



**Munyambu v Abubakar & another (Environment and Land Appeal
E017 of 2023) [2024] KEELC 753 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 753 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT AND LAND APPEAL E017 OF 2023
LG KIMANI, J
FEBRUARY 13, 2024**

BETWEEN

GEORGE KITEME MUNYAMBU APPELLANT

AND

MOHAMED SWALEH ABUBAKAR 1ST RESPONDENT

FESTUS MWANGANGI KITEME 2ND RESPONDENT

*(Being an Appeal from the ruling and order of Senior Resident Magistrate's Court, Mwingi
(Hon. I.G Rubu) dated 30th November 2023, in Mwingi CMCC NO. E011 OF 2023)*

RULING

1. Before the Court is an Application brought under Notice of Motion dated 14th December 2023 seeking the following orders: -
 1. Spent.
 2. Spent.
 3. That pending the hearing and determination of the appeal herein there be a stay of further proceedings in Mwingi Chief Magistrate's Civil Case No. E011 of 2023 Mohamed Swaleh Abubakar & Another v George Kiteme Munyambu.
2. The grounds on which the applicant relies are that the Magistrate's Court decided that it has jurisdiction to entertain the suit in CMCC NO. E011 of 2023 Mohamed Swaleh Abubakar & another v George Kiteme Munyambu, where the subject matter of the dispute is a boundary between the Appellant and the Respondents in respect of their properties. It is claimed that after the ruling on jurisdiction, the trial court directed the District Surveyor to file in court a boundary dispute report thus acknowledging that the dispute was a boundary dispute.



3. The Applicant avers that the appeal has a high chance of success and that unless an order of stay of proceedings is granted, the appeal shall be rendered academic and that he shall suffer prejudice and substantial loss. The respondents are keen to prosecute an application for contempt of court for alleged disobedience of a court order and adverse orders are likely to be issued in respect of the Appellant's development, which is a petrol station. The Applicant claims that the trial court is likely to proceed to determine a matter whose jurisdiction parliament had expressly ousted.
4. In the supporting affidavit sworn by the Applicant, he gave a summary of the suit filed against him before the trial court, where the respondents claim to be the joint legal proprietors of Land Parcel Mwingi/Kazanuzi/367. The state that they lodged a boundary dispute before the Land Registrar according to Section 18(2) of the [Land Registration Act](#). The Plaint was filed simultaneously with an application seeking interlocutory orders of injunction.
5. The Applicant then filed a notice of preliminary objection to the effect that the court lacked jurisdiction to determine the matter but the Court dismissed the objection. Despite this, the Court proceeded to order that the District Surveyor files a report on the boundary dispute.
6. The Appellant deposes that unless an order of stay of proceedings is issued, the court is likely to proceed with the matter yet its jurisdiction is under serious challenge and that the appeal herein will be rendered academic. Further, the respondents have filed an application against him seeking to commit him to civil jail for alleged contempt of court and he stands to suffer substantial loss since he has developed a Petrol Station on his property.

The Respondents' Replying Affidavit

7. Mohamed Swaleh Abububakar, the 1st Respondent swore a replying affidavit, deposing that the appeal has absolutely no chance of success as the Notice of Preliminary Objection raised before the trial court could not be determined without ascertainment of facts.
8. Further, the 1st Respondent submitted that the Appellant has not demonstrated the irreparable, harm or substantial loss that he risks to suffer, noting that the Land Registrar has scheduled the site visit on 15th February 2024 and as such, the question of a boundary dispute will be determined by the Land Registrar in light of Section 18 and 19 of the [Land Registration Act](#). The 1st Respondent also avers that even if there is a boundary dispute between the parties, the suit before the trial court raises an issue of trespass which the Land Registrar cannot determine.
9. It is the 1st Respondent's view that an order of stay of proceedings does not assist the parties in reaching a just expedition of their dispute. The boundary dispute will be duly determined by the Land Registrar and the trespass issue will also be determined, therefore the Appellant has no valid grievance. He noted that the matter is scheduled before the trial court for mention on 21st March 2024 for pre-trial, therefore there is no urgency requiring the grant of interim reliefs.
10. Hearing of the application proceeded orally on 25th January 2024 where senior counsel for the Applicant Mutua Advocate submitted that the fact that the Court gave directions that the Land Registrar and Surveyor to determine the boundaries between the parties' parcels of land is an acknowledgement that the dispute related to a boundary under Section 18 of the [Land Registration Act](#).
11. He noted that a site visit is scheduled to ascertain the boundaries on 15th February 2024 and parallel proceedings ought not to go on at the same time.



