REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

MOMBASA ELC NO.189 OF 2019

(Originally Nairobi HCCC No. 990 of 1999)

KUTIMA INVESTMENTS LIMITED.....PLAINTIFF

VERSUS

MUTHONI KIHARA.....1ST DEFENDANT

COMMISSIONER OF MINES AND GEOLOGY.....2ND DEFENDANT

RULING

(Application for stay of proceedings pending appeal; applicant aggrieved by procedural directions that the plaintiff's application for withdrawal of suit be heard before the applicant's application to amend defence; Notice of Appeal filed outside the 14 days period; competency of appeal doubtful as the Notice of Appeal cannot anchor an appeal to the Court of Appeal; affidavit in support of application sworn by stranger; whether principles to be applied in an application for stay of execution are the same to be applied in an application for stay of proceedings; court holding that the applicable principles are the same; no substantial loss demonstrated by the applicant; application dismissed)

1. The application before me is that dated 7 March 2020 filed by the 1st defendant. The sole substantive order sought in the application is an order of stay of proceedings in this suit pending the hearing and determination of an intended appeal against the directions given on 27 January 2020. The application is opposed.

2. To put matters into perspective, the plaintiff commenced this suit through a plaint filed sometimes in the year 1999 against the applicant and the Commissioner of Mines and Geology. The plaintiff pleaded to be the owner of the land reference number 12199/4 situated in Taita Taveta District having purchased it in the year 1994. The plaintiff claimed that the applicant was undertaking illegal mining activity on the suit land without the plaintiff's permission. The plaintiff further pleaded that the applicant had presented applications to the 2nd defendant for grant of prospecting and mining licences yet it had not issued its consent. In the suit, the plaintiff sought orders inter alia to restrain the applicant from the suit land and for a declaration that the 2nd defendant has no right to grant a licence to the applicant without the consent of the plaintiff. The applicant filed defence claiming to have a right to carry out mining on the said land. There was an application filed to strike out the suit as being incompetent, and through a ruling delivered on 26 April 2005, the plaintiff's suit was struck out. The plaintiff filed an appeal to the Court of Appeal against this ruling. The appeal was heard and the Court of Appeal reinstated the plaintiff's suit in a judgment delivered on 24 April 2015. Subsequently, and since by then the Environment and Land Court had been created through the Constitution of 2010, the suit was transferred to this Court for disposal.

3. On 29 July 2019, the plaintiff filed a Notice of Withdrawal of Suit, said to have been filed pursuant to the provisions of Order 25 Rule 1. On 29 September 2019, the applicant filed Grounds of Opposition, opposing the withdrawal of the suit by the plaintiff, contending inter alia, that such withdrawal can only be by consent or upon grant of leave by the court. While the issue of withdrawal of the plaintiff's suit was still pending hearing, on 15 October 2019, the applicant filed an application dated 14 October 2019. The principal order sought in that application was for leave to amend defence and for leave to file a counterclaim. Within that application, the applicant also sought an order that her application be heard in priority to the plaintiff's Notice to Withdraw suit. On 23 January 2020, the plaintiff filed a formal application seeking the order to have the suit withdrawn.

4. The matter came up before me on 27 January 2020. Mr. Kanjama, learned counsel for the applicant, argued that his application ought to be heard first, whereas Mr. Raiji, holding brief for Mr. Rachuonyo for the plaintiff, submitted that the application to withdraw suit ought to be given priority, or alternatively, the two applications be heard together. I took the position that the application to withdraw suit should be given priority and made the following directions :-

(i) That the application dated 23 January 2020 be heard in priority to the application dated 14 October 2019.

(ii) That pending determination of the application dated 23 January 2020, the application dated 14 October 2019 be stayed.

(iii) That at the moment, I am not persuaded to issue any interim orders of injunction as prayed by the 1st defendant.

(iv) That the 1st and 2nd defendants are at liberty to oppose the motion dated 23 January 2020 by filing a Replying Affidavit and/or Grounds of Opposition within 7 days of today.

