



Aziz v Mornach Developments Limited & 2 others (Environment & Land Case E426 of 2021) [2023] KEELC 18608 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18608 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E426 OF 2021**

**JO MBOYA, J
JULY 6, 2023**

BETWEEN

MOHAMED BASHIR ABDUL AZIZ PLAINTIFF

AND

MORNACH DEVELOPMENTS LIMITED 1ST DEFENDANT

MOHAMED MADHANI & CO ADVOCATES 2ND DEFENDANT

BANK OF BARODA (KENYA) LIMITED 3RD DEFENDANT

RULING

Introduction and Background

1. The 1st defendant/applicant has approached the honourable court *vide* the application dated the March 8, 2023; and in respect of which same seeks the following reliefs;
 - i.spent.
 - ii.spent.
 - iii.spent.
 - iv. This honorable court be pleased to grant an order of stay of execution of the orders of the court granted/given on the February 23, 2023; pending hearing and determination of the 1st defendant's appeal.
 - v. That this honorable court be pleased to grant an order of stay of further proceedings in the instant matter pending the *inter-partes* hearing and determination of the 1st defendant's appeal.
 - vi. That this honorable court be pleased to give any such other and/or further orders as it may deem fit.



- vii. That costs of the application do abide the cause.
2. The instant application is premised and anchored on various grounds which have been alluded to and enumerated in the body of the application. Furthermore, the application is supported by the affidavit of Arul Selvaraj Mudallar; sworn on the March 8, 2023 and in respect of which the deponent has annexed five documents, *inter-alia*, a copy of a notice of appeal.
 3. Upon being served with the subject application, the plaintiff/respondent responded thereto by way of a replying affidavit and in respect of which same has disputed the allegations contained at the foot of the supporting affidavit. Further and in addition, the plaintiff/respondent has also averred that the impugned orders of the court, which are the subject of the instant application have already been complied with by filing and service of the requisite amended plaint and impleading the additional defendants in line with the directions of the honourable court.
 4. Be that as it may, the instant application came up for hearing on the May 24, 2023; and whereupon the advocates for the parties and essentially, learned counsel for the plaintiff/respondent and the 1st defendant/applicant, agreed to canvass and dispose of the application by way of written submissions.
 5. Pursuant to and arising from the agreement by the advocates for the named parties, the court proceed to and circumscribed the timelines for the filing and exchange of the written submissions. Instructively, the learned counsel for the 1st defendant/applicant and the plaintiff/respondent duly complied and filed their respective written submissions.
 6. Nevertheless and for the sake of completeness, learned counsel for the 2nd and 3rd defendants indicated that same shall not be filing any written submissions as pertains to the application dated the March 8, 2023.

Submissions by the Parties

a. Applicant's submissions::

7. The 1st defendant/applicant herein has adopted and reiterated the grounds contained at the foot of the application beforehand, and similarly same have also reiterated the contents of the supporting affidavit and thereafter same has raised and canvassed three salient issues for consideration by the honourable court.
8. Firstly, learned counsel for the applicant has submitted that the applicant herein was aggrieved and dissatisfied by the ruling of the honourable court rendered on the February 23, 2023, which, *inter-alia*, lifted and pierced the veil of the applicant company, culminating into the joinder of persons who are said to be directors of the applicant company as co-defendants.
9. Further and in addition, learned counsel has submitted that premised on the dissatisfaction by the applicant, the applicant herein proceeded to and lodged a notice of appeal and thus expressing her intention to challenge the ruling rendered on the February 23, 2023.
10. Additionally, learned counsel has submitted that having filed and lodged a notice of appeal, the applicant herein has therefore demonstrated and/or established sufficient cause and/or basis to enable same to approach this honourable court and to procure an order of stay of execution of the impugned orders pending the hearing and determination of the intended appeal.
11. Secondly, learned counsel for the applicant has submitted that both the applicant herein and the persons who are ordered to be joined as co-defendants, after the lifting of the veil; are bound to suffer substantial loss unless the orders of the court are stayed and/or suspended.



