



REPUBLIC OF KENYA



**Beach Villas Limited v Mogeni & 4 others (Environment & Land  
Case 6 of 2020) [2024] KEELC 4780 (KLR) (18 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4780 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 6 OF 2020  
FM NJOROGE, J  
JUNE 18, 2024**

**BETWEEN**

**BEACH VILLAS LIMITED ..... PLAINTIFF**

**AND**

**KELVIN TOM MOGENI ..... 1<sup>ST</sup> DEFENDANT**

**DAVID KINISU SIFUNA ..... 2<sup>ND</sup> DEFENDANT**

**COUNTY GOVERNMENT OF KILIFI ..... 3<sup>RD</sup> DEFENDANT**

**LAND REGISTRAR, MOMBASA ..... 4<sup>TH</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. This is a ruling on the notice of motion application dated 24/1/2024 filed by the 2<sup>nd</sup> Defendant seeking the following orders: -
  - a. Spent.
  - b. Spent.
  - c. That pending the hearing and determination of the intended appeal, this honourable court be pleased to stay and/or suspend all proceedings herein.
  - d. That the costs of and incidental to this application be in the intended appeal.
2. The application which was brought under Section 1A, 1B and 3A of the *Civil Procedure Act* and Order 42 rule 6 of the *Civil Procedure Rules* is premised on the grounds set out on the face of the motion and the supporting and further affidavits sworn by the 2<sup>nd</sup> Defendant on 24/1/2024 and 19/2/2024 respectively.



3. The gravamen of the 2<sup>nd</sup> Defendant's case is that following a ruling delivered by this court on 14/12/2023 regarding his application for review dated 16/2/2023 he has preferred an appeal by filing a notice of appeal dated 18/12/2023 challenging the entire ruling, and that the grounds of appeal and intended appeal have overwhelming chances of success.
4. In opposition, the Plaintiff filed grounds of opposition dated 20/2/2024 stating that the application is unmerited and that the intended appeal is frivolous and a delaying tactic by the 2<sup>nd</sup> Defendant. According to the Plaintiff, the application is not only misconceived but also incompetent, an abuse of the court process and ought to be dismissed.
5. The application was canvassed by way of written submissions filed on 22/2/2024 by the 2<sup>nd</sup> Defendant and those dated 29/4/2024 by the Plaintiff.

### **2<sup>nd</sup> Defendant's Submissions**

6. I have perused the 2<sup>nd</sup> Defendant's submissions wherein I note that counsel majorly discussed the doctrine of *res judicata* and jurisdiction of this court, issues that were addressed in the impugned ruling. I will therefore not reproduce the same here. In relation to the instant issue concerning stay of proceedings, counsel relied on *inter alia* the cases of *Attorney General v Okiya Omtatah Okoiti & another* [2019] eKLR; *NIC Bank Ltd & 2 others v Mombasa Water Products Limited* [2021] eKLR and *Teachers Service Commission v Kenya National Union of Teachers & 3 others*, Sup. Ct. Application No. 16 of 2015 [2015] eKLR.

### **Plaintiff's Submissions**

7. Counsel for the Plaintiff identified two issues for determination; firstly, whether the 2<sup>nd</sup> Defendant has met the threshold for stay of execution and whether the intended appeal is frivolous.
8. Addressing the first issue, counsel submitted that the power to grant stay of proceedings is a matter of judicial discretion to be exercised judiciously, sparingly and only in the interest of justice. He submitted that the principles are well stated under Order 42 rule 6 (2) of the *Civil Procedure Rules*. To counsel, the 2<sup>nd</sup> Defendant had not met the threshold provided under the aforementioned provision. It states that the 2<sup>nd</sup> Defendant does not have an arguable appeal to warrant stay of proceedings for reasons that the present application contains prayers for orders which were already heard and determined by this court and that as such determining the same amounts to a contravention of Article 164 (3) (a).
9. Counsel added that the 2<sup>nd</sup> Defendant has also failed to illustrate what substantial loss he risks to suffer if the order for stay is not granted. To counsel, it is not enough to state that one will suffer substantial loss, but one must equally demonstrate the same. To buttress this point, counsel relied on the case of *Greyhound Company Limited v Globetrotter Agency Limited* Civil Appeal E024 of 2022; *Samvir Trustee Limited v Guardian Bank Limited* Nairobi Milimani HCCC No. 795 of 1997; and *Mocha Hotel Limited v Kwanza Estates Limited* [2023] KEELC eKLR. Counsel further submitted that the 2<sup>nd</sup> Defendant has failed to attach any evidence of his allegations that he transferred the suit property to third parties or that he is in occupation thereof to warrant the orders sought.
10. Further relying on the case of *Jimmy Parnyumba Luka & 3 others v Chairman Land Adjudication Committee, Lesbuta Land Adjudication Section & 6 others*; and *Reliance Bank Ltd v Norlake Investments Ltd* [2002] EA 227 counsel argued that the 2<sup>nd</sup> Defendant failed to demonstrate the hardship if any that he risks to suffer if the orders sought are not granted, which hardship would be out of proportion to any suffering which he might undergo while waiting for the determination of the appeal.



11. To counsel, the intended appeal is not arguable and there is nothing to show that the appeal will be rendered nugatory should the application be dismissed and the appeal succeeds. Counsel relied on the case of [Hassan Guyo Wakalo v Straman East Africa Ltd](#) [2013] eKLR to support this point.
12. Counsel's further argument was that allowing the application would amount to a further delay of justice, which to her, has been the 2<sup>nd</sup> Defendant's intention from the start. She argued that delaying the suit further will highly prejudice the Plaintiff as to its rights to access to justice and right to be heard without delay. In support of this argument, counsel relied on the cases of [Kenya Wildlife Services v James Mutembei](#) [2019] eKLR and [Re Global Tours & Travel Ltd](#) HCWC No. 43 of 2000 as quoted in [Peter Kariuki Mburu & another v Neema Shah](#) [2021] eKLR.
13. The issue that arises for determination is whether proceedings in this suit should be stayed pending the hearing and determination of the intended appeal.

### **Analysis and Determination**

14. A brief background of this matter is that the Plaintiff instituted this suit on 31/1/2020 claiming ownership of land subdivision no. 411/III/MN (the suit property). The Plaintiff pleaded that sometime around August 2019, upon conducting a search and investigations, it discovered that there was an alleged transfer from the Plaintiff to the 1<sup>st</sup> Defendant and subsequently a further transfer from the 1<sup>st</sup> to the 2<sup>nd</sup> Defendant. Thereafter, the 2<sup>nd</sup> Defendant caused a subdivision of the suit property into five portions.
15. The Defendants entered appearance and filed their respective statements of defence. The 2<sup>nd</sup> Defendant filed a preliminary objection dated 25/6/2021 challenging this court's jurisdiction by virtue of a consent order adopted in Mombasa ELC No. 111 of 2012. On 18/7/2022 the court dismissed the preliminary objection, prompting the 2<sup>nd</sup> Defendant to file an application dated 16/2/2023 seeking orders *inter alia*, of leave to file the aforementioned consent herein, an order for review of the ruling delivered on 18/7/2022, and dismissal of the suit for want of jurisdiction. A ruling was subsequently delivered by this court on 14/12/2023 dismissing the said application dated 16/2/2023. This court observed that the issue of jurisdiction was *res judicata*, and that there were no sufficient reasons to review the previous ruling. Aggrieved by the ruling dated 14/12/2023, the 2<sup>nd</sup> Defendant filed a notice of appeal and moved this court with the present application seeking stay of proceedings pending hearing and determination of the intended appeal.
16. Stay pending appeal is addressed under Order 42 Rule 6 (1) of the [Civil Procedure Rules](#) as follows: -

“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.”
17. Rule 6 (2) further provides: -



No order for stay of execution shall be made under sub-rule (1) unless—

- “(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
- (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”

18. Rule 6 (4) fortifies the position that for its purposes 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.
19. The import of sub-rule 1 above is that the mere filing of an appeal does not mean that the proceedings must be stayed. The court must be convinced that there is sufficient reason to do so. In doing so, the application must have been filed timeously and an applicant must satisfy the court that they stand to suffer substantial loss if stay is not granted.
20. Further, in *Ezekiel Mule Musembi v H. Young & Company (E.A) Limited* [2019] eKLR, the case of *Re Global Tours & Travel Ltd* HCWC No. 43 of 2000 was cited where Ringera, J (as he then was) 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 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.”

21. The impugned ruling was delivered on 14/12/2023 and a notice of appeal lodged on 19/12/2023 while the present application was filed on 25/1/2024, approximately one month and a few days after initiating the appeal. I find that the delay in seeking stay of proceedings in this matter is not inordinate.
22. The second hurdle was for the 2<sup>nd</sup> Defendant to demonstrate that substantial loss may result to him should the proceedings herein continue. The 2<sup>nd</sup> Defendant has failed to successfully surmount this hurdle in the sense that he has not shown this court the loss he stands to suffer should stay be denied. However, the court is entitled to grant a stay on the basis of any other sound ground.
23. The vital issue on appeal concerns the jurisdiction of this court which is challenged on the grounds that there exists a consent order adopted in a different case. This court has already found that it is seized of jurisdiction. It remains to be seen whether a contrary decision may emanate from the appeal.
24. It is proper that this court do direct its efforts towards resolving other disputes and avoid expending any resources on the present matter during the pendency of that appeal. Consequently, I am of the view that the proceedings herein should be stayed. The upshot of the foregoing analysis is that the notice of motion dated 24/1/2024 has merit and it is hereby granted in terms of prayer no (iii) thereof. Further, to ensure that the applicant does not drift into somnolence padded by the coziness of the stay order granted it is hereby ordered as follows:
  - a. The applicant shall file and serve the record of appeal within 30 days of this order;
  - b. In default of filing and service as ordered in (a) above the stay order granted herein shall stand automatically vacated;



- c. This matter shall be mentioned on October 24, 2024 to ascertain compliance with order no (a) herein above and, in the event of non-compliance, to issue it with a hearing date.

**RULING DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 18<sup>TH</sup> DAY OF JUNE 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC, MALINDI**

