



Langat & 2 others v Kericho County Government & 4 others; Koita Community Welfare Group (Interested Party) (Environment and Land Constitutional Petition 1 of 2017) [2022] KEELC 13547 (KLR) (13 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13547 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT AND LAND CONSTITUTIONAL PETITION 1 OF 2017**

MC OUNDO, J

OCTOBER 13, 2022

**IN THE MATTER OF ARTICLES 10, 20, 21, 23, 28, 40,
61, 63 AND 68 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF SECTION 37 OF THE LAND ACT
2012 AND THE ENVIRONMENT COURT ACT 2011**

AND

IN THE MATTER OF PARCEL NO. LR 5468/3/R

BETWEEN

**JOSEPH LANGAT 1ST PETITIONER
PETROLINER CHERONO 2ND PETITIONER
BARNARD LANGAT (SUING AS THE OFFICIALS OF 343 MEMBERS OF
KOITA WELFARE SELF-HELP GROUP) 3RD PETITIONER**

AND

**KERICHO COUNTY GOVERNMENT 1ST RESPONDENT
NATIONAL LAND COMMISSION 2ND RESPONDENT
CHIEF LAND REGISTRAR 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
JAMES FINLAY KENYA LIMITED 5TH RESPONDENT**

AND



RULING

1. Coming up before me for determination is an Application dated the November 23, 2021 brought pursuant to the provisions of 1A, 1B, 3, 3A and 63 of the Civil procedure Act, Order 42 rule 6, Order 50 Rule 1 of the Civil Procedure Rules and all enabling provisions of the law, wherein the Applicants herein seek substantive orders of stay of proceedings in the present suit to wit the delivery of a judgment which was scheduled to be delivered on the November 25, 2021, pending the hearing and determination of an intended Appeal on a ruling delivered by this court on the November 11, 2021, A ruling which had struck out the 5th Respondent from the Petition and/or proceedings herein.
2. The Application is supported on the grounds on the face of it as well as by a supporting affidavit of Petroliner Cheron, the 2nd Petitioner herein, sworn on the November 23, 2021.
3. The main issues upon which the Application is brought is that the Petitioners herein are in occupation of parcel of land No 5468/3/R to which they seek to be declared as its owners. That the original title to the suit land LR No 5468 as well as the resultant sub-divisions No LR No 5468/1/2/3 and R is registered to the 5th Respondent and therefore striking off of the 5th Respondent from the suit vide the impugned ruling herein, was tantamount to sitting as an appellate court in a decision decided by my predecessor and also determining the Petition at an interim stage thereby rendering their intended Appeal nugatory.
4. On the November 25, 2021 the court directed the petitioner to effect service of the Application to all parties herein within 7 days wherein the Respondents were granted leave to file their respective responses to the said Application within 14 days upon receipt. The matter was then slated for mention for compliance and for further directions for the February 16, 2022 in the presence of Mr Majange advocate holding brief for Mr Kamau Advocate for the 1st Respondent, Mr Ikol advocate for the 2nd Respondent and Miss Opiyo Advocate for the 5th Respondent, there was no appearance for the Attorney General.
5. Come the February 16, 2022, although there was representation of the 1st and 5th Respondents, there was no appearance for 2nd and 4th Respondents wherein the court was informed by Counsel for the Petitioners that although they had effected service to all parties as per their filed Return of Service, there had been no response. Counsel for the 5th Respondent then informed that court that they would not participate by virtue of having been struck out from the proceedings. Counsel for the 1st Respondent sought time to get more instructions from their client so as to put in a response. The Respondents were then granted a further 14 days to file their respective responses to the Application. By consent, it had been agreed that the Application was to be disposed of by way of written submissions. The matter was then slated for ruling for the 4th April 2022 on which day the court did not sit wherein the matter was mentioned on the May 19, 2022.
6. The court proceedings are clear that on the said date, the court acknowledged that although the matter had been scheduled for delivery of a ruling, yet the parties had not complied with its directions of February 16, 2022. It further went on to caution the parties of the impending dismissal of the Application for want of prosecution, but granted them a chance to redeem themselves by complying with the court's directions.



7. The Petitioners subsequently then filed their submissions on the July 20, 2022 and none of the Respondents had filed their submissions as at the time this ruling was written, it therefore goes without saying that although the Application dated the November 23, 2021 was undefended, yet the Applicants still had the duty to prove their case as required by law for the court to consider its merit.

Analyses and determination.

8. I have considered the Application and submissions thereto, the issue for determination which arises therefrom is whether an order for stay of proceedings can issue pending the determination of an intended Appeal.
9. The Application is premised on Order 42 rule 6 of the [Civil Procedure Rules](#) which specifies the circumstances under which either the trial court or an appellate court may order stay of execution or proceedings pending an Appeal.
10. Ringera J (as he then was) when confronted by a similar Application in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 held as follows:

“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)
11. In this regard thereof, the court’s discretion in deciding whether or not to grant stay of proceedings as sought in this Application must be guided by any of the following three main principles;
 - a. Whether the Applicants have established that they have a *prima facie* arguable Appeal.
 - b. Whether the Application was filed expeditiously and/or
 - c. 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.
12. It is important to point out that an arguable Appeal is not one that will necessarily succeed but one which raises triable issues. That for a party to succeed on an Application for stay of proceedings, (s)he or they in this instance, must demonstrate that they have an arguable Appeal. The Applicants have not attached documents to show that they had applied for copies of the proceedings and impugned ruling or even paid for the said proceedings and impugned ruling wherein the same were yet to be supplied to them. Further, save for a Notice of Appeal, the Applicants have also not filed and/or annexed their Memorandum of Appeal.
13. The Applicants have thus failed to demonstrate that their Appeal is arguable as the Memorandum of Appeal that would have been of assistance in discerning whether or not their intended Appeal was arguable was not annexed. It was thus trite that the merits of their intended Appeal could not therefore be discerned from their affidavit and the court cannot go out on a fishing expedition in discerning the decision they intend to appeal against and whether it was arguable. Indeed the decision by the Court of



Appeal in *Mwangi v Nyali Golf & Country Club* (Civil Application E080 of 2021) [2022] KECA 455 (KLR) (18 March 2022) (Ruling) was to the effect that due to the lack of an annexed Memorandum of Appeal, the Applicant had not demonstrated any arguable ground and had therefore not satisfied the first limb of ‘arguability’.

14. In the case of *Kenya Wildlife Service –vs- James Mutembei* [2019] eKLR, it had been held that: -

“...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...”
15. The court having rendered itself in the impugned ruling of 11th November 2021, it would have been prudent for the Applicants to move expeditiously to the Court of Appeal. Nothing has been tabled to show that they are desirous of prosecuting their intended Appeal which has time limitation. The Applicants’ indolence and lack of action with regard to having their Appeal set down for hearing cannot be visited on the Respondents, who have already presented their case and await judgment of the court which has been pending since November 25, 2021 (almost one year). Indeed the provisions of Article 159(2)(a)(b)(c) and (d) of the *Constitution*, as read with Sections 1A and 1B of the *Civil Procedure Act*, 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.
16. To this end I find no merit in the Applicants Application dated the November 23, 2021 and proceed to dismiss it with no costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 13TH DAY OF OCTOBER 2022.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

