



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT AND LAND CASE APPEAL NO. 37 OF 2019**

**JULIUS LIMELI NGETICH.....APPELLANT**

**VERSUS**

**CHRISTOPHER KUTO.....RESPONDENT**

**RULING**

This ruling is in respect of an application by way of notice of motion date 26<sup>th</sup> November 2019 by the appellant applicant seeking for orders:

- a. THAT a temporary injunction do issue restraining the Respondent either by himself or through his agents, servants, employees or anyone claiming under him from encroaching, trespassing onto, cultivating, interfering with and/or in any other manner whatsoever deal with the parcel of land known as Nandi/Kamoiywo/2542 pending the hearing and determination of this application inter partes and thereafter pending the hearing and determination of the Appeal.
- b. THAT this Honourable Court be pleased to stay proceedings in Kapsabet Senior Principal Magistrates Court E & L Case No. 97 of 2018 pending the hearing and determination of the Appeal.
- c. THAT cost of this application be provided for.

Counsel for the applicant served the application but the respondent did not file any reply to the application. Counsel therefore filed submissions in respect of the application and relied on the case of the case of **Bilha Mideva Buluku v Everlvne Kanvere [20161 eKLR]** where the court held at paragraph 12 as follows:

*"When a court is considering an application for injunction pending appeal, it should be guided by the principles as stated by Visram J(as he then was) in the case of **Patricia Njeri & 3 others v National Museum of Kenya [2004] eKLR** namely:-*

- a) an order of injunction pending appeal is a discretionary one and the discretion will be exercised against an applicant whose appeal is frivolous.*
- b) The discretion should be refused where it would inflict greater hardship than it would avoid.*
- c) The applicant must show that to refuse the injunction, would render the appeal nugatory.*

*The court should also be guided by the principles in **Giela v Casman Brown Ltd 1973 EA 358.** "*

Counsel therefore urged the court to grant the orders as prayed as the applicant has met the threshold.

**ANALYSIS AND DETERMINATION**

This application has two limbs, one for an injunction and stay of proceedings in Kapsabet Senior Principal Magistrates court E & L No 97 of 2018. The appellant instituted a suit against the respondent vide a plaint dated 24<sup>th</sup> October 2018 and an application for injunction against the respondent which application was heard and dismissed on 7<sup>th</sup> October 2019. The applicant was aggrieved and filed the instant application. I will therefore deal with the issue of stay of proceedings first before I handle the one on whether the applicant is entitled to an order of injunction.

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.

It should be noted that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the **Civil Procedure Rules** as well the inherent jurisdiction reserved in section 3A of the **Civil Procedure Act**. See **George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992.**

The use of discretion is to ensure proper use of judicial time and resources to dispense justice for the parties. This is also to guard against multiplicity of applications which are meant to delay the finalization of matters which go against the spirit of Article 159 that enjoins the court to hear matters expeditiously. However this is not to turn a blind eye on deserving applications for stay of proceedings.

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 circumstances in the instant case do not present any compulsion that would make the court exercise its discretion to stay the proceedings. This is a matter that is still pending before the Magistrates court and no decision has been arrived at. An order staying these proceedings would be counterproductive and would delay the finalization of this case. No compelling reason or prima facie case has been established to warrant the court to stay the proceedings.

The best option for the applicant is to go to the same court and fast track the hearing and finalization of this suit. The delay that would be occasioned by the stay of the proceedings in the lower court would defeat the purpose of expeditious disposal of matters.

In **Re Global Tours & Travel Ltd HCWC No. 43 of 2000 Ringera, J** (as he then was) held 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 matter, it should bear in mind such factors as the need for expeditious disposal of case, 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.”*

I have weighed the pros and cons of granting or not granting the order of stay of proceedings and is of the view that granting the order would cause more harm than good. Having said that I therefore will also not grant an order of injunction at this juncture. As earlier said the parties should fast track the hearing of the matter in the lower court.

The application is dismissed with no orders as to costs.

**DATED and DELIVERED at ELDORET this 23<sup>RD</sup> DAY OF APRIL, 2020**

**M. A. ODENY**

**JUDGE**