



REPUBLIC OF KENYA



KENYA LAW
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**Saoli v Saoli (Suing on his Own Behalf and as an Administrator
of the Estate of Leposo Ole Saoli) & 2 others (Civil Application
E044 of 2023) [2023] KECA 1536 (KLR) (15 December 2023) (Ruling)**

Neutral citation: [2023] KECA 1536 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAKURU
CIVIL APPLICATION E044 OF 2023
P NYAMWEYA, FA OCHIENG & WK KORIR, JJA
DECEMBER 15, 2023**

BETWEEN

SOITARA OLE SAOLI APPLICANT

AND

**PAUL MOROMBI SAOLI (SUING ON HIS OWN BEHALF AND
AS AN ADMINISTRATOR OF THE ESTATE OF LEPOSO OLE
SAOLI) 1ST RESPONDENT**

ANTONY PARSALOI SAOLI 2ND RESPONDENT

TIMOTHY LETOLUO SAOLI 3RD RESPONDENT

(An application for stay of further proceedings pending the lodging, hearing and determination of an intended appeal from the ruling and order of the Environment and Land Court of Kenya at Narok (C. G.Mbogo J.) dated 7th February 2023 in ELC Case No 264 of 2017)

RULING

1. The Applicant herein, Soitara Ole Saoli, has lodged a Notice of Motion application dated 9th May 2023 in this Court, seeking an order of stay of further proceedings in Narok ELC No 264 of 2017 - Paul Morombi Saoli & 2 Others v Soitara Ole Saoli pending the lodging, hearing and determination of his intended appeal against a ruling delivered therein on 7th February 2023. The application is supported by an affidavit sworn on 9th May 2023 and supplementary affidavit sworn on 19th June 2023 by the Applicant, who states that he is over 94 years old; that he instructed his then advocates to defend the suit in the Environment and Land Court (ELC); that the said advocates at the compliance stage misrepresented to the Court that the Applicant had filed all compliance documents; that the suit was consequently certified ready and fixed for hearing, that the said advocates did not attend Court on the



scheduled hearing date; and that the case by the Respondents, who were the Plaintiffs therein, thereby proceeded for hearing ex parte .

2. Thereafter, that the said advocates applied to cease acting for the Applicant, and that his current advocate, upon perusal of the Court file, realized that there were several substantive and procedural errors which go to the root of the Respondents' case, namely that the Respondents had filed an unsigned amended plaint. Consequently, that his current advocates, by an application dated 19th October 2022, moved the ELC to strike out the unsigned amended plaint dated 9th April 2018 and filed in Court on 11th April 2018, and to grant leave to the Applicant to further amend his defence and counterclaim and file his compliance documents. However, that the ELC in its ruling delivered on 7th February 2023 declined to strike out the amended plaint, despite finding that it was indeed unsigned; declined to grant leave to the Applicant to amend his defence and counterclaim; and failed to pronounce itself on the prayer for leave to file compliance documents without giving any reasons. The Applicant, being aggrieved by the said decision, filed and served a Notice of Appeal dated 7th February 2023 which was lodged on 15th February 2023, and prepared a draft memorandum of appeal copies of which he annexed. On 17th February 2023, the Applicant in addition sought a stay of proceedings in the ELC pending the hearing and determination of his intended appeal, which application was dismissed by the ELC on 25th April 2023, and the suit fixed for hearing on 28th June 2023, hence the present application.
3. The Applicant challenged the competence of the Respondents' suit in the ELC in his supplementary affidavit, on the ground that the grant of representation was not given to the respondents until after one year of filing of the suit. He also reiterated that it is in the interests of justice that he be granted the opportunity to file his defence and counterclaim as well as compliance documents, since the subject matter of the suit is land.
4. The Respondents opposed the application by way of a replying affidavit sworn on 16th June 2023 by Paul Morombi Saoli, the 1st Respondent herein, who deponed that he was one of the administrators of the estate of Leposo ole Saoli (deceased) and had the authority to swear the affidavit on behalf of his co-Respondents, a copy of which he annexed. According to the Respondents, the Applicant's advocate was aware of the hearing date of the suit at the ELC and chose to ignore the same, and since the advocate is an agent of the client, the Applicant was bound by the actions of his advocate and if aggrieved, was at liberty to institute disciplinary proceedings against the advocate before the Advocates Complaints Commission or Disciplinary Committee. Further, that it was evident that the Applicant is a lethargic litigant seeing that his amended statement of defence and counterclaim was filed more than five (5) years ago, and he had failed to provide sufficient explanation at the trial Court as to why he failed to amend his defence and/or file his compliance documents since 2018. The Respondents asserted that the Applicant's right to pursue an appeal did not extend to holding them and the trial Court hostage.
5. The Respondents made reference to the history of the litigation in the trial Court, and noted that the matter before the trial Court had earlier been stayed pending the hearing and determination of Narok Judicial Review No 1 of 2018 which had been filed by the Applicant, and which was dismissed upon which pre-trial directions were taken on 14th December 2022 with the Applicant's advocate being present, and the matter was fixed for hearing on 8th February 2022. That on the said date, the Applicant and his counsel were absent despite being served with a hearing notice, and the Applicant's son who was present was heard and the matter fixed for further hearing on 28th February 2022 when the remaining witnesses were heard, and directions for filing submission issued.
6. The Respondents deponed that the Applicant then filed an application in the ELC dated 8th May 2022, seeking orders to set aside the proceedings conducted on 8th February and 28th February 2022



