Tormoi & another v Koech (Sued in his Capacity as the Trustee and Executor of the Estate of Kipngeno Arap Ngeny) & 3 others (Environment & Land Miscellaneous Case 23 of 2020 & Environment & Land Case 13 of 2019 (Consolidated)) [2023] KEELC 18525 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18525 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND MISCELLANEOUS CASE 23 OF 2020 & ENVIRONMENT & LAND CASE 13 OF 2019 (CONSOLIDATED)

MC OUNDO, J

JULY 6, 2023

BETWEEN

TAPSABEI CHEPNGENO TORMOI ..... 1ST PLAINTIFF

DAVID KIPLANGAT ROTICH (SUING IN THEIR CAPACITY AS ADMINISTRATORS OF THE ESTATE OF KIMASIT ARAP TORMOI) ..... 2ND PLAINTIFF

AND

JOHN C. KOECH (SUED IN HIS CAPACITY AS THE TRUSTEE AND EXECUTOR OF THE ESTATE OF KIPNGENO ARAP NGENY) ..... 1ST DEFENDANT

RUTH CHERUIYOT ..... 2ND DEFENDANT

CHIEF LAND REGISTRAR ..... 3RD DEFENDANT

HONOURABLE ATTORNEY GENERAL ..... 4TH DEFENDANT

RULING

1. Coming up for determination is the applicants' application dated the March 23, 2022 brought pursuant to the provisions of order 42 rule 6(1) of the *Civil Procedure Rules 2010*, sections 19 (3)9f), (i) & (j) of the *Environment and Land Court Act* 2011 and Practice Directions number 1 under Gazette Notice issue No 5178 of July 28, 2014, wherein they seek that directions, order and as the case may be the (sic) execution of the terms of the decision/ruling of the court that was delivered on May 23, 2021 be stayed pending appeal of the said decision/ruling of the court. They also sought for costs of the application.

2. The application was based on the grounds therein as well as on the supporting affidavit of John C. Koech the 1st applicant herein to the effect that they were dissatisfied with the decision of the court delivered on May 13, 2021 and therefore sought to appeal against it. That to this effect, there be stay of the proceedings herein.

3. In response to the said application the respondents herein via their replying affidavit sworn by David Kiplangat Rotich on the June 10, 2022 averred that the application was a waste of the court's precious time and resources as the applicants had been buying time and not been willing to proceed with the hearing of this matter.

4. That the 1st applicant was acting in bad faith to delay the hearing and determination of this matter having failed to provide any correspondences between him and the registry confirming that he had applied for the typed proceedings.

5. That on the May 13, 2021, the court *vide* its ruling had dismissed the applicant's application dated October 30, 2020 where they had sought to set aside the orders of the court issued on the February 20, 2020. In the said ruling the court had directed parties to comply with order 11 of the *Civil Procedure Rules* within the next 21 days from the date of the said ruling.

6. Thereafter the matter had been mentioned severally wherein the applicants have blatantly failed to comply with order 11 of the *Civil Procedure Rules* for reason that they wished to file an appeal but which appeal was not forth-coming. On the March 24, 2022 the court had directed the applicants to file their notice of appeal before the close of the day failure to which the court will deem the application as abandoned. A notice of appeal had been filed on the March 28, 2022 which was in clear violation of the court's directions and to which the current application ought to be deemed as abandoned.

7. That they had fully complied with pre-trials as at October 13, 2021 and they would be greatly prejudiced were the court to entertain the 1st applicant's application. That the 1st plaintiff/respondent herein being elderly and of poor health, she may not live to see the fruits of the present litigation with the dragging of the matter.

8. They sought that the matter do proceed for hearing on merit. That the application herein was bad in law, frivolous, a waste of the court's precious time and was meant to delay the wheels of justice and therefore should be dismissed with costs.

9. The application was disposed of through written submissions wherein the applicants submitted that they had moved the court on March 20, 2022 seeking stay orders pending appeal on the decision of the court that had been delivered virtually on May 13, 2021. That the respondent's replying affidavit did not challenge the issues sought.

