



**Chumo v Onsase & 4 others (Environment & Land Case
74 of 2016) [2024] KEELC 211 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 211 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 74 OF 2016
MC OUNDO, J
JANUARY 25, 2024**

BETWEEN

ALEXANDER KIPNGENO K. CHUMO PLAINTIFF

AND

JOSEPHINE KERUBO ONSASE 1ST DEFENDANT

THE LAND REGISTRAR, BOMET 2ND DEFENDANT

THE HON. ATTORNEY GENERAL 3RD DEFENDANT

AFRICA GOSPEL CHURCH (KENYA) 4TH DEFENDANT

RADIANT HARDWARE LIMITED 5TH DEFENDANT

RULING

1. By a Notice of Motion dated 16th June 2023 brought under the provisions of Sections 3 and 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) and all enabling provisions of law, the Plaintiff/Applicant herein sought that there be an order for stay of proceedings herein pending the hearing and determination of an Appeal lodged on 29th March, 2023. He also sought for costs of the Application.
2. The said Application was based on the grounds therein and the Applicant's supporting affidavit sworn on the 16th June 2023 to the effect that on 14th March, 2023, the court delivered a ruling dismissing his application to re-open his case for the sole purpose of inviting the County Land Registrar, Bomet County to produce the Green Cards and Mutation Forms for LR No Kericho/Silibwet/818 and that being dissatisfied with the said ruling, he had instructed his Advocate on record to institute an Appeal.
3. That the said Advocate requested for and paid for the certified copies of the proceedings and ruling to enable them prepare and file a record of Appeal wherein the typing of the said proceedings was yet to be concluded.



4. That his Appeal had a reasonably high chance of success hence were the instant matter to proceed for determination, the said Appeal would be rendered nugatory. That it was in the interest of justice that an order of stay of proceedings be granted pending the hearing and determination of the said Appeal.
5. The Application was opposed by the 1st and the 5th Respondent's Replying Affidavit dated the 17th July, 2023 sworn by Josephine Kerubo Onsase, the 1st Respondent herein to the effect that on 8th March, 2018, the Applicant herein informed the court that he had complied with Order 11 of the Civil Procedure Rules and as a result he had requested for a hearing date wherein after, on 18th April 2018 by consent, parties had fixed the hearing date for the 5th July, 2018.
6. That on the said 5th July, 2018, the Applicant while testifying as the first witness for the Plaintiff, presented all the documents he had sought to rely on which included the mutation forms for Kericho/Silibwet/817 and Kericho/Silibwet/818 which were marked as Pf exh 7 and 6 respectively. Subsequently, on 11th October, 2022, the Applicant and his witnesses closed their case after testifying and producing all the documents they wanted to rely on.
7. She further deponed that on 11th October, 2022, the 1st and 5th Defendants/Respondents requested for issuance of summons to the Land Registrar to appear and produce the defence documents that had been marked for identification wherein subsequently, on 16th October, 2022, the Land Registrar, Bomet County complied and produced among other documents, the Mutation form for Kericho/Silibwet/817 as well as the green cards for Kericho/Silibwet/1470 and Kericho/Silibwet/1471.
8. That throughout the hearing, nothing prevented the Applicant from seeking the leave of the court to summon the Land Registrar to produce his documents especially on the date that the 1st and the 5th Defendants sought summons to issue to the said Land Registrar, if at all it was necessary. Consequently, the 1st and the 5th Defendants testified and closed their case and therefore, allowing the re-opening of the Plaintiff's case would be prejudicial to their case as it would amount to allowing the Applicant to fill in the gaps.
9. She deponed that it was not clear as to which mutation forms the Applicant sought to call the Land Registrar to produce since the Mutation forms for Kericho/Silibwet/817 and Kericho/Silibwet/818 had already been produced during the hearing. Further that in the Applicant's list of documents, the Green card for Kericho/Silibwet/817 and Kericho/Silibwet/818 had been not been listed as documents they had sought to rely on hence his application to call the Land Registrar to produce the same indicated that he was on a fishing expedition.
10. That an order for stay of proceedings was discretionary and ought to be granted only in deserving cases. The instant application was not deserving of the same. That the Applicant had not established whether he had an arguable Appeal since he had not even filed a draft Memorandum of Appeal to show the court the ground(s) on which he wished to challenge the court's decision and there had been no sufficient cause demonstrated. That the Application had been filed after an inordinate delay of a period of over 3 months without offering a plausible explanation for the delay. That the Applicant thus had not met the threshold for the grant of stay of proceedings.
11. That it would not be in the interest of justice for the court to grant stay of proceedings as the same would only serve to delay the fair finalization of the substantive suit to the detriment of the 1st and the 5th Respondents. That the instant Application was incompetent, bad in law, frivolous or vexatious, fatally defective and/or an abuse of the court process and the same should be dismissed with costs.



