



REPUBLIC OF KENYA



KENYA LAW
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**Shee v Kamau & 5 others (Environment & Land Case
49 of 2021) [2024] KEELC 4177 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4177 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 49 OF 2021**

**AE DENA, J
MAY 9, 2024**

BETWEEN

SALIM MWALIMU SHEE PLAINTIFF

AND

MACHARIA KAMAU 1ST DEFENDANT

MARTIN MONGWANJA 2ND DEFENDANT

PAULIN MONGWANJA 3RD DEFENDANT

AND

JOSEPH GILBERT KIBE 1ST INTENDED DEFENDANT

LAND REGISTRAR KWALE 2ND INTENDED DEFENDANT

ATTORNEY GENERAL 3RD INTENDED DEFENDANT

RULING

1. The Plaintiff in a Notice of Motion of Motion dated 24/7/23 craves the following orders; -
 1. Spent
 2. That the Honorable court grant leave to replace on a triple graphic error replacing the 3rd respondent to read Pauline Mongwanja in the Notice of Appeal dated 5th July 2023.
 3. That the Honorable court be pleased to order stay of the proceedings and the intended judgement in the instant suit pending hearing and determination of this application.
 4. That the Honorable court be pleased to order stay of the proceedings and the intended judgement in the instant suit pending hearing and determination of the Appeal.



5. Any other relief that the Honorable court deems fit to grant.
6. The costs of this application be provided for.
2. The Application is premised on the grounds on its face reiterated in the supporting affidavit of Salim Mwalimu Shee the Applicant. It is deponed that the court delivered its ruling in the Plaintiff's application dated 27/1/23 to amend the plaint. That being aggrieved a Notice of Appeal dated 5/07/23 was filed and served. A draft copy of a Memorandum of Appeal is annexed. It is further stated that the appeal raises substantive and meritorious grounds and if the Defendants deal with the suit in any way the appeal will be rendered nugatory. The deponent states that they have satisfied the conditions for grant of stay of execution as stipulated under the provisions of Order 42 Rule 6 of the Civil Procedure Rules.
3. The Applicant adds that during the hearing of the main suit DW1 testified that their plans were to subdivide the suit property and build more cottages which has not been possible because of the orders of injunction dated 22/7/2020 issued by the Honorable Justice Yano. This means after judgement the Defendants would proceed with these plans notwithstanding the pending appeal. It is stated that during hearing the Applicant's former advocate did not cross examine Halima Amina Bol to bring out the fact that the Applicant obtained the suit property through transmission via proceedings in the High Court and Kadhis Court Succession cause No. 18 of 2009 to assist the court in understanding the history of the property. The relevant documents in support of the succession proceedings and the title in the Applicants' names were annexed. That no appeal was lodged against the orders issued under the succession proceedings. Citing articles 40 of the Constitution and sections 27, 28 of the *RLA* and 143 it is deponed that the sanctity of title is emphasized. That the Defendant had failed to prove that the right procedure was followed in law. That again the Applicant's former advocate did not cross examine the Applicant to advance his case and amend his pleadings. That failure to amend the pleadings and ventilate all issues concerned was a human error of previous counsel which should not be visited upon his client.
4. The Applicant depones that the application has been made without delay less than 19 days of the ruling dated 1/7/23. An offer of security for costs of between Kshs 50,000 to Kshs. 100,000/- is made and in the alternative a friends title deed. The Applicant undertakes to abide by any orders of the court in granting the reliefs sought. That the proceedings of 7/12/22 were not pursuant to his instructions to counsel as several efforts to reach him were unsuccessful and that he was never apprised of the case, that the prayers sought do not capture a determination of the ownership of the land between the two titles presented in court and thus the need for amendment. There was likelihood of the injunction being lifted at judgement exposing the suit property to disposal.
5. The application is opposed by the replying affidavit sworn by Peter Migwi Karingu the Respondent on 9/10/23. It is deponed that the matter has been fully heard and any attempt to reopen proceedings at this stage will be highly prejudicial resulting into introduction of new witnesses including amendments at additional cost. That the appeal process is a separate legal avenue to address perceived errors in the trials court judgement which is an adequate legal remedy available to the applicant. Granting a stay of proceedings and judgement should not be used a tool to render an appeal meaningful. The court is invited to uphold the principal of finality of judgements.
6. The application was canvassed by way of written submissions which parties filed and exchanged.
7. The Plaintiff's submissions were filed on 16/10/23. It is contended the application is not opposed by the 2nd and 3rd Defendant since Peter Migwi Karingo who holds a power of attorney lacks legal authority to represent them. That as a result since he filed a witness statement to testify on behalf of the 2nd and



