



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC APPEAL NO. 7 OF 2020**

**BENARD KAMAU MBUGUA.....APPELLANT**

**VERSUS**

**KHIMJI KARSHAN CHABADIA.....1<sup>ST</sup> RESPONDENT**

**NANJI PREMCHAND CHABADIA.....2<sup>ND</sup> RESPONDENT**

**SHELL SERVICE STATION LTD.....3<sup>RD</sup> RESPONDENT**

**CAROLYNE WANJIKU WAIYAKI.....4<sup>TH</sup> RESPONDENT**

**RULING**

**The Application**

By a notice of motion dated **14/10/2020** and filed on the same date brought under provisions of **Sections 1A, 1B and 63** of the **Civil Procedure Act** and **Order 51** of the **Civil Procedure Rules**, the appellant/applicant seeks the following orders:-

**(1)...spent**

**(2)That this court be pleased to order stay of further proceedings in KITALE CHIEF MAGISTRATES LAND CASE NO. 18 OF 2018, pending hearing and determination of this appeal.**

**(3)...spent**

**(4)Costs be provided for.**

2. The application is grounded on the following grounds: that this appeal is likely to be rendered nugatory if the orders sought are not granted; that the appeal raises substantial issues of law; that the appeal and application have been made without undue delay and that the appellant shall suffer substantial loss and damage unless the orders sought are granted. The application is supported by the supporting affidavit of the appellant sworn on **14/10/2020**.

**The Response**

3. The **1<sup>st</sup>** and **2<sup>nd</sup>** respondents through their advocate filed grounds of opposition dated **3/11/2020** on **5/11/2020** and prayed that the application be dismissed with costs on the following grounds:

**(1)The intended appeal is fundamentally defective and hopeless.**

**(2)The application has been brought in bad faith as it is a dilatory tactic merely intended to delay the just and expeditious disposal of (Kitale Chief Magistrates) Land Case No. 18 of 2018 which is pending in the court below to the utter prejudice of the **1<sup>st</sup>** and the **2<sup>nd</sup>** respondents.**

4. I have perused the court record and found no reply to the application from the **3<sup>rd</sup>** respondent.

5. The **4<sup>th</sup>** respondent filed replying affidavit sworn on **9/11/2020** on **12/11/2020**. She depones that no application for stay was made before the Magistrate's Court prior to the filing of this application that this court should only intervene upon the applicant being aggrieved by a

decision on stay made by the Magistrate's Court.

### **Submissions**

6. The appellant filed his written submissions on **24/11/2020**. The respondents filed their submissions on **8/1/2021**.

### **Determination**

7. The issue that arises in the instant application is whether an order for stay of further proceedings in **Kitale Chief Magistrates Land Case No. 18 of 2018** should issue pending the hearing and determination of the appeal.

8. **Order 42 rule 6(1)** of the **Civil Procedure Rules** provides as follows:

**“6.(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.**

9. A plain reading of the aforesaid provisions shows that an appellate court has discretion to grant a stay of proceedings whether or not a prior application for stay has been made in the trial court below. The submission by the 4<sup>th</sup> respondent that the applicant should have first applied for a stay in the magistrate's court and referred the matter to this court in the event he was dissatisfied can not therefore stand.

10. A memorandum of appeal in this appeal has been filed by the appellant. The whole appeal revolves around the issue of whether the trial magistrate erred in law and in fact in declining to grant the appellant an adjournment. This court is aware of the principle espoused by the courts in decisions past that an adjournment of a suit is not a right of the parties in proceedings. However it is noteworthy that court in which an adjournment application has been made must decide the issue based on the circumstances of the case before it. I must not comment more on this issue in order not to prejudice the hearing of the main appeal herein. However it is clear that the appellant has a *prima facie* grievance that he requires this court to adjudicate upon in the appeal, and this court is aware that failure to issue orders of stay of proceedings would result in the continuance of the hearing of the suit in the trial court, possibly to completion, before the instant appeal is heard and finalised and this may occasion the appellant some injustice since his appeal would be rendered nugatory.

11. In the light of the foregoing and having regard to the right of every person to appeal the decision of a trial court subject to established rules, 1<sup>st</sup> and 2<sup>nd</sup> respondents' allegation that the instant application is hopelessly and merely a dilatory tactic merely intended to delay the just and expeditious disposal of **Kitale Chief Magistrates Land Case No. 18 of 2018** which is pending in the court below can not be said to be correct. This court must stand up for the right of an appellant to be heard and must not allow him to be prejudiced by a summary dismissal of a stay of proceedings application on the basis of mere speculation that a stay is likely to cause delay in the court below, for that upholding of his right would ensure that his case gets due process and a fair hearing.

12. The appellant cites two cases that is **Machakos High Court Civil Appeal No. 24 Of 2018 Ezekiel M. Musembi Vs H Young & Co Ltd** and **Kerugoya High Court Civil Appeal No 93 Of 2019 MWK Vs JDK** and I agree with the holdings of the courts in those two cases.

13. Consequently I find that the application dated **14/10/2020** has merit and the same is hereby granted in terms of **Prayer No. (2)** thereof. The costs of the application shall be costs in the main appeal. In addition, for expeditious disposal of this appeal, I hereby direct that the appellant shall file and serve his record of appeal within **30 days** of the date of this order and the appeal shall be brought up for a mention for this court's directions on **3/3/2021**.

It is so ordered.

**Dated, signed and delivered at Kitale via electronic mail on this 26<sup>th</sup> day of January, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**