which arises for determination is whether or not the Applicant has satisfied the criteria for grant of stay of proceedings.
13. This is essentially an application for stay of proceedings pending the hearing and determination of the 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. See Ringera J. (as he then was) in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 persuasively stated thus;

“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”

See also illumination on the threshold for stay of proceedings in the following passages 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 proceeding 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.”

14. It should be noted that this court has powers to stay proceedings pending appeal and this jurisdiction is derived from both order 42 rule 6 of the *Civil Procedure Rules* as well the inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. See *George Oraro vs. Kenya Television Network* Nairobi HCCC No. 151 of 1992.
15. The use of discretion is to ensure proper use of judicial time and resources to dispense justice for the parties. This is also to guard against multiplicity of applications which are meant to delay the finalization of matters which go against the spirit of article 159 of *the Constitution* that enjoins the



court to hear matters expeditiously. However, this is not to turn a blind eye on deserving applications for stay of proceedings.

16. In the case of *Christopher Ndolo Mutuku & another vs. CFC Stanbic Bank Ltd* (2015) eKLR, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

17. The provisions of article 159(2)(a)(b)(c) and (d) of *the Constitution* of Kenya as read with sections 1A and 1B of the *Civil Procedure Act*, cap 21 enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.

18. The applicant has not adequately explained why it took long to file the present application. In this regard, I am of the opinion that the application herein has not been filed expeditiously. I rely on the persuasive authority in *Pius Kawinzi Kitboka vs Jacinter Kavindu Makau* [2012] eKLR the court made the following observation:-

“The applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the Court’s discretion. Equity does not aid the indolent.”

19. In the instant case, upon perusal of the entire proceedings it is evident that there is no stay orders from the Court of Appeal and further it is also evident that the Plaintiff is not in possession of the suit property since the 2<sup>nd</sup> Defendant is the one in possession of the same. This is a matter that is still pending before this court. An order staying these proceedings would be counterproductive and would delay the finalization of this case. No compelling reason or prima facie case has been established to warrant the court to stay the proceedings. The delay that would be occasioned by the stay of the proceedings of this court would defeat the purpose of expeditious disposal of matters.

20. In conclusion, it is my considered opinion that it would not be in the interest of justice to exercise court’s discretion and grant stay of proceedings as the same will only serve the purpose of delaying the suit to the detriment of the defendants and the Interested party.

21. For the above reasons, the application dated December 9, 2021 is not merited and the same is dismissed with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31<sup>ST</sup> DAY OF MAY 2022**

**E. K. WABWOTO**

**JUDGE**

**In the presence of: -**

**Mr. Sumba for the Plaintiff.**

**Mr. Mwangi holding brief for Mr. Gichuru for the 1<sup>st</sup> Defendant.**

**Mr. Bulle for the 2<sup>nd</sup> Defendant.**

**Ms. Ndirangu for the Interested Party.**



**N/A for the 3<sup>rd</sup> Defendant.**

**Court Assistant; Caroline Nafuna.**