12. Learned counsel for the applicant has also submitted that the persons who were ordered and/or directed to be joined as co-defendants in respect of the instant matter are not the known directors of the 1st defendant/applicant. Consequently and in this regard, learned counsel has submitted that if proceedings are taken and continued against the applicant, with her veil lifted as well as against the co-defendants; then the applicant herein shall similarly be exposed to unnecessary costs, which ought to be averted.
13. In any event, learned counsel has contended that the continuation of the current proceedings may ultimately constitute a wastage of valuable judicial time, if the intended appeal to the Court of Appeal were to be heard and allowed.
14. Owing to the foregoing and in a bid to avert wastage of judicial courts time, learned counsel for the applicant has submitted that it is therefore imperative and expedient that the instant application be allowed.

b. Plaintiff's/Respondent's Submissions:

15. Learned counsel for the plaintiff/respondent has raised, highlighted and canvassed three (3) issues for due consideration by the honourable court.
16. First and foremost, learned counsel for the plaintiff/respondent has submitted that the orders of the honourable court which were made on the February 23, 2023 and in particular the aspect thereof that related to the lifting of the veil and the joinder of the directors of the 1st defendant/applicant, in their personal capacity, has since been duly complied with.
17. Further and in addition, learned counsel for the respondent has pointed out that the plaintiff/respondent has since filed and served the requisite amended plaint, wherein the named directors of the 1st defendant/applicant have already been impleaded as the 4th, 5th and 6th defendants in the main suit.
18. To the extent that the orders of the court alluded to and contained at the foot of the ruling rendered on the February 23, 2023 are concerned, learned counsel for the respondent has thus submitted that the impugned orders have been appropriated and acted upon and hence the prayer for stay of execution is therefore overtaken by events.
19. Secondly, learned counsel for the respondent has also submitted that even assuming that the orders granted on the February 23, 2023 had not been appropriated; learned counsel has submitted that the execution and/or compliance with the terms of the impugned orders would not occasion any substantial loss to the 1st defendant/applicant or at all.
20. Thirdly, learned counsel for the plaintiff/respondent has submitted that the grant of an order of stay of proceedings will unduly prejudice the rights and interest of the plaintiff/respondent, who shall be unduly held and kept in abeyance ad infinitum.
21. In any event, learned counsel has submitted that the grant of an order of stay of proceedings would work in favor of the applicant herein who received the purchase price from the respondent pertaining to and in respect of the suit property, but has to date failed, neglected and/or refused to effect the requisite transfer to and in favor of the plaintiff/respondent.
22. Premised on the foregoing, learned counsel for the plaintiff/respondent has contended that an order of stay of proceedings is such a grave order and hence same ought to be issued sparingly and taking into account the interests of all the parties concerned.



Issues for Determination

23. Having reviewed the notice of motion application dated the March 8, 2023; and the response thereto and having considered the written submissions which were filed on behalf of the named parties; the following issues are pertinent and are thus worthy of determination;
 - i. Whether the applicant herein has met the requisite conditions to warrant the grant of an order of stay of execution pending appeal.
 - ii. Whether the circumstances obtaining in respect of the instant matter merits the grant of an order of stay of proceedings, either as sought or otherwise.

Analysis and Determination

Issue number 1 whether the applicant herein has met the requisite conditions to warrant the grant of an order of stay of execution pending appeal.

