



Kariuki (Suing on behalf of the Board of Governors Tseikuru Technical Training Institute) v Kavaka & 5 others; Kavaka & 5 others (Respondent) (Environment and Land Appeal E005 of 2021) [2022] KEELC 4817 (KLR) (21 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4817 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E005 OF 2021
LG KIMANI, J
SEPTEMBER 21, 2022

BETWEEN

GEOFFREY KIARIE KARIUKI APPELLANT
SUING ON BEHALF OF THE BOARD OF GOVERNORS TSEIKURU
TECHNICAL TRAINING INSTITUTE

AND

SAMMY KAVAKA 1ST RESPONDENT
MWENDE KATHINGO 2ND RESPONDENT
NDEKE MUNUVE 3RD RESPONDENT
MUMBE KIMWELE 4TH RESPONDENT
MICHEAL MUTILI 5TH RESPONDENT
MUNUVE MUSYOKA 6TH RESPONDENT

AND

SAMMY KAVAKA RESPONDENT
MWENDE KATHINGO RESPONDENT
NDEKE MUNUVE RESPONDENT
MUMBE KIMWELE RESPONDENT
MICHEAL MUTILI RESPONDENT
MUNUVE MUSYOKA RESPONDENT

*((Being an Appeal from the Ruling of the Honourable Mercy Nasimiyu
PM delivered on 10th March 2022 in Kyuso ELC Suit No.7 of 2018))*



RULING

1. What is coming up for determination before the court is a Notice of Motion Application dated March 14, 2022 brought under Order 46 Rule 6 (1) of the *Civil Procedure Rules*, Sections 1A, 1B, and 3A and 63 of the *Civil Procedure Act* seeking the following orders:
 1. Spent
 2. Spent
 3. That this Honourable Court be pleased to stay proceedings in Kyuso MC ELC No 7 of 2018 Daniel Malinda Muumbi (Suing on behalf of the Board of Governors Tseikuru Technical Training Institute) vs Sammy Kavaka and others and specifically the judgment therein scheduled for March 17, 2022, pending the hearing and determination of the Appeal filed herein.
 4. That the costs of this application be provided for.

The Applicants Case

2. The grounds relied on are set out on the face of the application and in the sworn affidavit of Geoffrey Kiarie Kariuki, the current Principal of the Tseikuru Technical Training Institute and the Secretary of the Board of Governors. The background to the entire suit is that on or about the December 22, 2009, the defunct County Council of Mwingi, whose functions were taken over by the County Government of Kitui, passed a resolution to approve extra land to set up a Technical Institute at Tseikuru which was allocated an extra 40 acres of land.
3. During the adjudication process, the extra 40 acres were registered as part of Land Parcel No Tseikuru 'A'/315. In addition it is stated that the Tseikuru Technical Institute is the registered proprietor of Land Title No Tseikuru/Tseikuru 'A'/367 measuring 19.61Ha which was registered in favour of the Institute in 2011.
4. Sometime in 2012, when the Institute's foundation stone was being laid on the suit land, the Respondents tried to stop the construction claiming ownership of the suit land and on the November 7, 2016, the Appellant wrote to the County Government of Kitui and requested for identification of beacons. The Sub-County surveyor visited the suit land on the November 28, 2016 and identified beacons. On April 2017, the Institute fenced the suit land with concrete posts on the strength of a report by the County Government of Kitui. That sometime in August 2017, the Appellant avers that the Respondent's caused destruction to the Institute's property and have been grazing livestock on the thereon. The Appellant avers that they also made permanent structures as homesteads on the institute's land.
5. On January 31, 2018, the Appellant filed a suit as Kyuso MC ELC No 7 of 2018 seeking an order for permanent injunction against the Respondents and an order to compel them to give vacant possession of the suit land. The Respondents denied being in occupation of Tseikuru/Tseikuru 'A'/367 and stated that they were the proprietors of Land Parcel No Tseikuru/Tseikuru 'A'/139. Due to this, the trial court directed the District Land Surveyor to ascertain the boundary between Parcel Nos Tseikuru/Tseikuru 'A'/139 and Land Parcel No Tseikuru/Tseikuru 'A'/367.
6. The Applicant claims that on September 21, 2021 a joint survey was carried out on the suit land by Mwingi Surveyor, The Mwingi Land Registrar and a private surveyor appointed by the Appellant in



