



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LANDS COURT OF KENYA AT ELDORET

ELC NO. 11 OF 2020 (OS)

LAUREEN M. ISIAHO SAWE P/A

ISIAHO SAWE & COMPANY ADVOCATES.....PIAINTIFF/RESPONDENT

VERSUS

TERESA CHEBICHII RUTTO

TEKLA CHERONO

PHILIP KIPTOO MAIYO.....DEFENDANTS/APPLICANTS

RULING

This ruling is in respect of the defendant's/Applicants application dated 13th October 2020 seeking for the following orders:

- a. Pending the hearing and determination of an appeal in the Court of Appeal in Eldoret vide CACA No. 39/2020, there be stay of further proceedings in this matter.
- b. Costs of the application be in the cause.

Counsel agreed to canvas the application by way of written submissions which were duly filed.

DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel for the defendant/ applicants' submitted that the issues raised in the appeal have the potential of effectively and effectually determining this matter and that in the event the appeal succeeds then the hearing of this matter will be rendered unnecessary.

Mr. Momanyi also submitted that one of the issues in the appeal is the validity of the agreement under section 46 of the Advocates Act and the competency of the agreement in view of the fact that the plaintiff was not on record for the defendants in Eldoret ELC No 515 of 2013 and could not enter into an agreement with the defendants over her remuneration by payment of land.

Counsel also submitted on the principles of grant of stay of proceedings being:

- a. The determination of the appeal will have a bearing on the issues in controversy,
- b. The appeal is not frivolous
- c. The appeal will be rendered nugatory if stay of proceedings is not ordered

Counsel submitted that the appeal is not frivolous as the appeal is in respect of the validity of an agreement dated 24th February 2015 hence there would be no need to wait for the full hearing of the case.

On the issue as to whether the appeal will be rendered nugatory, counsel submitted that in the event that this case is heard during the pendency of the appeal, then the appeal will be an academic exercise.

Counsel relied on the *MACHAKOS HCCA NO.24 OF 2018 AND EZEKIEL MULE MUSEMBI -VS- H YOUNG & CO. (EA) LTD* where it was held at paragraphs 16 & 24 that; -

"This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the plaintiff proceeds with the suit and the appeal succeeds. Obviously, the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account"

Mr. Momanyi further relied on the cases of **Muchanga Investments Limited vs Safaris Unlimited (Africa) Ltd & 2 Others Civil Appeal No.25 of 2002(2009) KLR 229, and Niazons (K) Ltd -vs- China Road & Bridge Corporation Ltd Nairobi(Milimani) High Court Civil Case No. 126 of 1999** where it was held that:-

"Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile stay of proceedings ought to be granted..."

Counsel therefore urged the court to allow the application as prayed.

PLAINTIFF/RESPONDENT'S SUBMISSIONS

Counsel submitted that the defendant/Applicants preferred an appeal against the ruling of this honorable court delivered on 6th August,2020 dismissing their application dated 5th March, 2020 whereby they sought the striking out of the proceedings herein for alleged want of conformity with the law.

It was counsel's submission that the instant application is an afterthought calculated at derailing the wheels of justice at her expense. It is also counsel's contention that by executing the consent dated 26th June 2020, the parties had envisaged the hearing of the matter on merit and that the Defendants by bringing the instant application are trying to steal a match by amending and/or altering the terms of the said consent, which has never been set aside and/or varied.

Counsel submitted that in light of the directions taken on 30th September,2020, the Defendants through their counsel had intimated their intention to proceed with the matter on merit by seeking time to fully comply with Order 11 of the Civil Procedure Rules and the matter was fixed further mention on 15th October 2020 to confirm compliance.

The Plaintiff/Respondent further contend that in the foregoing and in light of the consent on record, the instant application is thus an afterthought calculated at derailing the wheels of justice and that same ought to be disallowed.

Counsel relied on Halsbury's Laws of England [4th Edition pages 330-332 wherein the learned writers observe that: -

"The stay of proceedings is a serious, grave and fundamental interference 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 proceedings beyond reasonable doubt should not be allowed to continue."

