



**Mutusi & 15 others v Stanley & Sons Limited & another; County Government of Makueni & 2 others (Interested Parties) (Environment & Land Case 8 of 2020) [2022] KEELC 3434 (KLR) (27 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 3434 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI  
ENVIRONMENT & LAND CASE 8 OF 2020**

**TW MURIGI, J**

**JULY 27, 2022**

**BETWEEN**

**MARY WAENI MUTUSI & 15 OTHERS ..... PLAINTIFF**

**AND**

**STANLEY & SONS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**COUNTY GOVERNMENT OF MAKUENI ..... INTERESTED PARTY**

**NATIONAL LAND COMMISSION ..... INTERESTED PARTY**

**CHIEF LAND REGISTRAR ..... INTERESTED PARTY**

**RULING**

1. By a Notice of Motion application dated March 31, 2021 brought pursuant to the provisions of Article 159 of the Constitution, Sections 63(e), 1B, 3A of the Civil Procedure Act and Order 42 Rule 6 of the Civil Procedure Rules, 2010, the Plaintiffs/Applicants seek the following orders: -
  - i. Spent.
  - ii. That pending the hearing and determination of this application the Honourable Court be pleased to order a stay of proceedings in the present suit.
  - iii. That pending the hearing and determination of the Intended Appeal in Makueni ELC Petition No 5 of 2018, the Honourable Court be pleased to order a stay of proceedings in the present suit.



- iv. That the Honourable Court be pleased to grant any further orders as it deems fit.
- v. That the costs of this application be provided for.

### **The Applicants Case**

2. The application is premised on the grounds on its face together with the supporting affidavit sworn on April 19, 2021 by Alfred Nyandieka Advocate.
3. A summary of the grounds and the averments is that on March 2, 2021 this Court gave directions in respect of this matter and Makueni ELC Petition No 5 of 2018. That by allowing the withdrawal of ELC Petition No 5 of 2018, the Court issued substantive orders in the withdrawn Petition. That being dissatisfied with the directions issued, the Applicants filed a notice of appeal and a letter requesting for typed proceedings in that regard. The Plaintiffs/Applicants averred that they would be extremely prejudiced if this matter were to proceed since they would not have been afforded an opportunity to present their case thus denying them access to justice. The Applicants argued that the intended appeal would be rendered nugatory if the case proceeds pursuant to the Court's impugned directions. The Applicants maintain that the intended appeal is arguable and has high chances of success.

### **The 1<sup>st</sup> Respondent's Case**

4. Opposing the application, the 1<sup>st</sup> defendant/respondent filed a replying affidavit sworn by Robin Alan Stanley on May 12, 2021. The 1<sup>st</sup> Respondent averred that on November 25, 2020 the Plaintiffs' Counsel informed the Court that the Plaintiffs had withdrawn claim No NLC/HLI/541/2018 lodged with the National Land Commission. That the withdrawal of the claim informed the decision to recommend a compromise of ELC Petition No 5 of 2018. He went on to state that on February 1, 2021, all the parties made representations on the proposed compromise and the Court reserved March 2, 2021 for delivery of directions thereof. The 1st Respondent maintains that, the Applicants' contention that they were denied an opportunity to present their case is false.
5. It was further averred that there is nothing untoward in the exercise of the Court's discretion under Order 25 Rule 5 in marking ELC Petition No 5 of 2018 as withdrawn. In further opposition of the application, the 1<sup>st</sup> Respondent averred that the Applicant had failed to demonstrate the connection between the present suit and ELC Petition No 5 of 2018 to warrant a stay of these proceedings. That by extension, the Applicants have not demonstrated how the Court Order of March 2, 2021 has prejudiced these proceeding or what harm they will suffer if the orders sought are not granted.
6. The application was canvassed by way of written submissions. The parties herein filed their respective submissions and proceeded to highlight the same on April 4, 2022.

### **The Applicants Submissions**

7. The Applicants submissions were filed on October 28, 2021. Counsel for the applicants submitted that the only issue for determination is whether or not the applicants have met the threshold for the grant of stay of proceedings pending the hearing of the intended appeal.
8. Counsel submitted that the Court has jurisdiction under Order 42 Rule 6 of the *Civil Procedure Rules* as well as Sections 1A, 1B and 3A of the *Civil Procedure Act* to grant stay orders. Counsel placed reliance in the case of *Ezekiel Mule Musembi vs H Young & Company (EA) Limited* [2019] eKLR.
9. Reliance was also placed on the following authorities: -
  1. *African Safari Club Limited vs Safe Rentals Limited* [2010] eKLR.



