



**Gituma v Murwithania & 2 others (Environment and Land Appeal
E039 of 2022) [2022] KEELC 15293 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15293 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E039 OF 2022**

CK NZILI, J

DECEMBER 7, 2022

BETWEEN

JOHN WYCLIFFE MUREITHI GITUMA APPELLANT

AND

MARTIN MUTWIRI MURWITHANIA 1ST RESPONDENT

LUCY GACHIGO MUTWIRI 2ND RESPONDENT

MWANAISHA NKIROTE M'MUTHAURA 3RD RESPONDENT

RULING

1. By an application dated August 3, 2022, the court is asked to stay further proceedings in Meru ELC No E513 of 2021 pending hearing and determination of this appeal. The application is based on the grounds on its face and the affidavit in support sworn by John Wycliffe Mureithi Gituma on August 3, 2022. The main ground is that the applicant had before the trial court sought leave to amend the defence, so as to introduce a counterclaim and a 4th defendant which was declined by a ruling made on July 6, 2022 now appealed against. The applicant averred that if the suit proceeds for hearing, this appeal would be rendered nugatory yet it raises some arguable issues of law.
2. By a supplementary affidavit sworn on August 31, 2022, the applicant averred that Nanyuki CMCC No E097 of 2021 was filed in the wrong court as per the ruling attached as annexure JNN a "5" which was yet to be transferred, or disclosed in the Meru suit yet the respondent was not keen in having it expeditiously transferred, perhaps with an intention of denying him an opportunity to raise the defence of illegality of the lease dated August 6, 2021. The applicant averred that if the matter continues without amendments, he will be prejudiced since parties are bound by their pleadings and without the amendments, his evidence will be of no use.
3. The respondents have opposed the application by a replying affidavit sworn on August 22, 2022 by Martin Mutwiri Murwithania on the basis that the application was a waste of court's time; it falls



- below the threshold for stay of proceedings; the appeal raises no serious issues of law; no loss will be occasioned; the respondents stand to be prejudiced; issues raised in the draft defence and counterclaim are already averred by the Nanyuki suit where the applicant is a 2nd defendant; the Nanyuki suit was as a result of a dispute on the validity of the lease agreement between them and Mwanaisha Nkirote M’Muthaura, the 1st defendant in the aforesaid suit.
4. Additionally, the respondents averred that the court in Nanyuki ordered for the transfer of the suit as per the ruling annexed as MMM – “2” but the application for transfer was still pending at Nanyuki High Court as per attached annexures marked MMM – “3”.
 5. The respondents further averred that despite being in occupation of the suit premises and the pendency of the Nanyuki suit, the applicant herein took the law into his own hands and destroyed the crops leading to the instant suit hence the application was without merits.
 6. With leave of court, parties filed written submissions dated August 30, 2022 and the respondents undated but filed on October 3, 2022 respectively.
 7. The applicant submitted that under order 42 rule 6 of [Civil Procedure Rules](#), the principles to apply are whether the case is arguable, there will be substantial loss and if the application was filed timeously.
 8. As to arguable case, the applicant submitted the joinder of the 3rd respondent to the case and a counterclaim based on illegality of the lease and claim based on illegal contract are serious legal issues, whose denial by the trial court would occasion serious injustice and prejudice to him. Reliance was placed on [KWS vs James Mutembei](#) (2019) eKLR and [Port Florence Community Health Care vs Crown Health Care Ltd](#) (2022) eKLR on the doctrine of sufficient cause to stay proceedings.
 9. As regards substantial loss the applicant submitted that the claim is for Kshs 13,099,000/= plus general, aggravated and exemplary damages and hence will suffer loss and damage by being put in a boxing right to fight with hands tied behind his back. To avoid this scenario, the applicant submitted that precious judicial time should be saved until the appeal is heard and determined. Reliance is placed on [MWK vs JDK](#) (2020) eKLR since the application was filed within 31 days which is a reasonable period of time.
 10. The respondents on the other hand submitted that the application falls short of meeting the grounds of stay of proceedings for it raises no arguable case since the Nanyuki matter is yet to be determined or transferred, parties are the same in both matters; occupation and utilization of the suit premises is not disputed; causation is the only issue to be determined as held in [Hakika Transporters Services Ltd vs Albert Chulab Wamimitaire](#) (2018) eKLR.
 11. Further the respondents submitted the issue of validity or legality of the lease agreement is irrelevant; the proper forum to raise such issues is in the Nanyuki suit; and there will be no substantial loss since there was no privity of contract between the applicant and the respondents so as to raise a defence of illegality; the issue is based on tort and lastly it is a delaying tactic.
 12. The principles to apply in stay of proceedings were discussed by the Court of Appeal in [Kenya Railways Corporation vs Odola & 217 others](#) (Civil Application No 312 of 2021))2022) KECA 662 (KLR) July 8, 2022) ruling. The court cited with approval [Stanley Kangethe Kinyanjui vs Tony Ketter & 5 others](#) (2013) eKLR, where the court said that a party must demonstrate that the appeal is arguable and not frivolous and that it would be rendered nugatory.
 13. In the said case, the applicants had raised issues of jurisdiction, whether the claim related to pension or not which the court found to be arguable points. Further, on nugatory aspect the applicants had averred that the amount in issue was colossal, some of the respondents were deceased and or scattered



