



REPUBLIC OF KENYA



Okach v Okach & 2 others; Ogonji & 7 others (Defendant) (Environment and Land Appeal 3 of 2023) [2023] KEELC 21121 (KLR) (13 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21121 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND APPEAL 3 OF 2023
MN KULLOW, J
OCTOBER 13, 2023**

BETWEEN

GRACE ATIENO OKACH APPLICANT

AND

TOM OKACH & 2 OTHERS PLAINTIFF

AND

PETER OGOJJI & 7 OTHERS DEFENDANT

RULING

1. The Applicant herein filed an Application vide Notice of Motion dated April 5, 2023 seeking the following Orders: -
 - a. Spent.
 - b. That the Honourable Court be pleased to issue a temporary stay of the proceedings in ELC No. 55 of 2021 between *Tom Akach & 2 Others vs Peter Ongonji & 7 Others* pending the hearing and determination of this Appeal.
 - c. Costs of this Application be provided for.
2. The Application was premised on the 2 grounds on its face and on the Applicant's Supporting Affidavit sworn on even date. It is the Applicant's contention that she has lodged an Appeal against the Ruling of Hon. R K Langat in Rongo ELC Case No. 55 of 2021 rendered on 28/02/2022 hence the need for stay of proceedings pending the determination of the Appeal.
3. It is her claim that the Appeal is arguable with high chances of success and if the orders sought are not granted, the Appeal may be rendered nugatory. She maintained that the Application was filed without



unreasonable delay and no party would be prejudiced if the Application is allowed. She urged the court to grant the orders sought.

4. The Application was opposed; the Respondents filed Grounds of Opposition dated May 12, 2023. It is their claim that the fact that the Applicant is a Co-Administrator in the Succession Cause does not entitle her to be an Interested Party in the pending Land Case in Rongo ELC No. 55 of 2021.
5. It was further their contention that Land title Nos. Kamagambo/ Kabuoro/ 6918, 1918 and 6920 which are subject of the pending suit actually exist and have never been revoked as alleged. They thus argued that the Application is not arguable but is only aimed at delaying the fair trial of the land case before the trial court in Rongo.
6. The Application was argued by way of written submissions; both parties filed their rival submissions and authorities which I have read and considered.

Applicant's Submission

7. The Applicant's advocate submitted on the 3 main principles to be considered by a court in an Application for stay of proceedings. It was counsel's submission that the Applicant has established that she has a *prima facie* arguable case; that the Memorandum of Appeal dated 28.03.2023 raised triable issues, she is a co-administrator in Succession Cause No. 29 of 2017 and which was subject to an Appeal at the Court of Appeal vide Civil Appeal No. 52 of 2020. Further, she contended that the suit parcels in the Rongo PMs Court ELC Case No. 55 of 2021 were as a result of a subdivision arising from the issuance of the grant of administration which had since been revoked and appealed against vide Kisumu Civil Appeal No. 52 of 2020.
8. She further submitted that her Application was filed expeditiously; that the Ruling in ELC Case No. 55 of 2021 was delivered on 28/02/2022 while the Application was filed on 05/04/2023. She maintained that the same was filed without undue delay.
9. On the final ground of sufficient cause; it was her submission that if the trial suit proceeds for hearing then she stands to suffer substantial loss and damage and, in the event that the appeal succeeds, then the same will be rendered nugatory.
10. She further relied on the decisions in *Port Florence Community Health Care vs Crown Health Care Ltd* [2022] eKLR, *Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya)* [2001] eKLR and *Daniel Maore M'Birithi vs. Miriti M'Ikanatha* [2007] eKLR in support of her Application.

Respondent's Submissions

11. The Respondent submitted that ELC No. 55 of 2021 was indeed filed; the advocate for the Applicant was served but she only filed a memorandum of appearance and has never filed any statement of defence in response, he thus averred that the Applicant is not entitled to the Orders sought. It was further his submission that the pleadings had since been closed and a hearing date fixed in the matter.
12. It was counsel's submission that the orders of stay of proceedings sought, by the Applicant who is seeking to be declared as an Interested Party shall only cause undue delay in the prosecution of the main suit.
13. He dismissed the grounds relied on by the Applicant in support of her Application as being frivolous with no substance since the said land parcels were still in existence and thus the Appeal as filed was frivolous and not arguable.



14. The sole issue for determination before me is whether the applicant has met the threshold for the grant of stay of proceedings in Rongo ELC Case No. 55 of 2021.

