



**Njuguna v Wanyoike (Environment and Land Miscellaneous Application
E003 of 2024) [2024] KEELC 4372 (KLR) (28 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4372 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E003 OF 2024**

JG KEMEI, J

MAY 28, 2024

BETWEEN

JOHN NG'ANG'A NJUGUNA APPELLANT

AND

HARUN MBURU WANYOIKE RESPONDENT

RULING

1. The Appellant/Applicant filed the instant Motion dated 18/1/2024 expressed under Sections 1A, 1B, 3A and 63(e) [Civil Procedure Act](#) and Order 42 Rule 6, Order 50 and Order 51 Rule 1 [Civil Procedure Rules](#) seeking orders That;
 - a. Spent.
 - b. This Honorable Court be pleased to grant the Applicant herein leave to file an appeal to this Court out of time, against the entirety of the Ruling of the Ruiru Principal Magistrates Court in MC ELC/E.119/2023: Harun Mburu Wanyoike Vs John Nganga Njuguna on 2nd November 2023.
 - c. Pending the hearing and determination of the appeal, to be filed, the Honorable Court be and is hereby pleased to issue an Order Of Stay, staying any proceedings before the Ruiru Principal Magistrates Court in MC ELC/E.119/2023: Harun Mburu Wanyoike Vs John Nganga Njuguna that is scheduled to come up for hearing on 2nd, February 2024.
 - d. This Honorable Court be pleased pending, the hearing and determination of this Application and appeal, to issue an order of Temporary Injunction restraining the Respondent, his assigns or representatives, employees or agents or any such person (s) acting under his command and/or instruction from any way whatsoever interfering with Applicant's peaceful enjoyment and use of his property suit land all that parcel of land known as LR No. 13673/195 Title No. 59788 situated in South Ruiru town.



- e. Costs of the Application be in cause.
2. The Application is premised on the grounds that the Applicant has been in possession, control and ownership of all that parcel of land known as LR No. 13673/195 Title No. 59788 (hereinafter the suit land). That the Respondent lodged his suit in the trial Court which issued a temporary injunction against the Applicant on 2/11/2023. That the ailing Applicant is aggrieved by the said order and is desirous of appealing against it hence the Application.
 3. The Application is supported by an Affidavit of even date of John Ng'ang'a Njuguna, the Applicant. Reciting the above aforementioned grounds, the Applicant annexed copies of the impugned trial Court order and medical chits as JNN1 & JNN2 respectively. He averred that at the opportune time he will be appealing against the assailed order on grounds inter alia that the Court erred in injunctioning him from using his property at the preliminary stage of the suit and the Court failed to consider the pleadings and evidence in their entirety. He beseeched the Court to exercise its discretionary powers in his favor and allow him to appeal out of time.
 4. Opposing the Application, the Respondent Harun Mburu Wanyoike swore his Replying Affidavit on 15/2/2024. He deponed that he is the registered owner of the suit land pursuant to the certificate of title dated 21/9/2000 annexed as HMW1. That at the time of purchasing the suit land from Charles Maina Kimunya, the Applicant was in occupation with intent to purchase the land as well. That Charles Maina Kimunya informed the Respondent that he had rescinded his sale agreement with the Applicant after the Applicant failed to pay the purchase price and was thus issued with a notice to vacate. That the Applicant was aware of the Respondent's purchase of land and even witnessed the transfer instrument dated 19/9/2000. That out of friendship and goodwill and on request by the Applicant to continue residing on the land as he looked for another parcel of land, the Respondent allowed the Applicant continue living on the suit land as he (the Respondent) was relocating out of the country. Later the Applicant's family vacated the suit land in 2018 and came back at the height of Covid in 2020. That the Applicant's wife passed on in 2021 and the daughter eventually vacated the suit land. That in 2023 the Applicant forcefully re-entered the suit property without the Respondent's consent prompting the filing of the trial Court case and the ensuing injunction order.
 5. Further the Respondent averred that the Applicant is a trespasser on the suit land and his occupation was with the Respondent's consent as demonstrated in Memorandum of Understanding marked HMW5. That no justifiable reason has been proffered for failing to file the appeal within time and the Applicant's intention is to delay the hearing of the main suit. That the Applicant has not established that his appeal a chance of success and no prejudice will be occasioned if the appeal and trial suit proceed simultaneously.
 6. In a rejoinder, the Applicant filed a Further Affidavit sworn on 8/5/2024. Denying the Respondent's averments, the Applicant avowed that he actually purchased the suit land from Charles Kamunya at Kshs. 100,000/- as shown by JNN-1A copy of the sale agreement signed on 10/2/2000. That without his knowledge, Charles went ahead to sell the suit land to the Respondent with the sole intention to defraud and defeat the Applicant's claim over the suit land. He denied ever moving out of the suit land and trespassing thereon. That through his former counsel the parties entered into a Memorandum of Understanding in an attempt to value and sell the suit land for each party to get a fair share as per Clause 1 of the Memorandum of Understanding annexed as JNN-3A. He urged the Court to stay the trial Court proceedings and allow him pursue his intended appeal.
 7. On 20/2/2024 directions were taken and parties elected to canvass the Application by way of written submissions.