24. Learned counsel for the applicant herein has contended that following the rendition and/or delivery of the ruling made on the February 23, 2023, the applicant felt aggrieved and/or dissatisfied with the impugned ruling and thereafter proceeded to and filed a notice of appeal.
25. Furthermore, learned counsel for the applicant has also submitted that other than the filing of the notice of appeal, the applicant also lodged the requisite letter bespeaking proceedings and a copy of the ruling; with a view to compiling the requisite record of appeal to the Court of Appeal.
26. Other than the foregoing, learned counsel for the applicant has also annexed and exhibited a copy of the draft memorandum of appeal, which is intended to be filed before the honorable Court of Appeal. In this regard, learned counsel has thereafter pointed out that the grounds at the foot of the memorandum of appeal exhibit and/or evidences arguable grounds before the Court of Appeal.
27. Having alluded to the foregoing submissions, learned counsel for the applicant has thereafter ventured forward and submitted that unless the orders sought are granted, the applicant herein, as well as the persons who were ordered to be joined as co-defendants, shall suffer substantial loss, if the order complained against is not stayed.
28. Evidently, learned counsel for the applicant is knowledgeable of and privy to the legal requirement that an order of stay of execution pending an appeal, cannot be issued and/or be granted unless the applicant establishes/demonstrates that substantial loss is likely to accrue and/or arise.
29. Be that as it may, what is important to consider and address is whether the applicant herein has established and demonstrated that there is a likelihood of substantial loss arising or occurring, if the orders of stay are not granted.
30. To my mind, the applicant herein has merely stated as hereunder; paragraph 8 of the supporting affidavit;

“The 1st defendant is further apprehensive that substantial loss will be occasioned to it by the piecing of the corporate veil and the joinder of persons who are not its directors as parties to this matter”.
31. However, despite making the foregoing averment, it is instructive to state and underscore that the applicant herein has neither demonstrated the nature or kind of loss, let alone substantial loss; that may arise and/or accrue.



32. In my humble view, it is incumbent upon the applicant who is desirous of procuring and obtaining an order of stay of execution pending the hearing of an appeal, to not only mention the incidence of substantial loss but to venture forward and establish what is the nature of loss that is alluded to.
33. Unfortunately, the applicant herein is contented with a mere reference and mention of the word substantial loss in the body of the application; and by extension the supporting affidavit and thereafter same is left to lie.
34. To the extent that no evidence of substantial loss has been adverted to and/or elaborated upon in the body of the supporting affidavit, there is no gainsaying that the strict requirement relating to proof of substantial loss, which is critical, has not been duly complied with and/or established.
35. Furthermore, it is not lost on this honourable court that the evidence relating to and concerning substantial loss must be expressly stipulated and elaborated upon and ought not to be left for purposes of anticipation and speculation; either by the adverse party or by the court itself.
36. For good measure, the moment the applicant who is seeking for an order for stay of execution, like the instant one, fails to implead and establish substantial loss; the application that seeks an order of stay of execution must of necessity fail. Simply put, substantial loss in its various dimensions and perspectives is the cornerstone to the grant of an order of stay of execution pending appeal.
37. In respect of the foregoing position, it is appropriate to restate and reiterate the hackneyed position, which was elaborated upon and underscored by the Court of Appeal in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* (1986)eKLR, where the court stated and observed as hereunder;

“It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.”
38. Arising from the *ratio decidendi* alluded to in the foregoing decision, there is no gainsaying that substantial loss is critical, essential and integral in the determination of an application for stay of execution pending the hearing and disposal of an appeal or better still, an intended appeal.
39. Other than the question of substantial loss, which has neither been established nor demonstrated, there is yet another issue that merits mention and a short discussion/ elaboration.
40. For good measure, the issue herein relates to the fact that the plaintiff/respondent has since proceeded to and filed the amended plaint, which has impleaded the directors of the 1st defendant/applicant as parties to the instant suit. In this regard, the amended plaint dated the March 6, 2023 was indeed lodged two days prior to the filing of the current application.
41. Insofar as the plaintiff has proceeded to and mounted the amended plaint, the question that does arise is whether the orders contained at the foot of the ruling rendered on February 23, 2023, have since been appropriated and/or acted upon.
42. To my mind, the filing and service of the amended plaint, which has impleaded the named directors of the 1st defendant/applicant, in accordance with the terms of the ruling; constitutes and amounts to the enforcement and actualization of the impugned ruling.



