



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC. APPEAL NO. 4 OF 2021**

**KERUGOYA SERVICE STATION LTD.....APPELLANT**

**VERSUS**

**KAJIADO COUNTY GOVERNMENT.....1<sup>ST</sup> RESPONDENT**

**JULIUS OLE NTAYIA.....2<sup>ND</sup> RESPONDENT**

**DUNCAN MBITHI KOMBO.....3<sup>RD</sup> RESPONDENT**

**RULING**

What is before Court for determination is the Appellant's Notice of Motion application dated the 22<sup>nd</sup> February, 2021 where it seeks the following orders:

1. Spent.
2. That there be a stay of proceedings in Kajiado CMELC No. 49 of 2018 pending the hearing and determination of this application.
3. That there be a stay of proceedings in Kajiado CMELC No. 49 of 2018 pending the hearing and determination of High Court Environment Civil Appeal No. 4 of 2021.
4. That costs of this application be in the cause.

The application is premised on the grounds on the face of it and the Supporting Affidavit of EMMANUEL GICHIRA NJAMUMO one of the Appellant's directors who deposes that they have appealed against the whole Ruling delivered by Hon. Principal Magistrate Kahuya I. M on 3<sup>rd</sup> February, 2021 and also sought for certified proceedings, ruling and order from the trial court. He claims the matter was scheduled for mention on 3<sup>rd</sup> February, 2021 for purposes of taking final pre trial directions. He contends that if proceedings herein are not stayed pending the outcome and determination of the appeal, then they shall be prejudiced as the said Ruling was in respect to stay of proceedings of the said lower court matter and if there are further proceedings, then the appeal will be rendered nugatory as well as an academic exercise. He insists the Respondents will not be prejudiced if the orders sought are granted save that the ends of justice will be met. He reiterates that they have an arguable appeal that raises serious issues thus the need to allow the determination of the appeal herein on merit and that any further proceedings will render the appeal nugatory. He avers that they stand to suffer irreparable loss and/or harm if the orders sought are not granted.

The 1<sup>st</sup> Respondent opposed the application by filing a replying affidavit sworn by NANCY SHININI its Legal Officer who deposes that this application is scandalous, frivolous and vexatious and intends to waste court's precious time. She contends that a similar application dated 26<sup>th</sup> November, 2020 had been filed at the Chief Magistrate's Court in Kajiado and dismissed on 3<sup>rd</sup> February, 2021. She insists the instant application by the Appellants is an appeal of the ruling delivered on 3<sup>rd</sup> February, 2021 through the backdoor and should not be entertained by this court. She avers that the orders sought if granted will delay the determination of the suit at the Chief Magistrates Court Case No. 2229 of 2007 (Test Suit in ELC No. 49 of 2018) which has been in court since the year 2007. She reiterates that it is highly prejudicial and embarrassing to the 1<sup>st</sup> Respondent to defend the matter herein for many years without conclusion. Further, the appeal filed is only for contempt of court application which has no bearing on the merits of the main suit. She reaffirms that the main suit when concluded will settle all the issues including the one of ownership of the suit land, attempted to be solved by way of contempt of court proceedings. She states that the ownership of the suit land is the main issue and facts including evidence adduced will rest the matter. Further, that the Appellant is highly interested with contempt proceedings rather than having the matter concluded.

The Appellant filed a further affidavit through Emmanuel Gichira Njamumo where he reiterated his claim and insists the Appeal is properly before Court. Further, that it shall be prejudiced if the stay of proceedings is not granted. He proceeded to provide a history of the lower court case and contended that the Appeal should be heard on merit.

The 3<sup>rd</sup> Respondent opposed the application and filed Grounds of Opposition where he avers that: The application is incompetent, bad in law, an abuse of the court process and meant to delay the finalization of the primary suit; the appellant has not satisfied the grounds for staying proceedings; the trial court correctly, properly and competently determined there were no grounds for stay of proceedings; the appellant is challenging exercise of discretion by the trial court but there is no proof the said discretion was exercised injudiciously or improperly or wrongly and or incorrectly; the appellant has not demonstrated any prejudice it will suffer if proceedings are not stayed; and matter being an old one needs to be concluded and parties will be at liberty to call any evidence during hearing.

The Application was canvassed by way of written submissions.