2. [\*E Muriu Kamau & Another vs National Bank of Kenya Limited\*](#) [2009] eKLR.
  3. [\*Hunker Trading Company Limited vs Elf Oil Kenya Limited\*](#) [2010] eKLR.
  4. [\*Richard Omari Nyamatura vs Daniel Ombachi Mogeni\*](#) [2015] eKLR.
  5. [\*Fredrick S Mburung'a vs George Murea M'itibua & Another\*](#) [2018] eKLR.
10. Counsel submitted that when granting a stay of proceedings Court should consider the following factors: -
- i. Whether the Applicant has established a *prima facie* arguable case.
  - ii. Whether the application was filed expeditiously.
  - iii. Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.
11. Counsel submitted that the Applicants have established that they have a prima facie arguable appeal with high chances of success. Counsel contends that the Applicants seeks to appeal against the orders of Court given by way of directions on the grounds that: -
- i. That the Court granted substantive orders in the Petition during a mention by way of directions and thus denying the Applicants an opportunity of being heard.
  - ii. That by the grant of the orders the petitioners/applicants notice of motion dated February 20 has been compromised without a hearing.
  - iii. The Court breached the Applicants right to fair hearing. That in breach of Article 50 of the [\*Constitution\*](#), the Court granted prayers (a) and (b) of the Petition without according the parties an opportunity to be heard. That moreover, the 2<sup>nd</sup> Respondent was absent during the mention.
12. Counsel contends that the Applicants have raised strong grounds for their intended appeal which have demonstrated that the Applicants have a *prima facie* arguable case.
13. As regards the issue as to whether the application was filed expeditiously, Counsel submitted that the orders were made on March 2, 2021 and issued on March 8, 2021. That the Applicants filed the Notice of Appeal on March 8, 2021 while the present application was filed on March 31, 2021. Counsel argued that the period of issuance of the orders and filing of the application cannot be deemed as inordinate delay.
14. As regards to the issue as to whether the applicants had established sufficient cause for the grant of the orders sought, Counsel submitted that the applicants had established a prima facie arguable case and if the present proceedings are allowed to proceed, the applicants would suffer substantial loss and grave injustice since the Appeal would be rendered nugatory.

### **The 1<sup>st</sup> Respondent's Submissions**

15. The 1<sup>st</sup> Defendant's submissions were filed on November 12, 2021. Counsel for the 1<sup>st</sup> Defendant submitted that the principles which guide the court in determining whether to stay proceedings were set out in the case of [\*Re Estate of Leah Nyawira Njega \(Deceased\)\*](#) [2021] eKLR namely: -
- a. Whether the Applicant has established prima facie arguable case.



- b. Whether the application for stay of proceedings has been file expeditiously.
  - c. Whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.
16. As regards the issue whether the applicants have established a prima facie arguable case, Counsel for the 1<sup>st</sup> Respondent submitted that that the Plaintiffs do not have an arguable appeal and that the application is a ruse to further delay these proceedings.
  17. Counsel gave an elaborate background of the proceeding before Hon Justice Mbogo that culminated to the issuance of the directions given on March 2, 2021. Counsel contends that the Court accorded all the parties an opportunity of being heard before it issued the directions on the 1<sup>st</sup> Respondent's proposal. He went on to state that the Applicants did not take any steps to prosecute the application dated February 20, 2020 and were yet to file their submissions despite the Respondent having done so.
  18. To buttress their submissions counsel relied on the following cases: -
    1. *Jinaani Nzioki Mbiuva vs Cabinet Secretary, Ministry of Lands and Housing & 6 Others* [2021] eKLR.
    2. *Josephine Koki Raymond vs Philomena Kanini Mainigi (personal representative of Mainigi Musila Mutava (Deceased) & Another* [2018] eKLR.
    3. *Co-operative Bank of Kenya Limited vs Banking Insurance & Finance Union (Kenya)* [2015] eKLR.
    4. *Karatina Municipal Council vs Kanyi Karoki* [2014] eKLR.
    5. *Kivanga Estates Limited vs National Bank of Kenya Limited* [2017] eKLR.
    6. *Rose Florence Wanjiru (Suing on her own behalf and on behalf of and representing and for the benefit of all persons interested in and being, past, present and future accounts holders with specified banks/institutions in Kenya and includes all those persons enjoined pursuant to the Honourable Court's order issued on August 27, 2015) & 187 others vs Standard Chartered Bank Kenya Limited & 3 others* [2021] eKLR.
    7. *Ezekiel Mule Musembi vs H Young & Company (E.A) Limited* [2019] eKLR.
    8. *Pius Kawinzi Kithoka vs Jacinta Kavindu Makau* [2012] eKLR.
    9. *Kenya Wildlife Service vs James Mutembei* [2019] eKLR.
    10. *Christopher Ndolo Mutuku & another vs Cfc Stanbic Bank Limited* [2015] eKLR.
    11. *Muchanga Investment Limited vs Safaris Unlimited (Africa Ltd & 2 Others* (2009) KLR 229.
  19. As regards the issue whether the application was filed expeditiously, Counsel submitted that the application was filed forty-eight days after the impugned directions were issued. Counsel argued that the delay was not explained. In addition, Counsel submitted that no sufficient cause has been shown to persuade this Court that the Applicants will suffer substantial loss if the orders sought are not granted. That moreover, the Applicants have not filed a record of appeal for the Court to exercise its discretion.
  20. As regards to the issue whether the Applicants have established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought, Counsel submitted that the



