



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MILIMANI

ELC CIVIL NO. 1180 OF 2014

MUCHANGA INVESTMENTS LTD.....PLAINTIFF

VERSUS

HABENGA HOLDINGS LTD.....1ST DEFENDANT

JINA ENTERPRISES LTD.....2ND DEFENDANT

TELESOURCE COM LTD.....3RD DEFENDANT

DIRECTOR OF SURVEYS.....4TH DEFENDANT

DIRECTOR OF PHYSICAL PLANNING

MINISTRY OF LANDS & HOUSING.....5TH DEFENDANT

REGISTRAR OF TITLES.....6TH DEFENDANT

CHIEF LAND REGISTRAR.....7TH DEFENDANT

JOHN MUGO KAMAU.....8TH DEFENDANT

CATHERINE NGANGA FOR THE

ESTATE OF CARMELINA MBURU.....9TH DEFENDANT

BARCLAYS BANK

OF KENYA LTD.....1ST INTERESTED PARTY

RULING

1. This is a ruling in respect of a notice of motion dated 12th February, 2019 brought by the 3rd Defendant/Applicant. The application seeks stay of proceedings before this Court pending the hearing and determination of an appeal the Applicant intends to lodge in the Court of Appeal.

2. A brief background of this application is that on 23rd November 2018, a director of the Applicant, Mr. Josphat Milimu Konzolo took to the witness box and started giving evidence. He completed his evidence in chief and was partly cross-examined before this case was adjourned to 30th November, 2018. On 30th November 2018, cross-examination could not take off because Mr. Konzolo's Advocate was not available as it was said that he had taken his sick wife to hospital. Hearing was adjourned to 14th December, 2018.

3. Before the hearing could resume on 14th December 2018, Mr. Odera for the Applicant raised a Preliminary Objection on the ground that the documents which the 4th to 7th Defendant/Respondents were relying on contained evidence gathered by the Ethics and Anti-Corruption Commission detectives when the Commission was not properly constituted. He therefore argued that the evidence had been illegally obtained and asked the Court to expunge the documents.

4. In a ruling delivered on 24th January 2019, the Preliminary Objection by the Applicant was dismissed with costs. It is as a result of the dismissal of the Preliminary Objection that the Applicant now wants proceedings before this Court stayed as the Applicant moves to the Court of Appeal against the ruling. The Applicant contends that if stay of proceedings is not granted, its appeal to the Court of Appeal would be rendered nugatory. The Applicant argues that the intended appeal has high chances of success. The Applicant further argues that the stay of proceedings will not prejudice any party as there is already an injunction in place preserving the suit property.
5. The Applicant contends that the appeal process is likely to take long and if proceedings were allowed to proceed, it is likely to suffer substantial loss as the suit property which it is pursuing is worth several billions and the impugned documents will be prejudicial to its case.
6. The Applicant's application is opposed by the Plaintiff/Respondent through a replying affidavit sworn by Dimitri Da Game Rose sworn on 28th February, 2018. The deponent of this affidavit is the general manager of the Plaintiff/Respondent Company. He contends that the Applicant has not met the threshold provided under Order 42 Rule 6 (2) on which the Applicant is relying. He further contends that the documents which are being impugned were filed by consent with leave of Court on 10th July, 2018 and that the Applicant never raised any issue with the same until after the Applicant's director had been cross-examined after he had testified in chief. The deponent also takes issue with the fact that the application for stay of proceedings was brought 21 days after the impugned ruling had been delivered.
7. The Plaintiff/Respondent argues that the Applicant has not demonstrated any loss that it will suffer if stay is not granted and that the Applicant will have a chance to appeal after the conclusion of the hearing as what the Applicant is pursuing is only an interlocutory application. The Plaintiff/Respondent further argues that the Court ought to take into account the overriding objective under sections 1A, 1B of the Civil Procedure Act which enjoin the Court to deal with Court matters expeditiously and efficient utilization of resources.
8. The Attorney General (AG) on behalf of the 4th to 7th Defendants/Respondents opposed the Applicant's application based on grounds of opposition filed in Court on 1st March, 2019. The AG contends that the instant application is only intended to delay the finalization of this case; that this case has been pending in Court since 2014; that the Applicant has an opportunity to be heard after conclusion of the main suit; that the Applicant's application is premised on wrong provisions of law and that the impugned documents have been on record since 5th September, 2016 and 10th July, 2018.
9. The AG further contends that this is not the proper forum where the Applicant should have filed this application as the Court has already rendered a ruling and is functus officio.
10. The Applicant's application was supported by Mr. Arusei for the 9th Defendant and Mr. Waweru for the executors of the Will of Camellina Mburu. I have carefully considered the Applicant's application as well as the opposition to the same by the Plaintiff/Respondent as well as the AG representing the 4th to 7th Respondents. The only issue for determination in this matter is whether these proceedings should be stayed.
11. The principles to be considered when dealing with stay of proceedings were succinctly stated in the case Global Tours and Travels Limited which was quoted by Justice Mativo in the case of *Masisi Mwita Vs Damaris Wanjiku Njeri [2016]eKLR* where it was stated as follows:-