10. The applicants relied on the provisions of order 42 rule 6(4) of the *Civil Procedure Rules* to submit that they had filed and served their notice of appeal upon the respondents. That what they were seeking in their application was the stay of the matter pending the hearing of the appeal and in granting the said prayers the court would essentially be staying the order/directions issued at paragraph 25 of the ruling which would in effect stay hearing of the matter.

11. That the court do exercise its discretion in favour of the applicants' application, to which they were willing to comply with the court's directions.

12. The application was opposed by the plaintiff/respondents who framed their issues for determination as follows;

i. Whether the applicants have established that they stand to suffer substantial loss unless the order of stay is made.

ii. Whether the application has been made without unreasonable delay.

iii. Whether the applicant has undertaken to furnish security.

iv. Whether the application has merit.

13. On the first issue for determination the respondent's submission was that although the applicants deponed that they had filed a notice of appeal against this honourable court's ruling, they had not deponed that they stood to suffer any loss, let alone substantial loss, unless the orders are granted. That there would be no loss suffered if the proceedings herein were to proceed pending appeal because any such loss would be adequately covered by the award of costs. That the application herein was merely intended to delay the finalization of the suit taking into account the fact that the orders being appealed against were interlocutory orders. Reliance was placed on the decision in *Robert Ngaruiya Chutha v Joseph Chege Ndungu* [2014] eKLR. That to justify a claim of substantial loss, the applicants needed to demonstrate that if proceedings herein were not stayed, it would result in a state of affairs that will render the entire intended appeal nugatory. The application must therefore fail.

14. On the second issue for determination as to whether the application had been made without unreasonable delay, the respondent submitted that the impugned ruling had been delivered on May 13, 2021. The notice of appeal had been filed on May 25, 2021 wherein the current application had been filed on March 25, 2022 which was 10(ten months) later. That no explanation had been given for the cause of delay despite the numerous mention dates that had been given to the applicants wherein they had even failed to comply with the provisions of order 11 of the *Civil Procedure Rules* on the pretext that they wished to file an appeal against the court's ruling. That they had subsequently filed the present application upon being issued with an ultimatum by court.

15. That the applicants' conduct in these proceedings exhibited an indolence that was confounding. There was clear intention to delay the finalization of the suit by delaying as much as possible, the process of the appeal. That justice ought to always cut both ways and the court should take into consideration the pain the delay in disposing this suit would occasion the respondents.

16. As to whether the applicants had undertaken to furnish security for due performance of the decree, the respondent submitted that the importance of stating the willingness of the applicants to furnish security for due performance of the decree was elaborated in the decision in *David Kihare Murage v Jacinta Karuana Nyangi & another* [2015] eKLR where the court had held that it was important for the applicant to state in their supporting affidavit of their readiness and willingness to abide by such orders as the court may make on security as that was a requirement under order 42 rule (2) of the *Civil Procedure Rules* .

17. That although the applicant had deponed that he would undertake to comply with directions of the court if their application was allowed, yet the the said undertaking was vague and couched in terms that indicated an unwillingness to furnish security. That the applicants had not offered security nor shown any intention to furnish security and as such, their application should not be allowed.

18. On the issue as to whether the application was merited, the respondent submitted that the court had discretion in deciding whether or not to grant an order of stay of execution. Reliance was placed on the decision in *Loice Khachendi Onyango v Alex Inyango & another* (2017) eKLR. That the applicants had not satisfied any of the three prerequisite conditions to warrant exercise of the court's discretion in their favour. Moreover, whereas the applicants had been ordered to file the current application

before the close of business on March 24, 2022, with explicit directions that should they fail, they would be deemed to have abandoned the same, yet they had failed to comply with the orders of the court consequently filing the application on March 25, 2022. The filing of the application a day later therefore rendered the same incompetent and a non-starter. That the applicants' application lacked merit and should be dismissed with costs.

Determination.

19. The 1st and 2nd applicants, vide an application dated the October 30, 2020, had sought to have all the ex-parte proceedings and orders issued by the court on the January 30, 2020 and the February 20, 2020 set aside so that the originating summons dated the November 18, 2019 could be heard afresh wherein *vide* a ruling of May 13, 2021, the court had dismissed the said application thereby directing parties to comply with the provisions of order 11 of the *Civil Procedure Rules* within the 21 days so that the matter could be set down for hearing expeditiously.

