



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT ELDORET

ELC CASE NO 18 OF 2019

GOOD NEWS CHURCH OF AFRICA.....PLAINTIFF/RESPONDENT

VERSUS

BOARD OF MANAGEMENT ELDORET SECONDARY SCHOOL.....DEFENDANT/APPLICANT

RULING

This ruling is in respect of an application dated 1st December 2020 by the defendant/applicant seeking for the following orders:

- a) Spent
- b) THAT there be stay of proceedings and/or further proceedings and/or hearing and/or any action in this suit pending the hearing and determination of this application inter partes.
- c) THAT there be stay of proceedings and/or further proceedings and/or hearing and/or further hearing and/or any action in this suit pending the hearing and determination of the appeal lodged in the Court of Appeal in Eldoret vide Notice of Appeal dated 23rd November, 2020.
- d) Costs

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

DEFENDANT/APPLICANT'S SUBMISSIONS

Counsel for the applicant gave a brief background to the case and stated that the Plaintiff/Respondent filed this suit against the Defendant on 12th November, 2018 whereby the defendant filed a Memorandum of appearance on 4th March, 2019 and a defence on 3rd March 2019. Subsequently the Plaintiff/Respondent amended its plaint on 28th March, 2019 and the defendant amended its defence and introduced a counter-claim and filed the same on 22nd August, 2019. The Defendant/Applicant filed its Amended -Amended Defence and counter-claim on 27th September, 2019.

Counsel further stated that the Defendant/Applicant further made an application dated 12th February, 2020 seeking leave to further amend its defence in accordance with the (draft annexed) which application was heard and a ruling rendered. That the said ruling is the gist of this application for stay of proceedings.

Counsel listed three issues for determination as follows:

- a) whether this court has power to order stay of proceedings pending appeal
- b) whether this application has been brought timeously and in good faith.
- c) whether stay of proceedings and/or further proceedings pending appeal should be granted.

On the issue as to whether the court has power to order for stay of proceedings pending appeal, counsel submitted that the court has inherent jurisdiction as provided for under Section 3A of the Civil Procedure Act, Cap. 21 of the Laws of Kenya. Further that Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 provides that;

"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 orders set aside".

Counsel relied on the case of Ezekiel Mule Musembi vs. H. Young and Company (E.A) Limited (2019) eKLR, where the court held that: had this to say on the jurisdiction to stay proceedings;

"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".

Ms Odwa also cited the case of Siokwet Trait Limited vs. The Commission for University Education and Kisii University and Prof. John S. Akama. Dr. Kibivegon Kirui (Contemnor) cited the case of Global Tours and Travels Limited. Nairobi I-IC. Winding Up Cause No. 43 of 2000 where it 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 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".

Counsel therefore urged the court to find that the application for stay of proceedings is merited.

On the second issue as to whether the application has been brought timeously and in good faith, counsel submitted that the ruling dismissing the application for leave was delivered on 17th November, 2020 and this application was filed on 6th December, 2020 under certificate of urgency. Further that counsel had applied for certified copies of proceedings and ruling on 23rd November, 2020 for purposes of appeal.

Counsel relied on the case of Ezekiel Mule Musembi vs. H. Young and Company (E.A) Limited (2019) eKLR(supra) where the court stated inter alia,

"that 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.

Ms Odwa also cited the case of Masisi Mwaita vs. Damaris Waniiku Nieri (2016) eKLR where it was stated that

"the policy of the court is to exercise latitude in its interpretation of the rules so as to facilitate determination of appeals, once filed, on merit and thus facilitate access to justice by ensuring that deserving litigants are not shut out

Further the court further stated in the above case that

"on whether or not the application was brought without undue delay. I am satisfied that there was no delay. The application was filed on 3rd December, 2015. The judgment was delivered on 5th November, 2015. There was no unreasonable delay."

Counsel urged the court to find that the application was brought without delay.

On the third issue as to whether the stay proceedings and/or further proceedings pending appeal should be granted, counsel submitted that unless stay of proceedings orders are issued, the Plaintiff/Applicant is likely to proceed with hearing of the suit to the detriment of the applicant.

Counsel cited the case of Niazons (Kenya) Limited vs. China Road and Bridge Corporation (Kenya) Limited. Nairobi (Milimani) HCCC. No. 126 of 1999 where 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 exercise futile, stay should be granted."

In the Ezekiel Musembi case (supra) stated at paragraph 19 as follows;

"In David Morton Silverstein vs. Atsango Chesoni. Civil Application No. Nai 189 of 2001(2002) KLR 867: (2002) 1 EA 296 the court of Appeal citing Kenya Commercial Bank Limited vs. Benjoh Amalgamated Limited and Another. Civil Application No. Nai 50 of 2001 held that it is not the law that a stay of proceedings cannot be granted

Counsel submitted that the appeal has very high chances of success in view of the important legal issues being raised with regard to the amendment of pleadings which ought to be freely allowed so as to enable access to justice and the real issues to be brought to the court's attention. Counsel therefore urged the court to allow the application as prayed.

PLAINTIFF'S SUBMISSIONS.

Counsel for the defendant opposed the application vide a replying affidavit sworn by Rev. Isaac Bett who is the Chairperson of the Plaintiff/ Respondent. Counsel submitted that the applicant filed an application for further amendment of the defence dated 12th February 2020 which was in essence to introduce a new party in the names of **GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEES** and **COUNTY LAND REGISTRAR, UASIN GISHU** as additional Defendants to the case.

Mr. Yego submitted that the Defendant intended to enjoin other parties to the suit through an application disguised as an application for amendment of the Defence and that the respondent stated that the proposed Co-Defendants are not necessary parties to the suit as the Plaintiff has no claim against them.