8. The firm of Okoth Obera Law Advocates filed submissions dated 5/3/2024 on behalf of the Applicant. Two issues were drawn for determination; whether the Application is merited and whether the Applicant is entitled to the Orders sought.
9. On the first issue, the Applicant relied on the proviso of Section 79G of the *Civil Procedure Act* that an appeal may be filed out of time if the Appellant satisfies the Court that he had a good and sufficient cause for not filing his appeal within time. The Applicant further cited the guidelines set out by the Supreme Court in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral and Boundaries Commission & 7 Others* [2014] eKLR to guide the Court in Applications of this nature. Explaining his delay in filing the Application, the Applicant submitted that he was battling with illness and also ran out of cash to lodge the appeal. That his intended appeal is arguable and raises substantial issues of law touching on the impugned Ruling. That no prejudice will be occasioned upon the Respondent as the Applicant exercises his right to appeal against a decision that has rendered him homeless.
10. Regarding the prayer for stay of proceedings, the Applicant acknowledged that it is a drastic order that can be only be granted in exceptional circumstances. That it is imperative to determine the merits of the Application on a case by case basis weighing the pros *vis-à-vis* the cons of granting the order. He relied on the case of *Re Global Tours & Travels Limited, (Nairobi High Court Winding Up Cause No. 43 of 2000)* and stated that his intended appeal touches on the core of the trial Court proceedings.
11. Concerning the prayer for temporary injunction pending appeal, the Applicant rehashed the Court’s power to grant the order under Order 42 Rule 6(6) *Civil Procedure Rules* and the principles to be considered as laid down in the case of *Patricia Njeri & 3 Others Vs. National Museum of Kenya* [2004] eKLR that;-
 - “1. An order of injunction pending appeal is a discretionary one which will be exercised against an Applicant whose appeal is frivolous.
 2. The discretion should be refused where it would inflict greater hardship than it would avoid.
 3. The Applicant must show that to refuse the injunction would render the appeal nugatory.
 4. The Court should also be guided by the principles set out in *Giella Vs. Cassman Brown Ltd 1973 E.A 358.*”
12. The Applicant urged that he has demonstrated arguability of his appeal and if the Application is not granted, he stands to suffer irreparable harm that cannot be compensated by way of damages. That having established that he has been in possession of the suit land since the year 2000 and extensively developed it as shown by pictorial evidence, the balance of convenience tilts in favor of the Applicant.
13. Lastly while answering the second issue in the affirmative, the Applicant rehashed the totality of his submissions and implored the Court to find his Application merited and allow it as prayed.
14. On the other hand, the firm of Armon Legacy Advocates filed the Respondent’s submissions dated 15/3/2024. The Respondent drew three issues for determination; whether the intended appeal should be admitted out of time; whether an interlocutory injunction pending hearing and determining of the appeal should be granted and whether the trial Court proceedings should be stayed.



15. The Respondent submitted that the Applicant has not tabled justifiable reasons for failing to file his appeal within the thirty days provided in Section 79G of the Civil Procedure Act. That Order 50 rule 4 of the Civil Procedure Rules is clear that the provisions therein do not apply to Applications for temporary injunctions. That the Applicant has not demonstrated that he has an arguable appeal in light of his grounds of appeal in para. 9 of his Supporting Affidavit.
16. On whether a temporary injunction can be issued pending appeal, the Respondent answer was in the negative. He urged that the Applicant has not met the conditions set out in the case of *Giella Vs. Cassman Brown Ltd* (1973) EA 358. That the Applicant's allegations of owning the suit land and being in occupation are untrue and unfounded. He accused the Respondent of introducing new evidence JNN2A and JNN4A which he never adduced before the trial Court.
17. Finally, the Respondent submitted that the Applicant has not demonstrated how the intended appeal will be rendered nugatory if the trial Court proceedings are not stayed.
18. The main issue for determination is whether the Application is merited addressed as follows.