20. The applicants then sought for stay of execution of the court's ruling on allegation of a possible appeal, wherein they were granted 30 days stay of execution on the May 13, 2021.

21. On the December 2, 2021 the applicants' counsel had not complied and sought for more time to file their appeal and to also file a formal application to stay the court's proceedings. The court granted them 14 days to file and serve the said application and the matter was scheduled for compliance on the February 23, 2022, on which day there still had not been compliance and more time was sought and granted. The matter was re-scheduled for the March 24, 2022 but still there had been no compliance wherein the court had issued an ultimatum to the applicants to either file their application seeking to stay the proceedings, in the cause of the day failure to which it would be deemed that the said application had been abandoned. The present application was filed on the March 25, 2022 which was one day out of the time frame issued and without leave to file it out of time.

22. However in the spirit of the provisions of section 3A of the *Civil Procedure Act*, the application herein was deemed as being properly on record.

23. I note that although the applicants had also filed a notice of appeal dated the May 13, 2021 on the May 25, 2021, to date 2 years down the line, the court has not been informed of what became of the intended appeal and if at all the same was filed. I shall thus take it that there is no appeal in existence and proceed to determine the application before me which in essence seeks a stay of proceeding herein.

24. I have considered the applicants' application and submissions thereto as well as the respondents' response in opposition, the law and authorities cited. The application is premised on provisions of order 42 rule 6 of the *Civil Procedure Rules* which specify the circumstances under which either the trial court or an aqppellate court may order stay of execution or proceedings pending an appeal.

25. Ringera J (as he then was) when confronted by a similar application in the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No 43 of 2000 held as follows:

> " 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)

26. In this regard thereof, the court's discretion in deciding whether or not to grant stay of proceedings as sought by this application must be guided by any of the following three main principles;

    a. Whether the applicants have established that they have a *prima facie* arguable appeal.

    b. Whether the application was filed expeditiously and/or

    c. Whether the applicants have established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

27. It is important to point out that an arguable appeal is not one that will necessarily succeed but one which raises triable issues. That for a party to succeed on an application for stay of proceedings, (s)he or they in this instance, must demonstrate that they have an arguable appeal. The applicants have not attached documents to show that they had applied for copies of the proceedings and impugned ruling, or even paid for the said proceedings and impugned ruling, wherein the same were yet to be supplied to them. Further, save for a notice of appeal, the applicants have also not filed and/or annexed their memorandum of appeal.

28. The applicants have thus failed to demonstrate that their appeal is arguable as the memorandum of appeal that would have been of assistance in discerning whether or not their intended appeal was arguable was not annexed. It therefore follows that the merit of their alleged intended appeal cannot be discerned from their affidavit wherein the court cannot also go out on a fishing expedition in discerning the decision they intend to appeal against and whether it was arguable. Indeed the decision by the Court of Appeal in *Mwangi v Nyali Golf & Country Club* (civil application E080 of 2021) [2022] KECA 455 (KLR) (18 March 2022) (ruling) was to the effect that due to the lack of an annexed memorandum of appeal, the applicant had not demonstrated any arguable ground and had therefore not satisfied the first limb of 'arguability'.

29. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, it had been held that: -

> " ...Stay of proceeding should not be confused with stay of execution pending appeal. 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 proceeding is high and stringent..."

30. The court having rendered itself in the impugned ruling of May 13, 2021, it would have been prudent for the applicants to move expeditiously to the Court of Appeal. Nothing has been tabled to show that they are desirous of prosecuting their intended appeal which has time limitation. The applicants' indolence and lack of action with regard to filing and having their appeal set down for hearing cannot be visited on the respondents, who had already complied with pre-trial directions on the December 2, 2021 and have been waiting to prosecute the matter since then.

31. Indeed the provisions of article 159(2)(a)(b)(c) and (d) of the *Constitution*, as read with sections 1A and 1B of the *Civil Procedure Act*, join this court to foster and facilitate the overriding objective of the Act to render justice to parties in all civil proceedings in a just, expeditious, proportionate and affordable cost to parties.

32. To this end I find no merit in the applicants' application dated the March 23, 2022 and proceed to dismiss it with costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 6TH DAY OF JULY 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE