



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT
AT ELDORET
ELC SUIT NO. 351 OF 2015

JAMES KIGEN AND

**JOHANA KIPKORIR KIGEN (Suing as the administrators of the estate of
 ZAKAYO SAWE ARAP NGASURA (DECEASED)).....PLAINTIFFS**

VERSUS

**CHINA HENAN INTERNATIONAL
 CO-OPERATION GROUP COMPANY LIMITED.....DEFENDANT
 NATIONAL LAND COMMISSION.....1ST INTERESTED PARTY
 THE ATTORNEY GENERAL.....2ND INTERESTED PARTY
 COUNTY GOVERNMENT OF UASIN GISHU.....3RD INTERESTED PARTY**

RULING

This ruling is in respect of an application dated 18th November 2019 by the plaintiff/applicant seeking for the following orders:

- a) That this honourable court be pleased to grant a stay of proceedings or any further proceedings arising from its decision made on 31st July 2019, pending the hearing of this application inter partes and thereafter pending the hearing and determination of Eldoret Court of Appeal Civil Appeal No. 76 of 2019.
- b) Costs be provided for.

Counsel agreed to canvass the application vide written submissions which were duly filed. Counsel for the applicant gave the background to the case leading to the current application for stay of proceedings.

The application is based on the grounds that the plaintiff is aggrieved by the order of the court made on 31st July 2019 refusing an adjournment prompting the applicant to file an appeal.

Counsel submitted that the applicants stand to suffer irreparable damages if stay of the proceedings is not granted as any lapse of justice can cause the defendant, who is a foreign company to take undue advantage of the plaintiffs which will result to miscarriage of justice. Further that the appeal will be rendered nugatory unless the proceedings are stayed since the appeal is arguable, based on strong grounds of facts and law and has high chances of success.

Counsel for the applicant submitted that the when the expert witness from Nema sought to be stood down so as to bring a crucial document and the same was denied, the court did not consider important facts before disallowing the applications for adjournment.

Counsel submitted that the issue for determination in such an application is as was set out in the the case of **Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, Ringera J (as he then was) stated 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”

Counsel urged the court to consider the pros and cons in granting or disallowing the application for stay of proceedings in the interest of justice. The issues to be considered are prima facie merits of the intended appeal, need for expeditious disposal of cases and whether the application was filed without undue delay. It was Counsel’s submission that the application was filed expeditiously.

Counsel gave a background to the proceedings leading to the refusal to grant the adjournment and raised grounds of bias against the court for not allowing an adjournment. Counsel therefore urged the court to allow the application as prayed.

DEFENDANT’S SUBMISSION

Counsel for the defendant filed grounds of opposition to the application together with submissions. It was counsel’s submission that the issue for the court to consider are as to whether the applicant has established an arguable case, whether the application was filed expeditiously and lastly whether the applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought.

Counsel submitted that the application has been brought after undue delay as the orders were made on 31st July 2019 and the application was filed on 18th November 2019 and no reason has been tendered by the applicants for that inordinate delay in bringing this application. Further that the appeal against the said orders have no effect on the substantive proceedings in this suit.

Counsel relied on the case of **MURANGA E & L CASE NO. 111 OF 2017: - MUKUNYA MISIGO “A” & ANR =VS= ELIZABETH MUGURE MUKUNYA**

It was Counsel’s submission that the applicant’s purported appeal is purely based on the orders of this Honourable Court disallowing an application for adjournment. The decision as to whether or not to grant an adjournment is purely at the discretion of the court.

Counsel submitted that unless it is proved or demonstrated that a discretion was improperly exercised, an appeal against such an exercise of discretion amounts to abuse of the court process. Further that the applicants have not demonstrated any misdirection on the part of the court in so far as the exercise of that discretion is concerned.

Mr. Omondi submitted that the record shall bear the defendant out that in seeking adjournment the plaintiffs sought for time stand down a witness in order to introduce a document after the said witness had been examined and cross examined by the counsel for the defendant and interested parties.

Counsel stated that the plaintiffs’ prayer for adjournment in the circumstances was prima facie against the rules of procedure and the court was justified in disallowing adjournment thereby rendering the intended appeal inarguable.

Mr Omondi submitted that an order of stay of the proceedings will be heavily prejudicial to the defendant, noting the age of the matter and the numerous interlocutory applications already made by the applicants. That it is noteworthy that the defendant is undertaking government projects in the form of road constructions and which projects are supposed to be completed within specific timelines.

Counsel cited the case of **MURANGA HCCA NO. 107 OF 2015: - MASISI MWITA =VS= DAMARIS WANJIKU NJERI**. Where it was held that courts general practice is that stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue. Further counsel cited the case of **MERU HCCA NO. 40 OF 2018: KENYA WILDLIFE SERVICES =VS= JAMES MITEMBEI**. Where it was held that deciding whether to order stay of proceedings the court should therefore weigh the pros and cons of granting the order.

