



Wakaimba & 2 others v Wahome (Environment and Land Appeal E045 of 2024) [2024] KEELC 4287 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E045 OF 2024**

JA MOGENI, J

MAY 23, 2024

BETWEEN

DAVID WAKAIMBA 1ST APPELLANT

KANYEKINE WISDOM AUCTIONEERS 2ND APPELLANT

PETER OUMA 3RD APPELLANT

AND

HELLEN WAHOME RESPONDENT

RULING

1. Appellant/Applicant herein has approached the Honourable court vide Notice of Motion Application dated the 11/04/2024; brought pursuant to the provisions of Order 42 rule 6 and 51 of the Civil Procedure Rules, 2010 and Section 3A of the Civil Procedure Act. The appellant/applicant has sought for the following reliefs [verbatim]:
 - i. Spent
 - ii. That this Honorable Court do order a stay of proceedings in Business Premises Tribunal Case No. E219 of 2024 (Hellen Wahome -vs- David Wakaimba & 2 Others) pending the hearing and determination of this application
 - iii. That this Honorable Court do order a stay of proceedings in Business Premises Tribunal Case No. E219 of 2024 (Hellen Wahome -vs- David Wakaimba & 2 Others) pending the hearing and determination of this appeal
 - iv. That the costs of the application be provided for
2. The instant Application is premised on numerous grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the affidavit of David Wakaimba [Applicant]



sworn on 9/04/2024 and to which the deponent has highlighted various pertinent issues for due consideration by the court.

3. Upon being served with the subject Application, on 16/04/2024 the Respondent herein did not file any responses despite the court's directions which required that the respondent files their Replying affidavit by 8/05/2024. The matter was mentioned for directions on 16/05/2024 and the court gave a ruling date after the applicant moved the court to rely on their pleadings in view of the fact that the respondent had not filed any response.
4. The Applicant has annexed a draft memo of Appeal alongside this application which seeks the Business Tribunal Case No. E219 of 2024 (Hellen Wahome vs David Wakaimba and 2 Others dismissed or stayed).
5. The applicant claims that the Business Tribunal Case No. E219 of 2024 is res judicata on account that a similar matter had previously been filed in the same Tribunal being BPRT Case No. E612 of 2021 which had been heard in full and determined. That the Chairman of the Tribunal has ignored the plea of the appellants and given directions that the matter must proceed and be heard on 29.04.2024. That the matter being res judicata is an abuse of the process of the court and ought to be stayed.
6. A second application by the applicant. The Respondent counsel urged that the applicant had sought a similar application before the Environment and Land court which application was declined. The said application is annexed to the Replying Affidavit. A copy of the ruling and Order in BPRT E612 of 2021 and marked DMW3 was attached to the application.
7. I have read through and considered the Notice of Motion Application dated 11/04/2024, and the Applicants' other pleadings. Only one issue for me arise for determination and this is Whether the Applicant should be granted the order for stay of proceedings in Business Premises Tribunal Case No. E219 of 2024, (Hellen Wahome -vs- David Wakaimba & 2 Others).
8. In the case of *Kenya Wildlife Service Vs James Mutembei* (2019) eKLR, Gikonyo J held that:

“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 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”.
9. Further, in the persuasive authority in *Global Tours & Travels Limited*, Nairobi HC Winding up Cause No. 43 of 2000 Ringera J, (as he then was) stated that: -

“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”.



10. In the *Kenya Wildlife Case* (Supra), Gikonyo J quoted Halsbury's Law of England, 4th Edition. Vol. 37 pages 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 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”.

11. The above authorities speak to the gravity of stay of proceedings which should only be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the court upon consideration of the facts and circumstances of each case. As stated by the Court of Appeal in the case of *David Morton Silverstein VS. Atsango Chesoni* (2002) eKLR: -

“The Court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the Court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

12. I have perused the Memorandum of Appeal dated 8/04/2024 and the appellant raised the following grounds:

1. The Learned Chairman erred in fact and in law in failing to hold that as there was a similar matter between the parties herein in which the issue was similar and which had already been determined in favour of the 1st Appellant, the matter filed from which the Appeal herein arises was Res Judicata.
2. The Learned Chairman erred in fact and in law in failing to stay BPRT Case No. E219 of 2024 (Hellen Wahome -vs- David Wakaimba)
3. The Learned Chairman erred in fact and in law in entertaining BPRT Case No. 219 of 2024 when it was clearly evident that the issues in the same had been dealt with in another matter and that the same was an abuse of the process of the court.

13. In the case of *Stanley Kinyanjui Vs. Tony Ketter & 5 Others* (2013) eKLR, the Court of Appeal stated that:-

“On whether the appeal is arguable, it is sufficient if a single bonafide arguable ground of appeal is raised”.



14. Additionally, the Court of Appeal in the case of *University of Nairobi Vs. Ricatti Business of East Africa* (2020) eKLR held that:

“An arguable appeal is also not one which must necessarily succeed, but one which ought to be argued fully before the Court; one which is not frivolous”.

Determination

15. In the absence of a response from the respondent, the applicant has explained despite bringing to the attention of the chairman of BPRT that BPRT Case No. E219 of 2024 was *Res Judicata* and availing all materials the Tribunal ignored their plea and gave directions that the said matter must proceed and be heard on 29.04.2024. From the sequence of events as narrated the applicant has shown they moved timeously in seeking notify the court about a matter being *Res judicata*. The applicant seeks to have judicial time which is scarce utilized prudently, efficiently and timeously.
16. In my view and from the annexures presented I am of the view that the matter at BPRT No. E219 of 2024 is indeed deserving to be stayed until the Appeal is heard and determined. No prejudice shall be caused to the respondent if the stay is granted.
17. Given the foregoing I make the following orders
- a. There shall be a stay of proceedings and/or further proceedings in Business Premises Tribunal Case No E219 of 2024 (Hellen Wahome -vs- David Wakaimba & 2 Others) pending the hearing and determination of the appeal.
 - b. Bearing in mind the provisions of section 1A and 1B of the *Civil Procedure Act*, and in order to have this matter expeditiously dealt with I direct that the matter be mentioned on 10/06/2024 for directions on the disposal of the appeal. Meanwhile the appellant is directed to file the record of Appeal within 60 days from the date hereof and serve in default the stay order cease to be in force.
 - c. The cost of this application shall abide the outcome of the Appeal.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2024

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MOGENI J

JUDGE

In the virtual presence of:

Mr. Maina for the Appellant/applicants

No appearance for Respondents

Caroline Sagina: Court Assistant

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MOGENI J

JUDGE

