



**Onyango v Mbitto & 2 others (Environment & Land Case  
62 of 2019) [2024] KEELC 4164 (KLR) (22 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4164 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 62 OF 2019  
FO NYAGAKA, J  
MAY 22, 2024**

**BETWEEN**

**DISMUS ONYANGO ..... PLAINTIFF**

**AND**

**MICHAEL MALINGA MBITO ..... 1<sup>ST</sup> DEFENDANT**

**NATIONAL LAND COMMISSION ..... 2<sup>ND</sup> DEFENDANT**

**THE HONOURABLE ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiff brought a Notice of Motion dated 27/10/2023 by which he sought stay of proceedings in this matter pending an intended appeal. Specifically, he moved Court under sections 1A, 1B, 3, 3A and 63(e) of the [Civil Procedure Act](#), Order 42 Rules 5 and Order 51 Rule 1 of the [Civil Procedure Rules](#), 2010 and all enabling provisions of the law. He prayed for orders: -
  1. That there be a stay of proceedings of the suit hearing pending the hearing and determination of this application and SUB. Sequentially pending the hearing and determination of the applicants intended appeal.
  2. Costs of the application may provided for.
2. The application was based on 4 grounds, namely, the applicant's right to fair hearing was greatly prejudiced by admission of new documents that changed the character of the suit and pleadings. The new evidence introduces a new entity, namely, Kenya Commercial Bank which held an alleged charge, therefore having an overriding interest over his suit land thus completely changing the nature of the pleadings and character of the suit thus causing substantial loss to the applicant. Sufficient cause existed to warrant the order sought and the application had been made without unreasonable delay.



3. The Application was supported by the affidavit of Paschal Okubasu sworn on 27/10/2023. He deposed that the suit was instituted against the defendant, seeking declaratory orders of ownership of the suit land and a permanent injunction against the defendant. The applicant subsequently testified and closed his case. The matter was set for defence hearing when the respondent filed the application seeking leave to introduce new documents and statement, which application was allowed on 04/10/2023. The Applicant being dissatisfied with the ruling sought leave to appeal against the decision and the leave was granted. The applicant instructed his advocate on record to serve a Notice of Appeal, a copy of which he annexed and marked PO1(a) and (b).
4. The matter had since been fixed for pretrial conference before fixing a hearing date, to which the Applicant sought a stay of proceedings. Having appealed against the decision, the appeal will be rendered nugatory. The Applicant believed that the appeal was not frivolous and raised arguable grounds. He would suffer prejudice since his right to fair trial was greatly compromised.
5. The introduction of new documents at the stage of the proceedings had completely changed the character of the suit and even introduced a new party, namely, Kenya Commercial Bank whom the respondents alleged to having the property charged to. Introducing new documents had the effect of changing the substratum of the case and pleadings as follows:-
  - a. The Pleadings as filed by the respondent never alluded to any charge of title by Kenya Commercial Bank, which now has an overriding interest known in law and as such the admission by the responded that the property was charged completely changed to the fact of the suit.
  - b. The failure to disclose the overriding interest that is in its pleadings had prejudiced my appellant's claim and had denied him an opportunity to either amend the pleadings and sue the bank for illegal charge or claim.
  - c. The admission that the suit parcel was charged with Kenya Commercial Bank changes the nature of the prayers sought as the bank ought to have been a party to the suit as it purports to have an overriding interest and any orders granted in finality were likely to affect their interests.
6. He pleaded further that by only being allowed to cross-examine or file statements and documents it limited him to responding to the documents filed by the respondents. It would not cure the prejudice that he would suffer, as it was clear that the document had completely changed the character of the pleadings by introducing a new party who has an overriding interest in the suit land who ought to have been a party and appropriate orders sought against them.
7. Further, great prejudice would be suffered by the Applicant leading to unfair trial and substantial loss. The intended appeal raised arguable issues which would merit pronouncements by the appellate court as alluded to and if the matter was allowed to proceed then the intended appeal would be rendered nugatory. The application was brought without unreasonable delay and the applicant was willing to comply with the terms and conditions that the court may impose on him. That the respondents were unlikely to suffer any prejudice if the application was allowed. The introduction of new documents completely changed the character of the suit and would force him to amend pleadings which would not be granted, hence greatly prejudice him. He annexed and marked PO2 (a) and (b) a letter from the Kenya Commercial Bank and a statement confirming the registration of the charge.
8. The application was opposed through an affidavit sworn by the 1<sup>st</sup> Defendant, Dr. Michael Malinga Mbito on 04/12/2023. He deposed that on 04/10/2023, this Court issued a ruling by which it allowed him to admit new documents and evidence in the matter due to the circumstances outlined in it. The instant Motion sought a blanket stay of proceedings which would unnecessarily delay or prolong the