Counsel therefore urged the court to dismiss the application with costs.

2ND INTERESTED PARTY’S SUBMISSIONS

Counsel for the 2nd interested party also filed their grounds of opposition that the application is fatally defective, incompetent, untenable and devoid of merit as it does not satisfy the requirements for granting stay of proceedings.

Counsel submitted that the applicant intends to delay the matter unnecessarily and that the instant application is an affront to the right to fair hearing. Counsel relied on the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabi Civil Appeal No. 326 of 2013 (2014) eKLR**, where the Court established the criteria for consideration for an order of stay of proceedings as follows:

“Having made that finding, it is obvious that Order 42 rule 6(2) cannot come to the aid of the Applicant. The Court must be guided by other considerations in making its decision whether or not to grant stay of proceedings as sought herein but then, what are those considerations”.

Counsel urged the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

This is an application for stay of proceedings pending the hearing and determination of an appeal filed against a ruling refusing to grant an adjournment. The issues for determination in an application for stay of proceedings are as was stated in the case of **Kenya Power & Lighting Co. Ltd vs. Esther Wanjiru Wokabi Civil Appeal No. 326 of 2013 (2014) eKLR** where the court laid down the following principles to for guidance

- a) Whether the Applicant has established that he/she has a prima facie arguable case.
- b) Whether the application was filed expeditiously and
- c) Whether the Applicant has established sufficient cause to the satisfaction of the Court that it is in the interest of justice to grant the orders sought.

In the case of **Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd (2015) eKLR**, the Court observed that;

“...what matters in an application for stay of proceedings pending appeal is the overall impression the Court makes out of the total sum of the circumstances of each, which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice...”

The above cases are to the effect that the court is enjoined to exercise discretion to ensure that justice is done for both parties.

The applicant must also explain the reason for the delay in filing the application to the satisfaction of the court. This was held in the case of **Pius Kawinzi Kithoka v Jacinta Kavindu Makau [2012] eKLR** where the court refused to exercise its discretion on the ground that there was no explanation for the delay in filing the application. Justice Ngugi J observed as follows:

“The Applicant has given no explanation at all for this delay. In my view, it shows lack of seriousness in pursuing the appeal at worst, and at best a vexing tardiness which disentitles him from the Court’s discretion. Equity does not aid the indolent”

The impugned order was made on 31st July 2019 while the application was filed on 18th November 2019 which is more than three months delay and the applicant has not attempted to give concrete reasons for the delay. The reason that the proceedings took long to be typed is not adequate as this did not preclude the applicant from filing the current application.

The applicant has also not convinced the court that failure to grant the orders of stay of proceedings will cause prejudice and injustice to the applicant. The question is what prejudice will the applicant suffer if the proceedings were not stayed, the answer would be in the negative that no prejudice would be occasioned to the applicant, in fact this would cause delay in finalization of this matter against the spirit of Article 159 of the constitution which enjoins the court to expeditiously dispose of matters.

Finally I wish to deal with the issue of Counsel Mrs. Chumba for the applicant who cast aspersions on the court and alleged bias on the ground that the court had refused to allow an adjournment. Counsel is aware that if she has any evidence of bias then she knows the kind of application to make for the court to recuse itself and not making submissions in support of a totally different application. Counsel is further aware of the Civil Procedure Rules, the procedures of conducting hearings in an adversarial system.

Rules and procedures are put in place to guide both the litigants and the court to ensure proper and smooth litigation where every party is given an opportunity to present their case. The court would not want to imagine where there were no rules in hearing of cases, as there would be confusion and uncertainty. This is what counsel wants the court to do to allow the court to stand down a witness who has given evidence, been cross examined and be allowed to go and get another document which issue came up during cross- examination. In all fairness, how do you introduce this document at this stage? This is a document that was neither filed nor served on the parties. Counsel should be aware that she cannot be allowed to abuse the court process by trying to introduce unknown procedures to patch up the client’s case by attempting to malign the court. The court has the discretion to ask for clarification when a point is not clear and this does not mean that the court has an interest in a case. The court is an umpire and cannot jump into the arena of conflict.

I have considered the application, the submissions by counsel and find that this application cannot benefit from the discretion of the court as it has not met the threshold stated above. Allowing this application would amount to miscarriage of justice and delay the finalization of this case. If litigants were to file such applications for any adjournment denied then the Court of Appeal would be inundated with applications as opposed to the real appeal cases. I therefore find that the application lacks merit and is therefore dismissed with costs to the defendants.

This being an old matter, the same should be fixed for hearing within 30 days.

DATED and DELIVERED at ELDORET this 23RD DAY OF APRIL, 2020

M. A. ODENY

JUDGE