(v) The application be heard inter partes on a date to be given (of which the date of 9 March 2020 was given).

5. The applicant was aggrieved by the above directions and filed a Notice of Appeal to the Court of Appeal. I observe that the Notice of Appeal was filed on 12 February 2020, an issue that is of significance as will be seen later. She then filed this application seeking stay of proceedings pending hearing of the appeal. The supporting affidavit is sworn by one Godfrey Kihara Kamau, who deposed to be "one of the directors of the applicant." He has more or less given the history of the matter as I have described hereinabove. He has further averred that if the application for withdrawal of suit is heard and determined prior to the application to amend the pleadings, then the latter's hearing would be reduced into an academic exercise and result to irreparable financial loss. He believes that the applicant has an arguable appeal and it would be in the interests of justice to have a stay of proceedings pending appeal. He has added that the application has been filed timeously.

6. The plaintiff has opposed the application through the replying affidavit of Saul Joel Mwangola, its director. He has deposed that the application is incapable of being granted and that what the applicant is aiming to do is to canvass afresh its desire to prioritise the application dated 14 October 2019. He believes that this is now *res judicata*. He has averred that the directions that I issued are not substantive determining any rights capable of being appealed from and that the applicant is obliged to comply with the court's directions. He has deposed on other issues, which to me, appear to justify the withdrawal of the suit. He has added that there is no prejudice to be caused to the applicant.

7. I have taken cognisance of a supplementary affidavit sworn by Charles Kanjama, who is also counsel on record for the applicant, stating that the appeal has already been filed.

8. I have taken note of the submissions of counsel alongside the authorities that they relied on. I note that in his submissions, Mr. Kanjama, learned counsel for the applicant inter alia submitted that the court needs to look at three principles in addressing an application for stay of proceedings, that is firstly, whether the applicant has an arguable appeal; secondly, whether the appeal will be rendered nugatory; and thirdly, the need for expeditious disposal of cases and optimal use of judicial time. He submitted that the application meets the three tests above. He thought that Order 42 Rule 6 is not all encompassing in an application for stay of proceedings though it would apply in an application for stay of execution. He thus submitted that Section 3A of the Civil Procedure Act, Cap 21, Laws of Kenya, may be incorporated. Mr. Raiji on his part submitted that Order 42 Rule 6 (2) is adequate authority for granting an order of stay and it is those conditions which need to be satisfied.

9. I have considered the application. This is an application for stay of proceedings pending appeal. At the outset, and although it has been demonstrated to me that a Memorandum of Appeal has been filed to the Court of Appeal, I am not satisfied that the applicant has properly exercised her right of appeal. I gave leave to appeal when I issued the directions of 27 January 2020. Pursuant to the provisions of Rule 75 (2), of the Court of Appeal Rules, 2010, a Notice of Appeal needs to be filed within 14 days of the decision appealed from. Rule 75 (1) and (2) are drawn as follows :-

75. Notice of appeal

(1) Any person who desires to appeal to the Court shall give notice in writing, which shall be lodged in duplicate with the registrar of the superior court.

(2) Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal.

10. I will reiterate that the decision appealed from was made on Monday, 27 January 2020. The applicant thus needed to file the Notice of Appeal on or before Monday, 10 February 2020. The Notice of Appeal was filed on 12 February 2020, which I would consider to be out of time. I therefore doubt if the applicant has any competent appeal before the Court of Appeal. When a party has no competent appeal before the Court of Appeal, generally, the court would decline to grant a stay of execution or stay of the proceedings, as it would be pointless to do so, since there is no appeal in the first place that is capable of being argued. It is difficult to present, when one has filed a Notice of Appeal out of time, that he has demonstrated that he has exercised his right of appeal, so as to anchor an application for stay pending appeal.

