



REPUBLIC OF KENYA



KENYA LAW
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**Choge v Chebet & another (Environment and Land Appeal 27 of 2022)
[2022] KEELC 12765 (KLR) (30 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12765 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND APPEAL 27 OF 2022
L WAITHAKA, J
SEPTEMBER 30, 2022
(FORMERLY ELDORET ELC APPEAL NO 22 OF 2022)**

BETWEEN

COLLINS KIMUTAI CHOGE APPLICANT

AND

MARTHA TERIKI CHEBET 1ST RESPONDENT

THOMAS KIPKEMOI KIPTOO 2ND RESPONDENT

RULING

1. This ruling is in respect of the notice of motion dated October 18, 2021 brought under section 3A of the *Civil Procedure Act* and order 42 rule 6 of the *Civil Procedure Rules*. Through the application, the appellant/applicant seeks an order of stay of proceedings in Iten Environment and Land Court Case No E009/2020 pending the hearing and determination of the application and the appeal.
2. The application is premised on the grounds that the appellant/applicant was aggrieved by the ruling of the lower court delivered on July 2, 2021 through which the lower court dismissed/declined to set aside the *ex parte* judgment entered in the case before it and to grant him leave to defend the suit pending before the lower court; the applicant filed an appeal to this court; that the appeal has high chances of success and that unless the orders are granted the lower court may proceed with the case rendering his appeal nugatory.
3. The application is supported by the affidavit (supporting) of the applicant in which the grounds on the face of the application are reiterated. Annexed to the affidavit are a copy of the ruling appealed from, marked CK1, and a copy of the memorandum of appeal filed in this matter, marked CK2.
4. In reply and opposition to the application, the 1st respondent, Martha Teriki Chebet, through the replying affidavit she swore on February 11, 2022 has deposed that the applicant filed a similar



application before the lower court, which was dismissed by the lower court on June 21, 2021; that the application is an afterthought and that she would be prejudiced if the application is allowed.

5. The 1st respondent further contends that the appellant's appeal should not prevent the lower court's proceedings between the 2nd respondent and herself; that it would be unjust to stay the proceedings at the instance of the appellant without considering the other parties to the suit; that the appeal is unlikely to succeed and that the appellant/applicant's right of appeal should not prevent and/or delay justice between the 1st respondent and the 2nd respondent.
6. The appellant/applicant and the 1st respondent filed submissions which I have read and considered. The sole issue arising from the application, the response thereto and the submissions is whether the appellant/applicant has made up a case for being granted the orders sought.
7. The circumstances leading to the filing of the appeal herein and the instant application are that the appellant/applicant instituted the appeal herein following dismissal of his application in the lower court, dated April 15, 2021. Through that application the appellant/applicant sought stay of execution of the decree and all consequential orders issued in the suit before the lower court and an order setting aside the *ex parte* judgment given in the suit below the lower court. The appellant/applicant also sought leave to file his statement of defence out of time.
8. In that application, the appellant/applicant, through his advocate Javan Kipnyekwei, acknowledged that he had been served with summons to enter appearance but through mistakes attributable to his advocate the appellant/applicant did not file a statement of defence within the time stipulated by law.
9. Based on the acknowledged fact that the appellant/applicant was aware of the suit and its determination that no explanation was given by the 1st defendant for failure to file a statement of defence and that the draft defence exhibited was a mere denial to the plaintiff/respondent's claim, the lower court declined to grant the orders sought by the appellant/applicant but allowed a similar application by the 2nd defendant/respondent.
10. Aggrieved by the decision, the appellant/applicant appealed to this court on the grounds that the learned trial magistrate erred by failing to find that no useful purpose will be served by setting aside judgment against one of the defendants when the cause of action against the defendants and the subject matter of the case is the same; that the learned trial magistrate failed to find that justice would be better served by granting the appellant a chance to be heard and that the learned trial magistrate failed to appreciate the import of his decision among other grounds.
11. Apprehensive that unless the proceedings in the lower court are stayed pending the hearing and determination of his appeal, the plaintiff/respondent may proceed with his case in his absence thus rendering his appeal nugatory, the appellant/applicant filed the instant application seeking to stay proceedings in the lower court pending the hearing of the application and the suit.
12. The principles that undergird an application for stay of proceedings pending appeal were aptly espoused in the case of *Ezekiel Mule Musembi v H Young & Company (EA) Ltd* (2019) e KLR thus:-