Applicants have not demonstrated sufficient cause to persuade the Court to exercise discretion in its favour on the following grounds: -

- a. The 1<sup>st</sup> Defendant holds an indefeasible title to the suit property and the Plaintiffs have no legitimate interest in the suit property.
- b. That the Plaintiffs have not demonstrated the connection between the ELC Petition No 5 of 2018 and the present suit or how the impugned order of March 2, 2021 has prejudiced this case.
- c. The other parties have not applied for stay of proceedings.
- d. That the Applicants have not stated the loss they are likely to suffer if the orders sought are not granted.

### **Analysis And Determination**

21. Having considered the application, the affidavits and the rival submissions, the only issue for determination is whether the plaintiffs/applicants have made out a case for an order for stay of proceedings pending the intended appeal.
22. In answering this question, it must be borne in mind that the onus lies with the applicants to convince this Court why discretion should be exercised in its favour.
23. An order of stay of proceedings is a serious judicial action which seriously interferes with the conduct of any litigation. The jurisdiction to grant an order for stay of proceedings pending appeal is anchored on Order 42 Rule 6(1) of the *Civil Procedure Rules, 2010*. It is a discretionary power which must be exercised judiciously and only in exceptional circumstances. The said Rule states as follows;
  - 6.(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.
24. In the case of *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 the Court 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 matters, 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.”



25. To further buttress the above position, an excerpt from *Halsbury's Laws of England*, 4<sup>th</sup> Edition Vol. 37 page 330 and 332, is quite relevant. It states 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 application 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.”

26. As very aptly stated by Justice Nyamu in *Bivac International SA (Bureau Veritas)* [2006] 1 EA 26 (HCK) at page 34: -

“The applicant seeks an order for stay of proceedings and in such applications which are clearly aimed at stopping a party from being heard there is a higher test of scrutiny if the proceedings were to be halted.”

27. In addition to the above position, the Court of Appeal went on to lay down the principles governing stay of proceedings in *Kenya Commercial Bank Ltd vs Benjob Amalgamated Ltd & Another*, Civil Application No NAI 50 of 2001 (29/2001 UR), (Unreported) as follows: -

“... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus. We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance therewith. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.”

28. From the foregoing, it is crystal clear that the three main principles to guide a Court in such an application are: -

- i. Whether the Applicant has established that he/she has a prima facie arguable case.
- ii. Whether the application was filed expeditiously.
- iii. Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

29. On the issue whether the Applicants have established a prima facie arguable case, the Applicants are seeking for an order of stay of proceedings in the present suit pending the hearing and determination of the intended appeal in Petition No 5 of 2018. Although the proceedings relating to Petition No 5 of 2018 were not annexed to the present application, I have had the opportunity to cite and read the same.