- 3rd Defendants it means that the said parties did not testify during the hearing on 16/5/22. That the said Peter Karingo was conflicted having been involved in witnessing the sale agreement.
8. It is submitted grant of stay of execution pending appeal is discretionary upon sufficient cause being demonstrated that the Applicant will suffer irreparable loss if the stay is not granted, filed the application without delay and security for costs. Reiterating the grounds stated in the memorandum of appeal it is stated that irreparable loss will occur in that the courts denial of the subject amendment created a state of affairs that will irreparably affect or negate the very essential core of the Plaintiff as the successful party in the appeal. There are two titles to the suit property consequently the court delivering a judgement without addressing the real issue in controversy will create substantial loss.
 9. It is further stated that the removal of the injunction as prayed by the defendant will pave way for the Defendants' plans to subdivide and develop the suit property causing substantial loss. That anything the renders the appeal nugatory impinges on the right of appeal and access to justice. The offer for security for costs is reiterated with an invitation to the court to impose a modest amount since there is no liquidated claim. That the court is enjoined in law to preserve the subject of the suit. Further that the court should invoke article 159 of the Constitution and render justice regardless of technicalities. Various court decisions were cited in support of various heads of the submissions.
 10. The Respondents submissions were filed on 3/11/23. It is submitted that the Applicant's plea for stay of proceedings does not meet the high and stringent criteria as highlighted in Kenya Wildlife Service's vs. James Mutembei (2019) eKLR as the Applicant has failed to demonstrate substantial loss they would suffer to warrant the grant of the orders of stay. That the introduction of new parties at the tail end of the proceedings would disrupt the orderly conduct of proceedings and lead to prejudice to the opposite and should not be allowed. Further it will undermine the finality of the intended judgement. That the Applicant has failed to show the merits of the appeal. On the request for leave to rectify a typographical error in the Notice of Appeal dated 5/7/23 the same is opposed on the grounds of lack of due diligence and disregard of court processes exhibited by the Plaintiff throughout the trial. Various court decisions were cited in support of various heads of the submissions.

Analysis and Determination

11. Having considered the application, the responses in opposition thereto and the submissions of the parties, the main issue that commends determination is whether the application is merited.
12. The application is brought under the provisions of order 42 Rule 6 and, 9 of the Civil Procedure Rules 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and article 159(2) of the Constitution of Kenya 2010.
13. Stay of proceedings pending appeal is governed by the provisions of Order 42, Rule 6 of the Civil Procedure Rules, 2010 which 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 appeal case of 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.

- (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.

14. The grant for order of stay of proceedings is therefore discretionary. It has been demonstrated by authorities cited by both counsels that stay of proceedings is a serious and grave matter and the court agrees. The threshold for stay of proceedings was enunciated in the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR where the court citing *Halsbury's Law of England*, 4th Edition. Vol. 37 page 330 and 332 thus:-

“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.”

15. In *Kenya Wildlife Services v James Mutembei* [2019] eKLR the court held that the threshold required in granting stay of proceedings is higher and stringent as compared to grant of stay of execution pending appeal.
16. This then brings me to the need for an Applicant to demonstrate sufficient cause warranting such stay and which in my view goes in tandem with the requirement to demonstrate substantial loss.
17. Sufficient cause was defined in the case of *The Hon Attorney General vs The Law Society of Kenya & Another*, Civil Appeal (Application) No. 133 of 2011 as; -

“Sufficient cause” or “good cause” in law means: the burden placed on a litigant (usually by Court rule or order) to show why a request should be granted or an action excused”. See *Black's Law Dictionary*, 9th Edition, page 251. Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge’s mind. The explanation should not leave unexplained gaps in the sequence of events.”