12. The Applicant's position is that the court lacks jurisdiction to hear this matter and relied on the authority of *Reuben Kioko v Hellen Kiunga Miriti* (2021) eKLR which considered the provision in Section 18(2) of the *Land Registration Act*, submitting that Parliament's intention in including this section was to avoid parallel proceedings.
13. Mwanzia Advocate, counsel for the Respondents relied on the Respondents' replying affidavit. He submitted that the Appeal has no chance of success as it is frivolous. Paragraph 6 of the supporting affidavit acknowledges that they had lodged a boundary dispute with the Land Registrar and there was trespass with construction activities as an issue for determination. He also submitted that paragraph 2 of the prayers in the Plaint sought a declaration that the Appellant had trespassed on the suit property and an injunction, which falls within the jurisdiction of the Environment and Land Court.
14. The Respondents' submission is that the Appellant's preliminary objection was only concerned with the dispute being determined by the Land Registrar, but the Court determined that if that were so, the issue of trespass would remain.
15. It was further submitted that no prejudice will be occasioned since the Court already directed the Registrar to determine the boundary dispute and that this application will bring the matter to a standstill. Counsel for the Respondents relied on the authority in the cases of *Gerald Gacheru Wambugu v Jonathan Patita Katua & Another* (2008) eKLR and *Hasainiz Investment Limited v County Government of Mombasa* (2022) eKLR.
16. In rebuttal, Mutua Advocate for the Applicant submitted that there is a distinction between a court referring a dispute to a professional land registrar and a surveyor and where there is a need for determination of a boundary dispute.

Analysis and determination

17. The trial court has considered the proceedings before the trial court, the application herein and submissions by counsel and considers the only issue arising for determination is whether the Appellant/Applicant is entitled to an order of stay of proceedings in Mwingi Chief Magistrate's Civil Case No. E011 OF 2023 Mohamed Swaleh Abubakar & Another v George Kiteme Munyambu pending hearing and determination of this appeal.
18. The application is brought under Order 42(6) of the *Civil Procedure Rules* (2010) which states as follows:

“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.

2. No order for stay of execution shall be made under subrule (1) unless—
 - a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and



- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

19. The test for grant of stay of proceedings is higher and more stringent than the test for grant of an order of stay of execution pending appeal as was held in the case of [Port Florence Community Health Care v Crown Health Care Limited](#) [2022] eKLR where the Court held that;

“The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. Gikonyo J addressed the question of an order for stay of proceedings being an important consideration in the case of *Lucy Waitthera Kimanga & 2 Others v John Waiganjo Gichuri (Supra)*.

This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful.”

20. The Applicant stated in his application that he is apprehensive that unless an order of stay of proceedings is issued, the appeal shall be rendered nugatory and that he shall suffer prejudice and substantial loss yet in the Applicant’s view parliament passed law expressly ousting the Court’s jurisdiction.

21. The Pleint before the trial court shows that the claim by the Plaintiff is that the Defendant trespassed onto their suit property while the Respondents claim that the claim is a boundary dispute which had been lodged before the Land Registrar and further that the Court had ordered that the District surveyor to file in court a boundary dispute report. The Applicant herein raised a preliminary objection to the court’s jurisdiction under Sections 18 and 19 of the [Land Registration Act](#).

22. The trial Court the Hon. I.G Ruhu in his ruling dismissing the preliminary objection stated that the suit relates to alleged acts of trespass.

23. The Applicant insists that the suit before the trial court is a boundary dispute that should be heard and determined by the Land Registrar in accordance with Sections 18 and 19 of the [Land Registration Act](#) No.3 of 2012.

