



**Cherono v Kahama (Environment & Land Miscellaneous Case
E052 of 2024) [2024] KEELC 3887 (KLR) (14 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 3887 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND MISCELLANEOUS CASE E052 OF 2024**

JA MOGENI, J

MAY 14, 2024

BETWEEN

JAMES KIMUTAI CHERONO APPLICANT

AND

ANNETTE WANJIRU KAHAMA RESPONDENT

RULING

1. Before this Court for determination is the Application dated 4/03/2024 duly filed under Order 51 Rule 1, Order 12 Rule 7, Order 1 Rules 14 and 15 Order 42 Rule 6(1), Order 43 Rule 1(1) (a) of the Civil Procedure Rules, Article 159 (2) (d) of the Constitution of Kenya, 2010 and all other enabling provisions of the law. The Applicant is seeking orders infra; -
Spent.
 2. That the Honourable Court be pleased to stay proceedings and/or further proceedings in Milimani Commercial MCELC E293 OF 2022 pending the hearing and determination of the appeal.
 3. That the Honourable Court be pleased to set aside and or vary the orders for the dismissal of the applicant's chamber summons application for leave to join a proposed third party.
 4. That the Honourable Court be pleased to allow the applicants to join a proposed third party.
 5. That the Honourable Court grant any other relief that this court may deem fit and just to grant.
1. The motion is premised on the Supporting Affidavit of James Kimutai Cherono, and grounds (1) to (17) set out on its face.
 2. This Application is opposed. There is a Replying Affidavit sworn by Annette Wanjiru Kahama sworn on 4/04/2024. The Respondent deponed that the applicant seeks orders from the court



to set aside the dismissal of their second chamber summons application and to allow them to join proposed third parties. However, the court is advised that it lacks jurisdiction to grant these orders at this stage, as they can only be granted on appeal. Additionally, staying the proceedings at this point, with the plaintiff's case closed, would contravene the principle of expeditious disposal of cases as outlined in Article 159(2)(b). Furthermore, there is currently no appeal pending, and the applicant has not filed a memorandum of appeal or provided grounds for appeal, creating uncertainty about the nature of the intended appeal. Moreover, the Respondent asserts that the Applicant has missed the deadline for filing the appeal, further complicating the matter.

3. The Court directed that the Application to be heard by way of written submissions and a Ruling date was reserved. By the time of written this ruling, none of the parties had duly submitted.
4. Having considered the motion, supporting affidavit and the replying affidavit, this court is of the considered view that the only issue falling for determination is whether the grounds and facts presented make the applicant's motion merited. I will proceed to analyze the legal and jurisprudential framework on the issue.
5. The first issue for determination is whether this Court can order stay proceedings and/or further proceedings in Milimani Commercial MCELC E293 of 2022 pending the hearing and determination of the appeal.
6. The *Halsbury's Law of England 4th Edition Vol. 37 pages 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.”

8. It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50(2)(e) of the *Constitution* as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit. The threshold for such proof is beyond reasonable doubt.
9. In the instant application, the Applicant has not presented any argument before this Court to convince the court that stay of proceedings is warranted. There is no appeal before this Court with regard to



Milimani Commercial MCELC E293 of 2022. The Applicant did not adduce any evidence before this Court with regard to the stage at which the suit in the trial court is at. It is only the Respondent who has deponed that the Plaintiff in the trial court has closed her case. This means that the suit at the trial court is yet to be determined. This Court therefore will sit on appeal in that matter and it would not be proper to stay the suit without considering the compelling circumstances. It is therefore my considered view that there is no justification for staying the proceedings in Milimani Commercial MCELC E293 of 2022.

