



Ibrahim v Makau & another; Musembi (Interested Party) (Environment & Land Case 370 of 2017) [2022] KEELC 2342 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2342 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 370 OF 2017**

**OA ANGOTE, J
JUNE 30, 2022**

BETWEEN

ALIO SIAD IBRAHIM PLAINTIFF

AND

JOSEPH MAKAU 1ST DEFENDANT

NATIONAL SOCIAL SECURITY FUND (THROUGH THE BOARD OF TRUSTEES) 2ND DEFENDANT

AND

DOROTHY MUSEMBI INTERESTED PARTY

RULING

1. Before this court for determination is the Plaintiff's/Applicant's Notice of Motion application dated May 10, 2021 brought pursuant to the provisions of Article 159 of *the Constitution*, Section 3A and 6 of the *Civil Procedure Act* and Orders 42 Rule 6 and 51 Rule 1 of the *Civil Procedure Rules* seeking for the following orders:
 - i. That the proceedings of this case be stayed pending the Appeal of the Judgment of the Honourable Obaga J delivered on February 14, 2019 in ELC 338 of 2009 Nairobi
 - ii. That costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Alio Siad Ibrahim, the Plaintiff, in which he deponed that he filed a Cross-Appeal in Civil Appeal No 205 of 2019, being an appeal against the decision of Obaga J in ELC 338 of 2009 rendered on February 14, 2019 and that this suit is substantially similar to ELC 338 of 2009 and relates to the same property.



3. The Plaintiff deponed that the issues before the Court of Appeal are similar to those in the present suit; that any decision rendered by this court will be affected by the decision of the Court of Appeal and that proceeding with the present matter is futile.
4. In response to the application, the 2nd Defendant filed Grounds of Opposition and averred that the application is misconceived and constitutes an abuse of court process; that a party cannot file a suit and thereafter seek that it be stayed; that there is no evidence of an Appeal and that the parties in ELC 338 of 2009 are different from the parties herein.
5. Vide a Further Affidavit, the Plaintiff deponed that Civil Appeal No 205 of 2019 was filed by counsel for the Plaintiffs in ELC 338 of 2009; that the Plaintiff's counsel thereafter filed a cross-appeal which was duly served on the parties; that the plot the subject of the instant case is a corner plot which traverses and shares boundaries with Plot No's 419 and 418/1 owned by the Appellants in ELC 338 of 2009 and that the decision of the Appellate court will have a great bearing on the instant case. The parties did not file submissions.

Analysis & Determination

6. The Plaintiff/ Applicant is seeking to have the present proceedings stayed. According to him, this matter is substantially similar to ELC number 338 of 2009; that judgment was rendered in ELC 338 of 2009 and an Appeal filed thereto being Civil Appeal No 205 of 2019; that the Applicant has filed a Cross-Appeal to the Appeal; and that due to the similarity of the matters, any decision by the Court of Appeal will greatly influence this case hence the continued hearing of this matter will be rendered futile.
7. In response, the 2nd Defendant deponed that the application constitutes an abuse of process as a party cannot file a suit and seek that it be stayed; that the parties in ELC 338 of 2009 are different from the parties herein and that there is no evidence of an Appeal.
8. *Black's Law Dictionary, Ninth Edition*, defines a proceeding as;
 - “(1) The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment; (2) any procedural means of seeking redress from a tribunal or agency; (3) an act or step that is part of a larger action; (4) the business conducted by a Court or other official body, a hearing.”
9. The general principles which guide the courts whenever they are invited to exercise jurisdiction to stay proceedings are best summarized in *Halsbury's Law of England, 4th Edition, Vol 37* at pages 330 and 332 as follows:
 - “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.”



10. In discussing the concept of stay of proceedings, the court in *Ferdinand Ndung'u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 others* [2013] eKLR persuasively stated thus:

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black’s Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court’s discretion.”
11. Similarly, in the case of *Church Road Development Co. Ltd v Barclays Bank of Kenya Ltd* 2007] eKLR, Ochieng, J held as follows:

“Black’s Law Dictionary defines ‘stay of proceedings in the manner following;

‘The temporary suspension of the regular order of proceedings in a cause, by direction or order of the Court, usually to await the action of one of the parties in regard to some omitted step or some act which the Court has required him to perform as incidental to the suit; as where a non-resident plaintiff has been ruled to give some security for costs. It is similar to an injunction with which a Court freezes its proceedings at a particular point. It can be used to stop the prosecution altogether, or to hold up some phase of it, such as an execution about to be levied on a judgment.’

Evidently, the scope of an order for stay of proceedings is wide as it is varied. It could relate to a specific action, such as taxation or execution; and it could also relate to the prosecution of the suit altogether.”
12. It is apparent from the foregoing that the order for stay of proceedings is discretionary in nature. While the present application seeks to invoke, and rightfully so, the courts inherent jurisdiction as provided for under Section 3A of the *Civil Procedure Act*, it is substantially founded on Section 6 of the *Civil Procedure Act* and Order 42 Rule 6 of the Civil Procedure Rules.
13. Order 42, Rule 6 of the Civil Procedure Rules provides as follows:

“(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.”
14. A keen reading of Order 42 Rule 6 hereinabove makes it apparent that a stay of proceedings is envisioned in instances where the suit and the Appeal are in respect to the same matter. In the current circumstances, the Appeal does not arise from the present matter.
15. ELC No. 338 of 2009 which the applicant avers is similar to the present matter has been concluded and judgment entered therein. Subsequently, it is no longer pending.



16. The court has considered the Memorandum of Appeal vis a vis the present case. In as much as the parties herein are not identical those in Civil Appeal No 205 of 2019, save for the Plaintiff and the 2nd Defendant, it is apparent that the litigation in the Court of Appeal is with respect to the same subject matter.
17. The court in ELC number 338 of 2009 made a determination that the property known as Plot 388/1 was none existant. The Cross-Appeal seeks to have this position overturned. The present case seeks injunctive orders restraining the Defendant from interfering with the Plaintiff's quiet enjoyment of the suit property being plot no 388/1.
18. It is apparent from the foregoing that any attempt by this court to proceed with this matter has great potential of conflict in respect of the suit property, and may well be an exercise in futility considering that the Court of Appeal is seized of the matter arising from ELC 338 of 2009 which was filed earlier than this suit.
19. It is trite that the court should not act in vain. The outcome of the Court of Appeal's decision in so far as the existence or non-existence of the suit property will have a bearing on the outcome of this suit. To save the precious judicial time, the best course of action is to stay the present proceedings.
20. For those reasons, the court allows the application dated 10th May, 2021 as follows:
 - a. That the proceedings of this case be stayed pending the Appeal of the Judgment of the Honourable Obaga J delivered on February 14, 2019 in ELC 338 of 2009 being Civil Appeal number 205 of 2019.
 - b. Each party to bear his own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 30TH DAY OF JUNE, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Mugo holding brief for Mbabu for the Plaintiff

Masese for 2nd Defendant

Mushangi for Wamaitha for 1st Defendant

Court Assistant – June/Tracy

