



**Kimasway v Attorney General & 3 others (Environment & Land Case  
E014 of 2021) [2022] KEELC 2964 (KLR) (18 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 2964 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE E014 OF 2021**

**EO OBAGA, J**

**MAY 18, 2022**

**BETWEEN**

**AGATHA JERUTO KIMASWAY ..... PLAINTIFF**

**AND**

**ATTORNEY GENERAL ..... 1<sup>ST</sup> DEFENDANT**

**MINISTRY OF MINING ..... 2<sup>ND</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 3<sup>RD</sup>  
DEFENDANT**

**ELDOSONE QUARRY LIMITED ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

**Introduction**

1. This is a ruling in respect of a Notice of Motion dated 16<sup>th</sup> September, 2021 in which the 4<sup>th</sup> Defendant/Applicant seeks stay of proceedings pending hearing and determination of an appeal filed before the Court of Appeal.
2. The Plaintiff/Respondent had filed a suit against the Applicant and 3 others in which she contended that the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents had granted a stone extraction license and an environmental impact assessment license respectively which action enabled the Applicant to undertake blasting with a view to having stones from its quarry at Kapsaret at the outskirts of Eldoret Town.
3. The Respondent contemporaneously filed an application in which she sought injunctive orders seeking to stop the blasting by the Applicant which she stated had caused cracks on her house which is near the quarry. Before the Application for injunction could be heard, the Applicant raised a Preliminary objection arguing that the Respondent's application as well as the suit were premature as the Respondent had not exhausted the internal mechanism provided under the



Environmental Management and Co-ordination Act. The Applicant therefore argued that this court lacked jurisdiction to entertain this suit.

4. In a ruling delivered on 17<sup>th</sup> August, 2021 the Applicant's Preliminary objection was dismissed with costs to the Respondents. The Applicant appealed against the dismissal and hence this Application.
5. The Applicant contends that as it has filed an appeal to the Court of Appeal, it will be prudent that there be stay of proceedings as it pursues its appeal. The Applicant argues that it will be a waste of judicial time to proceed and if the appeal succeeds the proceedings will still be a nullity as the court would have been found to have had no jurisdiction.
6. The Applicant's application was opposed by the Respondent based on a replying affidavit sworn on 6<sup>th</sup> October, 2021. The Respondent contends that there is nothing to stay in this matter as what arose out of the ruling of 17<sup>th</sup> August, 2021 is a negative order incapable of being stayed. The Respondent further argues that the present application is a calculated move to delay the finalization of this matter particularly the Application for injunction in order to allow the Applicant to continue blasting for stones.
7. In a further affidavit by the Applicant sworn on 6<sup>th</sup> October, 2021, the Applicant contends that what it is seeking is not stay of execution but it is seeking stay of proceedings. The Applicant revealed that it had subsequently filed stay of proceedings before the Court of Appeal but because the Court of Appeal diary is congested, it decided to pursue the present Application.
8. The parties were directed to file written submissions. The Applicant filed its submissions dated 22<sup>nd</sup> October, 2021. The Respondent filed her submissions dated 8<sup>th</sup> November, 2021. I have considered the Applicant's Application as well as the opposition to the same by the Respondents. I have also considered the submissions by the Applicant and those of the Respondent. The only issue for determination is whether the Applicant has met the threshold for grant of stay of proceedings.
9. The principles to be considered in determining whether to grant stay of proceedings or not were well put up by Justice Ringera (as he then was) in Nairobi High Court winding up cause No.43 of 2000 Global Tours & Travels Limited where it was stated 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.”

10. In the instant case, the Applicant has appealed to the Court of Appeal on the ground that this court lacked jurisdiction to entertain both the application and the suit. The issue of jurisdiction is a fundamental one for if the court does not have it, it has no business to make any further steps. Now that the issue of whether the court had jurisdiction or not is before the Court of Appeal, it will be prudent that the proceedings herein be stayed pending the pronouncement of the Court of Appeal on the issue. In my view, the Applicant has raised an arguable ground of appeal and an arguable ground is not that which will necessarily succeed. If the court were to proceed while there is an appeal on jurisdiction,



pending, it will be a waste of judicial time as all those proceedings will be a nullity in case the appeal succeeds.

11. The Respondent has heavily submitted on stay of execution pending appeal. This is perhaps because the Applicant cited order 42 Rule 6(2) of the [Civil Procedure Rules](#) which deal with stay of execution pending appeal. I must point out that there is a difference between stay of execution pending appeal and stay of proceedings. This court is aware that the order which was given on 17<sup>th</sup> August, 2021 is a negative order which is incapable of stay. The considerations for stay of proceedings are different.
12. The only disturbing bit of this Application is that the Applicant has filed for stay of proceedings before this court and at the same time filed a similar Application before the Court of Appeal. I do not think this a proper practice and the fact that the diary of the Court of Appeal is congested is a reason for adopting this practice. However, this notwithstanding, as the central issue in this matter is jurisdiction, I will allow the Applicant's Application and order that the proceedings herein are stayed pending the outcome of the appeal pending in the Court of Appeal. The costs of this Application shall abide the outcome of the pending appeal.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 18<sup>TH</sup> DAY OF MAY, 2022.**

**E. OBAGA**

**JUDGE**

In the virtual presence of;

Ms. Achesa for Mr. Mwangi for 4<sup>th</sup> Defendant

Mr. Oduor for Ms. Isiaho for Plaintiff

Ms. Rutto for 1<sup>st</sup> and 2<sup>nd</sup> Defendant

Court Assistant -Albert

**E. OBAGA**

**JUDGE**

**18<sup>TH</sup> MAY, 2022**

