



Kiu Construction Limited v Motion Pictures Limited (Environment & Land Case E204 of 2024) [2025] KEELC 952 (KLR) (26 February 2025) (Ruling)

Neutral citation: [2025] KEELC 952 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E204 OF 2024
JM ONYANGO, J
FEBRUARY 26, 2025**

BETWEEN

KIU CONSTRUCTION LIMITED PLAINTIFF

AND

MOTION PICTURES LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 10th December, 2024, the Plaintiff /Applicant filed an application pursuant to Sections 63E, 79G, 1A, 1B and 3A of the Civil Procedure Act and Order 42 Rule 6(1) (a) and (2) of the Civil Procedure Rules seeking the following orders:
 - a. Spent.
 - b. That this honorable court be pleased to grant an order of stay of proceedings in Milimani HCCOMMC/E002/2020; Francis Gichaba Gachagua pending hearing and determination of this application.
 - c. That this honourable court be pleased to grant an order of stay of proceedings in Milimani HCCOMMC/E002/2020; Francis Gichaba Gachagua pending hearing and determination of the intended suit.
 - d. That costs of this application be in the cause.
2. The application is based on the grounds set out on the face of the Notice of Motion and the Supporting Affidavit of Julia Kariuki, the Applicant's company secretary sworn on 10th December 2024. In the said affidavit, Julia Kariuki depones that the Defendant /Respondent has two directors who are equal shareholders in the company, one John Francis Kariuki Theuri and Francis Gachagua. She depones that the Respondent purchased land known as L.R No. 76/407 (hereinafter referred to as the suit property) by making partial payment of the purchase price and paying the balance through a loan



facility from Equity Bank Ltd (the chargee). The title to the suit property was used to secure the said loan. The respondent fell into arrears of the loan and as a result, in 2018, the chargee sought to exercise its statutory power of sale by auctioning the suit property to recover the outstanding loan amount.

3. Julia Kariuki contends that in order to salvage the suit property from sale by auction by the chargee, the Respondent and the Applicant agreed that the plaintiff would take over the loan at Equity Bank Ltd amounting to Kshs 48,000,000. She further contends that it was agreed that the value for the suit property would be repaid by servicing the Respondent's outstanding loan and making a further payment of Kshs 23,000,000.
4. She adds that the Applicant commenced the repayment of the Respondent's loan on 4th April 2018. It is her contention that through the Respondent's board resolution dated 2nd October 2019, it was agreed that the Applicant would continue servicing the Respondent's loan in exchange for the suit property. She further contends that the Applicant wrote to the chargee to inform them that they had repaid a sum of Kshs 10,000,000 on behalf of the Respondent. She states that the Applicant had no intention of taking over the suit property but was only salvaging the same to prevent it from being auctioned. However, it was only upon the realization that the Respondent would not be able to repay the Applicant the amount it had spent in repaying the loan, that the decision to allow the Applicant to take over the property was reached.
5. It is her contention that the Applicant serviced the Respondent's loan to the tune of Kshs 31,381,109 from 4th April 2018 until 24th February 2023. The Applicant faults the Respondent for initiating liquidation of the Respondent company through Milimani High Court Petition No. E002 of 2022. The Applicant further faults the Respondent for making it impossible for them to pay the remaining balance because the Respondent's managing director, Mr. Francis Gachagua insists that the balance should be paid to his personal account instead of the Respondent's bank account. She argues that the issue of ownership of the suit property ought to be determined before the ruling on the liquidation petition before the High Court is delivered. The same is scheduled for delivery on notice. The Applicant is apprehensive that if the ruling on the liquidation petition is delivered, the Respondent may proceed to execute it in order to defeat the Applicant's interest in the suit property.
6. The Respondent did not file a response to the application. However, the parties made oral submissions on the application in court on 4th February 2025.

Applicant's Submissions

7. Learned Counsel for the Applicant invited the court to note that, no response had been filed to this application and therefore the application was unopposed.
8. Secondly, counsel denied there was a similar application in the insolvency suit at the High Court. Counsel submitted that what was before the High Court was an application to stay the delivery of the judgment pending the outcome of the present application. Counsel denied the allegation that the Applicant was forum shopping. Counsel stated that Section 48 of the *Insolvency Act* provided that where a creditor was involved in proceedings in another court then they could apply for a stay of proceedings.
9. Counsel argued that the suit herein relates to a land matter given that the dispute arose from a sale agreement and that the Applicant sought an order for transfer of land or in the alternative, reimbursement of the purchase price paid.



