



**Karia v Keshe (Environment and Land Appeal E006 of 2023)
[2024] KEELC 1184 (KLR) (6 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1184 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E006 OF 2023**

CG MBOGO, J

MARCH 6, 2024

BETWEEN

NTETO OLE KARIA APPLICANT

AND

MUSUA OLE KESHE RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion Application dated 30th October, 2023 filed by the applicant and is expressed to be brought under Sections 1, 1A, 3A, 3B and 63 (e) of the Civil Procedure Act and Orders 42 Rule 6 (6) and 51 Rule 1 of the Civil Procedure Rules seeking the following orders: -
 1. Spent and vacated.
 2. Spent and vacated.
 3. That pending the hearing and determination of the intended appeal, this honourable court be pleased to order a stay of any further proceedings in CMELC No. E043 of 2023.
 4. That this honourable court does issue such further orders as it may deem fit and just in the interest of justice.
 5. That the costs of this application be provided for.
2. The application is premised on the grounds on its face and is further supported by the affidavit of the applicant sworn on even date.
3. In his affidavit, the applicant deposed that on 6th September, 2023, the Hon. Mungai in CMELC No. E043 of 2023 delivered a ruling which dismissed his preliminary objection dated 4th May, 2023. That being aggrieved with the said decision, he has preferred an appeal which was filed on 4th October,



- 2023 and that owing to the fact that the said judicial officer had proceeded on leave, it took time to be supplied with a certified copy of the ruling.
4. The applicant further deposed that his advocate is in the process of filing a record of appeal but the same has been hampered since he is yet to be supplied with typed proceedings. Further, that if the application is not allowed, the intended appeal will be rendered nugatory and he shall suffer great prejudice.
 5. The application was opposed by the replying affidavit of the respondent sworn on 6th November, 2023 and filed in court on 21st November, 2023. The respondent deposed that the instant application is a delaying tactic made in bad faith, is misconceived and is an abuse of the court process meant to frustrate his efforts to pursue his proprietary rights to land which the applicant/appellant now wishes to fraudulently acquire.
 6. The application was canvassed by way of written submissions. On the 8th February, 2024 the applicant filed his written submissions of even date where he raised one issue for determination which is whether the appellant/applicant has met the threshold for grant of stay of proceedings in CMCC ELC No. E043 of 2023.
 7. On this issue, the applicant submitted that the appeal raises arguable points of law with high chances of success and that if stay of proceedings is not granted, the appeal will be rendered nugatory. He further submitted that the appeal is arguable and is not frivolous owing to the issues raised therein. The applicant relied on several authorities as listed below: -
 - a. *Peter Kariuki Mburu & Cecilia Nyokabi versus Neema Shah* Civil Appeal No.118 of 2020.
 - b. *Port Florence Community Health Care versus Crown Health Care Limited*, Civil Appeal No. E053 of 2021 [2022] eKLR.
 - c. *Co-operative Bank of Kenya Limited versus Banking Insurance of Finance Union (Kenya)* [2015] eKLR
 - d. *UAP Insurance Company Limited versus Michael John Beckett* [2004] eKLR.
 - e. *Niazsons (K) Limited versus China Road & Bridge Corporation (Kenya)* [2001] eKLR.
 8. On 22nd February, 2024, the respondent filed his written submissions dated 20th February, 2024 where he raised one issue for determination which is whether the appellant has met the threshold of granting stay of proceedings.
 9. On this issue, the respondent submitted that there is no proper appeal that has been admitted before this court to warrant the orders sought. Further, that the applicant has failed to demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the matter before the trial court heard and concluded.
 10. He submitted that stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation, and that the general practice is that a stay of proceedings should not be imposed unless the proceedings, beyond reasonable doubt, ought not to be allowed. The respondent relied on the cases of *William Odhiambo Ramogi & 2 Others versus The Honourable Attorney General & 3 Others* [2019] eKLR and *Macharia t/a Macharia & Co. Advocates versus East African Standard (No.2)* (2002) KLR 63.
 11. The respondent further submitted that stay of proceedings is a radical remedy which is only granted in exceptional circumstances as was held in the case of *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000).



12. The respondent further submitted that the application is scandalous and frivolous as it does not demonstrate that there is an arguable appeal with high chances of success nor satisfied the pre-requisites set out in Order 42 Rule 6 of the *Civil Procedure Rules* to enable grant of stay of proceedings.
13. I have considered the application, the replying affidavit and the written submissions filed by both parties as well as the authorities cited. The sole issue for determination is whether this court ought to grant the applicant herein stay of proceedings pending the hearing and determination of the intended appeal.
14. Order 42, Rule 6 of the *Civil Procedure Rules* provides as follows: -
- “(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.
- (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.
- (3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.
- (6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms.”
15. From the above provision of the law, it will be observed that a court may issue a stay of proceedings after an appeal has been filed though the mere filing of an appeal does not mean that the proceedings must be stayed. The same provision provides that the court must be persuaded that there is sufficient cause to do so.



16. In this case, the applicant, contended that if the proceedings before the trial court are not stayed, he will be deprived of his right to exhaust the appellate process available contrary to the dictates of justice.
17. The principle for granting stay of proceedings which in my view applies to the instant case is whether the application has been made without unreasonable. The reason is that unlike stay of execution, which requires that three conditions be met before grant of stay of execution, the same is quite different for stay of proceedings pending appeal.
18. The applicant herein being dissatisfied with the ruling delivered by Hon. S. Mungai on 6th September, 2023, filed his memorandum of appeal dated 4th October, 2023. The said appeal challenges the ruling of the trial court in dismissing his notice of preliminary objection dated 4th May, 2023.
19. *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.”
20. In *Re 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.”
21. In addressing my mind to the above principles in the cited authorities and bearing in mind the nature of what is before this court i.e. an appeal arising from a ruling dismissing a preliminary objection and, taking into consideration that the courts must ensure that justice is done, I find it necessary to exercise my discretion in favour of the applicant.
22. I note that the memorandum of appeal and the instant application have been filed without delay and it would only be fair that the parties are heard. I do also realise that the applicant is yet to file his record of appeal. However, considering the rights of a party to be heard even on appeal, this court would only operate so within timelines to ensure that the successful party does not take advantage of the stay to the detriment of the other party.



- 23. In this case, the parties ought to ensure expeditious disposal of the appeal within the timelines provided hereunder.
- 24. As such, the Notice of Motion Application dated 30th October, 2023 is hereby allowed as follows: -
 - i. The stay of proceedings in CMELC No. E043 of 2023 is hereby granted pending the hearing and determination of the appeal and shall only subsist for 60 days from the date hereof.
 - ii. The applicant to file and serve the record of appeal within 14 days from the date hereof.
 - iii. Mention on 14th March, 2024 to confirm compliance and for further directions as to disposal of the appeal.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL on this 6TH day of MARCH, 2024.

HON. MBOGO C.G.

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JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of:

Mr. Meyoki – C. A