and commence the suit *de novo*, which orders were declined in a ruling dated 5th July 2022, but the trial Court however allowed the reopening of the case to allow the Applicant present his case for trial on merit. The trial was to proceed for defence hearing on 26th October 2022, but the Applicant filed yet another application dated 21st October 2022, and it was the 1st Respondents' assertion that the Applicant's intention was to circumvent and/ or review, the trial Court's ruling of 5th July 2022, and that the trial Court in its ruling of 7th February 2022 dismissed the said application. However, that the Applicant did not relent and moved the trial Court by another application dated 17th February 2023 for stay of any further proceedings in the matter, and on 25th April 2023, the ELC in its ruling held inter alia that the Appellant's right of appeal could not be exercise at the expense of justice, and that that the stay of proceedings sought was a delaying tactic as the issues raised by the Applicant had been previously dealt with in the rulings dated 5th July 2022 and 7th February 2023.

7. The Respondents contend that should this Court stay the proceedings of the trial Court, they stand to suffer great prejudice as it will interfere with their right to expeditiously litigate the suit which has been pending since 2010, and will infringe on their right of access to justice, right to be heard without delay, the right to a fair trial, as well as right to ownership of property guaranteed under Article 40 of the *Constitution*. The 1st Respondent urged that as a general rule, the stay of proceedings should not be granted unless it is demonstrated beyond all reasonable doubt that the proceedings ought not to be allowed to continue, which the Applicant had failed to do, and the application was meant to delay the just conclusion of the suit in the trial Court to the Respondents' detriment.
8. We heard the application on the Court's virtual platform on 11th October 2023. Learned counsel Mr. F. M. Ratemo, appeared for the Applicant while learned counsel Ms. Mukira, appeared for the Respondents, and the two counsel highlighted their submissions dated 23rd June 2023 and 26th June 2023 respectively. This Court has discretion under Rule 5 (2)(b) of the *Court of Appeal Rules 2022* to grant and order of stay of further proceedings pending appeal, and the applicable principles are well settled. Firstly, an applicant has to satisfy that he or she had an arguable appeal. Secondly, an applicant in addition has to demonstrate that unless an order of stay is granted, the appeal or intended appeal would be rendered nugatory. These principles have been restated and amplified by this Court in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* [2013] eKLR.
9. Mr. Ratemo also cited the decisions in *UAP Provincial Insurance Co LTD v Michael Job Beckett* [2004] eKLR., *David Morton Silverstein v Atsango Chesoni* [2002] eKLR and *Kenya Commercial Bank Ltd v Benjob Amalgamated Ltd & another*, Civil Application no Nai 50 of 2001 (29/2021) (UR)(Unreported) to submit that the grant of stay of proceedings depended on the facts of each case. On whether or not the appeal was arguable, the counsel urged that the amended plaint remained unsigned to date, and that having re-opened the suit for hearing of the defence case, the Court failed to pronounce itself on the prayer for leave to file compliance documents. Mr. Ratemo referred us to the 8 grounds of appeal in the Applicant's draft memorandum of appeal, and the decision in the case of *Khwatenge Wafula v Director of Public Prosecutions, Ethics and Anti-Corruption & 2 others (Interested Parties)* [2020] eKLR for the position that the issues for consideration in the intended appeal raised serious questions of law.
10. Ms. Mukira on her part placed reliance on the decisions in *Charterhouse Bank Limited v Central Bank of Kenya & 2 others* [2007] eKLR and *Kalumass Company Limited & another v Emmanuel Charo Tinga* [2016] eKLR to submit that the intended appeal was frivolous, as noted in the ruling of 25th April 2023 by the learned trial Judge that the issues raised by the Applicant had been previously dealt with in the Court's rulings dated 5th July 2022 and 7th February 2023.



11. We need to point out that an arguable appeal is one which must not necessarily succeed, but one which is not frivolous and merits to be argued fully. Further, that it is sufficient if the appeal raise only one triable issue. The Applicant has in this regard raised the issue of infringement of his constitutional right to a fair hearing if the hearing proceedings on the basis of pleadings which are a nullity, and without his documents. This ground in our view is sufficient to demonstrate that the Applicant has an arguable appeal.
12. On the question of whether the appeal, when ultimately heard, will be a futile exercise if the stay of proceedings is not granted, Mr. Ratemo submitted that by the time the Court pronounced itself on the appeal, the trial before the trial Court would have concluded and the Applicant will already have suffered miscarriage of justice and precious judicial time would have been wasted in the hearing of the appeal.
13. Ms. Mukira submitted that the intended appeal would not be rendered nugatory if the orders sought are not granted, and that on the contrary, granting the orders would only serve to forestall an already old matter. The counsel placed reliance on the cases of *Reliance Bank Limited v Norlake Investment Ltd* (2002) 1 EA 227 and *William Lerikan Konchellab & another v Julius Tabarai Ole Maito Tampushi* [2014] eKLR to urge that the Applicant had not satisfied any of the limbs for stay of proceedings.
14. It was held in *Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 others* (*supra*) that whether or not an appeal will be rendered nugatory depends on whether or not what is ought to be stayed or injuncted, if allowed to happen is reversible; or if not reversible whether the damages will reasonably compensate the party aggrieved. The Applicant has stated that he will suffer miscarriage of justice, if the hearing of the defence case proceeds on 28th June 2023 as scheduled or any other date thereafter since he will be compelled to go through a trial based on pleadings that were a nullity, without stating his full defences, without bringing all his claims and without anchoring his defence case on any compliance documents. The Respondents on the other hand appear to blame the Applicant for the delay. We are of the view that it is in the interests of justice that the Applicant be given the time to demonstrate if the trial Court denied him the opportunity to canvass his case fully, and if indeed there was any error made. In this regard the appeal will therefore be rendered nugatory if the hearing in the trial suit proceeds to conclusion. We are however also mindful of the delay in hearing this matter, and for this reason we are of the view that the stay be made conditional on steps being made in the expeditious hearing of the intended appeal.
15. We accordingly order as follows:
 - i. A stay of further proceedings in Narok ELC No 264 of 2017 - Paul Morombi Saoli & 2 others v Soitara Ole Saoli be and is hereby granted pending the lodging, hearing and determination of the Applicant's intended appeal against the ruling delivered therein on 7th February 2023.
 - ii. The Applicant herein shall file and serve his record of appeal of the said intended appeal in this Court within 60 days of today's date, failing which the stay orders granted herein shall automatically lapse.
 - iii. Given the circumstances giving rise to the Notice of Motion application dated 9th May 2023, each party shall bear their own costs of the said application.
16. It is so ordered.

DATED AND DELIVERED AT NAKURU THIS 15TH DAY OF DECEMBER, 2023

P. NYAMWEYA



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JUDGE OF APPEAL

F. OCHIENG

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JUDGE OF APPEAL

W. KORIR

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