- the presence of the court. That during the survey the distance between point B-C marked in the map by the private surveyor was measured, initially agreed by the surveyors but later disputed by the District Land surveyor. As a result the trial magistrate directed the Private Surveyor to file a report in court for the courts consideration.
7. The matter came up for mention on the November 30, 2021 to confirm filing of the Surveyor's Report but the report had not been filed and the Applicants advocate claims that he informed the court via email that the report was not ready. On December 16, 2021, the Appellant sought further extension of 21 days to enable him to file the surveyor's report via email but did not receive any response. The Court proceeded to fix a judgment date for February 10, 2022.
 8. According to the Applicant it was not until January 19, 2022 that the private surveyor's report was availed to the Appellant's Advocates and the Appellant states that the delay was occasioned by the Office of the Director of Land Adjudication in furnishing the private surveyor with the satellite image Map for Tseikuru 'A' Adjudication area which was necessary for the surveyor to back up his report.
 9. It apparently also dawned on the Appellant that the District Land Surveyor, Christopher Mbuvi Nzengu on September 21, 2021 deliberately and dishonestly misled the trial court as to the location of the point marked 'B' in the sketch map filed in court by him on August 14, 2019.
 10. The Appellant averred that it became necessary to have the said District Land Surveyor recalled for cross-examination. Therefore, on January 24, 2022, the Appellant moved the trial court vide a Notice of Motion Application dated January 24, 2022 seeking orders that the trial court to reserve its judgment and issue an order to recall the District Land Registrar for cross-examination and an order that the Director of Land Adjudication and Settlement be called to identify and produce the satellite image map for the area to give the correct position.
 11. On the March 10, 2022, the Trial Magistrate issued a ruling dismissing the application on grounds that the main reason that the Appellant wanted to produce the satellite map was to challenge the earlier report filed by the District Land Surveyor and the District Land Registrar and that it would be prejudicial to the Defendants and that the matter has delayed in court. The Appellant avers that the Learned Trial Magistrate did not address the prayer to recall the District Land Surveyor for cross-examination and proceeded to fix the matter for judgment. Being dissatisfied with the Ruling, the Appellant has filed an appeal seeking to overturn this decision.
 12. According to the Appellant if this application is not allowed, the Appellant will be occasioned substantial loss and hardship because they will not get a chance to file the private surveyor's report which is a critical piece of evidence and cross-examine the District Land Surveyor who was never cross-examined during trial.
 13. The Appellant filed written submissions to their application submitting that this Court has powers to stay proceedings pending an Appeal derived from Order 42 rule 6(1) of the Civil Procedure Rules, 2010 They relied on the case of *Global Tours & Travel Ltd HCWC No 43 of 2000* where the court stated that it is a discretionary power and the sole question is whether it is in the interest of justice to order a stay of proceedings and on what terms.
 14. The Appellant stated that the underlying interest ought to be that the appeal should not be rendered nugatory while relying on the cases of *Port Florence Community Health Care vs Crown Health Care Limited (2022)eKLR*, *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya) 2015eKLR*, *UAP Insurance Company Ltd vs Micheal John Beckett(2014)eKLR*, *Niazsons(K)Ltd vs China Road and Bridge Corporation (Kenya)(2001)eKLR*.



15. According to the Appellant, the orders sought in the dismissed application before the trial court were meant to enable court to establish the correctness of all facts presented before it and thus it was only fair and just that the orders prayed for herein be granted. Counsel for the Appellant relied on the oxygen principle under Sections 1A, 1B and 3A of the Civil Procedure Act deriving its legitimacy from Article 159(2)(d) of the Constitution. It is their submission that they stand to suffer immense loss if denied the chance to exhibit evidence that the District Land Surveyor misled the court in his report and during the locus in quo. Further, the Appellant submitted that the Respondents have not demonstrated that they would suffer any prejudice and that if the trial court is allowed to proceed and render its judgment and the same goes against the Appellant, if the Appeal herein succeeds then there would be nothing left to litigate on.

