



REPUBLIC OF KENYA



**Ethics and Anti-Corruption Commission v Nesco Service Limited & 8 others
(Land Case E211 of 2023) [2025] KEELC 3738 (KLR) (8 May 2025) (Ruling)**

Neutral citation: [2025] KEELC 3738 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
LAND CASE E211 OF 2023**

JG KEMEI, J

MAY 8, 2025

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

NESCO SERVICE LIMITED 1ST DEFENDANT

HARUN OSORO NYAMBOKI 2ND DEFENDANT

JOEL JOSEPH MUSYIMI 3RD DEFENDANT

JOHN NYAGA MAUKU 4TH DEFENDANT

NATIONAL LAND COMMISSION 5TH DEFENDANT

THE DIRECTOR, PHYSICAL PLANNING & SURVEY 6TH DEFENDANT

THE CHIEF LAND REGISTRAR 7TH DEFENDANT

NAIROBI CITY COUNTY 8TH DEFENDANT

NATIONAL BANK OF KENYA 9TH DEFENDANT

RULING

1. Before this Court for determination is the 1st and 2nd Defendants' application dated 3/10/2024 expressed to be brought under the provisions of Section 3A of the *Civil Procedure Act* and Order 42 Rule 6(1), Order 51 Rule 1 of the Civil Procedure Rules. The Applicants pray for the following orders;
 - a. That the Honourable Court be pleased to order for stay of the proceedings of the entire suit herein pending the hearing and determination of the Intended Appeal;
 - b. That the costs of the application be provided for.



2. The application is premised on the face of it and supported by the Affidavit of Harun Osoro Nyamboki, the 2nd Defendant herein and a Director of the 1st Defendant/Applicant. The affidavit was sworn on 3/10/2024. The Deponent avers that on 24/9/ 2024, the Honourable Court delivered two rulings in the consolidated applications. He avers that the Plaintiff's application seeking an interim injunction to stop any dealings on the suit property pending the hearing and determination of the suit was granted whereas their application seeking to strike out the suit was dismissed. He deposes that they are aggrieved by the said Ruling and have therefore preferred an appeal against the said Ruling vide the Notice of Appeal.
3. The deponent further deposes, that they are exercising their constitutional right of appeal which right ought to be protected by this Court. He states that the intended appeal has high chances of success as per the grounds of appeal stated in support of the application.
4. He contends that they stand to suffer prejudice if the stay orders sought herein are not granted. He argues that the application was promptly filed and that the Plaintiff shall not suffer any prejudice if the orders sought are granted.

Plaintiff's Replying Affidavit

5. The Plaintiff opposed the application through the Replying Affidavit dated 4/11/2024 sworn by Feiza Abdi, one of the Commission's Investigating Officer who avers that upon conducting investigations, it was discovered that there was an irregular allocation of LR No. 209/13557, the suit property herein, to the 2nd Defendant. That the suit property was allegedly designated for a public utility, that is a public parking. The Commission therefore instituted this suit for recovery of the said public land.
6. The deponent avers that the Commission sought and was granted an interim injunction for purposes of preserving the suit property pending the hearing and determination of the suit. He avers that he is aware that the Applicants have preferred an appeal against the said Ruling.
7. Further the deponent contends that that the orders for stay of proceedings sought herein are a mere delay tactic by the Applicants as the orders will not serve any purpose. That no prejudice shall be occasioned to any party if the matter proceeds substantively as each party shall have an opportunity to prosecute their case and canvass all issues at trial.
8. He contends that the Applicants have not demonstrated any exceptional circumstances to warrant the issuance of stay of proceedings orders. He argues that the Applicants have not demonstrated what loss they would suffer or stand to suffer if this court proceeds with the determination of the dispute substantively. The Commission urges the Court to dismiss the application with costs.

3rd Defendant's Replying Affidavit

9. The 3rd Defendant filed a Replying Affidavit deposed by its Director Legal Affairs, Mr. Brian Ikol sworn on 14/1/2025. Counsel states the Constitutional and Statutory mandates of the National Land Commission, in particular, management of public land on behalf of the national and county governments as well as allocation of public land upon approval by the respective authorities.
10. He states he is aware that the Applicants have lodged an appeal against the Ruling delivered on 24/9/2024, in which their application for striking out the suit was dismissed and the Plaintiff's application for interim injunction granted. That whereas the said appeal is pending, the suit herein is ripe for hearing hence the court ought to examine the nature of the resulting scenario and the outcome of the intended Appeal if they proceed simultaneously. He does not expressly state whether the 3rd Defendant supports or objects to the Application.



Court's direction

11. On 24/3/2025, the Court directed that the application be canvassed by way of written submissions. Parties complied. The Applicants' filed submissions dated 20/2/2025 whereas the Plaintiff's and the 3rd Defendant's submissions are dated 21/03/2025 and 14/01/2025 respectively. The court has had the opportunity to read through the submissions together with the cited authorities and considered them in its determination.