10. Counsel submitted that the Applicant was not calling upon this court to exercise appellate jurisdiction over the High Court, instead the Applicant was calling upon the court to exercise its original jurisdiction. Counsel urged the court to grant the reliefs sought in the application as prayed.

Respondent's Submissions

11. Learned Counsel for the Respondent submitted that Section 428 of the *Insolvency Act* required a party to seek leave of the High Court before filing any case against a party that is undergoing liquidation. Counsel faulted the Applicant for failing to seek leave prior to filing this suit. Counsel argued that this suit was therefore defective.
12. Secondly, counsel faulted the Applicant for seeking stay of proceedings in the insolvency suit through this application when the Applicant had sought similar orders through an application filed at the High Court. Counsel argued that there was a possibility of the two courts giving conflicting rulings, hence this application ought not to be entertained.
13. Counsel submitted that the current suit is not a claim of ownership of the suit property but one for a refund hence the High Court is the one competent to deal with the dispute.
14. Counsel argued that this suit was filed by the Applicant as an afterthought because the Applicant was apprehensive of the outcome of the High Court suit. Counsel added that the suit sought to be stayed at the High Court was filed in 2020 and that a judgment date was set in the matter in November 2024. Counsel faulted the Applicant for failing to seek a stay of proceedings order earlier.
15. Lastly, counsel submitted that this court lacks jurisdiction to issue the orders sought in this application and the main suit, hence the application is an abuse of court process. Counsel urged the court to dismiss this application and award costs to the Respondent.
16. On the issue of the application not being opposed, counsel submitted that this court gave directions on the preliminary issue of jurisdiction but no directions had been given with regard to the filing of a response to this application.

Analysis and Determination

Having considered the application, supporting affidavit and rival oral submissions, the following issue falls for determination.

i. Whether this court has jurisdiction to issue the orders sought.

17. Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, states 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 proceeding 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 this ground must show not merely that the plaintiff might



not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.”

18. The principles for stay of proceedings were set out In Re Global Tours and Travels Ltd: Winding Up Cause No.43 of 2000 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 interests 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 interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously.”

19. However, before the court exercises this discretionary power, the court has to be satisfied that it possesses the requisite jurisdiction to do so as was espoused in the case of Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] eKLR.

20. The suit the Applicant seeks to stay is before the High Court which is a superior court of equal status with the Environment and Land Court. The jurisdiction of this Court is limited in that it cannot stay matters which are the in the province of the High Court. On the other hand, Section 13 of the [Environment and Land Court Act](#) states that:

- “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of [the Constitution](#) and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
- (2) In exercise of its jurisdiction under Article 162(2)(b) of the Constitution, the Court shall have power to hear and determine disputes-
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;
 - d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
 - e. any other dispute relating to environment and land.
- (3) Nothing in this Act shall preclude the Court from hearing and determining applications for redress of a denial, violation or infringement of, or threat to,



rights or fundamental freedom relating to a clean and healthy environment under Articles 42, 69 and 70 of *the Constitution*.

21. A court's jurisdiction flows from *the Constitution* or legislation or both. This Court has jurisdiction to only deal with matters related to use, occupation and title to land and the environment.
22. Even though section 48 of the *Insolvency Act* provides that a creditor may apply to court for stay of proceedings, section 2 of the said Act clearly states that the Court means the High Court. The suit in the High Court relates to insolvency proceedings which is beyond the jurisdiction of this court. Additionally, a close scrutiny of the Plaint reveals that the predominant claim in the Plaint relates to a refund of Kshs. 31, 381,109 plus interest being the amount paid by the Plaintiff to service the loan owed by the Defendant to Equity Bank. The claim is therefore purely a commercial and not a land matter as contemplated by section 13 of the *Environment and Land Court Act*. In essence, this court lacks jurisdiction to hear and determine this suit.
23. The upshot is that the application is dismissed and the suit is struck out with costs to the Defendant/ Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 26TH DAY OF FEBRUARY 2025.

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J. M ONYANGO
JUDGE.

In the presence of:

1. Ms Wanja for the Respondent
 2. Miss Wambui for the Applicant
- Court Assistant: Hinga

