



**Mwangi v Kuria & 3 others (Environment and Land Case
200 of 2009) [2024] KEELC 4107 (KLR) (9 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4107 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND CASE 200 OF 2009**

CA OCHIENG, J

MAY 9, 2024

BETWEEN

AGNES WAITHERA MWANGI PLAINTIFF

AND

DENNIS M KURIA 1ST DEFENDANT

DENOIL KENYA LIMITED 2ND DEFENDANT

**DAVID KILONZO (SUED IN HIS CAPACITY AS THE CHAIRMAN OF KASINA
HOUSING SCHEME SOCIETY) 3RD DEFENDANT**

MAVOKO MUNICIPAL COUNCIL 4TH DEFENDANT

RULING

1. What is before Court for determination is the Plaintiff's Notice of Motion Application dated the 25th September, 2023 brought pursuant to Order 42 Rule 6 and Order 51 Rule 1 of the [Civil Procedure Rules](#) as well as Sections 1A, 1B, 3A and 6 of the [Civil Procedure Act](#). The Plaintiff seeks the following orders:-
 1. This Honourable Court be pleased to grant an order for stay of these proceedings pending the hearing and determination of the Plaintiff/Applicant's Appeal before the Court of Appeal being Civil Appeal No. COACA/E741/2023 – *Agnes Waitthera Mwangi - v- Dennis M. Kuria & Others*; and
 2. Costs of this Application be in the cause.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Agnes Waitthera Mwangi where she deposes that on 30th May, 2023, the Court delivered its Judgment by dismissing her claim against the Defendant. She explains that she has lodged an Appeal against the said Judgment by filing a Notice of Appeal on 12th June, 2023. Further, that her Advocate obtained



necessary documents and lodged an Appeal in the Court of Appeal being Civil Appeal No. COACA/E741/2023 *Agnes Waithera Mwangi - v- Dennis M. Kuria & Others*. She reiterates that she has an arguable appeal with high chances of success. Further that the success will be void if the court does not grant an order of stay of proceedings in this suit, pending the hearing and determination of her Appeal. She contends that, if the proceedings are not stayed, her Appeal will be rendered useless and her right to be heard as well as present her case in the best way possible will be defeated.

3. The Application was opposed by the 1st, 2nd and 4th Defendants who filed Grounds of Opposition as well as a Replying Affidavit sworn by Dr. Vincent Chokaa PhD. They contend that there are no ongoing proceedings in this suit, which can be stayed as this Court became functus officio, when it delivered its Judgment on 30th May, 2023. They aver that there is no execution against the Judgment of this Court as the Plaintiff's claim against the Defendants' was dismissed. Further, there is no Decree issued against the Plaintiff, which can be stayed under Order 42 Rule 6 of the *Civil Procedure Rules*. They explain that the costs of this suit have not been taxed and the Court having awarded the costs of the suit to the Defendants, cannot stay taxation of this costs by the Taxing Officer. They reiterate that the Application is incompetent and misconceived.
4. The Application was canvassed by way of written submissions but it is only the Plaintiff who filed hers as the Defendants' opted to rely on their Grounds of Opposition including Replying Affidavit.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the Grounds of Opposition, respective Affidavits and Plaintiff's submissions, the only issue for determination is whether this court should stay proceedings pending the outcome of the Appeal.
6. The Plaintiff in her submissions contends that she is entitled to the orders as sought. She argued that an Application for stay of proceedings pending Appeal, is to preserve the subject matter in dispute so that the rights of the Appellant (in this case the Plaintiff), who is exercising the right of Appeal are safeguarded. She reiterated that she had already filed the Appeal which raised triable issues and has high likelihood of success. To buttress her averments, she relied on the following decisions: *Global Tours and Travel Ltd - v- Five Continents Travel Ltd* (2015) eKLR and *Congress Rental South Africa v Kenyatta Convention Centre: Cooperative Bank of Kenya & Another (Garnishee)* (2019) eKLR.
7. In this instance the Court delivered its Judgment on the 30th May, 2023 dismissing the Plaintiff's suit with costs to the Defendants. The Plaintiff being aggrieved with the said Judgment lodged an Appeal being Civil Appeal No. COACA/E741/2023 *Agnes Waithera Mwangi - v- Dennis M. Kuria & Others*. The Plaintiff has even annexed a copy of the Memorandum of Appeal and confirmed filing of the relevant documents in the Court of Appeal. The Plaintiff now seeks to stay any proceedings in this matter, pending determination of the Appeal.
8. On stay of proceedings, Order 42 Rule 6 of the *Civil Procedure Rules* stipulates that:-
 - (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, 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.”



9. In the case of *Global Tours & Travels Limited*; Nairobi HC Winding Up Cause No. 43 of 2000 the Judge while dealing with an issue revolving around stay of proceedings held 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 Justicethe 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” (emphasis added)

10. Further, in the case of *Co-operative Bank of Kenya Limited – v- Banking Insurance & Finance Union (Kenya)* [2015] eKLR, the Court of Appeal (Kantai J.A) held as follows: -

...An order for stay of execution [pending appeal] is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a Judgment. The delay of performance presupposes the existence of a situation to stay – called a “positive order” – either an order that has not been complied with or has partly been complied with.”

11. While, in the case of *Arthur Mathitu Nderitu & Another v Settlement Fund Trustees & 2 others; Fredrick Wan’gombe Nderitu & another (Proposed Interested Parties)* [2019] eKLR, the court held that:-

It is a general principle of law that a Court after passing Judgment, becomes functus officio and cannot revisit the Judgment on merits, or purport to exercise a judicial power over the same matter, save as provided by law.”

12. Based on the facts as presented, while relying on the legal provisions I have cited and associating myself with the decisions quoted, I find that since the Plaintiff’s suit was dismissed with costs, there is no positive order to be stayed. Further, there are no pending execution proceedings before this court, to be stayed. It seems to me the Plaintiff seeks to stay taxation of the Defendants’ Bill of Costs but this is a role designated to the Taxing Officer, and not for this Court. I find that, since this Court delivered its Judgment in the matter, which the Plaintiff has appealed from, it is hence functus officio.
13. It is against the foregoing that I find the Notice of Motion Application dated the 25th September, 2023 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 9TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of

Mr. Muriithi for the Plaintiff

Dr. Chokaa for 1st, 2nd and 4th Defendants

No appearance for the 3rd Defendant