Analysis and Determination

12. I have considered the application, the reply as well as rival submissions. In my considered view, the only issue arise for determination is; Whether there should be a stay of proceedings pending the outcome of the Appeal
13. The law on stay of proceedings pending appeal is provided for in Section 6 of the [Civil Procedure Act](#) to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another court ought to stay its proceedings in respect of such suit. Stay of proceedings is further alluded to under Order 42 Rule 6(1).
14. In the case of *Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000*, the court 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.
15. The Halsbury's Law of England 4th Edition Vol. 37 pages 330 and 332 states that;

“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.”

This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.

“It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the Plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”
16. In the case of *William Odhiambo Ramogi & 2 Others –vs- The Honourable Attorney General & 3 Others [2019] eKLR*, a 5-judge Bench of the High Court, laid out the principles our Courts have



established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory Application to a higher Court. They laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an Application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an Application for stay of proceedings to inordinately delay trial, there is a policy in favour of Applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the Application for stay was filed expeditiously and without delay.

17. It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50 (1) of *the Constitution*, as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit.

18. It is also important to note that stay of proceedings orders are issued at the discretion of the Court, save to say, that the unfettered powers should be exercised judicially and not capriciously at the whim of the Court. See the case of *Kenya Wildlife Service –vs- James Mutembei* [2019] eKLR where it 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...”

19. The grant of an order for stay of proceedings is a discretionary judicial power which must be exercised judiciously and sparingly. The Court has to consider if it will be in the interest of justice to grant the same.

20. In the instant suit, the Applicants contend that they are exercising their constitutional right of appeal which right ought to be protected by this Court. He states that the intended appeal has high chances of success in view of the grounds of appeal stated in support of the application. In summary, the



Applicants stated that they intend to raise the following grounds at Appeal; That the Learned Judge failed to consider the 3 principles set out in *Giella –vs- Cassman Brown & Co. Ltd (1973) EA 358*. The Learned Judge is further faulted for granting an interim injunction on defective pleadings and failing to strike out the entire suit as the same is founded on bad faith and is an abuse of the court process.

21. In their submissions, the Applicants submit that there are high chances of the two courts making conflicting orders which will result into confusion and irreparable harm to the Applicants. They argue that the outcome of the appeal will be rendered nugatory and a total waste of the precious judicial time as well as increasing the costs incurred.
22. The Plaintiff on the other hand contend that the Applicant's shall not suffer any prejudice in the event the proceedings herein are not stayed. It argues that the appeal shall not be rendered nugatory as the appeal does not touch on the merits of the appeal. The Plaintiff contends that the application is a mere delay tactic.
23. I have perused the impugned Ruling by my Learned brother, Justice Mwangi. The Learned Judge issued an interim injunction so as to preserve the suit property pending the determination of the suit. He further declined to strike out the suit as the Plaintiff's suit raises triable issues that ought to be considered after a full hearing. He noted that the pleadings are not a sham.
24. In my view, this court is yet to decide on the Plaintiff's suit. This Court only issued interim orders and is now functus officio on the two issues of interim injunction and striking out of the Plaintiff's case. Therefore, in the event that the superior court finds in favour of the Applicants, its orders will take precedence. It is therefore my finding that the Applicants have not demonstrated the prejudice they are likely to suffer.
25. In determining this application, I am also inclined to apply the principle of public interest. The Supreme Court of Kenya in the case of *Gatirau Peter Munya -vs- Dickson Mwenda Kithinji & 2 Others [2014] eKLR* stated as follows on the public interest as an element to be considered in stay applications:
 - (87) ...The principles to be considered before a Court of law may grant stay of execution have been crystallized through a long line of judicial authorities at the High Court and Court of Appeal. Before a Court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the Court that:
 - i. the appeal or intended appeal is arguable and not frivolous; and that
 - ii. unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
 - (88) These principles continue to hold sway not only at the lower Courts, but in this Court as well. However, in the context of *the Constitution* of Kenya, 2010, a third condition may be added, namely:
 - iii. that it is in the public interest that the order of stay be granted.
 - (89) This third condition is dictated by the expanded scope of the Bill of Rights, and the public-spiritedness that run through *the Constitution*”
26. I am of the view, that there is a public interest element in this suit and/or application. The public interest is for the matter to be determined expeditiously in line with the Provisions of Art 159 (2) (b) of *the Constitution* and Section 1A (1) of the *Civil Procedure Act*.
27. Final orders for disposal



- a. Accordingly, I find no merit in the Applicants' application for the aforesaid reasons.
- b. The application is disallowed with no orders as to costs.

28. It is so ordered

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 8TH DAY OF MAY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Delivered Online in the presence of:

1. Mr Allan Kamau HB for Ms Kenduiwo for the Plaintiff
2. Mr Manyara HB for Mr Oyugi the 1st and 2nd Defendants
3. Mr Allan Kamau for the 2nd, 4th and 5th Defendants
4. Mr Osoro for the 3rd Defendant
5. CA- Ms Yvette Njoroge

