



REPUBLIC OF KENYA



**KENYA LAW**  
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**Gitahi v Kamau (Environment and Land Appeal E21 of 2022)  
[2022] KEELC 13782 (KLR) (24 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13782 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT AND LAND APPEAL E21 OF 2022  
FM NJOROGE, J  
OCTOBER 24, 2022**

**BETWEEN**

**ESTHER MUTHONI GITAHU ..... APPELLANT**

**AND**

**SAMUEL MUNGAI KAMAU ..... RESPONDENT**

**RULING**

1. The appellant moved the court through notice of motion dated May 27, 2022 brought under sections 1A, 1B, 3A & 65 of the [Civil Procedure Act](#) and order 42 rule 6 of the [Civil Procedure Rules](#), Cap 21 seeking the following orders:
  1. spent
  2. spent
  3. That the honourable court be pleased to issue a temporary order staying further proceedings in the Chief Magistrate ELC Case No 87 OF 2019 between Samuel Mungai Kamau versus Esther Muthoni Gitahi before Honourable J Karanja pending hearing and determination of the substantive Appeal.
  4. That costs be in the cause.
2. The application is supported by the affidavit sworn on May 27, 2022 by Esther Muthoni Gitahi, the appellant, where she deposed that she had filed a notice of preliminary objection dated September 1, 2021 in the chief magistrate's court in ELC No 87 of 2019 challenging the jurisdiction of the court to hear and determine the substantive suit as it offended the express provisions of article 162(2) (b) of the [Constitution](#) and sections 18 and 19 of the [Land Registration Act](#) No 3 of 2012; that the court delivered its ruling on May 16, 2022 where it dismissed the preliminary objection stating that the parties had already subjected themselves to the jurisdiction of the court thus they cannot challenge it; that further,



the court held that the preliminary objection had been brought late yet the parties are yet to close the plaintiff's case.

3. She went on to depose that being dissatisfied with the ruling, she has preferred an appeal before this court appealing the entire ruling in Chief Magistrate ELC Case No 87 of 2019. She deposed that as advised by her advocates which information she believes to be true that pending the hearing and determination of the appeal, this honourable court should grant an order for the stay of proceedings in the instant suit. She further deposed that failure to grant an order of stay in the proceedings in the lower court would adversely infringe on her right to an appeal making any decisions rendered by the appellate court of no consequence.
4. She deposed that if the order of stay of proceedings is not granted by this honourable court, the suit shall proceed before a court devoid of jurisdiction and that she will suffer irreparable damage.
5. She finally deposed that the application was brought without unreasonable delay and further that the respondent will not suffer any prejudice should the orders sought herein be granted and if any the same shall be compensated as costs.

### **Response**

6. The respondent filed a replying affidavit dated June 22, 2022 sworn by Samuel Mungai Kamau where he deposed that he had instituted in the lower court Naivasha MELC No 87 of 2019 which is now before this honourable court as Nakuru ELC No 301 of 2019; that on September 24, 2017 this honourable court directed that it be transferred to the lower court in Naivasha within which jurisdiction the property is located as the value of the property lay within the pecuniary jurisdiction of that court.
7. He further deposed that the appellant filed her statement of defence on October 25, 2019 where she admitted the jurisdiction of the chief magistrate's court in Naivasha to hear and determine the matter; that both parties filed compliance pleadings and documents under order 11 rule 3 of the Civil Procedure Rules and the court conducted a case conference and gave directions as to the hearing of the case; that the matter was heard on July 7, 2021 where he testified and the appellant's counsel cross-examined him and thereafter he was stood down; that he filed an application which sought leave to amend the plaint that is still pending before the lower court.
8. He further deposed that the appellant filed the preliminary objection before the application could be heard and dispensed with whose outcome led to the institution of the appeal herein; that there is no boundary dispute since he is the owner of plot No 495 while the appellant is the owner of plot No 496; that his claim against the appellant is that she has encroached into his property and erected an illegal structure and thus seeks for a permanent injunction against the appellant.
9. He deposed that the suit properties are situate within Naivasha Township and that the chief magistrate's court in Naivasha has the necessary jurisdiction under article 162(2) of the Constitution and sections 18 and 19 of the Land Registration Act; that the trial court was right when it disallowed the appellant's preliminary objection and further contends that it has no merit as it is purely meant to delay the expeditious disposal of the suit; that the appellant has not met the threshold for the grant of the orders of stay as provided under order 42 rule 6 of the Civil Procedure Rules; that litigation must come to an end and he urged the court to allow the matter proceed before the Naivasha chief magistrate's court as it has jurisdiction to hear and determine it.
10. He finally deposed that the appellant's instant notice of motion lacked merit for being an abuse of the court process and urged the court to have it dismissed with costs.



