



**Mutua & 4 others v M’Mwobobia & another (Environment & Land Case
E005 of 2023) [2023] KEELC 17366 (KLR) (10 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17366 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E005 OF 2023**

CK NZILI, J

MAY 10, 2023

BETWEEN

**HARUN MUTUA 1ST APPLICANT
CHARLES MWENDA 2ND APPLICANT
DENIS MUTETHIA 3RD APPLICANT
WILLIAM KAIMENYI 4TH APPLICANT
ROBERT KINYUA 5TH APPLICANT**

AND

**GRACE KARWIRWA M’MWOBOBIA 1ST RESPONDENT
SABELA NKATHA M’MWOBOBIA 2ND RESPONDENT**

RULING

1. What is before the court is the application dated 30.1.2023 in which the applicants seek that this court stays Meru CM ELC No. 122 of 2019, till this appeal is heard and determined following a ruling by the trial court on 24.1.2023, which essentially locked out the applicants from participating in the suit. The notice of motion is based on the reasons on its face and the supporting affidavit of Charles Mwenda sworn on 30.1.2023. It is the applicants’ contention that the interlocutory judgment made on 7.12.2021 was conditionally set aside. In compliance with the terms, the defence, and counterclaim were to be filed together with the payment of Kshs.20,000/= throwaway costs to avoid the matter from proceeding to formal proof.
2. The applicants averred that the ruling dated 31.5.2022 was sent late through email, so the defence and counterclaim were filed five days late as well as the payments by cheque on 26.9.2022, which the respondent declined. On 6.10.2022, the applicants applied to set aside and or allow the filed defense and counterclaim out of time, but were dismissed by the trial court hence the pending appeal. The



- applicants further averred that should the matter proceed on formal proof, they will be deprived of the right to be heard.
3. The motion is opposed through a replying affidavit by the 1st respondent on behalf of the 2nd respondent on the basis that the applicants have been indolent, are out to delay the suit since they are in occupation of the land; that Kshs.10,000/= were the throwaway costs, but were sent contrary to the order; the defense was filed out of time; they had no option but to apply for the striking out of the defense filed without leave and that this application has no merits.
 4. With leave parties filed written submissions dated 10.2.2023 and 13.2.2023. It is the applicant's submissions that the application before the court is equitable in nature to ensure that justice is administered without undue regard to procedural technicalities and that in this case, the delay was out of the late delivery of email and financial constraints. Therefore, the applicants urged the court to find that the right to be heard under article 50 of *the Constitution* is non-derogable, especially for a merit-based hearing of a suit. Reliance was placed on *Lynette Wambui Gitau v KEMU* Petition 5 of 2022 [2021] KEHC 322 (KLR) December 8, 2021) (ruling). Further, the applicants urged the court to find that a 6 days delay was not inordinate.
 5. The respondents on the other hand submitted that the conduct of the applicants shows that they have been indolent and should not, therefore, attract the discretion of this court.
 6. The issue for determination is whether the applicants are entitled to a stay of proceedings at the lower court pending the hearing and determination of this appeal. To stay or not stay proceedings is a discretionary power bestowed upon the court to be exercised judicially and not whimsically bearing in mind that access to justice, fair hearing, and the duty to the court under sections 3 & 19 of the *Environment and Land Court Act* as read together with sections 1A, 1B and 3A of the *Civil Procedure Act*.
 7. In *Global Tours & Travel Nairobi Winding Cause No. up 43 of 2000* as cited in *Ezekiel Mule Musembi v H Young & Co. E.A Ltd* [2019] eKLR, the court held that the discretion to stay proceedings is exercised in the interest of justice bearing in mind the objective of the court to expeditiously dispose of cases, the prima facie merits of the intended appeal, scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously. Further in *Christopher Ndolo Mutuku v E.C.F Stanbic Bank Ltd* [2015] eKLR, the court said that what matters in such an application is the overall impression the court makes out of the total sum of the circumstances of each case, which should arise almost a compulsion that the proceedings should be stayed in the interest of justice, taking into consideration the ultimate unfettered right of appeal, balancing the said right with that of the respondent to equal treatment before the law and the expeditious disposal of his suit, without unreasonable delay. The court said there must be just and sufficient cause to stay proceedings, bearing in mind that under article 159 of *the Constitution*, there is the overriding objective of the law for cases to be disposed of in a just, proportionate, expeditious, and affordable manner.
 8. In the case of *Eri Ltd v Velji* (Civil Appeal) Application) 47 of 2000 [2021] KECA 306 (KLB) December 17, 2021) Ruling) the Court of Appeal held that an applicant has to demonstrate that he has an arguable appeal, that is to say, one which was not frivolous, and secondly to demonstrate that unless an order of stay of proceedings is granted, the appeal would be rendered nugatory. In this application, the applicants urged the court to find that they will suffer gravely if the matter proceeds at the lower court without their participation.
 9. The ruling appealed against is the one dated 24.1.2023, arising from the lower court ruling setting aside the interlocutory judgment on 31.5.2022 on certain conditions that the intended defence and



counterclaim to be filed within 14 days, throw-away costs of Kshs.10,000/= to be paid in default the orders to be vacated and the matter to go for formal proof.

10. The applicants failed to comply until 19.8.2022, when the alleged defense and counterclaim were filed. The initial interlocutory judgment had been made on 9.1. 2020. In the memorandum of appeal, the applicants state that the trial court failed inter alia to analyze the law and find the delay not fatal in the interest of substantive justice.
11. The court has taken into consideration the ruling, the application, and the written submissions. The 14 days to comply were expiring on 14.6.2022 or thereabout. Therefore, the delay could not be only 5 days as alleged by the applicants. I do not find the appeal arguable and or likely to be rendered nugatory since the applicants still retain the right to participate in the hearing, notwithstanding the non-filing of the defence and counter-claim.
12. The upshot is I find that it would not be in the interest of justice to stay the proceedings. The notice of motion is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT MERU

ON THIS 10TH DAY OF MAY 2023

In presence of

C.A John Paul

Anampiu for respondents

HON. C.K. NZILI

ELC JUDGE

