



REPUBLIC OF KENYA



KENYA LAW
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**Kosgei v Mugun (Environment & Land Case 37 of 2021)
[2022] KEELC 14631 (KLR) (7 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14631 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 37 OF 2021
MN MWANYALE, J
NOVEMBER 7, 2022**

BETWEEN

GEOFFREY KIPSEREM KOSGEI PLAINTIFF

AND

SIMON KIMERU MUGUN RESPONDENT

RULING

1. The application coming for consideration is the one dated 23rd May 2022 seeking the following orders:
 - i. Spent
 - ii. That this court be pleased to stay the further hearing of this suit scheduled for the 7th day of June, 2022 pending the hearing and determination of the Applicant in Court of Appeal Civil Appeal Case No. E121 of 2022 (Plaintiff -vs- Defendant).
 - iii. That the costs of this Application be provided for.
2. The application is premised on the rounds on the face of it and supported by the Affidavit of Geoffrey Kipserem Kosgei in which he deponed that on 22nd day of February 2022 he raised a preliminary objection that the counter claim filed by the Respondent was incompetent. He further deponed that the said Preliminary objection was dismissed on 17th March 2022 and fixed for further hearing on 7th June 2022.
3. The Applicant stated that he was aggrieved by the said ruling and proceeded to file an Appeal vide Eldoret Court of Appeal Civil Appeal No. 121 of 2022 which is pending hearing and determination. That the appeal is meritorious with high chances of success hence proceeding with this suit would render his appeal nugatory.
4. The Defendant/Respondent opposed the Application vide Replying Affidavit dated 3rd June 2022 sworn by Michael K. Chemwok. Counsel for the Defendant averred that order 7 Rule 5, 6, 7 and 8 of



the Civil Procedure Rules allowed a Defendant to reply to a Plaintiff by way of Counter Claim. Further that the application is not meritorious and Applicant would not suffer any damage if suit is not stayed.

5. Directions were taken that the application be canvassed by way of written submissions. The application complied by filing submissions on 20th June 2022.
6. The Applicant reiterated the grounds set out in their application and emphasized that further hearing of this suit would prejudice the Appeal and render it nugatory. Counsel also submitted that the Appeal was arguable, was filed within the period prescribed in the Court of Appeal rules and that the instant application was filed without undue delay.

Analysis and determination

7. I have carefully considered the Application, Supporting Affidavit, Replying Affidavit as well as submissions filed herein and deduced that the sole issue for determination is whether the applicant has met the conditions necessary for grant of stay of proceedings pending appeal.
8. The jurisdiction of this Court on whether or not to grant stay of proceedings is derived from Order 42 Rule 6(1) of the *Civil Procedure Rules*. It provides that:

“6. Stay in case of Appeal No. Appeal or second Appeal shall operate 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 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 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.”

9. The test for stay of proceedings was expounded in the case of *Global Tours and Travels Limited Nairobi High Court Winding Up Cause No. 43 of 2000* where Ringera J. (as he was then) held 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.”

10. The Halsbury's Law of England 4th Edition Vol. 37 on pages 330 and 332 states the following on stay of proceedings:

“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.”

11. From the foregoing, it is evident that whether or not to grant stay of proceedings is a discretionary power of the court which should be exercised sparingly in order not to infringe on a person’s right to fair trial particularly to have a dispute heard and determined without unreasonable delay as enshrined in Article 50(2) (e) of *the Constitution* of Kenya.
12. In the instant suit, it is my considered view that the interest of justice do not lean towards exercising this court’s discretion to grant a stay of proceedings for the following reasons. First, the applicant has not demonstrated that they have arguable appeal, rather the applicant has just mentioned that they have an arguable appeal. For this Court to establish whether an appeal is arguable, it ought to peruse a Memorandum of Appeal or grounds set out in the application.
13. It is noteworthy that no Memorandum of Appeal was annexed to the application as alleged by the Applicant. Further, as earlier stated, the applicant has failed to demonstrate that they have an arguable appeal in the grounds relied upon and set out in the application. For these reasons, this court is unable to establish whether the application has an arguable appeal.
14. Secondly, bearing in mind the need for expeditious disposal of cases, it is the court’s view that allowing or granting stay of proceedings will hinder the Defendant’s right to expeditious disposal of this case considering the fact that this suit was filed in the year 2015.
15. Nevertheless, the Plaintiff/ Applicant will have an opportunity to ventilate on all issues arising in this suit on appeal to the Court of Appeal upon conclusion of the case on merit if aggrieved.
16. In view of the reasons cited, herein above, it is clear that the pros of not granting stay of proceedings outweigh the cons as cited by Ringera J (as he was then) in the case of Global Tours and Travels Limited relied upon herein.
17. In the circumstances the application dated 23rd May 2022 is dismissed with costs to the Defendant/ Respondent.
18. It is so ordered.

DATED AT KAPSABET 7TH THIS NOVEMBER OF 2022.

HON. M. N. MWANYALE

JUDGE

No appearance for Mr. Chemwok

No appearance for Mr. K. K. Arap Sego

Notice duly served to the parties respective email addresses on 2nd November 2022.