determination of this matter. Considering that the matter had been in court since 2019 it could be inequitable if the orders were granted without a condition that the proceeds from the property be deposited in court. He reiterated that he was the registered owner of the property and held a title which was now sought to be impugned. He annexed a copy of the Grant issued to one, Abdul Rehman, in January, 1956 and the Provisional Certificate showing entries with Entry No. 9 showing a transfer to him. He marked it as MMM1.

9. He deposed that since 2019 he pleaded that the Applicant was a trespasser on the suit property and that the Plaintiff pleaded that his title was not legitimate, but he had none of his own. It was common ground that based on the instant application herein the Plaintiff acknowledged that there was a Certificate now charged to the bank but for him, all he had was an allotment letter. Further, he knew that the Plaintiff had leased out spaces in the suit property to various people (traders) who had set up semi-permanent structures, running a myriad of businesses, the traders paid the Applicant rent to the Respondent's detriment while the latter awaited the determination of this matter yet the Plaintiff had neither a superior right to the property nor any right for that matter over the rental income.
10. Further, that the court must balance the rights of the parties and the order that commends itself to equity was that the rental income from the property be deposited in court until the dispute is determined by the Court and the proceeds be released to the successful applicant. His further deposition was that where the parties litigate over the ownership it would be fair and just that that income be deposited in a joint interest earning account between the advocates of the parties and the proceeds be released to the party who would be successful in the suit. The plaintiff had been collecting rent from the property since he trespassed onto it. Article 40 of the Constitution could not be abrogated as provided by law. Since the Respondent had acquired the property legally, he knew that the law provides that the Certificate of Title issued by the Registrar upon the registration was prima facie evidence that the person named thereon as the proprietor of the land was the absolute and indivisible owner.
11. Further, the plaintiff wanted to avoid or delay the trial after the Respondent had been allowed to avail documentary evidence to help the Court adjudicate the matter. Further, the title of a proprietor could not be challenged except on the ground of fraud, misrepresentation, or where it was acquired illegally or there was procedural impropriety or through a corrupt scheme and none of these were present in the instant matter. The plaintiff was in occupation of the land without any enforceable right as he did not have a title and the alleged letter of allocation to him referred to a different parcel of land which to which he had no document to challenge the title to the suit land herein.
12. The allegations of forgery were unsubstantiated, and the Respondent would defend them at the trial. That indeed, that the land was charged to the Kenya Commercial Bank, which held the title the usual way. He had been paying rates for the property and the plaintiff was staying on it illegally, and essentially the Respondent was funding their stay on the property while also repaying a loan to his detriment, which loan the respondent had taken in order to fence the land. He annexed as MMM2 a copy of a letter dated 05/06/2023 from the Kenya Commercial Bank which indicated that the title was charged to the bank.
13. His further deposition was that whereas the plaintiff had a right to appeal the receivables from the suit property should be preserved as security for the appeal. No prejudice would be occasioned if the orders were granted as they would preserve the rights of the parties pending the outcome of the appeal. He deposed he knew of his own knowledge that the plaintiff had since leased out the premises to various traders. The land was located in a prime area in the center of Kitale town and he received more than 300,000 Kenya shillings from the property.



