



REPUBLIC OF KENYA



**KENYA LAW**  
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**Wachira v Maina & another (Environment & Land Case E003 of 2022)  
[2022] KEELC 12764 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 12764 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT THIKA  
ENVIRONMENT & LAND CASE E003 OF 2022**

**JG KEMEI, J  
SEPTEMBER 29, 2022**

**BETWEEN**

**PETER GICHIRI WACHIRA ..... APPELLANT**

**AND**

**LUCY MUTHONI MAINA ..... 1<sup>ST</sup> RESPONDENT**

**DISTRICT LAND REGISTRAR, THIKA ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

1. Vide an application dated the May 2, 2022 the applicant sought the following orders;
  - a. Spent
  - b. Stay of proceedings in *ELC 124 of 2020* pending the outcome of the appeal in *ELCA No 3 of 2022* filed in this court.
  - c. Costs of the application.
2. The application was premised on the grounds annexed thereto and the supporting affidavit of the applicant. The appellant averred that he was aggrieved by the ruling of the court delivered on the December 22, 2021 the lower court leading to the filing of the current appeal which he believes is meritorious as it seeks to challenge the entry of judgment on the counterclaim and the irregularly obtained injunctive orders that continue to be enjoyed by the 1<sup>st</sup> respondent at the prejudice of the applicant. He urged the court to grant the orders pending the hearing and determination of the appeal.
3. The application is opposed by the 1<sup>st</sup> respondent *vide* her replying affidavit deponed on the May 30, 2022 where she was emphatic that the ruling of the court delivered on the December 22, 2021 was sound reasonable and judicious and thus the instant application is intended to delay the proceedings in the suit. She explained that the applicant was served with the defense and counterclaim in the suit but failed to file a defence and that the interlocutory judgement was entered by consent. In addition,



she stated that the applicant has not established the requisite conditions nor established a prima facie merits in the application to warrant the orders sought. Further that the applicant shall not suffer any prejudice and that the only purpose to be served by the application is to delay the suit.

4. Parties elected to file written submissions which I have read and considered.
5. The applicant submitted and gave the background of the application as thus; The plaintiff filed suit against the defendants on the March 12, 2020 which suit was resisted by the 1<sup>st</sup> defendant via a defense and counterclaim on the December 15, 2021; on the February 26, 2021 the 1<sup>st</sup> defendant successfully sought an order of interim injunction to restrain the plaintiff from interfering with the suit lands pending the hearing and determination of the suit; the court entered *ex parte* judgement against the plaintiff with regard to the counterclaim in the absence of the plaintiffs' counsel on the April 26, 2021. Unhappy with the outcome, the plaintiff filed an application seeking orders to set aside the restraining orders and discharge the *ex parte* Judgment but the application suffered a dismissal. Aggrieved and dissatisfied with the said decision, he filed the pending appeal as well as the instant application to stay the proceedings of the lower court pending the hearing and determination of the current appeal.
6. On whether the court has power to determine the application the applicant, he relied on the case of *Global Tours & Travel Limited (supra)* and submitted that the power to grant stay of proceedings is a discretionary power exercised mostly in the interest of justice, the sole reason being whether or not it is in the interest of justice to order a stay of proceedings. Further the applicant submitted that the grant of orders of stay of proceedings must be guided by any of the following principles; whether the applicant has established that he or she has a prima facie of an arguable case; whether the application was filed expeditiously and whether the applicant has established sufficient cause to the satisfaction of the court and that it is in the interest of justice to grant the orders sought. See *Kenya Power & Lighting Company Limited Vs Esther Wanjiru Wokabi* (2014) EKLR. The applicant urged the court to grant the orders as he has satisfied the threshold.
7. As to whether the applicant has established a *prima facie* case the applicant submitted that he has established the infringement of a right thus setting out an arguable case with a probability of success on his appeal. The applicant reiterated his argument that a court cannot enter *ex parte* judgement on a counterclaim filed in respect to a suit that is yet to be heard and determined on merit without the need to proof the claim by way of formal proof.
8. In addition, the applicant avers that his right to a fair hearing as set out in Art 50 of the *Constitution* has been violated as a result of the court entering an *ex parte* judgement irregularly.
9. He submitted that the application was filed expeditiously following the delivery of the ruling in the trial court.
10. The 1<sup>st</sup> respondent relied on the case of *Kenya Wildlife Services Vs James Mutembei* (2019) eKLR where the court held that;

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It infringes on the right of access to justice, the right to be heard without delay and overall right to a fair trial. Therefore, the test for stay of proceedings is high and stringent.”
11. Further the 1<sup>st</sup> respondent lamented that though she was dragged to court by the plaintiff, the plaintiff has been consistent in being a stumbling block to the hearing and timely resolution of the case. That the applicant has not shown *prima facie* case with high chance of success and neither has he shown any prejudice that he has suffered. In sum she stated that granting the orders of stay of proceedings



shall interfere with the 1<sup>st</sup> defendants right to ventilate her case before the court. She urged the court to dismiss the application.

12. An order for stay of proceedings is discretionary in nature for deserving cases. The test for stay of proceeding is high and stringent as held by Ringera J in the persuasive case of *Global Tours & Travels Limited*; Nairobi High Court Winding Up Cause No 43 of 2000 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 courts 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.”

13. I rely on the further exposition of the subject 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. In this case it is the applicant's application that the suit in the lower court is still in existence and that there is a question that requires the inquiry of the Court on Appeal; which is that *ex parte* Judgment was issued without a formal proof of a counterclaim, something that he opines is strange to the rules of procedure. In addition, the applicant is also challenging the interlocutory restraining orders which were said to have been recorded by way of consent of the parties and yet he was not involved. The 1<sup>st</sup> respondent on the other hand has defended the ruling on the grounds that the same is sound and was issued judiciously. Indeed her position is that the applicant has no arguable appeal nor has established a *prima facie* case to warrant the issuance of the orders of stay of proceedings. Neither has the applicant satisfied the court of any prejudice that has been visited on him. She was of the view that in the main, the application is only geared to delay the conclusion of the case and infringe on her right to be heard.
15. I have keenly perused the memorandum of appeal and I find that the issues raised in the said memorandum call upon the court to inquire into them. Therefore I do not find them to be idle.
16. I find that it is in the best interest of justice that the proceedings in the lower court are stayed to allow the appeal to be heard and concluded. I see no prejudice that will be suffered by the 1<sup>st</sup> respondent that cannot be compensated by costs.
17. In the end I find the application meritorious and I accordingly allow it in the following terms;



- a. The appellant/applicant to expedite the filing of the record of appeal within the next 45 days from the date hereof.
- b. In default the orders shall lapse without any further orders of the court.
- c. The costs of this application shall be in favour of the 1<sup>st</sup> respondent.

18. It is so ordered.

**DELIVERED, DATED AND SIGNED AT THIKA THIS 29<sup>TH</sup> DAY OF SEPTEMBER 2022 VIA MICROSOFT TEAMS.**

**J G KEMEI**

**JUDGE**

Delivered online in the presence of;

Kimathi for Plaintiff/Applicant

Ms. Gachugu HB Ambani for 1st Defendant/Respondent

Attorney General - Absent

Court Assistant – Phyllis Mwangi

