



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELCA NO. 17 OF 2019

BLUSHING BEACH LIMITEDAPPELLANT

-VERSUS-

1. RUTH WANGUI DEYA

2. PHILEMON BERNARD ODHIAMBO WASHINDU..... RESPONDENTS

AND

1. ABDALLA SWALEHE RENGWA

2. HASSAN SWALEHE RENGWA

3. LAND REGISTRAR KWALE

4. HON. ATTORNEY GENERAL.....INTERESTED PARTIES

RULING

1. The application for consideration is the Notice of Motion dated 25th October, 2019 and stated to be brought under Order 42 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B & 3A of the Civil Procedure Act. In the application, the applicant seeks orders of stay of proceedings and/or further proceedings in Kwale Land Cause 4 of 2019 and/or any action pending hearing and determination of the appeal against the ruling made by Hon. Mrs. Betty Koech on 17th May, 2019, plus costs of the application.

2. The application is premised on following grounds:

1. That the Hon. Betty Koech PM delivered a ruling on 17th day of May 2019.

2. That if a stay of proceedings are not granted, the Appellant/Applicant stands to suffer injustice.

3. That the Appeal herein has a reasonable chance of success and if the lower court proceedings proceed concurrently with the appeal, it will be rendered nugatory.

4. That it would be in the interest of justice that stay pending the hearing and determination of this application and the appeal be granted.

3. The application is supported by the affidavit of Jennifer Shamala sworn on 25th October 2019, in which she has deposed that the 1st and 2nd Respondents instituted in the Chief Magistrate Court at Kwale Land Case No.4 of 2019 on 30th January 2019 vide a plaint dated 29th January, 2019. That the 1st and 2nd Respondents concurrently filed an application dated 29th January 2019 under certificate of urgency for orders that the 1st, 2nd and 3rd defendants be temporarily restrained from encroaching into, trespassing, alienating, occupying, erecting buildings or structures or in any way dealing with or interfering with the suit property pending the hearing and determination of the application as well as the suit. In response to the plaint and the application, the applicant filed a statement of defence and counter-claim, a supporting affidavit and a preliminary objection. That the preliminary objection raised various issues of law specifically; the 3rd defendant is the legally registered proprietor of the LAND REFERENCE NUMBER KWALE/MSAMBWENI 'A'/2909 MEASURING 1.10 Ha bearing a Certificate of title issued on 2nd Day of 2018 (sic) by the Land Registrar at Kwale which is the subject of the suit; that the said application is

in flagrant and incurable breach of Section 26 of the Land Act; that the said application is in any event premature and therefore a non-starter; that the pleadings are incurably defective as they have been drawn by unqualified persons and are not appropriately deponed; that the prayers as sought in the said application are frivolous, vexatious and abuse of the Court process.

4. The applicant states that on 17th May, 2019, the Preliminary Objection was dismissed for lack of merit by Honourable Mrs. Betty Koech SRM. Having been dissatisfied with the ruling delivered on 17th May, 2019, the Applicant filed an appeal pursuant to Order 42 Rule 1 of the Civil Procedure Rules as the preliminary objection touches on the substance of the suit. That the Lower court matter has a hearing date set for the 4th of December 2019. It is the Applicant's contention that the risk of the matter proceeding concurrently with the appeal will be that the appeal will be rendered nugatory owing to the fact that the preliminary objection touches on the substance of the suit. The applicant avers that the appeal filed has a reasonable chance of success and therefore if the lower court matter proceeds, the success of the Appeal may be rendered a mere academic exercise and that it is an affront to the rule of law to render a decision made by any court nugatory or worthless. That it is in the interest of justice that a stay of proceedings in the lower court be granted pending the hearing and determination of the appeal.

5. In opposing the application, the respondents filed grounds of opposition on the following grounds:

- 1. That the appellant's appeal is frivolous, vexatious and has no probability of success since the preliminary objection raised by the appellant in Kwale Civil ELC Case No. 4 of 2019 was based on contested issues of facts as opposed to issues of law.**
- 2. That the appellant will not suffer any prejudice whatsoever if Kwale Civil ELC case No.4 of 2019 proceeds for hearing and disposal on its substantive merits as the Appellant is not barred from participating in the proceedings.**
- 3. That the appellant has not proved beyond reasonable doubt that there exists any sufficient cause for Kwale Civil ELC Case No.4 of 2019 not to proceed for hearing and determination.**
- 4. That allowing the application in the circumstances of this case would not only be against the interests of justice but will also frustrate the court's overriding objective of facilitating affordable and expeditious resolution of civil disputes.**
- 5. That the application is just a ploy by the Appellant to delay the hearing and determination of Kwale Civil ELC Case No. 4 of 2019 on its substantive merits.**
- 6. That in view of the foregoing, the notice of motion dated 25th October 2019 is devoid of merit, incompetent and ought to be dismissed with costs to the Respondents.**

6. I have considered the application and the submissions made. This application is for stay of proceedings of Kwale CMC Land Case No. 4 of 2019 pending hearing of the appeal herein. The appeal arises out of a preliminary objection that was dismissed by the subordinate court. Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice depending on the justice of each case. Stay of proceedings should not be confused with stay of execution pending appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore the test for stay of proceeding is high and stringent.

7. In the case of in the matter Global Tours & Travels Limited, Nairobi HC Winding Up Cause No. 43 of 2000 (unreported), Ringera, J (as he then was) persuasively stated thus:

“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. See also illumination on the threshold for stay of proceedings in the following passages in Halsbury's Law of England, 4th Edition, Vol. 37 page 330 and 332, that:

“The stay of proceedings is a serious, grave and fundamental interruption 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 all reasonable doubt ought not to be allowed to continue. This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.” “It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on these grounds must show not merely that the Plaintiff might not, or probability would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

9. In the instant case it is my considered opinion that it would not be in the interest of justice to exercise the court's discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter that is pending in the lower court. I am not satisfied that the Applicant has demonstrated that it has an arguable appeal to warrant the issuance of the orders being sought. The ruling appealed against was only in respect of a preliminary objection. The main issues in the lower court case are yet to be determined. This includes the respondents' application, the respondents' case and the applicant's counter-claim.

10. Accordingly, the application is devoid of merits and is dismissed with costs to the respondents.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA this 2nd day of December 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Makuto holding brief for Mkok for 3rd and 4th interested parties.

No appearance for appellant

No appearance for respondents

No appearance for 1st and 2nd interested parties

Yumna Court Assistant

C.K. YANO

JUDGE