- all over Kenya and were of unknown means of income which the respondent had not countered. The court allowed for stay of execution and of the proceedings.
14. In *Global Tours & Travels Ltd* NRB High Court Winding up Cause No 43 of 2000 the court held that to stay proceedings was a judicial discretion to be exercised in the interest of justice depending on the pros and cons of granting or not granting while bearing in mind the need for expeditious disposal of cases, prima facie merits of the intended appeal, scarcity and optimum utilization of judicial time and if the application has been brought on time.
 15. In *KWS vs James Mutembei (supra)* the court held that the grant of stay of proceedings should be exercised sparingly and in exceptional cases. In *William Odhiambo Ramogi & 2 others vs the AG and 3 others* (2019) eKLR, a bench of five laid out the principles to be applied while citing with approval *Kenya Shell Ltd vs Benjamin Karuga Kibiru & another* (1986) eKLR, *David Morton Silverstein vs Atsanyo Chesoni* (2002) eKLR namely: -
 - "a. There must be a pending appeal in a higher court
 - b. Explanation why stay was not sought in the higher court if it is sought in the court below
 - c. Demonstration that the appeal raises substantial questions to be determined.
 - d. Demonstration that the appeal may be rendered nugatory if no stay is granted.
 - e. Exceptional circumstances warranting stay
 - f. Filing the application expeditiously."
 16. The court held that the stay of proceedings was a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards trial on the basis of substantive merits of his case.
 17. In this application what is being appealed against is the ruling delivered on 6.7.2022 declining leave to amend the applicant's defence and joinder of a 4th defendant to the suit, said to have been sued by the 1st & 3rd respondents herein in Nanyuki CMCC No E097 of 2021 Lucy Gathigo Mutwiri vs Mwangi & John W Mureithi Gituma over the same suitland LR No Ex-Lewa Settlement Scheme/1216 & 1217 situated in Ngushishi area of Timau within Meru County.
 18. The 1st and 2nd respondents have admitted the pendency of the Nanyuki suit and a preliminary objection raised by the applicant herein which was upheld by a ruling dated November 16, 2021 on account of territorial jurisdiction. The trial court then gave the 1st respondent 14 days to seek for the transfer of the suit.
 19. The 1st respondent following the ruling filed HC Nanyuki Misc Civil Application No 18 of 2021 on November 24, 2021 seeking for the transfer of the suit. Soon thereafter and before the transfer could be allowed, the 1st and 3rd respondents moved to the Chief Magistrates court Meru under certificate of urgency on December 22, 2021 over a cause of action said to have occurred on August 6, 2020 this time round over crop damage by the applicant using a tractor belonging to the 1st & 2nd defendants in that suit.
 20. From the attachment by parties herein, in the respective affidavits the applicants raise an issue that he had also been leased the same premises by a relative of the deceased, one Naftali Muthaura on June 18, 2020 said to be an executor of a will going by the replying affidavit filed in the Nanyuki suit dated September 6, 2021. Similarly, in the Nanyuki case the 1st respondent herein averred she was leased the suit premises on August 6, 2020 by the proposed 4th defendant.



21. Given the above admission by the parties herein in previous pleadings; the question as to whether the two suits are related and if the proposed amendments and joinder of parties are relevant to the proceedings raise arguable points of law requiring the determination by this court through an appeal.
22. Similarly, and as a collorary to this, whether the trial court exercised its discretion properly in law in rejecting the application for both an amendment and a joinder of a necessary party to the suit is an arguable point of law.
23. Coming to the issue of whether to stay the proceedings until the determination of this appeal; the application was filed within 31 days and 8 days after the appeal was filed. The case is yet to be heard by the trial court.
24. As indicated above, the respondent is also the one who filed the suit in Nanyuki before a court lacking jurisdiction.
25. The trial court made a finding that the suit was incompetently filed before a court lacking territorial jurisdiction. It cannot therefore be true the issues raised will be handled in an incompetent suit. There is no evidence that the applicant has been a cause of delay in this matter. I find there are exceptional circumstances to stay the lower court proceedings until the appeal is heard and determined one way or the other. There shall be a stay for six months only. The lower court file to be availed.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 7TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

Karanja for appellant

HON. C.K. NZILI

ELC JUDGE