12. On 26th July, 2023, directions were taken for the Application to be disposed of by way of written submissions to which parties complied and filed their respective written submissions to which I shall herein summarize as follows:

Applicant's submissions.

13. In support of his Application, the Applicant vide his written submissions dated 9th October, 2023 summarized the factual background of the matter before framing the issues for determination as follows;
- i. Whether the proceedings herein should be stayed pending the hearing and determination of Nakuru Court of Appeal Civil Appeal No E104 of 2023.
 - ii. Who should bear the costs of the Application.
14. On the first issue for determination, the Applicant while relying on the provisions of Order 42 Rule 6 the *Civil Procedure Rules* submitted that the court had the power to stay the proceedings herein pending the hearing and determination of the Applicant's Appeal as guided by the established principles as to whether the Applicant had an arguable Appeal and whether the Appeal would be rendered nugatory, if successful.
15. That the Appeal, which sought to reverse the court's decision dismissing the Applicant's application to re-open his case, was instituted on 29th March, 2023 when the Applicant filed his Notice of Appeal. Further that the question as to whether or not the court exercised its discretion judiciously in refusing to re-open the Applicant's case was a question to be argued on Appeal hence the Plaintiff/Applicant had an arguable Appeal. That an arguable Appeal needed not be meritorious on the outset, but to have grounds that could be argued on Appeal.
16. That the Plaintiff/Applicant's Appeal was interlocutory in nature hence incase the Appeal was successful and the Plaintiff/Applicant's case re-opened, his Appeal would certainly be rendered nugatory should the instant case proceed to its conclusion and the final judgment rendered in the absence of the two crucial documents intended to be produced. That there would be no further recourse for the Plaintiff/Applicant and an irreparable injustice would have been occasioned. That the Defendants/Respondents stood to suffer no prejudice whatsoever were the court to await the decision of the Court of Appeal before embarking on further proceedings. Reliance was placed on decided case in *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR, to submit that the instant application satisfied the principles for the grant of stay of proceedings.
17. He reiterated that the instant application was presented expeditiously before any adverse step could be taken in the proceedings herein, the decision to be Appealed against having been rendered on 14th March, 2023 and directions given for the matter to be mentioned for submissions on 20th June, 2023, subsequently, the Plaintiff/Applicant had requested for certified copies of the proceedings on 27th March, 2023 and instituted his Appeal on 29th March, 2023 but as of 16th June, 2023, the typing of the proceedings was still ongoing prompting the Plaintiff/Applicant to file the instant application on 20th June, 2023 before any further directions could be given.
18. The Applicant further submitted that the proceedings had been certified ready for collection on 25th July, 2023 which enabled him to prepare and file his Record of Appeal on 4th August, 2023 thus the instant application was presented expeditiously.
19. On the costs of the application, the Applicant relied on the Provisions of Section 27(1) of the *Civil Procedure Act* to submit that although the same was discretionary, the instant application was



procedural and had not been brought at the fault of any party hence the costs of the application should be in the cause.

20. In conclusion, the Applicant submitted that the Notice of Motion dated 16th June, 2023 was merited and ought to be allowed since there existed exceptional circumstances to warrant stay of proceedings pending the hearing and determination of Nakuru Court of Appeal Civil Appeal No E104 of 2023.

1st and 5th Defendants/Respondents' Submissions.

21. The 1st and 5th Respondents, in opposition to the Applicant's application, filed their submissions dated 1st August 2023 in which they summarized the factual background of the matter before framing one issue for determination to wit, whether the court should grant the order of stay of proceedings.
22. The 1st and 5th Respondents, while placing reliance on the decided case of *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 (sic) and the Provisions of Articles 159 (2) (a), (b), (c) and (d) of the Constitution and Sections 1A and 1B of the *Civil Procedure Act* submitted that in applications like the instant one, the court ought to consider factors such as prompt resolution of cases, whether the intended Appeal was arguable, and whether the application had been brought timeously.
23. They reiterated that stay of proceedings was a grave action that significantly disrupted a litigant's ability to pursue their case, by infringing upon the fundamental rights of accessing justice, being heard promptly and ultimately receiving a fair trial, hence the test for granting the same was high.
24. It was their submission that an order to stay proceedings should only be issued when there was unquestionable evidence that the case should not be allowed to proceed because it was either frivolous, vexatious or harassing. That the said case must be clearly groundless without any legal or equitable basis for it, which was not the position in the instant case. Reliance was placed on the decision in the *Kenya Wildlife Service v James Mutembei* [2019] eKLR where the court was mandated to promote and facilitate the overriding objective, which is to provide fair, prompt, proportionate and affordable justice to all parties involved in Civil proceedings.
25. The 1st and the 5th Respondents, while relying on the decided cases in *Stanley Kinyanjui v Tony Ketter & 5 Others* [2013] eKLR and *University of Nairobi v Ricatti Business of East Africa* [2020] eKLR submitted that the Applicant in his application had not raised a single bonafide issue that he wished to argue on in his intended Appeal and neither had he filed a draft Memorandum of Appeal to show the court the ground on which he wished to challenge the ruling of the court which thus made his Appeal frivolous.
26. The 1st and 5th Respondents reiterated the contents in their Replying Affidavit as to the background of the instant application and relied on the case of *Raila Odinga & 5 Others v IEBC & 3 others* [2013] eKLR (sic) to submit that the court had a constitutional mandate to ensure that a trial would be fair and therefore retained the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules.
27. Reliance was also placed on the case of *Muchanga Investments Limited v Safaris Unlimited (African) Ltd & 2 Others* [2009] eKLR to reiterate that the intended Appeal was a planned maneuver by the Applicant which went against the timely, cost-effective and proportionate resolution of disputes in order to ensure access to justice by parties. Further that, due regard must be given to time in order to avoid delaying the matter any further.
28. As to whether there was inordinate delay in filling the instant Application, the 1st and 5th Respondents while relying on the decided cases of *Khalifa v Wafula Chebukati & 2 others* (Civil Application E124 of 2022) [2022] KECA 1024 (KLR) (23 September 2022) (Ruling) and *Margaret Kaguri & another*