The Respondent's Case

16. In his Replying Affidavit, the 6th Respondent averred that he had authority from the 1st-5th Respondents to make the affidavit on their behalf. He stated that the Appellant had ample time to comply with the orders of the Trial Court issued on September 23, 2021 but failed and neglected to comply by filing the Private Surveyor's report despite the trial court giving them several extensions of time to comply.
17. It is the Respondents' averment that judgment was reserved for February 10, 2022 without the benefit of being served with the private surveyor's report dated January 19, 2022. The Respondents' also contended that the Appellant has never made a request in the trial court's proceedings to cross-examine the District Land Surveyor and instead proceeded to close their case when the matter came up for hearing on September 21, 2021.
18. In response to the averments in paragraphs 3-18 of the Appellant's supporting affidavit, the Respondents stated that those are facts that are pending determination by the trial court. Further, the 6th Respondent averred that in response to paragraphs 19 and 20 of the Supporting affidavit that the private surveyor's report marked GKK8 was never admitted in evidence after it was expunged from the court's record that it was done unilaterally without the court's presence or participation. He also averred that the report marked GK9a and 9b was never served upon them or their advocates.
19. The 6th Respondent contended that the surveyors never agreed on any points other than points A to B and the District Surveyor solely relied on his report dated August 14, 2019 which report the Appellant already signed consent agreeing to its admission. He stated that the Trial Court made a sound ruling.
20. The 6th Respondent avers that this application has been made in bad faith and if allowed will occasion prejudice and injustice to him and his co-respondents. They stated that the Appellant has dragged the matter since 2018 and that there has to be an end to litigation and the application is aimed at aiding a negligent party to defeat the effective and expeditious disposal of the trial court matter.
21. The Respondents further state that the Applicant failed to comply with orders of the court issued on September 23, 2021 to file the Private Surveyors report and when the matter was mentioned on 30th November and December 16, 2021 the report had not been filed. That on December 17, 2021 the court directed parties to file written submissions by January 17, 2022.
22. The Respondents also filed written submissions stating that the Court should exercise its discretion to grant stay judiciously and not on caprice. They submit that the application herein is an afterthought, an attempt to delay the course of judicial proceedings and brought merely to frustrate the process of the court.



23. The Respondents submit that the Trial Court gave its ruling declining to exercise her judicial discretion to aid indolence while quoting from the court's holding in *Peter Kariuki Mburu & Nother vs Neema Shab (2021)eKLR*. The Respondents also relied on the case of *Kenya Wildlife Service vs James Mutembei(2019) eKLR* where the court held that stay of proceedings should not be confused with stay of execution pending appeal as well as the holding in the case of *Gichui Macharia & Another vs Kiai Mbaki & 2 others(2016)eKLR*.
24. It is the Respondent's submission that the stringent test for granting stay of proceedings has not been met and that the Applicant wishes to waste the Court's time. It is their contention that Order 42 rule 6 of the Civil Procedure Rule on stay pending appeal is not what the Appellant has prayed for since their application is for a stay of proceedings. Further, the Respondents submit that they have not shown how they will suffer substantial loss should stay not be granted. No record of appeal has been filed hence it is their submission that the instant application is meant to delay the court matter. The Respondents state that the grant of stay of proceedings will seriously interfere with the rights of the Respondents to access justice and will only serve to aid the Appellant's Agenda and pray that the Court dismisses the Application with costs to the Respondents.

Analysis and Determination

25. The Application at hand is one that seeks stay of proceedings in Kyuso MC ELC No 7 of 2018 Daniel Malinda Muumbi (Suing on behalf of the Board of Governors Tseikuru Technical Training Institute) vs Sammy Kavaka and others pending the hearing and determination of this application and appeal.
26. Gikonyo J noted as hereunder in *Kenya Wildlife Service v James Mutembei [2019] eKLR*

' Stay of proceeding should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent. See Ringera J in the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000* persuasively stated thus; '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' (emphasis added) See also illumination on the threshold for stay of proceedings in the following passages 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.'



27. The Appellant has relied on Order 42(6) of the Civil Procedure Rules(2010).Sub-rule 1 of the said provision states as follows:

' No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.'

28. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously in the interests of justice. In the case of Port Florence Community Health Care v Crown Health Care Limited [2022] eKLR quoting Gikonyo J where he addressed the question of an order for stay of proceedings being an important consideration in the case of Lucy Waithera Kimanga & 2 Others vs John Waiganjo Gichuri (Supra).

This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.'

29. The Court should therefore 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 or whether if stay of proceedings is not granted the Appeal will be rendered nugatory.

30. In the case of Peter Kariuki Mburu & another v Neema Shah [2021] eKLR the court considered The provisions of Article 159(2)(a)(b)(c) and (d) of the Constitution of Kenya as read with Sections 1A and 1B of the Civil Procedure Act, Cap 21 which enjoin the court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.'