11. The other issue that makes this application incompetent is that the supporting affidavit is filed by a stranger to the proceedings without there being any explanation. The person who has sworn the affidavit to support the application is one Godfrey Kihara Kamau. In his supporting affidavit, Godfrey Kihara Kamau deposed that he is a director of the applicant. The 1st defendant in this matter is not a corporate body but an individual namely Muthoni Kihara. In responding to this, Mr. Kanjama submitted that this was an error and that it is inadvertent. He submitted that the rest of the affidavit should be allowed. I do not agree. Whereas there could be an error in describing himself as a director, Godfrey Kihara Kamau has not stated why it is him swearing the affidavit, and not Muthoni Kihara. What capacity does he have in this suit since he has not been sued ? There are no rights and obligations sought for or against Godfrey Kihara Kamau and he certainly is not a party to these proceedings. He cannot purport to be the one aggrieved by the directions that I gave on 27 January 2020. If an affidavit was to be filed, then it needed to be filed by Muthoni Kihara. If another person was swearing an affidavit on her behalf, then this needed to be disclosed, and the competency of the person swearing the affidavit and his proximity to the case, also revealed. There being no such explanation, my finding is that this application is supported by an incompetent affidavit which cannot support an application of this nature. Not being properly supported, the application cannot succeed.

12. I believe I have said enough to demonstrate that this application has no legs upon which to stand on and must be dismissed.

13. Nevertheless, counsel made elaborate submissions on the applicable principles in an application for stay of proceedings, and I would not wish to disregard their industry. There were submissions made on whether or not Order 42 Rule 6(2) applies to an application for stay of proceedings. Mr. Kanjama did not think that Order 42 Rule 6 (2) would relate to stay of proceedings, and the principles therein would thus not apply. He submitted that in such scenario the Court would fall back on the provisions of Section 3A of the Civil Procedure Rules. He submitted that in doing so, the Court may consider the principles enunciated by the Court of Appeal under Rule 5 (2)(b) of the Court of Appeal Rules. Mr. Raiji was of a contrary view.

14. To address that, I think I need to first set out the provisions of Order 42 Rule 6 (1) and (2). The same provide as follows :-

> *Stay in case of appeal [Order 42, rule 6.]*
>
> *(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; 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.*

15. I was also referred to Rule 5 (2) (b) of the Court of Appeal Rules of which the entire Rule 5 provides as follows :-

> *5. Suspension of sentence, injunction and stay of execution and stay of further proceedings*
>
> *(1) No sentence of death shall be carried out until the time for giving notice of appeal has expired or, where notice of appeal has been given, until the appeal has been determined.*
>
> *(2) Subject to sub-rule (1), the institution of an appeal shall not operate to suspend any sentence or to stay execution, but the Court may—*
>
> *(a) in any criminal proceedings, where notice of appeal has been given in accordance with rule 59, order that the appellant be released on bail or that the execution of any warrant of distress be suspended pending the determination of the appeal;*
>
> *(b) in any civil proceedings, where a notice of appeal has been lodged in accordance with rule 75, order a stay of execution, an injunction or a stay of any further proceedings on such terms as the Court may think just.*

16. My opinion is that Rule 5 (2) (b) applies strictly to the Court of Appeal. The Court of Appeal Rules are prescribed for the Court of Appeal and not for other courts unless there is a specific reference to other courts. Indeed Rule 2 of the Court of Appeal Rules states that *"Court" means the Court of Appeal and includes a division thereof and a single judge exercising any power vested in him sitting alone*. Thus, this court cannot use the principles in Rule 5 (2) (b) of the Court of Appeal Rules to determine an application for stay pending appeal that has been filed before this court. In interpreting Rule 5 (2) (b) the Court of Appeal has pronounced that the following principles are applicable in determining such application. These are firstly, that the appeal is arguable and not frivolous, and secondly, that unless the court grants stay, the appeal will be rendered nugatory. These principles indeed were pronounced in the various Court of Appeal decisions referred to me by Mr. Kanjama, being the cases of *Judicial Commission of Inquiry into the Goldenberg Affairs & 3 Others vs Kilach (2003)KLR 249*; *Hashmukhlal Virchand Shah & 2 Others vs Investment & Mortgages Bank Limited (2014)eKLR*; and *Mrao vs First American Bank of Kenya Limited & 2 Others (2003)KLR 125*. The Court of Appeal in the above cases was dealing with applications under Rule 5 (2)(b) of the Court of Appeal Rules. The principles pronounced therein do not apply to an application under Order 42 Rule 6.