14. The respondent was puzzled by the plaintiff's reliance on the charge to state that a stay of proceedings should be granted because the bank had an overriding interest over it. If the plaintiff had an issue he would join the bank to invoke the court's discretion on a decision touching it. He deposed further that the fair thing to do was to provide security for the intended appeal. The applicant's argument that the Respondent should deposit funds that he received on the charge was unreasonable because the respondent was paying rates for the land. The plaintiff was pocketing rent and it was equitable for the court to dismiss the application.
15. The application was canvassed of by way of written submissions. On his part the plaintiff submitted that the reason for seeking a stay of the proceedings were to avoid prejudice to his right to fair trial because the charge registered created an overriding interest by the bank. That re-opening of the plaintiff's suit limited his rebuttal did not allow him to amend his pleadings. On the stay of proceedings pending appeal, he relied on the case of *William Odhiambo Ramogi and three Others v The Honorable Attorney General and six Others Interested Parties* [2020] eKLR which gave the conditions for stay of proceedings pending appeal. He also relied on the case of *Global Tours and Travel Limited* (Nairobi HC Winding VP Cause No. 43 of 2000 in which Justice Ringera explained that for an order of stay of proceedings to be granted it is a matter of discretion to be exercised in the interest of justice.
16. The Respondent submitted on 14/02/2024. He argued that the issue was whether the court could grant an order allowing the rental income received from the property to be deposited in a joint interest earning account. He argued that the rental income from the suit property served a substantial part of the property in dispute and ought to be preserved pending the appeal. He relied on the decision in the case of *Exclusive Living East Africa Limited & another v Bolimu* (Civil Case E453 of 2020) [2022] KEHC 3159 (KLR) (Commercial and Tax) (19 May 2022) (Ruling).
17. He submitted that he would undergo substantial loss if the Application was determined in favour of the applicant. Lastly, he argued that the Court had considered the aspect of the title document being deposited with the bank, a process which had long commenced before the filing of the suit. To submit that the Defendant had disobeyed a court order of which he was not aware was misleading. He relied on the case of *Sheila Cassat Isenberg & another v. Anthony Machatha Kinyanjui* [2021] eKLR.
18. In applications of this nature, the Court has wide discretion to grant an order for stay of proceedings pending appeal. But that should be done judiciously by weighing the merits of each case carefully and balancing the interests of justice for the parties.
19. To decide the instant application easily this Court applies the Issue, Rule, Application and Conclusion (IRAC) method. Starting with the Issue, the Applicant contends that following the decision of this Court, made on 04/10/2023 he was dissatisfied with it and has preferred an appeal therefrom. For that reason, he argues that unless the application is granted the appeal shall be rendered nugatory and he will be prejudiced.
20. The Rule on stay of proceedings pending appeal in applications filed before this Court against decisions made by it is the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and *Rules 2010 (as amended in 2020)*. Specifically, the grounds for the grant of an order for stay of proceedings pending appeal are to be found in Order 42 Rule 6(1), which provides at the relevant part as follows:-

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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, ...”



21. From the provision places it is the obligation of the Applicant to satisfy only one requirement in order to be granted the order. But the law clearly provides that the fact that a party has filed an Appeal against a judgment, decree, ruling or order of a court that does not entitle him to automatic stay of proceedings in the matter. It is not a matter of right. The Applicant ought to show sufficient cause to warrant the grant of the order.
22. About the meaning of sufficient cause, the Courts have explained it. It has been stated to mean bona fide and more than inaction on the part of a party. Thus, in *Parimal v Veena*, [2011] 3 SCC 545, the Supreme Court of India tried to define the terms by stating that:-
- “sufficient cause” is an expression which has been used in large number of statutes. The meaning of the word “sufficient” is “adequate” or “enough”, in as much as may be necessary to answer the purpose intended. Therefore, the word “sufficient” embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man. In this context, “sufficient cause” means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been “not acting diligently” or “remaining inactive.” However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously”.
23. From the decision above, it is clear that there has to be enough or adequate reason to be demonstrated to the satisfaction of the Court to the grant of the orders sought. The reason should be borne out of good faith, honesty, blamelessness and diligence in action.
24. In the instant matter, it is clear that this suit was filed on 09/10/2019. it has never proceeded to hearing until 16/12/2021, three years after its institution. On 14/10/2019 the Plaintiff was granted temporary orders against the Defendants. After that the Plaintiff did not serve the Application on the Defendants. The record shows that, except for the process of substitution of the deceased Plaintiff who died on 19/07/2020, most of the adjournments before hearing were occasioned by the Plaintiff. And now the Plaintiff seeks to stay the proceedings yet for another longer time than necessary simply because the 1<sup>st</sup> Defendant has demonstrated where the title is and the reason for being held by the said institution.
25. In the case of *Halal & Another v Thornton & Turpin [1963] Ltd* [1990] eKLR the Court of Appeal has held that:
- “The application must of course, be made without unreasonable delay.
- In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in the case of *Hassan Guyo Wakalo v Straman EA Ltd* [2013] as follows:
- “In addition, the Applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall be rendered nugatory.”
- These two principles go hand in hand and failure to prove one dislodges the other.”
26. It is not lost to the Court that the intention and purpose of stay of proceedings pending appeal always is to ensure that the subject matter of the Appeal is not rendered nugatory in the long-run. In that regard



the Applicants only needs to show that he has filed an appeal and it is arguable. And for a demonstration of the filing of an Appeal, under Order 42 Rule 6(4) the Applicant needs to show that he has filed that he may do by exhibiting a Notice of Appeal lodged and served. The sub-rule provides that

“For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.”

27. The Applicant has not exhibited any memorandum of appeal to demonstrate that he has an arguable appeal. Further, in regard to the Ruling sought to be appealed from, the Respondent herein sought in the Application granted, the order to adduce more evidence. The Applicant now herein opposed the Application and prayed for its dismissal. He neither filed an application to seek reopening of his case nor one for amendment of the Plaintiff and it was denied. Instead, the Court in balancing the interests of justice, in allowing the 1<sup>st</sup> Defendant’s application reopened the Plaintiff’s case and granted him an opportunity not to only “cross-examine” the Respondent on the new evidence as argued and submitted by the Applicant but also to adduce any evidence to rebut the said new evidence. He was granted leave to file his witness statements and evidence within ten days of service by the then applicant. Further, in my view, and as a way of clarifying the Ruling that gave rise to the instant application, this Court did not in any way limit the Applicant herein from applying to amend his pleadings to reflect the character of the claim that there was a bank involved in the alleged charge created. Thus, in the interest of justice the Court, applying Section 3A of the *Civil procedure Act*, went beyond not finding merit in the prayer for dismissal but granted the Applicant herein more than he prayed for.
28. The Applicant did not adduce any evidence to rebut the new evidence about the title being held at the bank but chose to challenge the Ruling on Appeal. Again, the Applicant’s argument that the Appeal would be rendered nugatory is nothing neither here nor there for the reason that the Applicant argues that the title held by the Plaintiff is fake. If indeed it is fraudulent yet Plaintiff has proper documents for the parcel of land it means that the alleged charge over the suit land by the Kenya Commercial bank is neither here nor there. In essence it would mean that the charge is not a valid one and the bank cannot see the property. It means the bank would have been duped into releasing funds as a charge over a non-existent title.
29. But, if the argument by the Applicant would be that the title charged to the bank is a proper title, then it means that the Plaintiff does not have a valid ownership document to the land, and perhaps claims that the title, which would be the one and only in the bank is a title duly issued by the relevant lands office but the 1<sup>st</sup> Defendant who has offered the same to the bank as security was (allegedly) registered as such by way of fraud or illegality or misrepresentation.
30. Regarding the Respondent’s argument that the Applicant deposits the rental income being earned from the investments on the suit property which the Plaintiff is said to have leased out, it is my humble view that the prayer cannot be granted in a reply or opposition to the instant application. Such prayers are wide and require both evidentiary support and pleadings by way of a formal application. This Court cannot therefore grant it.
31. To order a stay of proceedings in this matter would serve to prolong the delay in this matter which is already five years old in the Court registry and contribute to backlog of cases, a menace the courts are doing the best they can to do away with. It would not serve justice to delay the matter. In any event, the Applicant had stated, which is not denied, that he is repaying the loan hence there is no risk of the suit land being subjected for realization by the bank for default of payment. Lastly, this Court is alive to the fact, as borne by the record, that the Defendant has been sickly and in and out of the hospitals both in the country and outside, for treatment of an ailment said to be terminal. To order the stay of proceedings herein will not be in the interest of the said sickly party. While the Court does not know



when his Maker (God) will permit the Defendant to heal or rest from the illness it is in the best interest of all parties to have the said party testify before this Court as soon as practicable in order to immortalize his evidence just as the Plaintiff's has been already to the extent of closing his case at one time.

32. Based on the Applicant's and Respondent's arguments which give rise to the two above conflicting positions, besides the other reasons of failure to demonstrate that there is an arguable appeal, it leads this Court an inescapable finding that there is no merit in the Application herein. The Application is dismissed with costs to the Respondent.
33. This matter shall be mentioned virtually on 12/06/2024 at 8:30 AM to fix a hearing date for further hearing.
34. It is so ordered.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 22<sup>ND</sup> DAY OF MAY, 2024.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE.**