18. Guided by the above case law the question that arises is whether the Applicant has demonstrated sufficient cause to convince this court that these proceedings should be stayed. The background to this application is premised on a ruling delivered by this court on 4/7/2023. It is the ruling the subject of the Memorandum of Appeal filed herein. The ruling was subject of the Plaintiff’s application for leave to amend the plaint to introduce some new parties effectively reopening his case. I dismissed the application and gave my reasons for the decision. The present application is not the intended appeal of the said ruling. The import of the ruling was that the desired amendments would not be effected including joinder of the intended additional parties. Further parties were required to file their final submissions in the matter for the court to consider when it retires to pen its Judgement in the matter. It is the delivery of this judgement that the Applicant seeks to forestall with the confidence that the appeal has merit.



19. The Applicant advances that he has an arguable appeal and has in fact gone into great length of expounding the merits of the grounds in the Memorandum of Appeal in the process. This is a preserve of the Court Appeal when it shall be dealing with the soundness of this court's ruling delivered on 4/7/2023. I reiterate this application is not the intended appeal. Even if it were I would not seat on appeal on my own ruling. For this reason I will disregard all the arguments advanced in support or against the Memorandum of Appeal.
20. The Applicant states that during the proceedings the Defendants intimated to the court that they have intentions to subdivide the suit property for additional development and the orders of injunction issued in the proceedings hampered their plans. According to the Applicant, after judgement there was likelihood the Defendants would proceed with these plans notwithstanding the appeal. I think for me this is rather speculative and premature. As it is the orders of injunction have not been vacated by the court as they were issued pending the hearing and determination of this matter. The court is yet to render its judgement in the matter to warrant the apprehension on the part of the Plaintiff. Granted that judgement is delivered, Order 42 provides for an opportunity for an application for stay of execution orally immediately after delivery of judgement, thereafter upon formal application and even to the Court of Appeal. There is therefore opportunity to preserve the suit property should the application be found meritorious. I do not find this sufficient cause neither does it portend irreparable loss to warrant the stay of the proceedings or judgement herein.
21. Referring to Justice Yano's ruling the Applicant urges that the court in that ruling observed that both parties held title to the suit property yet the plaintiff did not seek nullification of the Defendants' title while at the same time the Defendant did not raise a counterclaim. Consequently the court delivering a judgement without addressing the real issue in controversy will create substantial loss. According to the Plaintiff this is one of the reasons that this court ought to have allowed amendment of the pleadings. Again this is a matter to be argued during the appeal. It cannot be a reason for this court to stay the proceedings.
22. The Applicant further pleads that if the judgement is rendered he will have been denied access to justice. In my view this is far from the truth. The judgement of this court whether in favor of the Plaintiff or the Defendant is subject to appeal and could be affirmed or overturned.
23. I think I have said enough to show that the Applicant has not met the threshold to warrant the grant of orders of stay of proceedings and intended judgement herein. I recognize the timeliness of the application as urged by the Appellant. However my view is the timeliness should be looked at wholistically. The stay of proceedings is being sought at a point where parties have been heard and only awaiting the determination of the suit. This is 17 years since the suit was commenced. Justice delayed is justice denied.
24. An order has been sought for grant of leave to amend a typographic error replacing the 3rd Respondent to read Pauline Mongwanja in the Notice of Appeal dated 5/07/23. I have reviewed the Notice of Appeal herein and I have noted the 2nd Defendant/Respondent is also reflected as the 3rd Defendant/Respondent. The court sees no prejudice in allowing the correction under section 100 of the [Civil Procedure Act](#), being a typographical error as the said Pauline Mongwanja is not a new party to these proceedings.
25. The upshot of the foregoing is that the application is disposed of in the following terms:-
 1. Leave is hereby granted to amend a typographic error replacing the 3rd Respondent to read Pauline Mongwanja in the Notice of Appeal dated 5/07/23.



2. Prayer No. 2 of seeking stay of proceedings and the intended judgement in the instant suit pending hearing and determination of the Appeal is denied.
3. Parties to bear their own costs.
4. Judgement shall be delivered on 5th July 2024.

RULING DATED SIGNED AND DELIVERED THIS 8TH DAY OF MAY 2024.

A.E DENA

JUDGE

Mr. Otieno holding brief Mr. Oyoo for the Plaintiff

No appearance for the Defendants

Mr. Daniel Disii – Court Assistant