Counsel submitted that this application was filed on 14th October 2020 while the order appealed against was issued on 6th August 2020 hence it was not filed timeously and such delay has not been explained.

Counsel therefore urged the court to dismiss the application as the applicant will not suffer any loss as the suit properties are currently registered in the applicant's name.

ANALYSIS AND DETERMINATION

The issues for determination in an application for stay of proceedings are as to whether the applicant has met the threshold to be granted the orders of stay. 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 matter, 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."

The grant or refusal to stay proceedings is a judicial discretion. The question is whether in the current case it would be in the interest of justice to stay the proceedings taking into account the circumstances of the case and the ruling that is being appealed against.

In the above cited case the court held that the court should also consider the expeditious disposal of cases and whether the applicant has an arguable appeal. This is not to mean the merits or the success of the appeal but whether it is arguable.

In the case of **MUKANYA MUGO & ANOR VS ELIZABETH MAGURE MUKANYA [2019] eKLR**, the court relied on the case of

Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokebii Civil Appeal No. 326 of 2013 (2014) eKLR, where the Court established the criteria for consideration for an order of stay of proceedings as follows:

“Having made that finding, it is obvious that Order 42 rule 6(2) cannot come to the aid of the Applicant. The Court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations”.

The Court further came up with the following three main principles to guide a Court in such applications:

- a. Whether the Applicant has established that he/she has a prima facie arguable case.*
- b. Whether the application was filed expeditiously and*
- c. Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.*

In the case of **Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd (2015) eKLR**, the Court observed that;

“...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...”

It should also be noted that the guidance on stay of proceedings emanate from Order 42 Rule 6 of the Civil Procedure Rules as was held by Odunga J in the case of **EZEKIEL MULEMUSEMBI VS H. YOUNG CO (E.A) LTD [2019] eKLR. MACHAKOS CIVIL APPEAL NO 24 OF 2018** stated as follows; -

“..... It is not in doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the Civil Procedure Rules as well the inherent jurisdiction reserved in section 3A of the Civil Procedure Act and cited the case of George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.

“..... This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously, the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered, I am convinced that delay is a factor that ought to be taken into account.....”

Application for stay of proceedings depends on the facts of each case and if the applicant meets the threshold for stay then the court should grant such stay. In the case of **Niazons (Kenya) Ltd. vs. China Road & Bridge Corporation (Kenya) Ltd. Nairobi (Milimani) HCCC No. 126 of 1999 Onyango-Otieno, J** (as he then was) held that:

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”

Further in the case of **Wachira Waruru & Another vs. Francis Oyatsi Civil Application No. Nai. 223 of 2000 [2002] 2 EA 664** the Court of Appeal held that:

“In an application for stay of proceeding pending appeal where the Judgement is entered in an application for striking out a defence, it cannot be gainsaid that unless a stay is granted the appeal will be rendered nugatory since if the process of assessing damages goes on and the appeal is allowed that process would be an exercise in futility.”

The application for stay of proceedings are to appeal against an interlocutory order of a ruling that was issued by the court. It should also be noted that the threshold for stay of proceedings is found in the ***Halsbury’s Law of England, 4th Edition. Vol. 37 page 330 and 332***, which prides 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.”

The court is under a duty to dispense justice to both parties and if an application is meant to delay the wheels of justice then the court must make a stop to it. The applicant has met established that the appeal will be rendered nugatory if the stay of proceedings is not granted. Furthermore, the court has looked at the order appealed against and the consent that was entered into by counsel of compromising the applications in order to fastrack the hearing of the main suit and find that the issue that was raised and declined by the court can be dealt with at the hearing of the main trial.

Courts should not be quick at striking out suits on technicalities as this is a draconian step that should rarely be used unless the issue is glaring. Counsel should also not burden the court with too many applications which cannot help in the determination of the main suit. Side shows create a huge backlog in the judicial system which in effect denies litigants access to justice.

I have considered the application and the submissions of both counsel and find that the applicant has not met the threshold for grant of stay of the proceedings. The same is therefore dismissed with costs.

DATED and DELIVERED at ELDORET this 17TH DAY OF MARCH, 2021

M. A. ODENY

JUDGE