Njogu v Mburu & another (Environment and Land Appeal E060 of 2024) [2025] KEELC 481 (KLR) (11 February 2025) (Ruling)

Neutral citation: [2025] KEELC 481 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAKURU

ENVIRONMENT AND LAND APPEAL E060 OF 2024

MAO ODENY, J

FEBRUARY 11, 2025

BETWEEN

JANE NYAWIRA NJOGU ..... APPELLANT

AND

TABITHA WANJIRU MBURU ..... 1ST RESPONDENT

JACKSON MUIRURI ..... 2ND RESPONDENT

RULING

1. This ruling is in respect of a Notice of Motion dated 30th October, 2024 by the Appellant/Applicant seeking the following orders:

   a. Spent

   b. Spent

   c. That the Honourable Court be pleased to issue an Order for stay of the Ruling and proceedings in Nakuru CMC ELC Case No E017 of 2023 pending the hearing and determination of the Appeal.

   d. That the costs of this application be in the cause.

2. The application was supported by the affidavit of Jane Nyawira Njogu, the Appellant/Applicant who deponed that the trial court in its ruling of 1st October, 2024 granted leave to the Respondent to file a supplementary list of documents well after the hearing had commenced and when her counsel had already started cross-examining the Respondent. The Applicant deponed that she was aggrieved by the ruling, and therefore filed an appeal and urged the court to allow it as prayed.

3. The 1st Respondent filed a Replying Affidavit sworn on 18th November, 2024 and deponed that despite being present during the reading of the ruling, counsel for the Appellant never sought an order for a

stay of proceedings and that she has filed for review to force the court to give a determination that only suits their position. The 1st Respondent further deponed that the hearing at the trial court is slated for 6th May, 2025 and by then the Appeal herein will probably have been heard and determined and urged the court to dismiss the application with costs.

Appellant/applicant's Submissions

4. Counsel for the Appellant/Applicant filed submissions dated 25th November, 2024 and identified the issue for determination as to whether the application dated 30th October, 2024 has merit and relied on Order 42 Rule 6(2) of the Civil Procedure Rules and the case of Mukunya Mugo 'A' & another vs Elizabeth Mugure Mukunya [2019] eKLR.

5. Counsel submitted that the application has been brought without delay having been filed on 4th November, 2024 about a month from the delivery of the impugned ruling and after leave had been granted and the Memorandum of Appeal filed. Counsel further submitted that if the court fails to allow the application, there is a possibility that the hearing will proceed on 6th May 2025 rendering the present appeal nugatory since the very evidence that the Appellant/Applicant seeks to be expunged will be heard and considered by the trial court to the Appellant's prejudice.

6. Counsel submitted that no prejudice will be suffered by the 1st Respondent if the application is allowed and that the balance of convenience lies in the favour of having the proceedings of the main suit stayed.

1 St Respondent's Submissions

7. Counsel for the 1st Respondent filed submissions dated 5th December, 2024 and relied on the case of Kenya Wildlife Service vs James Mutembei [2019] KEHC 10478 (KLR) and submitted that the instant application has not met the threshold for a stay of proceedings. Counsel submitted that the production of documents is not a reason beyond reasonable doubt for stay of proceedings.

8. It was counsel's submission that the Appellant has failed to show that there is an arguable appeal and that the appeal would be rendered nugatory should the stay not be allowed. Counsel further submitted that the appeal is solely based on a supplementary list of documents and these are documents that can be easily expunged from the record in the event that the appeal succeeds.

9. According to counsel, the additional documents, which were allowed at the discretion of the court, are public documents issued by official bodies within Section 79 of the *Evidence Act*, Cap 80 and do not in any way prejudice the Applicant's right to a fair hearing.

10. Counsel relied on the cases of Bob and Ursulla Brenneisen & 7 others vs Shanzu Waterfront Limited [2016] eKLR and Printing Industries Limited & Multiple Industries Limited vs Bank of Baroda Kenya Limited [2014] KECA 281 (KLR) and urged the court to dismiss the application with costs to the 1st Respondent.

Analysis And Determination

11. The issue for determination is whether the court should issue an Order for stay of the Ruling and proceedings in Nakuru CMC ELC Case No E017 of 2023 pending the hearing and determination of the Appeal.

12. In the case of Kenya Wildlife Service – Versus - James Mutembei (2019) eKLR, the court held that:

> " Stay of proceedings 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".

13. An applicant must file an application for stay of execution without unreasonable delay, must demonstrate that he/she will suffer substantial loss if the orders sought are not granted and that he/she is willing to offer security for the due performance of the decree.

14. In the case of Global Tours & Travels Limited, (Nairobi High Court Winding Up Cause No. 43 of 2000), Ringera, J opined 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."

15. The grant or refusal to grant stay of proceedings is a judicial discretion, which must be, exercised in the interest of justice. The court must consider the pros and cons of granting or refusal to grant stay of proceedings. Will the order enhance access to justice or be an impediment to the administration of justice for both litigants. This is a draconian order which should be sparingly issued and should not be readily available to litigants who want to forestall hearing of cases on flimsy reasons which can be dealt with during the hearing and cross-examination of witnesses.

16. In Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, states 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. It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case."

17. Similarly, in the Court of Appeal case of David Morton Silverstein v Atsango Chesoni (2002) eKLR: -

> " The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court's own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay".

18. In applications for stay of proceedings, it is noted that such an application is a grave matter, which can only be entertained in the most deserving cases as it impacts the right to expeditious trial.

19. The applicant was aggrieved by a ruling allowing a supplementary list of documents, which could be interrogated during the hearing and cross-examination. Allowing a supplementary list of documents is not an end in itself.

20. I have considered the application, the submissions by counsel and find that the application lacks merit and is therefore dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 11 TH DAY OF FEBRUARY 2025 .

M. A. ODENY

JUDGE