10. The second issue is whether the Applicant has met the grounds to warrant an order setting aside and/or varying the orders for the dismissal of the Applicant's Chamber Summons Application for leave to join a proposed third party.
11. Order 45 Rule 1 of the *Civil Procedure Rules* as well as Section 80 of the *Civil Procedure Act* give this Court unfettered discretion to allow a review on any sufficient reason which reason may relate to not only the law, but also to facts as they may emerge from adducing evidence. See the case of *Shanzu Investments Ltd v Commissioner for Lands* Civil Appeal No. 100 of 1993.
12. The substantive law regarding reviewing a judgment or order of the court is found in Section 80 of the *Civil Procedure Act* and the procedural law is Order 45 of the *Civil Procedure Rules* which stipulate as stated above. That the jurisdiction of the Court under the Order 45 of the *Civil Procedure Rules* is restricted to the grounds set out in the said order which are well outlined in Rule 1 as follows: -

“Discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”
13. The Applicant therefore should satisfy any of the three grounds of (a) Discovery of new and important matter or evidence (b) some mistake or error apparent on the face of the record (c) other sufficient reason.
14. The issue of inordinate delay was discussed in the case of *Mwangi S Kimenyi v Attorney General & Another* [2014] eKLR where it was held that there was no precise measure of what amounted to inordinate delay save that it would differ from case to case. In the instant application the applicant has not even discussed the issue of delay in bringing this application before the court. The impugned order dismissing the Applicant's application for joinder of a third party was delivered on 01/02/2023 and the instant Application was brought on 14/03/2024. I am not persuaded that filing an application for review 407 days when the trial court had already delivered its decision is reasonable time. A period of that kind is unreasonable delay and the Applicant has not given any explanation for the inordinate delay.
15. On account of some mistake or error apparent on the face of the record, it was submitted that in *Mumby's Food Products Limited & 2 Others v. Co-Operative Merchant Bank Limited* Civil Appeal No. 270 of 2002, the Court held that:

“a review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must however be self-evident and should not require an elaborate argument to be established. It will not



be a sufficient ground for review that another Judge could have taken a different view of the matter.”

16. The instant application is based on the affidavit of James Kimutai Cherono on grounds that the Applicant’s Chamber Summons Application for leave to join a proposed third party was dismissed on 1/02/2023. That it is only fair and just for the said Land Registrar Nairobi and the Attorney General be joined as the 1st and 2nd Third parties respectively so that the real issues in controversy can be resolved once and for all.
17. The provisions of Order 45 Rule 1 of the Civil Procedure Rules were restated by the Court of Appeal in *Benjoh Amalgamated Limited and another v Kenya Commercial Bank Limited* [2014] eKLR as follows:

“In the High court, both the Civil Procedure Act in section 80 and the Civil Procedure Rules in Order 45 rule 1 confer on the court power to review. Rule 1 of Order 45 shows the circumstances in which such review would be considered ranging from discovery of new and important matter or mistake or error apparent on the face of the record or any other sufficient reason but section 80 gives the High Court greater amplitude for review”.
18. The court in the case of *Muyodi v Industrial & Commercial Development Corporation & Ano.* (2006) IEA 243 stated as follows: -

“For an application for review under Order 45 Rule 1 to succeed, the applicant was obliged to show that there had been discovery of new and important evidence which, after due diligence, was not within his knowledge or could not be produced at that time. Alternatively, he had to show that there was some mistake or error apparent on the face of the record or some other sufficient reason. In addition, the application was to be made without unreasonable delay”.
19. In my view I find that there definitely has not been any discovery of any new matter or evidence that was not available at the time the order was issued. There is no error apparent on the face of the record either. The Applicant in this application has not explained the delay in bringing the application. As already stated, the bringing of the application after the lapse of 407 days after the impugned order was issued in my view is dilatory and the delay is unreasonable and I would equally on this account disallow the Applicant’s application.
20. The upshot of the foregoing is that I find the application by the Applicant dated 4/03/2024 to be devoid of any merit and I accordingly order the same dismissed with costs to the Respondent.
21. It is so ordered.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF MAY 2024

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MOGENI J

JUDGE

In the Virtual Presence of:

Mr. Kipkoech for Respondent

No appearance for Applicant



Ms. Caroline Sagina: Court Assistant

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MOGENIJ

JUDGE