v Purity Kagendo [2020] eKLR, submitted that a delay of 3 months could be deemed inordinate when there was no reasonable explanation, as was in the instant case. They reiterated that the instant Application had been filed after an inordinate delay since the impugned ruling was delivered on 14th March 2023 and the Applicant had approached the court after a period of over 3 months without offering a plausible explanation for the delay.

29. They thus submitted that it would not be in the interest of justice for the court to exercise its discretion and grant stay of proceedings as the same would only delay the fair finalization of the substantive suit to the detriment of the 1st and the 5th Respondents.
30. In conclusion, the 1st and 5th Respondents reiterated that from the foregoing, the instant Application was incompetent, bad in law, frivolous or vexatious, fatally defective and or an abuse of the court process and the same should be dismissed and/or struck out with costs because the Applicant had not met the high threshold established for the grant of stay of proceedings.

Determination.

31. I have considered the Application and submissions thereto, the issue for determination which arises therefrom is whether an order for stay of proceedings can issue pending the determination of an intended Appeal.
32. The Application is premised on Order 42 Rule 6 of the *Civil Procedure Rules* which specifies the circumstances under which either the trial court or an appellate court may order stay of execution or proceedings pending an Appeal.
33. Ringera J (as he then was) when confronted by a similar Application in the case of Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000 held 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” (emphasis added)
34. In this regard thereof, the court’s 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 has a prima facie arguable Appeal.
 - b. Whether the Application was filed expeditiously and/or
 - 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.
35. It is important to point out that an arguable Appeal is not one that will necessarily succeed but one which raises triable issues. That for the Applicant to succeed on an Application for stay of proceedings, he must demonstrate that he has an arguable Appeal. That save for a Notice of Appeal, the Applicant did not file and/or annex his Memorandum of Appeal.



36. The Applicant has thus failed to demonstrate that his Appeal is arguable as the Memorandum of Appeal that would have been of assistance in discerning whether or not his intended Appeal was arguable was not annexed. It is thus trite that the merits of his intended Appeal could not therefore be discerned from his affidavit and the court cannot go out on a fishing expedition in discerning the decision he intend to Appeal against and whether it was arguable. Indeed the decision by the Court of Appeal in *Mwangi v Nyali Golf & Country Club* (Civil Application E080 of 2021) [2022] KECA 455 (KLR) (18 March 2022) (Ruling) was to the effect that due to the lack of an annexed Memorandum of Appeal, the Applicant had not demonstrated any arguable ground and had therefore not satisfied the first limb of ‘arguability’.
37. In the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR, it had been held that: -
- “...Stay of proceeding 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 a litigant to conduct his litigation. It impinges on 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...”
38. The court having rendered itself in the impugned ruling of 14th March 2023, it would have been prudent for the Applicant to move expeditiously to the Court of Appeal. Nothing had been tabled to show that they were desirous of prosecuting their intended Appeal which has time limitation. The Applicants’ indolence and lack of action with regard to having their Appeal set down for hearing cannot be visited on the Respondents, who have already presented their case and await judgment of the court which has since been pending. Indeed the provisions of Article 159(2)(a)(b)(c) and (d) of the *Constitution*, as read with Sections 1A and 1B of the *Civil Procedure Act*, join this court to foster and facilitate the overriding objective of the Act to render justice to parties in all Civil Proceedings in a just, expeditious, proportionate and affordable cost to parties.
39. To this end I find no merit in the Applicant’s Application dated the 16th June 2023 and proceed to dismiss it with costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 25TH DAY OF JANUARY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