43. Consequently and in my view, once the terms of the ruling have been complied with and enforced and the resultant amended plaint filed and served; then the entire ruling and the consequential orders arising there from are spent and are thus incapable of being stayed in the manner sought by the applicant.
44. Notably, an order of stay of execution and in this case stay of execution pending appeal, could only issue and/or be issued once it is demonstrated that the impugned orders which are sought to be stayed have actually not been executed.
45. To the contrary, where it is shown and demonstrated that the impugned orders have been acted upon, actualized and/or executed, like in the instant case; then an order of stay of execution becomes overtaken by events and same is therefore rendered inoperative, ineffectual and thus an exercise in futility.
46. In ordinary parlance, the application by the applicant for the grant of an order of stay of execution of the ruling rendered on the February 23, 2023, which has been actualized; is tantamount to closing the stable long after the horse has bolted. Surely, such an act would amount to an exercise in futility, if not, vanity.
47. Arising from the foregoing elaboration, I surmise that the limb of the application which seeks for the order of stay of execution pending the hearing and determination of the intended appeal, is therefore misconceived and legally untenable.

Issue Number 2:

Whether the circumstances obtaining in respect of the instant matter merits the grant of an order of stay of proceedings, either as sought or otherwise.

48. Other than the prayer for the order of stay of execution of the ruling which was rendered on the February 23, 2023, which has been discussed in the preceding paragraphs; the applicant herein has also sought for an order of stay of proceedings pending the hearing and determination of the intended appeal.
49. According to the applicant, if the current proceedings are continued, both the applicant and the persons who were joined as co-defendants arising from the lifting/ piercing of the veil would be subjected to various court proceedings, which may ultimately be rendered unnecessary, nay useless, if the appeal before the Court of Appeal ultimately succeeds.
50. Nevertheless and in my humble view, the applicant herein may very well prosecute the intended appeal before the honorable Court of Appeal and upon the determination of the appeal before the Court of Appeal; the proceedings before the superior court, namely, this honourable court; would thereafter abide by the outcome of the judgment/ decision of the Court of Appeal.
51. Clearly, if the court of appeal were to agree with the applicant and find that the appeal/intended appeal is meritorious, then what shall happen is that the applicant would be indemnified by a suitable award of costs and the veil that had hitherto been pierced, would effectively be restored.
52. On the other hand, the proceedings before the superior court, namely, the Environment and Land Court, which would have included the persons who were joined on the basis of the lifting of the veil will also align or re-align itself with the orders of the Court of Appeal and where appropriate, the names of the persons who would have been found to have been improperly joined, if any, shall be struck out.



53. Apparently, the continuation of the proceedings before this honorable court during the pendency of the intended appeal to the honorable Court of Appeal, will neither prejudice nor in any way interfere with exercise of jurisdiction by the honorable Court of Appeal.
54. To underscore the foregoing observations, it is imperative to take cognizance of the holding by the Court of Appeal in the case of *Kenya Commercials Bank Ltd v Benjob Amalgamated Ltd & another*, civil application No Nai 50 of 2001 (29/2001 UR), (unreported), where the court stated as follows:
- “... The onus of satisfying us on the second condition, that unless stay is granted, the intended appeal would be rendered nugatory, is also upon the applicant. In our view, it has unfortunately failed to discharge this onus.
- We remind ourselves that each case depends on its own facts and we find it difficult to be persuaded that the appeal on the facts of the present case would be rendered nugatory if stay is not granted. The appeal may be heard and, if successful, the proceedings in the superior court would be determined in accordance there with. The hearing in the superior court might have been unnecessary for which appropriate costs can be ordered but the appeal will not have been worthless.”
55. Furthermore, the same Court of Appeal reverted to the same issue and arrived at a similar holding in the case of *Dr David Morton Silverstein v Atsango Chesoni* (2002)eKLR, where the court held thus:
- “What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this court would not have been rendered nugatory”.
56. In my humble view, the legal position espoused by the Court of Appeal in the decisions alluded to (supra) are appropriate and relevant to the proceedings beforehand. For good measure, once the appeal before the Court of Appeal is heard and determined, any orders that may arise in respect of the instant proceedings, shall abide the outcome of the judgment of the Court of Appeal.
57. In a nutshell, the intended appeal by the applicant herein, shall be heard and determined and same shall not be rendered nugatory or academic, in any manner whatsoever, if the instant proceedings were continued with.
58. Notwithstanding the foregoing, it is also important to mention the fact that the dispute beforehand relates to sale of the suit property by the 1st defendant/applicant to and in favor of the plaintiff/respondent; but which sale seems to have hit a stalemate because the suit property was duly charged to the 2nd defendant at the time of the alleged sale.
59. Despite the foregoing, it is worthy to recall and reiterate that the 1st defendant/applicant, who is now seeking for the order of stay of proceedings, was indeed paid the entire purchase price, which same holds to date.
60. To the contrary, the plaintiff/respondent, who paid out the purchase price, remains in suspense, awaiting the formalization, transfer and registration of the suit property, which was the subject of the impugned transaction or better still, reimbursement of the purchase price plus damages for breach of contract, if any.



61. From the foregoing circumstances, it is imperative to underscore that an order of stay of proceedings in the manner sought, shall indeed postpone, if not defeat, the plaintiff's/respondent's desire to have the dispute beforehand addressed, resolved and adjudicated upon, albeit without undue delay.
62. To my mind, the plaintiff herein filed and/or commenced the instant proceedings before this honorable court in pursuance of his rights and fundamental freedoms as entrenched in articles 10(2), 24, 27(1), 47, 48 and 50(1) of The Constitution, 2010. Furthermore, upon the mounting of the instant suit, the plaintiff/respondent developed a legitimate expectation that the dispute beforehand shall be attended to in accordance with the provisions of article 159(2) (d) of the Constitution, 2010.
63. From the foregoing, it is evident and apparent that the grant of an order of stay of proceedings, either in the manner sought by the applicant herein or otherwise, is such a disruptive order, which has the net effect of obstructing and defeating the expeditious hearing and disposal of proceedings.
64. Consequently and given the disruptive nature of an order of stay of proceedings, there is no gainsaying that such an order ought to be granted with the necessary circumspection and, in any event; only in deserving instances/cases. Otherwise, this court may very well plunge back to the years/days when matters would last for decades in the corridors of the court, awaiting determination.
65. To underscore the fact that an order of stay of proceedings ought to be granted sparingly and only in deserving cases, it is appropriate to take cognizance of an excerpt in Halsbury's Law of England, 4th Edition Vol 37 page 330 and 332, where the learned authors stated as hereunder;

“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.”

66. Additionally, the grave nature and the consequences attendant to an order of stay of proceedings was also elaborated upon and underscored in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000(UR) where the court stated thus;

“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” (emphasis added)

67. In the premises, I am not persuaded that the circumstances obtaining over and in respect of the subject matter, merits the grant of an order of stay of proceedings, either as sought or otherwise.
68. Contrarily, the grant of an order of stay of proceedings, shall indeed and in my humble view, occasion grave injustice not only to the plaintiff/respondent but also to the general administration of justice in our system. Consequently, the request for the grant of the orders of stay of proceedings herein must be declined.

Final Disposition

69. Having addressed the twin issues which were alluded to and enumerated in the body of the ruling, it must have become apparent and crystal clear that the application by and on behalf of the 1st defendant/applicant; is not only misconceived, but also legally untenable.
70. Furthermore, even taking into account the merits thereof, I come to the inevitable conclusion that the same is similarly devoid and bereft of merits. Consequently, the application dated the March 8, 2023, be and is hereby dismissed with costs to the plaintiff/respondent only.
71. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Benson - Court Assistant.

Mr. Eric Mugo h/b for Miller for the Plaintiff/Respondent.

Mr. Busaidy for the 1st Defendant/Applicant.

Mr. James Gathaiya for the 2nd Defendant/Respondent.

Mr. Antony Mbugua for the 3rd Defendant/Respondent.

