



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 796 OF 2017

PAUL KIROKET OLE MUTUNKEL.....PLAINTIFF

VERSUS

MAGANA HOLDINGS LIMITED.....1ST DEFENDANT

LAND REGISTRAR KAJIADO.....2ND DEFENDANT

RULING

What is before Court for determination is the 1st Defendant's Notice of Motion dated the 11th February, 2019 and the Plaintiff's Notice of Preliminary Objection filed on 21st May, 2019. The Notice of Motion is brought pursuant to Section 1A and 3A of the Civil Procedure Act and Order 42 Rule 6 as well as Order 51 Rule 1 & 3 of the Civil Procedure Rules. The Applicant seeks orders of the Court to stay all proceedings herein pending hearing and determination of the Appeal. The Notice of Motion is premised on the summarized grounds that the 1st Defendant filed a Notice of Appeal dated the 9th August, 2018 against the Ruling of this Court delivered on 30th July, 2018. The Applicant has filed a Record of Appeal and if the proceedings are not stayed, the suit will proceed for hearing to the detriment of the Applicant and it will render the Appeal an exercise in futility.

The Application is supported by the affidavit of PATRICIA KHISA who is the Advocate in conduct of the matter on behalf of the 1st Defendant. She explains the contents of the Ruling delivered by this Court on 30th July, 2018 and avers that the 1st Defendant filed a Notice of Appeal dated the 10th August, 2018 and subsequently a Record of Appeal in the Court of Appeal at Nairobi. She confirms that there is no delay in filing this application. She reiterates that no prejudice will be occasioned on the Plaintiff if the orders sought are granted.

The Plaintiff in opposition to the instant Application filed a Notice of Preliminary Objection dated the 20th May, 2019 where he contended that this Court does not have jurisdiction to grant orders of stay. Further, there is no power given to the High Court under the Appellate Jurisdiction Act for the High Court to issue a stay of proceedings.

The Applicant filed Grounds of Opposition in respect to the said Notice of Preliminary objection where it contended that the said Notice is an abuse of the Court process and the 1st Defendant has properly as well as procedurally sought for stay of proceedings. Further, that the Court has powers to grant Stay of Proceedings and the said Notice is incompetent, unmeritorious, gross abuse of the court process and should be struck out with costs.

The 1st Defendant and the Plaintiff filed their respective submissions.

Analysis and Determination Upon consideration of the 1st Defendant's Notice of Motion dated the 11th February, 2019 and the Plaintiff's Notice of Preliminary Objection filed on 21st May, 2019 as well as the supporting affidavit, Grounds of Opposition and Submissions, the only issue for determination is whether the proceedings herein should be stayed pending the outcome of the Appeal.

In its submissions the Applicant states that it has established a sufficient cause to seek stay of proceedings filed; an application within a stipulated time without unreasonable delay; the balance of convenience tilts in its favour; the Appeal will be rendered nugatory and a mere academic exercise if the stay is not granted and the Appeal raises triable issues and has high chances of success. The Applicant relied on various case law including **Elena Doudoladova Korir V Kenyatta University (2014) eKLR; Anne Njeri Mwangi V Muzaffer Musafee Essajee & Another (2014) eKLR; Amal Hauliers Limited V Abdulnasir Abukar Hassan (2017) eKLR; African Safari Club Limited V Safe Rentals Limited (2010) eKLR; and Mary Wambui Munene V Peter Gichuki Kingara & 2 Others (2014) eKLR; Ezekiel Mule Musembi V H Young & Company (EA) Limited (2019) eKLR and James Njuguna Chui V John Njogu Kimani (2014) eKLR** to buttress its arguments. The Plaintiff in opposing the application submitted that the same is not merited and relied on the authorities of **Benson Muiruri V Kenya National Capital Corporation HCCC No 1981 of 1993 and Owners of Motor Vessels (Lillian S) V Caltex**

Oil Kenya Limited (1989) 1KLR to support his averments.

Order 42 Rule 6 (2) (1) (a) of the Civil Procedure Rules provides 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 subrule (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;’

The Applicant has filed a Notice of Appeal in respect of the Ruling issued in this Court on 30th July, 2018. The Applicant has stated that it has filed a Record of Appeal but never annexed a copy of the same in its application. Further, I note the Court had made a ruling in respect to two applications but the Applicant has not attached a copy of the Memorandum of Appeal or the specific orders being appealed against to enable the Court decipher whether it has an arguable Appeal or not.

In the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000** Ringera J (as he then was) when dealing with an application for stay of proceedings pending appeal, had this to say:

“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 added)

From the evidence before me, I note the Applicant seeks to stay the proceedings herein pending the determination of the Appeal. Insofar as the instant Application has been brought without undue delay, the Applicant has not indicated what prejudice it stands to suffer as it is still the registered proprietor of the suit land and in occupation of the same. Further, there are no injunctive reliefs granted against it in respect to the suit land. I note the parties are yet to even comply with Order 11 in order to set the suit down for hearing. I opine that the stay sought would actually hamper the expeditious disposal of the instant case. In the circumstance and associating myself with the decision cited above, I am unable to grant an order of stay of proceedings as requested.

It is against the foregoing that I find the instant application unmerited and will disallow it.

Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 27th day of January, 2020

CHRISTINE OCHIENG

JUDGE