



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

E.L.C PETITION NO. 22 OF 2013

CHARLES KIUNGA M'MBOROGI (Suing as the administrator of the estate of

M'KIUNGA M'MBOROGI- deceased).....PETITIONER/APPLICANT

VERSUS

MERU UNIVERSITY OF SCIENCE & TECHNOLOGY & 3 OTHER.....RESPONDENTS

RULING

1. The applicant's Notice of Motion dated 7.12.2018 is brought under order 42 rule 6 of the Civil Procedure Code, sections 13 and 19 of the Environment and Land Court Act and Articles 10, 25 (c), 48, 50 (1), 159 and 162 (2) (b) of the constitution, where the applicant is seeking the following orders;

- a. Spent.
- b. That pending inter-parties hearing of the application, further proceedings in this matter may be stayed.
- c. That pending hearing and determination of the intended appeal in the Court of Appeal at Nyeri, further proceedings in this matter be stayed.
- d. That costs of this application be provided for

2. This application was supported by the grounds on the face of it and the affidavits of Charles Kiunga M'Mbogori who deponed that this application emanates from a ruling dated 4th October 2018 denying him a chance to testify orally and impeach the suspects documents relied on by the respondents. He has already filed and served a notice of appeal which was lodged without delay. It is his belief that unless the proceedings are stayed he would be prejudiced as the file would be dispatched to Hon. Justice Mwangi Njoroge for the writing of the judgement.

3. The application was opposed by the 1st Respondent via the Replying affidavits of Prof. Romanus Odhiambo the vice chancellor of the 1st respondent dated 7th February 2019 and 20.3.2019. This respondent has argued that the Notice of Motion by the applicant is incompetent and has no merits, that the matter has been delayed and that the Applicant/petitioner is out to procrastinate and abuse the court process to ensure that this matter is never concluded

4. The 3rd and 4th respondents have also opposed the application in their grounds of opposition dated 7.2.2018 where they state that the application is bad in law because after the ruling of 4th October 2018, the court became functus official and therefore this court has no jurisdiction to entertain the present application. In addition there is no law which allows a party to stop the court from writing a judgement. The intended appeal therefore cannot operate as a stay of proceedings.

5. The brief history of the litigation herein is that on 27/6/2018 this petition came up for hearing before Judge Njoroge M, whereby, the petitioner raised the issue of being heard by way of oral evidence, but the court ordered that the suit be heard by way of written submissions instead. The applicant thereafter filed an application to set aside the orders of 27.6.2018 of which I delivered a ruling on 4th October 2018 dismissing the applicant's application. This file was therefore to be forwarded to Judge Njoroge for Judgment writing.

6. I have carefully perused the application, affidavits, submissions and the record in its entirety and the issue to be determined herein is **whether to grant a stay of proceedings herein pending the hearing and determination of the intended appeal in the court of appeal?**

7. In Global Tours & Travels Limited; Nairobi HC Winding Up Cause No. 43 of 2000, Gikonyo J Opined as follows;

“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”

8. Similarly, in Kenya Power & Lighting Company Limited v Esther Wanjiru Wokabi [2014] eKLR the Court distinguished stay of proceedings from stay of execution. It held that the courts discretion in deciding whether or not to grant stay of proceedings as sought in this application must be guided by any of the following three main principles;

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.

9. Turning to the application herein, the applicants/petitioners have filed a notice of appeal against the ruling of 4th October 2018. The said ruling was in respect of an order given by this court on 27th June 2018 where the court directed that this matter be heard by way of written submissions. In the ruling this court stated that;

“It is also not lost on this court that after the ruling of the court on 27. 6. 2018 counsel for the applicant (petitioners) prayed for leave to introduce their documents by way of an affidavit. The court granted them their wish. The further affidavit of the petitioners was to be filed with submissions within 30 days. The applicants did not comply with this direction. Instead they have resulted to filing the present application four and a half years since the time of filing this suit”

10. This court having determined that the orders dated 27th June 2018 should be complied with, and having given the petitioner an opportunity to comply with the said orders, the petitioner/applicant cannot now seek a stay of proceedings in this petition as it will amount to this court sitting as an appeal on its own orders. In Ahmet Ali Gure v Daud Sethe Diff [2009] eKLR, the court held that;

“The right position in my view is that, any party aggrieved by an order on appeal by the High court should pursue the same in the Court of Appeal which then has the appellate jurisdiction to correct any adverse situation that may be complained of by any party ... the court has therefore become functus officio and it would be against the norms and principles of law to revisit what it has concluded (emphasize). In fact this will lead to prejudice against the respondent. I am persuaded therefore that, I have no jurisdiction to entertain an application of this nature but, this is not to say the appellant’s doors are closed. There is definitely room for him to pursue the matter in the Court of Appeal where all the matters related to the proceedings herein may be addressed. Accordingly, this application is dismissed with costs to the Respondent.’

11. Guided by the above authorities, the principle of *functus officio* prevents this court from re-opening the matter as the court had pronounced itself regarding the order of 27th June 2018 to the effect that the said order ought to be complied with. It is also not lost to this court that though the applicant intends to appeal against the court’s orders of 4.10.2018, the orders which directed the parties to file submissions instead of proffering oral evidence were actually given on 27.6.2018 of which the said orders were not challenged by way of an appeal.

12. Therefore, this court does not have jurisdiction to deal with this application and the same is dismissed with costs to the applicant/petitioner. Pursuant to the orders of 27.6.2018, this file is to be forwarded to Judge Njoroge Mwangi for the writing of the Judgment.

DATED, SIGNED AND DELIVERED IN OPEN COURT AT MERU THIS 9TH DAY OF OCTOBER, 2019 IN THE PRESENCE OF:-

C/A: Kananu

Muriithi holding brief for C.P Mbaabu for petitioner

Nyenyire holding brief for Muriuki for 2nd respondents

AG for 3rd respondent

Petitioner

HON. LUCY. N. MBUGUA