## Submissions

11. Upon perusal of the file, there were no submissions file on behalf of the applicant on the record. However, the respondent's submissions were filed on August 1, 2022. In his submissions the respondent reiterated the history of the suit and, citing Peter Kariuki Mburu & Cecilia Nyokabi vs Neema Shah, and Kenya Wildlife Service vs James Mutembei, the respondent urged that it would be unfair for the motion dated May 27, 2022 to be allowed. He further stated that the appellant's preliminary objection on jurisdiction of the lower court lacked merit and stood no chance of success for the reasons stated. The reasons, according to him, are the suit land is situate in Naivasha; the pecuniary value of the real property is indisputably below Kshs 2,000,000/= and that this court considered the matter and transferred it to that court with no demur from the appellant.

## Determination

12. It is my considered opinion that what arises for determination is whether the appellant has met the threshold for grant of stay of proceedings in CMC ELC No 87 of 2019.
13. In the instant case, the appellant is seeking an order to stay the proceedings in Chief Magistrate ELC No 87 of 2019 pending the hearing and determination of their appeal.
14. The decision on whether or not to grant stay of proceedings is discretionary and this court has powers to stay proceedings pending an appeal. This jurisdiction is derived from of order 42 rule 6 (1) of the Civil Procedure Rules.
15. In the case of *Re Global Tours & Travel Ltd HCWC No 43 of 2000* Ringera, J (as he then was) 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' [Emphasis mine]
16. For this court to grant stay of proceedings in CMC ELC No 87 of 2019, the appellant ought to show that she has an arguable appeal with high chances of success such that if the stay of proceedings is not granted the appeal will be rendered nugatory.
17. In the case of *Christopher Ndolo Mutuku & Another vs CFC Stanbic Bank Ltd (2015)eKLR*, the Court observed as follows:  

' What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice'
18. In the present case, the appellant filed a preliminary objection dated September 1, 2021. She argued that the chief magistrate's court in Naivasha ELC 87 of 2019 lacked jurisdiction to hear and determine the suit. The preliminary objection was dismissed vide a ruling delivered on May 16, 2022 by J Karanja



(SRM) Naivasha which ruling is the subject of this application. This application was filed on May 31, 2022 and it is this court's view that the application was filed timeously.

19. The appellant had also filed an application dated July 23, 2018 seeking orders that the suit Nakuru ELC 301 of 2018 be struck out on the ground that the respondent herein lacked the locus standi to institute the suit. This court notes that on record there is also an application by the respondent herein dated August 4, 2021 which sought leave to amend his plaint in terms of his annexed draft amended plaint and which application is yet to be determined, a fact which the trial magistrate also recognized in his ruling.
20. The appellant filed her preliminary objection dated September 1, 2021 almost a month after the respondent had already filed his application seeking leave to amend his plaint. The main content of the preliminary objection was the fact that the subject of the plaint was a boundary issue which falls within the land registrar's jurisdiction; it was not premised on territorial or pecuniary aspects but simply on the issue of remedies available prior to institution of proceedings.
21. The respondent avers that hearing of the suit had proceeded on July 7, 2021 where he testified, produced all documents in support of his case and the appellant's counsel extensively cross-examined him after which he was then stood down. This has not been rebutted by the appellant and further there is also on record pretrial questionnaires filled by both the appellant and respondent confirming that indeed the matter was certified ready for hearing.
22. In the instant suit I have considered the fact that the jurisdiction issue is raised in respect of the role of the magistrate's court vis a vis the role of the land registrar under section 18 and section 19 of the Land Registration Act No 3 Of 2012. It is not being urged that the matter ought to be reverted back to the Environment and Land Court; therefore whether or not the matter was transferred from this court to the Naivasha chief magistrates court is of no relevance.
23. 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 enjoins 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 and proportionate manner and at affordable cost to parties.
24. I think it is obvious that the grant of a stay herein would prejudice the respondent who would have to wait for a little longer before the case is finalized. However, the examination by court of whether any point of law raised has merit has to take time.
25. In the case of Masai & another v Masai & another (Civil Application 148 of 2020) [2021] KECA 170 (KLR) (Civ) (November 19, 2021) (Ruling) (Neutral citation number: [2021] KECA 170 (KLR) the Court of Appeal, citing its own decision in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others [2013] eKLR stated as follows:

' An arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court; one which is not frivolous.'
26. I am of the view that the applicant's appeal ought to be heard fully before this court before the proceedings in the lower court can proceed any further. I will avoid saying more here because it may prejudice the hearing of the appeal, but all in all, and, in order to accord the appellant a chance to have her appeal heard and for the sake of a considered opinion by this court as to whether the decision of the magistrate dismissing the preliminary objection was legally correct, I find that I have to exercise my discretion and grant the stay of proceedings order sought. I will therefore leave the merits of the appeal for the court that will hear the appeal.



27. Consequently, for the above reasons, the application dated May 27, 2022 has merit and I hereby grant it in terms of prayer No 3 The costs of the application shall be costs in the appeal.
28. I also order that the original file record for Naivasha Chief Magistrate’s ELC Case No 87 Of 2019 shall be sought and attached to this record and placed before this court during a mention on November 8, 2022 for issuance of directions as to the hearing of the appeal.

**Dated, signed and delivered at Nakuru via electronic mail on this 24<sup>th</sup> day of October, 2022.**

.....

**MWANGI NJOROGE**

**JUDGE, ELC, NAKURU**