“It is not in doubt that this court has power to stay proceedings pending appeal and this jurisdiction is derived from both order 42 rule 6 of the civil procedure rules as well as the inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. See *George Oraro v Kenya Television Network Nairobi HCCC No 151 of 1992*. This jurisdiction is meant to avoid a waste of valuable judicial time; prevent court from duplication of efforts and prevent multiplicity of suits and where if the stay is not granted and defend were to succeed it would have rendered the appeal nugatory. In such applications the court aims at ensuring



that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the plaintiff proceeds with the suit and the appeal succeeds. Obviously, the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay...”

13. In applying the above principles to the circumstances of this case, the instant application was filed October 19, 2021 to challenge the decision of the lower court made on June 2, 2021. The court record shows that before filing the instant application, the applicant had filed a similar application, dated July 27, 2021. The application was dismissed by the lower court on September 22, 2021. In view of the foregoing, it follows that the application was filed 4½ months after delivery of the ruling appealed from and one month after dismissal of the appellant’s application for stay of proceedings made before the lower court.
14. Order 42 rule 6 vests concurrent jurisdiction on both the trial court and this court to hear and determine an application for stay of proceedings. However, that does not mean that an applicant is at liberty to disregard the law on sub judice and res judicata provided for under section 6 and 7 of the [Civil Procedure act](#). In that regard see the persuasive decision in the case of [Heritage Insurance Company Ltd v Patrick Kasina Kisilu](#) (2015) e KLR where it was stated:-

“I consider the provisions of the rule in 6(1) of the Civil Procedure Rules must be understood as follows:-

- i. There is no automatic stay of execution upon appeal and therefore no appeal or second appeal shall operate as a stay of execution or proceedings except as the court appealed from may order.
- ii. The court appealed from may for sufficient cause order stay of execution of such decree or order.
- iii. Even where an application for such stay shall have been granted or refused by the court appealed from, the appellate 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.
- iv. There’s a right of appeal for any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred to the appellate court to have such order set aside.

In accordance with the hierarchical authority of laws, as part of the civil principles rules the provisions for the filing of repeat applications for stay of execution in the court to which the appeal is preferred, regardless of whether such an application has been granted or refused (and I daresay made) in the court appealed from must be subject to the ordinary principles of civil litigation on sub judice and *res judicata* which are statutorily underpinned under sections 6 and 7 of the [Civil Procedure Act](#), respectively. Accordingly, the filing of the application herein by the appellant falls to be considered with reference to the principles of *res judicata* and *sub judice* as well as other considerations relating to abuse of process. The application, having been filed upon appeal, is similarly subject to common law principles regarding the setting aside, alteration or variation of orders made by a trial court by the appellate court...”

The court further observed:-

“The filing of an application before this court while a similar application is pending before a lower court of competent jurisdiction is, clearly an abuse of court process. In addition, the appellate court has no jurisdiction to interfere with the exercise of discretion by a lower court



except where the court is clearly wrong or has misdirected itself resulting in a miscarriage of justice.”

15. In applying the principles espoused in the case of *Heritage Insurance Company Ltd v Patrick Kasina Kisilu* supra to the circumstances of this case where the appellant/applicant had filed and prosecuted a similar application before the lower court, I do find the current application to be bad in law for violating the provisions of section 7 of the *Civil Procedure Rules*.
16. Consequently, I dismiss it with costs to the plaintiff/respondent.
17. The foregoing notwithstanding, to address the concerns raised by the appellant/applicant of the suit before the lower court being heard and determined before the appeal herein is heard and determined, I direct the parties to the appeal to ensure the appeal is heard and determined within the shortest time possible.
18. Orders accordingly.

DATED, SIGNED AND DELIVERED AT ITEN THIS 30TH DAY OF SEPTEMBER, 2022.

L. N. WAITHAKA

JUDGE

Ruling read virtually in the presence of:

Mr. Kipnyekwei for the appellants.

N/A for the respondent

Christine Towett: Court Assistant