31. Taking into account the tests enumerated above for consideration on whether to grant orders of stay of proceedings, and without pre-empting the final determination of the appeal herein I wish to point out that this court was not supplied with the proceedings before the trial court which would have assisted the court to have on hand information on how the trial was conducted and the parties attendances. However the affidavits filed and ruling of the court have given a glimpse of the proceedings before the court.

32. Has the Applicant shown there 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? On this issue I observe that the grounds of Appeal contained in the Memorandum of Appeal challenge the courts decision in disallowing the applicants application to call the witness the Mwingi District land surveyor and for Director of Land Adjudication be called to produce the satellite Image Map for Tseikuru A Adjudication area. The Appellant contends that the government and private surveyor had agreed that the only way to ascertain



- the distance between point B and C was by obtaining the Satellite Image Map for the Tseikuru 'A' Adjudication area.
33. It has been claimed by the Applicant and this has not been disputed by the Respondents that the necessity for filing a report by the private surveyor appointed by the Applicant arose out of a visit to the locus in quo on September 21, 2021. I am cognizant of the issue raised by the Respondents on the failure by the applicant to file the private surveyors report in the time and as directed by the court even after there was extension of time to do so. However an explanation was given for the failure and the explanation was that the Satellite Image Map for the Tseikuru 'A' Adjudication area which was required to be attached to the surveyors report was not availed in time for the Applicant to file.
 34. Examination of the said delay and the explanation given will be one of the issues for consideration at the hearing of the appeal and I do not wish to posit any view on it. On the whole, upon perusing the grounds of appeal, the ruling of the court and the issues raised in this application, I am satisfied that the appeal raises a prima facie arguable appeal which the Applicant ought to be given an opportunity to pursue.
 35. The other test for consideration is whether if the application for stay of proceedings is not allowed the appeal will be rendered nugatory. The foremost consequence of not allowing this application is that the trial court will proceed and render its judgement without the appeal having been heard. The mere fact that judgment will have been rendered does not necessarily mean the end of the appeal. However, the determination of the appeal may be rendered an academic exercise in the event that the appeal is determined in favour of the Appellant at a time when the trial court matter will have been concluded. I therefore determine that the appeal will be rendered nugatory if the application herein is not granted.
 36. With regard to the application of the provisions of Article 159(2)(a)(b)(c) and (d) of the Constitution of Kenya as read with Sections 1A and 1B of the Civil Procedure Act, Cap 21 which enjoin this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties, I am of the view that since the trial court had found it necessary to allow the filing of the private surveyors report after the case had been closed, the same must have been a report required for the just determination of the suit. Notwithstanding any delay that may be caused in rendering the judgement, I find that it is in the interests of justice that the Applicant be given an opportunity to have the appeal heard to determined.
 37. On the issue of time I have considered that the ruling by the trial court the subject matter of this appeal was rendered on March 10, 2022, the Memorandum of Appeal was filed in court on March 16, 2022 while this application was filed on March 16, 2022. Thus the appeal and the application were filed in a timely manner.
 38. I have considered that an order of stay of proceedings will cause delay in determination of the suit pending before the trial court. The trial court expressed the view that the suit was an old one and was classified as a backlog case having been four years old at the time of the court's ruling. The court was of the view that the Respondent would be highly prejudiced if the orders sought were granted. I am cognizant of the prejudice that the Respondent stands to suffer due to the orders of stay of proceedings however, balancing the interests of justice, I find that the same tilts toward allowing the application but with strict timelines for hearing of the appeal.
 39. I therefore allow the application dated March 14, 2022 in the following terms:-
 - A. An order be and is hereby issued staying further proceedings in Kyuso MC ELC No 7 of 2018 Daniel Malinda Muumbi (Suing on behalf of the Board of Governors Tseikuru Technical



Training Institute) VS Sammy Kavaka and Others and specifically staying delivery of the judgment therein pending the hearing and determination of the Appeal herein.

- B. The Appellant shall file and serve the record of appeal together with written submissions within 45 days from the date hereof.
- C. In the event that Order No 2 above is not complied with Order No 1 above shall automatically lapse.
- D. Each party to bear their own costs of this application

DELIVERED, DATED AND SIGNED AT KITUI THIS 21ST DAY OF SEPTEMBER 2022.

L. G. KIMANI

JUDGE ENVIRONMENT AND LAND COURT

Ruling read virtually in the presence of-

Musyoki: Court Assistant

Mwikali Advocate holding brief for Mwalimu for the Appellant/Applicant

Omoyo for the Respondent