24. Section 18 of the [Land Registration Act](#) No.3 of 2012 provides as follows:

“(1) Except where, in accordance with section 20, it is noted in the register that the boundaries of a parcel have been fixed, the cadastral map and any filed plan shall be deemed to indicate the approximate boundaries and the approximate situation only of the parcel.

(2) The court shall not entertain any action or other proceedings relating to a dispute as to the boundaries of registered land unless the boundaries have been determined in accordance with this section.”

27. On the other hand section 9 (a) of the [Magistrates Courts Act](#) Cap 10 provides as follows on the jurisdiction of the court on the environment and land matters:

“Claims in employment, labour relations claims, land and environment cases A magistrate’s court shall—



- a. in the exercise of the jurisdiction conferred upon it by section 26 of the *Environment and Land Court Act* (Cap. 8D) and subject to the pecuniary limits under section 7(1), hear and determine claims relating to—
 - i. environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources.
25. The court has considered the above two provisions of the law relating to the jurisdiction of the court to hear and determine disputes relating to boundaries and shall say no more about them since this issue is at the heart of the pending appeal and any further comments may prejudice the pending appeal.
 26. It is noted from the pleadings before the trial court that the main contention is the issue of trespass onto the suit land where the Plaintiffs complained that the Defendant entered onto their land and started carrying out construction work thus depriving them of ownership and possession. The Plaintiffs prayed for a declaration that the Defendant was a trespasser on the suit land and an order of permanent injunction restraining them from carrying on certain acts on the land. The Plaintiffs also applied for a temporary injunction against the Defendant dated 21st September 2023.
 27. The court has considered the plaint filed and considers that the issues before the trial court are mainly as seen from paragraphs 5, 6, 7, 9 and 11 of the plaint. It is trite law that courts should determine a case on the issues that flow from the pleadings and the court may only pronounce judgment on the issues arising from the pleadings or such issue as the parties have framed for the court's determination. As per Mativo J (as he then was) in *Ndishu & another v Muriungi* (Civil Appeal 3 of 2020) [2022] KEHC 2 (KLR) (21 January 2022) (Judgment)
 28. On the factors to be considered in deciding whether or not to grant an order of stay of proceedings, the Court has considered the findings in several cases. In the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR, Gikonyo J held that:

“Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on the right of access to justice, the right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceeding is high and stringent.”
 29. Further, in the persuasive authority in *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated 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. 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.”



30. In the *Kenya Wildlife Case (Supra)*, Gikonyo J quoted *Halsbury's Law of England, 4th Edition. Vol. 37 pages 330 and 332*, 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.”

30. From the foregoing, the court agrees that an order of stay of proceedings is a serious, grave and fundamental interruption in the right of a party to conduct litigation. The power to grant such an order is discretionary and the said discretion ought to be exercised judiciously. The Court considers that it is in the best interests of justice and the interests of all the parties herein if the suit before the trial court is heard to determine whether the acts of trespass complained of are taking place at all and the land on which they are taking place. In this regard, the Court finds nothing wrong or prejudicial in the trial court directing the District surveyor to file a boundary dispute report.
31. The court has also considered that the right of access to justice and speedy, expeditious disposal of disputes will be better served if the hearing of the suit before the trial court is not impeded by an order of stay of proceedings. There is also the important need to hear matters and determine them on substantive merit and looking at the matters pleaded a substantive hearing of the suit will save time for the parties and the court and also avoid the possible scenario where a party may spend funds constructing on another person’s land.
32. Finally, the Court does not consider the suit before the trial court 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.
33. Arising from the foregoing the court finds that the application dated 14th December 2023 lacks merit and the same is hereby dismissed with costs to the Respondents.

DELIVERED, DATED AND SIGNED AT KITUI THIS 13TH DAY OF FEBRUARY, 2024.

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

The ruling read in open court and virtually in the presence of-

Musyoki Court Assistant

Kalii holding brief for Mutua for Applicant

Mwanzia for the Respondents

