



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MAKUENI

ELC CASE NO. 19 OF 2020

EDITH MUENI MUINDE.....PLAINTIFF/APPLICANT

VERSUS

MUTISO NASON MUNYASYA.....DEFENDANT/RESPONDENT

RULING

1. This matter came before this Court for hearing of the main suit on 14th June, 2021 after the date was taken by consent of the parties. On this date, counsel for the Plaintiff/Applicant presented an application dated 27th May, 2021 seeking leave to appeal against part of the ruling that was delivered on 17th May, 2021. After a brief oral exchange of views, and the concession from the Defendant's/Respondent's counsel to the application for leave, counsel for the Plaintiff/Applicant made a new oral application for stay of further proceedings. Before I expound on the oral application for stay, I wish to point out that I have taken note of the fact that the Plaintiff's/Applicants notice of motion application dated 27th May, 2021 and filed in court on even is unopposed. In the circumstances therefore, I hereby proceed to allow the application as hereunder;

i) The Plaintiff/Applicant is granted leave to appeal against part of the ruling delivered by this court on 17th May, 2021.

ii) That the notice of Appeal filed on 24th May, 2021 without first seeking leave to appeal is deemed as withdrawn and/or is of no consequence.

iii) Costs in the cause.

2. It is the application for stay of proceedings that has prompted the writing of this ruling. For recap purposes, the Plaintiff is aggrieved by the order of this court declining to grant her leave to file additional documentary evidence in a matter that went through pre-trial and was certified ready for hearing on 15th February, 2021 by the Deputy Registrar of this Court. The stay application has also been made on the back of the Plaintiff/Applicant being granted leave to substitute her witness, one Agnes Nthamba Maitha, who recanted her statement in favour of the Defendant's/Respondent's claim and is now a defence witness.

3. Being keen not to preempt the grounds of the intended appeal and so as to expeditiously move this matter forward, I shall examine the merits of the oral application before me. Much discourse has gone to paper in these proceedings regarding the right to a fair hearing as guaranteed under Article 50 of the Constitution. In an application for stay of proceedings such as the instant one, consideration must be made to the competing interests. First, to the Applicant's undoubted right of appeal and next is to the Respondent's right to be heard on his defence. As very aptly stated by Nyamu, J (as then was) in **Bivac International SA (Bureau Veritas) [2006] 1 EA 26 (HCK)** at page 34: -

“The applicant seeks an order for stay of proceedings and in such applications which are clearly aimed at stopping a party from being heard there is a higher test of scrutiny if the proceedings were to be halted.”

4. In the above case, Justice Nyamu went on to cite from *Halsburys Laws of England* (4ed) at 137 paragraph 442 as follows: -

“The stay of proceedings is a serious grave and fundamental interruption in the right that a party has to conduct his litigation or the trial on the basis of substantive merits of his case and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond all reasonable doubt ought not to be allowed to continue.”

5. In addition to the above position, the Court of Appeal went on to lay down the principles governing stay of proceedings in **Kenya**

"... 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 therewith. 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."

6. It is noteworthy that until this point, no material has been presented by the Plaintiff/Applicant to convince this court that any injustice would be visited on her in the event this matter proceeds to substantive hearing of main suit. I am also wary of the fact that introduction of documentary evidence at this stage would likely change the character of the case, the issues for determination and ultimately the cause of action before this Court. I would classify it as an unfair discharge of this Court's duty to hear this matter to its logical conclusion when all that has been presented by the Plaintiff/Applicant is mere speculation of an unjust outcome to these proceedings or in any event the probability of their intended appeal being rendered nugatory. Needless to state, the application for stay of proceedings is hereby dismissed with costs.

SIGNED, DATED AND DELIVERED AT MAKUENI VIA EMAIL THIS 18TH DAY OF JUNE, 2021.

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HON. MBOGO C.G.

JUDGE

Court Assistant: Mr. Kwemboi