### **Analysis and Determination**

Upon consideration of the materials presented in respect to the Notice of Motion application dated 22<sup>nd</sup> February, 2021, the only issue for determination is whether there should be a stay of proceedings in Kajiado CMELC No. 49 of 2018 pending the outcome of the Appeal.

The Appellant in its submissions reiterated the averments in the respective affidavits and insisted that the Learned Magistrate while dealing with their application for contempt which was dismissed gave a lower profile to the issue of contempt hence the Appeal. It submitted that contemnors have to be punished and issue of contempt dealt with first. It further submitted that it had fulfilled the conditions for granting of stay of proceedings. To buttress its averments, it relied on the following decisions: **Vimalkumar Bhimji Depar Shah & Another V Stephen Jennings & 5 Others (2016) eKLR; Siokwet Tarita Limited V Commission for University Education & Another (2017) eKLR; Beijing Industrial Designing & Researching Institute V Lagoon Development Limited (2015) eKLR; Edward Muchiri Ituma V Beatrice Wangigi & 9 Others (2019) eKLR and Ezekiel Mule Musembi V H. Young & Company (EA) Limited (2019) eKLR.**

The 3<sup>rd</sup> Respondent in his submissions reiterated the Grounds of Opposition and insists the instant application lacks merit, an abuse of the court process, defective including res judicata as the Appellant has not appealed against the Ruling dismissing the application dated the 26<sup>th</sup> November, 2020 for stay of proceedings. He claims the Appellant has not demonstrated how the learned Magistrate exercised her discretion injudiciously and erred by doing so. Further, the issue the Appellant is raising can be ventilated at the full hearing and it has not satisfied the conditions set for stay of proceedings. To support his arguments, he relied on the **Halbury's Law of England, 4<sup>th</sup> Edition, Vol. 34 at page 330 as well as 332 plus the following decisions: Edward Sargent V Chotabha Jhaverbhat Patel (1949) 16 EACA 63; Mbogo & Another V Shah (1968) EA; and Kenya Wildlife Service V James Mutembei (2019) eKLR.**

Order 42, Rule 6(1) of the Civil Procedure Rules stipulates that: **'(1) No appeal or second appeal shall operate as a stay of execution or proceedings 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 decree or order, and whether the 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 to it 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. (2) No order for stay of execution shall be made under sub rule (1) unless - (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.'**

In this instant application, the Appellant has sought for stay of proceedings in Kajiado CMELC No. 49 of 2018 which was vehemently opposed by the Respondents. The gist of this matter is that the Appellant having been aggrieved with the Learned Magistrate's Ruling which dismissed its application to cite the Respondents for contempt lodged an Appeal to this court and is now seeking for the proceedings in the lower court to be stayed pending outcome of the said Appeal. It has emerged that the Appellant had initially filed an application for stay of proceedings in the lower court which the Learned Magistrate dismissed. I however note that he has not sought to appeal against the said Ruling. The provisions of Order 42 Rule 2 of the Civil Procedure Rules which I have cited above are clear in terms of the conditions a party seeking a stay of proceedings pending appeal should fulfill and these include: demonstration of substantial loss; application has been filed without unreasonable delay and provision of such security as the court orders for the due performance of such decree or order.

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** Ringera J as he then was heard this to say on staying proceedings pending appeal;

**"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."**

In the current scenario, the Appellant claims it will suffer substantial loss but has not indicated which loss it stands to suffer. I note the Ruling it seeks to Appeal against is one touching on the discretion of the court in making a determination on its contempt of court application and will rely on the case of **Edward Sargent V Chotabha Jhaverbhat Patel (1949) 16 EACA 63**, and hesitate to deem the said Appeal arguable on this point. Insofar as the application was filed within a timely period, I note the suit sought to be stayed was filed in 2007 and is yet to be heard. It is my considered view that staying the said suit would hamper the expeditious disposal of the lower court case which is

even a test case and is not in the interest of justice.

In the circumstances, while relying on the legal provisions cited above as well as the associating myself with the decisions quoted, I find the Appellant has not met the threshold set for staying proceedings and I opine that the issues it is raising can be dealt with when the lower court suit will be heard and determined.

It is against the foregoing that I find the Notice of Motion application dated the 22<sup>nd</sup> February, 2021 unmerited and will dismiss it with costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 25<sup>TH</sup> DAY OF OCTOBER, 2021**

**CHRISTINE OCHIENG**

**JUDGE**