17. In my view, it is Order 42 Rule 6, and the principles contained therein, which would apply to an application for stay of execution or stay of proceedings made before this Court. To me it matters not that the application is for stay of execution or stay of proceedings. Order 42 Rule 6 will apply to both. Certainly, Rule 6(1) does prescribe that *"no appeal or second appeal shall operate as a stay of execution or proceedings…"*. Thus it will be seen that Rule 6(1) explicitly mentions both stay of execution and stay of proceedings. What Rule 6(1) does, is to first make clear, that the fact that one has filed an appeal does not mean that there will be a stay. Secondly, what the same sub-rule does, is to prescribe where one needs to file such an application. My interpretation is that one is at liberty to file such an application either in the court appealed from or in the court appealed to. If one files the application in the court appealed from, there is a further right to seek stay in the court appealed to, if one is denied in the court appealed from. The one aggrieved by the grant of stay in the court appealed from also has a right to have the order set aside in the court appealed to. One can therefore have a second bite at the cherry if the court appealed from declines to grant stay.

18. Rule 6 (2) prescribes the principles that the court would apply in order to assess an application for stay. It of course states that *"no order for stay of execution…"* and does not explicitly mention a *"stay of proceedings."* However, to me, although the sub-rule does not explicitly

mention a *"stay of proceedings"* the principles prescribed therein, for assessment of an application for stay of execution, would similarly apply to an application for stay of proceedings. In fact, I would go further to state that the provisions in Sub-Rule 2 that apply to an application for stay of execution, will apply, *mutatis mutandis,* to an application for stay of proceedings. I do not agree with Mr. Kanjama, that because Sub-Rule 2 does not explicitly state that it is applicable to an application for stay of proceedings, then that rule does not apply, and the court thus ought to utilise the principles outlined in Rule 5 (2)(b) of the Court of Appeal Rules or fall back on its discretion in Section 3A of the Civil Procedure Act. I have already pointed out above, that Rule 5(2)(b) would not be applicable to this court. As to the application of Section 3A of the Civil Procedure Act, that is a general power given to court, and if the court feels that it is appropriate to use that Section, in order to do justice to the parties, there would be no bar, but the first port of call would be Order 42 Rule 6(2). The principles set out therein are three. Firstly, the applicant needs to demonstrate that he has filed his application without inordinate delay; secondly, the applicant needs to establish that unless the order for stay is granted, he stands to suffer substantial loss; finally, the applicant needs to furnish security as the court may prescribe for the due performance of the decree.

19. I have already stated that this application is not merited at the outset even without going to the principles set out in Order 42 Rule 6(2), but even if I was to apply the said principles, this application would still fail. If a court is not going to dismiss an application for stay for not being filed timeously, the key consideration, in my opinion, would be whether there is demonstration of substantial loss. In the instance of this case, I am not persuaded that the applicant stands to suffer any loss if stay is not granted. The appeal that is sought to be preferred is against a procedural direction that the plaintiff's application for withdrawal be heard first. What loss does the applicant stand to suffer if that application is heard first ? I cannot see any. The application for withdrawal of suit has not been considered and the applicant cannot say that it will succeed or it will fail. We can only know that after the application is heard. Even assuming that the application is heard and succeeds , the applicant (subject to the necessity of leave) can still pursue all the issues, substantively, in the Court of Appeal. I am thus not in any way persuaded that there is any substantial loss that the applicant stands to suffer by having the application for withdrawal heard first. Having not satisfied the principle of substantial loss, the application, even considered on its merits, will still not succeed.

20. I believe that I have said enough to demonstrate that this application must fail. It is hereby dismissed with costs.

21. Orders accordingly.

DATED AND DELIVERED THIS 30TH DAY OF JULY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA