



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
ELC CASE NO. 454 OF 2003

SELINA WEKESA.....PLAINTIFF

-VERSUS-

GEORGE ELLAN WEKESA.....DEFENDANT

RULING

1. The 2nd defendant/Applicant moved the Court in the notice of motion dated 11th December 2014. It is brought under Order 42 rule 6 and Order 51 of the Civil Procedure Rules and Section 1A, 1B, 3 A and 63 (e) of the Civil Procedure Act. The main prayer pending for determination is for an order that; **“the honourable Court to grant an Order for stay of these proceedings pending hearing and determination of the intended Appeal from the ruling of this Court issued on 23rd August 2013”**.
2. The motion drives support from the several grounds listed on the face of the motion and the Affidavit sworn by Abdalla Ali Taib. Inter alia, the Applicant states that he filed a notice of appeal on 23rd August 2013. He also referred this court to the details of the findings made and status of the case **HCCC NO 260 of 2003**. That the Applicant has an arguable appeal, the application was made expeditiously without undue delay. Lastly that if the orders sought are not granted, the Court may be embarrassed by the conflicting findings of the Court of Appeal.
3. The application is opposed by the plaintiff and the 1st defendant vide their replying affidavits filed. The plaintiff deposed that it is 13 years since she filed her suit and gave reasons why the suit should be heard fast as she is sickly having suffered a stroke. She opposed the present application because the Applicant already made an application for review which was dismissed thus alleging that the Applicant is seeking the same orders twice. She denied the deposition that the hearing of this case amounts to duplication of efforts and even if the appeal is successful, no prejudice will be suffered by the Applicant.
4. The 1st defendant deposed that the application is incompetent and defective. He raised issues on illegalities of the transfer documents which I do not think is relevant to the issue before Court now. He also stated that the motion should not be granted as the matter has been pending for long.
5. The advocates for the parties on record put in written submissions which I have had occasion to read and consider. I will make appropriate references to them in the body of this ruling. The applicant has

asked the Court to invoke its overriding objectives and inherent powers to grant the orders sought under Order 42 and the proceedings herein be stayed. From the record, the matter has not proceeded even for pre-trial directions as on the date set for pre-trial directions, the Plaintiff/Applicant filed the application result of whose orders the notice of appeal was lodged.

6. The application was heard and the Judge granted the orders sought in the application dated 12th November 2012 for the reasons contained in the ruling dated 23rd August 2013. Subsequently the 2nd Defendant/Applicant unsuccessfully applied for review of the orders of 23.8.2013. The question I am mandated to determine therefore is whether stay of proceedings can be granted in these circumstances where the order being appealed against is itself a stay.

7. The Applicant was unhappy with the decision of the Judge issued on 23rd August 2013 to the effect that the learned Judge found for the Plaintiff that HCCC No 260 of 2003 is similar to this suit and ordered the suit No 260 of 2003 be held in abeyance and parties to agree to the consolidation of the two suits and be heard together. The Applicant lodged a notice of appeal and shortly thereafter filed an application for review which has since been determined. The 1st defendant submits on this point that the Applicant cannot exercise both the right of review and appeal at the same time under section 80 of Civil Procedure Act and order 45 of the Civil Procedure Rules. That the Applicant lost the right of appeal as soon as he applied for review making this motion incompetent.

8. The plaintiff on her part submitted that this application is made in an attempt to lift the stay orders given in HCCC No 260 of 2003 by the orders of 23rd August 2013. The issue of abatement of the suit is of no relevance here as this is purely stay pending appeal and has nothing to do with merits of either of the suits in question.

9. The Applicant submitted that the nature of the prayers sought does not require a party to prove loss as if the person was applying for stay of execution. It is his submission that staying the proceedings herein will prevent duplication of efforts and save judicial time. He cited the case of **KCB Ltd vs Muturi Gakuo & Co Advocates (2005) eKLR** where Kasango J. stayed taxation stating that if the appeal was successful would be set aside.