Leave to appeal out of time

19. The relevant law in an Application seeking leave to appeal out of time is anchored on the proviso of Section 79G of the Civil Procedure Act that;-

“79G. Time for filing appeals from subordinate Courts

Every appeal from a subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the Appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the Appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time.”

20. A reading of the above proviso indicates that such extension of time is based on the discretionary powers of the Court. Section 95 Civil Procedure Act empowers the Court to enlarge such time as follows;-

“

“95. Enlargement of time

Where any period is fixed or granted by the Court for the doing of any act prescribed or allowed by this Act, the Court may, in its discretion, from time to time,

enlarge such period, even though the period originally fixed or granted may have expired.”

21. The SC in the case of *Nyamboki Vs. Gathuru* (Application 6 of 2019) [2019] KESC 44 (KLR) held as follows in determining an Application seeking such extension;

“In determining such an Application, the Court has to consider whether the explanation given for any delay is reasonable and credible; whether there also exist extenuating circumstances to enable the Court exercise its unfettered jurisdiction; and that the delay, in any event, should not be so inordinate as to leave no doubt, that an Applicant has been slothful, and filed such an Application as an after-thought.”



22. Earlier on the Supreme Court had devised principles to be considered in an Application for extension of time in the case of *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral And Boundaries Commission & 7 others* [2014] eKLR as follows;

- “ 1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;
2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court
3. Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
5. Whether there will be any prejudice to be suffered by the Respondents if the extension is granted;
6. Whether the Application has been brought without undue delay; and
7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.” See also *Leo Sila Mutiso -vs- Rose Hellen Wangari Mwangi* [1999] 2 EA 231.”

23. In this case the Applicant states that the reason he failed to file his appeal within time was due to illness and lack of finances to facilitate filing the appeal. That he was in grief and sorrow and it took him time to come to terms of the assailed Ruling despite his counsel’s advice on the right to appeal. To support this assertion, the Applicant annexed sick off sheet and communicate on his hospital appointments as JNN-2.

24. The Respondent opposes the Application and defends the impugned Court Ruling. He contends that the intended appeal is a ploy to derail the hearing of the suit.

25. A glean of the sick sheet annexed in the Applicant’s Supporting Affidavit is dated 18/11/2022. That is barely a year before the delivery of the assailed Ruling. A glance of JNN-2 it is evident that subsequent checkups ran through the months of February to December year 2023. Based on the forgoing it is plausible that the Applicant claim on illness is founded and established. However, by his own admission, the Applicant is ably represented by counsel who advised him on the right to appeal. He chose not to heed the advice.

26. Was the filing of the Application done inordinately? The impugned Ruling was delivered on 2/11/2023 and the Application was filed on 23/1/2024. That is a period of about two and half months later. Considering the Applicant’s plea of illness, I find the delay is not inordinate.

Stay of proceedings

27. The law on stay of proceedings is generally provided for in Section 6 of the *Civil Procedure Act* to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another Court ought to stay its proceedings in respect of such suit.

28. The *Civil Procedure Rules* alludes to stay of proceedings under Order 42 Rule 6(1) as follows;

“Stay in case of appeal [Order 42, rule 6.]



1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the Court appealed from may order but, the Court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the Application for such stay shall have been granted or refused by the Court appealed from, the Court to which such appeal is preferred shall be at liberty, on Application being made, to consider such Application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the Court from whose decision the appeal is preferred may apply to the appellate Court to have such order set aside.

29. In the case of *Global Tours & Travel Limited Vs. Five Continents Travel Limited* [2015] eKLR where it was held that:-

“... 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.”

30. Moreover, in *William Odhiambo Ramogi & 2 Others Vs. The Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory Application to a higher Court. See: *Kenya Shell Limited Vs. Benjamin Karuga Kibiru & Another* [1986] eKLR; *Global Tours & Travels Limited (Nairobi)* HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein Vs. Atsango Chesoni* [2002] eKLR: They laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an Application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an Application for stay of proceedings to inordinately delay trial, there is a policy in favour of Applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar



with its docket and is therefore in a position to calibrate any order it gives accordingly;

- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;
- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
- f. Sixth, the Applicant must demonstrate that the Application for stay was filed expeditiously and without delay.”