Counsel submitted that is the applicant wanted to enjoin the proposed co-defendants then they should introduce the said parties as third parties to the suit by dint of the provisions of Order 1 Rule 15 of the Civil Procedure Rules.

It was counsel's submission that the current application is superfluous as subsequent to filing the of said application, the Defendant lodged a fresh suit against the Plaintiff and the proposed Co-Defendants in **Eldoret E&L Originating Summons Cause No.8 of 2020 Bharati S.Joshi as the personal representative ad litem to the estate of the Late Naralal Narii Bhadla T/ A Eldoret Secondary School and another —vs- Good News Church of Africa Registered Trustees and Gospel Furthering Fellowship Registered Trustees.**

Counsel also urged the court to note that no appeal has been lodged yet by the Defendant in the Court of Appeal and the intended appeal is still a long shot hence the application is incompetent as no such appeal exists.

Counsel relied on the case of **Kenya Power & Lighting Co. Ltd vs. Esther Waniiru 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 then quoted Ringera J (as he then was) when he stated the following when confronted by a similar application in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000(supra)**

"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"

Counsel stated that the three main principles to guide a Court in such applications are:

- 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.

Mr. Yego relied on **Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332**, where the principles upon which stay of proceedings may be granted are summarized as follows:

"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.(emphasis added)

Further 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... "

Counsel listed the following issues for determination by the court:

- 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 is likely to suffer substantial harm in absence of the orders sought

On the first issue as to whether the applicant has established that he/she has a prima facie arguable case, counsel submitted that the applicant's application for further amendment of the defence was in effect to introduce new parties called the GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEES and COUNTY LAND REGISTRAR, UASIN GISHU as additional Defendants to the case. That the Defendant intended to enjoin other parties to the suit through an application disguised as an application for amendment of the Defence, yet the Plaintiff/ Respondent has no claim against the said proposed Defendants.

Mr Yego therefore urged the court to find that the applicant has not established a prima facie arguable case and therefore the stay orders should not be granted. Counsel also submitted that the application was not filed expeditiously as the ruling was delivered on 17th November 2020, but this was filed on 8th December 2020 which is three weeks after this court delivered its ruling.

Counsel relied on the case of **Pius Kawinzi Kithoka vs Jacinter Kavind u Makau**, where the Court made the following observation:

"The Applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the Court's discretion. Equity does not aid the indolent"

On the issue as to whether the Applicant is likely to suffer substantial harm in absence of the orders sought, counsel submitted that the Defendant has not demonstrated any substantial harm that it is likely to suffer if this matter proceeds for hearing. Further that the defendants are in occupation of the suit land hence this application is therefore a delaying tactic by the Defendants. That this application has been brought in bad faith hence should be dismissed with costs to the plaintiff.

ANALYSIS AND DETERMINATION

The issues for determination in an application of stay of proceedings are well settled. The court must determine whether the Applicant has established that he/she has a prima facie arguable case, whether the application was filed expeditiously and 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 as *Ringera J (as he then was)* held in the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000(supra)**

The applicant filed an application for further amendment of defence which was heard and determined. The application was disguised as an application for further amendment but it was seeking to enjoin a party as a co-defendant which the court dismissed on the ground that the defendant cannot impose a co- defendant on the plaintiff as the plaintiff has no claim against such a party.

The Applicant has attached a copy of a notice of appeal and there is no evidence that an appeal has been filed. The applicant's intention was to enjoin a co- defendant in this suit and it is also on record that the applicant has already filed another suit involving the respondent herein and the proposed co-defendant in **Eldoret E&L Originating Summons Cause No.8 of 2020 Bharati S.Joshi as the personal representative ad litem to the estate of the Late Naralal Narii Bhadla T/ A Eldoret Secondary School and another —vs- Good News Church of Africa Registered Trustees and Gospel Furthering Fellowship Registered Trustees.**

Courts should not be used for parallel process which might have different outcomes that can embarrass the courts. A party should choose the parties that they intend to sue and the forum to sue without second guessing which one to settle on. An order staying these proceedings would be counterproductive and would delay the finalization of this case. No compelling reason or prima facie case has been established to warrant the court to stay the proceedings.

In the case of **Kenya Wildlife Service v James Mutembei (2019) eKLR** the court 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 right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent."

I find that the applicant has not established an arguable appeal. Furthermore, there is no appeal that has been filed as yet.

On the issue whether the application has been filed timeously, the ruling was delivered on 17th November 2020 and this application was filed on 8th December 2020 which is three weeks after delivery of the ruling. In the circumstances I find that the same was done without delay.

Is the applicant going to suffer any substantial loss if an order of stay of proceedings is not granted? Substantial loss is a key consideration in an application for stay of execution and stay of proceedings. The applicant must establish the loss which he/she will suffer if such orders are not granted

In the instance of this case the applicant has not demonstrated any substantial loss that it would suffer if the order is not granted. The appeal has not yet been filed and the applicant has another avenue in the suit that has been filed in respect of the party that they wanted to enjoin as a co- defendant.

In the case of **Silverstein –vs- Chesoni [2002]1 KLR 867** the Court held that:-

“The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such a loss would render the appeal nugatory.”

Further in the case of **Shell Ltd –vs- Kibiru & Another, Civil Appeal No. 97 of 1986, Nairobi** the court stated that:-

“The application for stay made before the High Court failed because the 1st of the conditions was not met. There was no evidence of substantial loss to the applicant, either in the matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made since the Respondents would be unable to pay the money.”

The applicant having not satisfied the principle of substantial loss, I find that the application lacks merit and is therefore dismissed with costs to the plaintiff/respondent

DATED AND DELIVERED AT ELDORET THIS 27TH DAY OF APRIL, 2021

M. A. ODENY

JUDGE