“ ...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. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interest of justice to order a stay of proceedings and if it is so, 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditions disposal of the case, the prima facie merits of the intended appeal in the sense 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 timeously.”
12. In considering whether to grant stay of proceedings or not, I will examine the circumstances of this case in light of the principles set out in the Global Tours and Travels Ltd case (Supra). The suit herein was filed in September, 2014. The Plaintiff had testified and closed its case. The second Defendant has not been participating in the proceedings. The third Defendant had started testifying. The director of the third defendant had completed his evidence in chief. It is after the cross-examination had started, that the objection to the documents being impugned was raised. The impugned documents had been on record since September, 2016 and some since 10th July, 2018. The Applicant only raised the Objection to the same on 14th December, 2018. A ruling on the objection was delivered on 24th January, 2019. The application for stay of proceedings was not filed until after three weeks later that is on 14th February, 2019.
13. If the Applicant was serious about the documents, it would have raised the objection when the first batch was filed in September, 2016 or when the second batch was filed on 10th July, 2018. The documents were filed on 10th July, 2018 with concurrence of the Applicant's counsel and with leave of Court. It is not clear why no issue was raised in good time. As is aptly captured in Hasbury's Laws of England 4th Edition Vol 37 pages 330-332, stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case and therefore the Court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue.”
14. In the instant case, the intended appeal by the Applicant would in my view not be rendered nugatory. If the Applicant's appeal succeeds, the import of the success would mean that the impugned documents would not be used in considering the decision which the Court will give in the final judgment. In that regard, the Applicant's appeal will not be rendered nugatory and the Applicant will not suffer any loss.
15. Ordinarily, it is not for this Court to weigh whether the intended appeal is arguable or not. That is the preserve of the Court of Appeal

but the application having been filed before this Court as opposed to the Court of Appeal, it is irresistible to comment on its success in light of the decision on which the Applicant relied on. The Applicant had relied on the Court of Appeal decision in ***Michael Sistu Mwaura Kamau Vs Ethics & Anti-Corruption Commission & 4 Others [2017]eKLR*** where the Judges observed that the appellant's appeal had succeeded on a technicality which was that the recommendation to charge the Appellant was made when the Commission was not properly constituted and not that evidence had been obtained illegally as the Applicant herein had argued. In the impugned ruling, I had clearly stated that the evidence contained in the impugned documents had been obtained when the Commission was properly constituted and therefore there was no basis upon which the Court would find that the evidence was illegally obtained. This being the case, I do not see which arguable case the Applicant has before the Court of Appeal.

16. Based on the above analysis, I find that the Applicant's application lacks merit. The same is hereby dismissed with costs to the Plaintiff/Respondent as well as the 4th to 7th Defendants/Respondents.

It is so ordered.

Dated, Signed and delivered at **Nairobi** on this **28th** day of **August, 2019**.

E.O OBAGA

JUDGE

In the presence of M/s Darr and Mr Wena for Mr Miller for Plaintiff, Mr Otweya for Mr Gikera for 3rd defendant, Mr Kamau for 4th to 7th defendants and Mr Wena for M/s Jalega for interested party

Court Clerk : Phyllis

E.O OBAGA

JUDGE