10. I have considered all the issues raised. The Judge made two orders but the order relevant to this motion is the one directing HCCC No 260 of 2003 to be held in abeyance (stayed) until this suit is heard and determined. On consolidation, he left it open to the parties to agree. The effect of that ruling allowed this suit to be heard first. The Applicant does not want the hearing to proceed until his appeal is heard arguing that the suit that is being stayed is concluded. The explanation given by the applicant as constituting substantial loss are in terms of the decree obtained in No 260 of 2003 and secondly the unreasonableness of being put to participate in these proceedings in a matter in his view where his claim is determined.

11. The issues to be considered in granting stay of proceedings was set out by Ringera J in the case of **Global Tours & Travels Ltd, Nairobi Winding Up cause no 43 of 2000** where the learned judge stated thus;

“As I understand the law, whether or not to grant a stay of proceedings in a decree or an 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 interests of justice to order a stay of proceedings and if it is, on what terms it should be granted.... And in considering those matters it should bear in mind factors such as the need for expeditious disposal of cases, prima facie merits of the intended appeal whether it is arguable, the scarcity and optimum utilization of judicial time and whether the application has been brought expeditiously.”

12. The record does reveal that although the notice of appeal was lodged on August 2013, the same has not been prosecuted to date probably because of the application for review that was subsequently filed and heard. Yet the applicant submits that his application was brought without undue delay? The order being

appealed against was rendered on 23.08.2013 while this application was filed 1 year later. In this Court's view, this is unreasonable delay and there fails this test.

13. The applicant did not move the Court in due time because he was enjoying stay orders during the pendency of the application for review whose decision he has also lodged an appeal against. In effect the Applicant wants to enjoy stay orders for limitless time without taking into consideration the prejudice being occasioned to the plaintiff or the 1st defendant. As to whether he lost the right to appeal, the 1st defendant can take up that point before the Court of Appeal since section 80 of the Act is silent on it.

14. Has the Applicant established a prima facie case or an arguable appeal? This suit is yet to commence. The applicant's pleadings and submissions indicated that issues in **HCCC NO 260 of 2003** had proceeded upto the Court of Appeal which court is said to have rendered its judgement on 25th July 2013 indicating that suit no 260 of 2003 abated on 25th July 2007 and has never been rescuciated. He asked the court to take cognizance of that fact and therefore the Court cannot stay orders or any orders in relation to that suit.

15. If this court took cognizance of the fact that **HCCC no 260 of 2003** abated then this Court wonders loudly why the proceedings in this suit should be stayed. Is the Applicant breathing hot and cold at the same time? In my understanding, the orders of the judge of 23rd August 2013 only held proceedings in HCCC no 260 of 2003 in abeyance. It did not set aside the judgement in that suit neither did he order for consolidation. However on the basis that he is challenging the order staying his suit thus denying the fruits of his judgment, I find that is a prima facie case.

16. Having found that the Applicant has an arguable appeal, on what terms should the order of stay of proceedings be granted that would serve the interest of justice? The court has discretion to make appropriate orders that serves the interest of justice and the orders which I deem just in the circumstances is to stay proceedings in both this suit and suit no HCCC no 260 of 2003 pending the determination of the Appeal. In reaching this conclusion, I take note of the following factors :

i) The cases in the Court of Appeal currently are quickly disposed off because we have a permanent bench of the Court of Appeal in the coast region.

ii) The Plaintiff lives in the suit premises and It would be unfair to stay the Plaintiff's suit and allow the HCCC No 260 of 2003 to proceed with execution process.

iii) Further lifting the order of stay granted by my brother judge would be equivalent to me sitting on appeal over a decision of Judge of concurrent jurisdiction which is improper and unlawful.

17. In conclusion, I allow the application on terms for the reasons set out above. Each party to bear their costs of the motion.

Ruling dated and delivered at Mombasa this 3rd day of March 2016

A. OMOLLO

JUDGE