30. The record shows that the Petitioner (the 1<sup>st</sup> Defendant herein) vide a Petition dated November 8, 2018 sought the following orders:-
- a. This Honourable Court be pleased to declare that Section 15(3) of the National Land Commission Act is null and void for being contrary to Articles 24, 27(1), 40, 47 and 50(1) of the Constitution of Kenya.
  - b. A permanent injunction order do issue restraining the 2<sup>nd</sup> Respondent either by itself, agents, employees, servants or whomsoever from commencing, continuing or otherwise completing the process of hearing, investigating or considering claim NO NLC/HIL/541/2018 or any other claim relating to historical land injustice complaints in relation to the Petitioner's property being LR No 1748 Kiima Kiu/Kalanzoni and Mukaa ward, Makueni County as under the provisions of Section 15(3) of the National Commission Act.
  - c. This Honourable Court be pleased to issue an order of Certiorari to remove into this court and quash the 2<sup>nd</sup> Respondent's decision through the 4<sup>th</sup> Respondent to carry out a survey of the Petitioner's property being LR No 1748 Kiima Kiu/Kalanzoni and Mukaa Ward, Makueni County contained in the 2<sup>nd</sup> Respondent's letter dated October 30, 2018.
  - d. Such other orders as this Honourable Court shall deem just.
  - e. Cost of this Petition.
31. Both parties made reference to the proceedings dated November 25, 2020 that culminated IN the issuance of the directions made on March 2, 2021. Although I have not had the opportunity to cite the proceedings for November 25, 2020 and February 1, 2021, the record shows that on March 2, 2021 the Court issued the following directions: -
1. Consequently, I direct that the Petition be compromised in terms of prayer (a) and (b) of the Petition. There shall be no orders as to costs. The Petition is hereby marked as withdrawn.
  2. With regard to the application for injunction in ELC No 8 of 2020, my finding is that whereas doctrine of lis pendens would be applicable if the 5<sup>th</sup> Respondent were to withdraw the said application for injunction so as to assist the court to further the overriding objective provided under section 1A of the Civil Procedure Act, given the peculiar circumstances of the historical injustices case filed by the 5<sup>th</sup> Respondent, I am of the view that the latter Respondent has the right to ventilate on the said application.
  3. Consequently, parties starting with the Plaintiffs/Applicants in ELC Case No 8 of 2020 have 21 days each from the date hereof to file and serve their submissions in respect of the application for injunction dated February 20, 2020.
  4. This matter will be mentioned on April 20, 2021 when further directions shall be issued regarding the said application and the 1<sup>st</sup> defendant's notice of preliminary objection dated April 17, 2020.
32. The applicants intention is to appeal against the directions of the Court issued on March 2, 2021 with regards to ELC Petition No 5 of 2018. In that regard, the Applicant attached a Notice of appeal dated March 8, 2021. There is no evidence that an appeal has been filed. The Court has not seen the grounds of appeal. The Court is not able to determine whether the applicants have an arguable appeal. I therefore find that the applicants have not established a *prima facie* arguable case.



33. On the issue as to whether the application has been filed timeously, the Court record shows that the directions were issued on March 2, 2021. The present application was filed on March 11, 2021. I find that the same was done without delay.
34. On whether the Applicants will suffer substantial loss, if the order of stay of proceedings is not granted, the Applicants must demonstrate the loss that he will suffer. The Applicants have not satisfied the principle of substantial loss. I note that the appeal is yet to be filed.
35. It is noteworthy that no material has been presented by the Plaintiffs/applicants to convince this court that any injustice would be visited on them in the event this particular matter proceeds to main suit hearing. It is evident from the record that The pleadings filed in this civil case are distinct to those filed in ELC Petition No 5 of 2018. The facts and issues in dispute are also different. No correlation between the two matters has been pointed out and no adverse orders were issued in respect of these proceedings. I find that there is no sufficient cause to stay these proceedings. It would be a tragedy to halt these proceedings at the expense of an unrelated cause of action when it is actually the Plaintiffs' duty to prosecute their claim against the Defendants.
36. The upshot of the foregoing is that the Court is not satisfied that the applicants have made out a case for stay of proceedings. In the end, I find that the application dated March 31, 2021 is devoid of merit and I proceed to dismiss the same with costs.

**HON. T. MURIGI**

**JUDGE**

**RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 27<sup>TH</sup> DAY OF JULY, 2022.**

**IN THE PRESENCE OF: --**

Court assistant – Mr. Kwemboi.

Nyandieka for the Applicants.

Dr Musau appearing together with Kuyo for the 1<sup>st</sup> Defendant.