31. Additionally, the Court in the case of *Kenya Wildlife Service –vs- James Mutembei* [2019] eKLR 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...”

32. The *Halsbury’s Law of England 4th Edition* Vol. 37 pages 330 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.”

33. Flowing from the above jurisprudence, it is emerging that whether or not to grant an order for stay of proceedings is a discretionary judicial power. This discretionary power must be exercised judiciously and sparingly. The Court has to consider if it will be in the interests of justice to grant the same.



34. In this case the Applicant urges this Court to relook into the impugned Ruling to prevent occurrence of grave injustice. That if the proceedings are not stayed his appeal maybe rendered nugatory and the resultant orders, if he succeeds on appeal, will amount to an academic exercise. Refuting the prayer for stay of proceedings, the Respondent the Applicant has not demonstrated how the intended appeal will be rendered nugatory. The Court of Appeal in the case of *Stanley Kang'ethe Kinyanjui Vs. Tony Keter* [2013] eKLR stated that whether or not an appeal would be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible whether damages would reasonably compensate the parties aggrieved.
35. Undoubtedly the Court is called upon to strike a balance between the competing rights to fair hearing for both rival parties as enshrined under Article 50(1) of the *Constitution* of Kenya. On the one part the Applicant is entitled to his right of appeal whereas the Respondent has a right to have his case determined expeditiously by a Court of law. As far as the issue of temporary injunction pending the hearing of suit, the trial Court is *functus officio* and the Court's pronouncement thereon is the subject of the intended appeal. In order to protect the sanctity of Court proceedings and avoid parallel proceedings and indeed outcomes in both the trial Court and this Court, and in light of Section 6 *Civil Procedure Act*, I find that it is proper to stay the trial Court proceedings as prayed.

Temporary Injunction pending appeal

36. The legal provisions for Temporary injunction pending appeal are anchored in Order 42 rule 6 (6) of the *Civil Procedure Rules* that;
- “(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with.”
37. The above proviso is to the effect that the temporary injunction pending appeal maybe granted so long as the procedure for instituting an appeal from a subordinate Court or tribunal has been complied with. As it stands the Applicant failed to file his appeal within t30 days as envisaged under Section 79G *Civil Procedure Act*. He now seeks leave to appeal out of time and accordingly the threshold set out in the above proviso has not been satisfied.
38. The Court of Appeal in the case of *Charter House Investments Ltd Vs Simon K. Sang & 3 Others* (2010) eKLR stated: -
- “Injunction is an equitable and discretionary remedy, given when the subject matter of the case before the Court requires protection and maintenance of the status quo. The award of a temporary injunction by Courts of equity has never been regarded as a matter of right even where irreparable injury is likely to result to the Applicant. It is a matter of sound judicial discretion, in the exercise of which the Court balances the convenience of the parties and possible injuries to them and to third parties.”



39. Further the Court of Appeal in the case of *Patricia Njeri (supra)* inter alia stated that in an Application of this nature, the Court should be guided by the principles set out in *Giella Vs. Cassman Brown Ltd* 1973 E.A 358 that; the claimant has established a *prima facie* case with a probability of success; once established, the claimant ought to prove that an award of damages would be insufficient to alleviate any damage caused and finally, when in doubt, the Court would decide the Application on a balance of convenience. In his Application the Applicant did not file his Memorandum of Appeal for the Court to consider if a *prima facie* case has been established. Further no evidence has been tendered that damages in this case would not be an adequate remedy since the temporary injunction granted by the trial Court is already in place. Lastly on a balance of convenience, I am not persuaded that a temporary injunction pending appeal would ensue in a Miscellaneous Application of this nature since no appeal has been filed yet.
40. In the end I order that the Application be allowed on terms;-
- **a. The Application is allowed in terms of Prayers b and c only.**
 - **b. Leave is granted to the Applicant to file and serve his Memorandum of Appeal within 7 days from today's date.**
 - **c. Upon filing the appeal, the Applicant to file and serve his Record of Appeal within 21 days of today's date.**
 - **d. The Appeal be listed for hearing within 45 days of today's date.**
 - **e. Failure to comply with either of orders b, c and d above the Application shall stand dismissed and the orders herein deemed vacated.**
 - **f. Costs be in the cause.**

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 28TH DAY OF MAY, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of

Onganya HB Okoth for Applicant

Ian for the Respondent

Court Assistant – Phyllis

ELC MISC. APPL. E003.2024 - THIKA 5R of 5