Analysis and Determination

15. Stay of proceedings is a grave and draconian interruption of a party's fundamental right in prosecuting his case. It impinges on the right of access to justice, right to be heard without delay and overall, the right to fair trial. Therefore, the test for stay of proceedings is high and stringent. This court must therefore exercise its discretionary power sparingly/ judiciously by considering the facts and circumstances of each case. See *Kenya Wildlife Service –vs- James Mutembei* [2019] eKLR
16. The principles to be considered in an Application for Stay of Proceedings were discussed by Ringera J. (as he then was) in *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No. 43 of 2000 where he stated 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”. (emphasis mine)
17. Guided by the above decision; the court in deciding whether or not to grant stay of proceedings as sought herein must be governed by the three main principles;
- Whether the applicant has established that he has a *prima facie* arguable case.
 - Whether the application was filed expeditiously;
 - 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 of stay of proceedings.
18. An Applicant must demonstrate that he has an arguable Appeal with high chances of success, that unless the order of stay of proceedings is granted, then the Appeal would be rendered nugatory. An Appeal will be rendered nugatory based on whether or not the appeal is arguable and not whether the appeal will be successful. An arguable appeal is one which raises a single *bona fide* point or triable issue worthy of consideration and need not be one that must necessarily succeed. See *Co-operative Bank of Kenya Ltd vs Banking Insurance of Finance Union (Kenya)* [2015] eKLR.
19. The Applicant herein contends that her Appeal raises triable issues with high chances of success. It is her claim that she is a Co-Administrator in Succession Cause No. 29 of 2017 whose decision has since been challenged vide Civil Appeal No. 52 of 2020 which is pending at the Court of Appeal in Kisumu.
20. It is also her claim that the suit parcels in dispute in the trial court Rongo ELC Case No. 55 of 2021, were as a result of a subdivision pursuant to the Grant of Administration in Succession Cause No. 29 of 2017 and which is under challenge in the Kisumu Civil Appeal No. 52 of 2020. She thus maintained that stands to suffer substantial loss and prejudice unless the orders sought are granted.



21. The Respondents on the other hand, neither controverted the averments by the Applicant on the issues of subdivision of the original suit land nor the claims that the said subdivision was as a result of the Grant of Administration, which has since been challenged vide Civil Appeal No. 52 of 2020 pending at the Court of Appeal in Kisumu. They did not also challenge the fact that the suit parcels Nos. 6918, 1918 and 6920 in dispute in the trial court case No. 55 of 2021 were as a result of the said subdivision of the original No. 416 or in the alternative indicated how the said titles came into existence to controvert the averments by the Applicant.
22. I have looked at the said Appeal and I find that the same raises triable issues which may have a direct impact on the trial court in ELC Case No. 55 of 2021. This court is mindful not to delve into the merits of the said Appeal at this interlocutory stage. However, from the grounds of Appeal raised in the Memorandum of Appeal, I note that if the Appeal is allowed then it would have a direct impact on the trial of the lower court suit and the subject matter in dispute before it. Therefore, if the proceedings are not stayed and the Appeal is allowed, the same would amount to a waste of judicial time and an academic exercise.
23. In *Niazsons (K) Ltd. vs. China Road & Bridge Corporation (Kenya)* [2001] eKLR, 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 orders made nugatory and render the exercise futile, stay...should be granted.”
24. As regards the filing of the instant Application and whether the same was filed without undue delay; the Ruling of the trial court was delivered on 28/02/2022 while the instant Application was filed on 05/04/2023; that is within 14 months. The Applicant did not explain the said delay and maintained that it was done without unreasonable delay.
25. Having looked and considered the facts and circumstances in the instant case critically; it is my considered opinion that it is in the interest of justice to exercise this court’s discretion in favor of the Applicant and grant stay of proceedings as sought, pending determination of the instant Appeal. The Applicant has demonstrated how the appeal may be rendered nugatory and illustrated the prejudice he is likely to suffer unless the orders sought are granted.
26. I am therefore satisfied that the Applicant has satisfactorily demonstrated that she has a sufficient cause and an arguable Appeal to warrant issuance of the orders being sought.

Conclusion

27. In the upshot, I accordingly find that the Application dated April 5, 2023 is merited and I hereby proceed to allow the same on the following terms: -
- i. An Order of Stay of Proceedings be and is hereby issued in Rongo Principal Magistrate’s ELC CASE No. 55 of 2021 between *Tom Akach & 2 Others vs Peter Ongonji & 7 Others*, pending the hearing and determination of the Appeal.
 - ii. That the Appellant is hereby directed to file the Record of Appeal within 45 days from the date of this ruling.
 - iii. Costs of the Application to abide the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 13TH DAY OF OCTOBER, 2023.



MOHAMMED N. KULLOW

JUDGE

Ruling delivered in the presence of: -

_____ for the Applicant/ Appellant

_____ for the Appellant

_____ for the Respondents

Court Assistant- Tom Maurice/ Victor

