



Njoroge (Suing as the legal representative of the Late Geoffrey G Njoroge) v Wanje Holdings Limited (Civil Suit 307 of 2016) [2023] KEELC 18029 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18029 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 307 OF 2016
LL NAIKUNI, J
JUNE 5, 2023**

BETWEEN

SAMUEL G NJOROGE (SUING AS THE LEGAL REPRESENTATIVE OF THE LATE GEOFFREY G NJOROGE) PLAINTIFF

AND

WANJE HOLDINGS LIMITED DEFENDANT

RULING

I. Introduction

1. The ruling before this Honorable Court regards the Notice of Motion application dated 6th July 2022 brought by way of Certificate of Urgency. It was premised under the provision Sections 1A, 1B, 3 and 3A, Section 79G and 95 of the *Civil Procedure Act*, Cap. 21, Order 42 Rule 6 (1) & (2), Order 51 Rule 1 of the *Civil Procedure Rules* of 2010.

II. The Plaintiff/Applicant's Case

2. The Plaintiff/Applicant herein sought for the following orders reproduced herein verbatim: -
 - a. Spent.
 - b. Pending the hearing and determination of this Application inter parties, this Honorable Court be pleased to stay the proceedings herein pending the hearing and determination of Mombasa Civil Appeal No 37 of 2021 *Samuel G Njoroge v Kenatco Transport Co Limited*.
 - c. Pending the hearing and determination of the suit herein, this Honorable Court be pleased to stay the proceedings herein pending hearing and determination of Mombasa Civil Appeal No 37 of 2021 *Samuel G Njoroge v Kenatco Transport Co Limited*.
 - d. Costs of this application be awarded to the Applicant.



3. The application was premised on the grounds, testimonial facts and the averments made out under the 15 Paragraphed Supporting Affidavit sworn by Samuel G Njoroge and dated 6th July, 2022 together with three (3) annexures marked as “SGN – 1 to 3” annexed thereto.
4. He stated being the duly appointed Legal Administrator of the Estate of the late George G. Njoroge (hereinafter referred to as “The Deceased”) and hence authorized and competent to swear this affidavit.
5. He deponed that sometimes in the year 1996, Kentaco Transport Company Limited filed a suit – “*Kenatco Transport Co. Limited v Geoffrey G. Njoroge* Civil Case No 265 of 1996” - against his late father for vacant possession of the suit properties known as Plot No MN/VI/2360 located at Port Reitz at Changamwe within the County of Mombasa.
6. He deposed that his father died before the hearing and determination of the above stated suit as he took over the suit on behalf of the Estate of the late father. The suit was amended to substitute his father with himself thus the suit “*Kenatco Transport Co Limited v Samuel G Njoroge* – Civil case No 265 of 1996). Judgment on the suit was delivered on 11th February 2021 by Learned Justice CK Yano Being aggrieved by that decision, he preferred an appeal being the “Court of Appeal (Mombasa civil Appeal No 37 of 2021 *Samuel G Njoroge v Kenatco Transport Co Limited*). He annexed the Record of Appeal and Memorandum of Appeal and marked as “SGN - 2(a) & (b)” thereto.
7. On 6th April, 2022, the matter came up before the Court of Appeal. Parties took directions on the hearing and disposal of the Appeal. It was directed that the matter would most likely be heard in the month of October 2022. He deposed that there was a high likelihood that the Court of Appeal would conclude this matter before this Court determined this suit. As it stood the subject of the appeal was the same - - Plot No MN/VI/2360 located at Port Reitz at Changamwe within the County of Mombasa.
8. He informed Court that the Respondent in the appeal transferred the suit properties to the Defendant herein Wanje Holdings during the pendance of the case “No 262 of 1996 *Kenatco Transport Company Limited (Under receivership v Geoffrey Gikaru Njoroge*).

III. The responses by the Defendant Respondent.

9. While opposing the application by the Plaintiff/Applicant herein, the Defendant/Respondent filed a 13 Paragraphed Replying Affidavit sworn by Wachira King’ang’ai an Advocate of the High Court of Kenya and who has been on record for the Defendant/Respondent in this matter dated 7th December, 2022 together with one (1) annexure marked as “WK – 1” annexed thereto. He deponed as follows:-
 - a. He had read and understood the Applicant’s Notice of Motion dated 6th July, 2022 together with the supporting affidavit sworn on the same date.
 - b. He admitted that although the subject matter was the same in this case as the subject matter in Civil Appeal No 37 of 2021 but the parties were totally different.
 - c. The Defendant in this case was not a party in Civil suit No 265 of 1996.
 - d. The facts in issue in this case were different from the facts in issue in Civil Suit No 265 of 1996.
 - e. The Defendant was now the registered owner of Plot No MN/VI/2360 having purchased it from National Bank Limited through private treaty. He produced a copy of the official search in respect of the suit property and marked as “WK - 1”.
 - f. The Applicant’s prayer for an injunction in this suit was declined.



- g. Staying the hearing of this case deprived the Defendant the independence and freedom of exercising his ownership rights over the suit property.
- h. The Defendant/Respondent had got no interest on the pending appeal.
- i. The Defendant had better chances pursuing this case than having it halted to await the outcome of the appeal.
- j. The Plaintiff would not suffer any prejudice if this case proceeded on for hearing. On the contrary, it was the Defendant/Respondent who would suffer prejudice if the stay of proceedings orders were granted since its proprietary rights and interests over the property shall be limited under “the Doctrine of Lis Pendens.

IV. The Submissions

10. On 9th December, 2022, the matter was before Honorable Court. While in the presence of all parties, it was directed that the matter be canvassed by way of written submissions within clear and stipulated timeframe to each party. Despite of this, its instructive to note that none of the parties complied and in the given circumstances, the Honorable Court was compelled to proceed to pen down this ruling on its own merit.

IV. Analysis and Determination

11. I have keenly assessed and considered the Notice of Motion application dated 6th July 2021 by the Plaintiff/Applicant herein, the Responses by the Defendant/Respondent herein, the appropriate and relevant provisions of the *Constitution* of Kenya, 2010 and the statutes. For the Honorable Court to reach an informed, Just, fair and Equitable decision on the subject matter, it has crafted the following three (3) issues for its determination. These are:-
 - a. Whether the Notice of Motion application dated 6th July, 2022 by the Plaintiff/Applicant herein seeking for orders of stay of proceedings of these matters herein has any merit?
 - b. Whether the parties are entitled to the reliefs sought?
 - c. Who bears costs of the application?

Issue No a). Whether the Notice of Motion application dated 6th July, 2022 by the Plaintiff/Applicant herein seeking for orders of stay of proceedings.

12. The Applicant contends that the matter herein is over the same subject matter was that in the case “Court of Appeal (Mombasa Civil Appeal No 37 of 2021 *Samuel G Njoroge v Kenatco Transport Co Limited*). though parties are different. It is also contended that decision of the Court of Appeal will determine the outcome of the matter herein and it would be just for the Court to grant stay of proceedings in the matter herein.
13. On perusal of the material on record, I make the observations that indeed the subject matter of the two suits is similar – ownership of Plot No MNVI2360 located at Portreizt Changamwe Mombasa County. The matter has different parties but there are a few correlations. The Respondent in the Appeal transferred the property to the Respondent herein during the period when the matter was ongoing in the High Court as No 262 of 1996 *Kenatco Transport Company Limited (Under receivership v Geoffrey Gikaru Njoroge*. The bone of contention in the said matter was ownership of the suit property, and that is the same contention in the matter herein.



14. Principles guiding grant of stay proceedings is provided under Order 42 Rule 6 of the [Civil Procedure Rules](#) which stipulates 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 sub rule (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.’

15. It will be noted that the above stated legal provisions do not directly provide the Court powers to stay proceedings pending outcome of a higher Court where different parties involved are different but the same subject matter is similar.
16. However, guidance of navigating such a scenario is provided under the provisions of Sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) Cap. 21, which empowered the court to determine matters in a just way. Sections 1A and 1B of the [Civil Procedure Act](#) provide as follows:-

“ 1A

- (1) The overriding objective of this Act and the rules made thereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act”.
- 2) The Court shall, in exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
- (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

1B For the purpose of furthering the overriding objective specified in section 1A, the court shall handle all matters presented before it for the purpose of attaining the following aims-

- (a) the just determination of the proceedings;
- (b) the efficient disposal of the business of the court;
- (c) the efficient use of the available judicial and administrative resources;



- (d) the timely disposal of the proceedings, and all other proceeding in the Court, at a cost affordable by the respective parties; and
- (e) the use of suitable technology

Issue No b). Whether the parties herein are entitled to the reliefs sought?

17. From material on record it would be poor use of the Courts time to carry on the suit herein given that the outcome of the Court of Appeal will directly affect the outcome of the matter herein and potentially render it null and void given it's over the same subject matter. This Court would loath to be making decision which eventually will end being otiose or academic. Certainly, that would not be the best way to maximumly utilise the very scarce judicial resources. Furthermore, it is trite law that the decisions of the Court of Appeal are also binding on the High Court. This legal position is buttressed in the Court of Appeal case of: "*National Bank of Kenya Limited v Wilson Ndolo Ayah* Civil Appeal No 119 of 2002; [2009] KLR 762 where it was held:-

“It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter.”

18. Predictably, in the interest of Justice parties are heeded to exercise patience as moving forward within given time, the Court of Appeal is likely to make a determination on either to allow the appeal as prayed or refer it back to this Court for re – trial. Therefore, from the surrounding facts and inferences herein, it is my own finding that for what would be just and expeditious use of the Courts resources is to stay proceedings herein pending hearing and determination of the matter at the Court of Appeal. For these reasons, the application should succeed.

Issue No c). Who bears costs of application?

19. It is trite law that costs is a matter of Courts discretion. Costs mean the award that is granted to a party at the conclusion of a legal action or proceedings of any litigation. The proviso of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the result of any legal action or proceedings. See the Court of Appeal cases of "*Republic v Rosemary Wairimu Munene, Ex-Parte Applicant v Ibururu Dairy Farmers Co-operative Society Ltd* Judicial Review application No 6 of 2014 & *Cecilia Karuru Ngayu v Barclays Bank of Kenya & Another* (2016) eKLR. Where the Court held:-

“the basic rule on attribution of costs is that costs follow the event.....its is well recognized that the principles costs follow the events is not to be used to penalize the losing party rather. It is for compensating the successful party for the trouble taken in presenting or defending the case.

20. In the instant case, though the Plaintiff/Applicant herein was successful, in the given circumstance, the Honorable Court is of the view that it is just and reasonable that each party bears their own costs.

VI. Conclusion & Finding

21. The upshot of the matter, and upon conducting the analysis of the framed issues herein, on preponderance of probability the Honorable Court makes the following orders: -



- a. That the Notice of Motion application dated 6th July, 2022 be and is hereby allowed.
- b. That there be an order of stay the proceedings herein pending hearing and determination of “Civil Appeal (Mombasa) No 37 of 2021 *Samuel G Njoroge v Kenatco Transport Co Limited*. The parties herein in this matter have an obligation to keep this Court fully informed on the progress matter.
- c. That each party to bear their own costs.

It Is So Ordered Accordingly.

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 5TH JUNE, 2023

.....
HON. JUSTICE MR. L.L. NAIKUNI, (JUDGE)

ENVIRONMENT & LANDS COURT AT MOMBASA

Ruling delivered in the presence:

- a. M/s. Yumnah, the Court Assistant.
- b. Mr. Wachira Advocate for the Plaintiff/Applicant.
- c. No appearance Advocate for the Defendant/Respondent.

