



**Njue v Mwangi & 2 others (Environment and Land Appeal
E007 of 2023) [2024] KEELC 4613 (KLR) (6 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4613 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT AND LAND APPEAL E007 OF 2023**

JG KEMEI, J

JUNE 6, 2024

BETWEEN

PRISCILLA NYAMBURA NJUE APPELLANT

AND

JACINTA NJERI MWANGI 1ST RESPONDENT

DAVID WANG'ANG'A MWANGI 2ND RESPONDENT

MAX KARIUKI MWANGI 3RD RESPONDENT

*(Being an Appeal against the Ruling and Orders of the Chief Magistrate Court at
Thika M.W. Wanjala, PM delivered on 16/6/2023 in CMELC No. 117 of 2018)*

RULING

1. Before Court is the Appellant/Applicant's Notice of Motion Application dated 21/9/2023 expressed under Sections 3 and 3A [Civil Procedure Act](#) and Order 42 Rule 6 and Order 51 [Civil Procedure Rules](#) seeking orders That;
 - a. Spent.
 - b. This Honorable Court be pleased to stay proceedings in Thika CMELC No. 117 of 2018 Jacinta Njeri Mwangi & Others v Priscilla Nyambura Njue at the Chief Magistrates Environment and Land Court at Thika pending hearing and determination of this Application inter partes.
 - c. This Honorable Court be pleased to issue an order of stay of execution of the Ruling and Order given on 16th June 2023 and all consequential orders in Thika CMELC No. 117 of 2018 Jacinta Njeri Mwangi & Others v Priscilla Nyambura Njue at the Chief Magistrates Environment and Land Court at Thika pending hearing and determination of this Application inter partes.



- d. This Honorable Court be pleased to stay proceedings in Thika CMELC No. 117 of 2018 Jacinta Njeri Mwangi & Others versus Priscilla Nyambura Njue at the Chief Magistrates Environment and Land Court at Thika pending hearing and determination of the instant Appeal.
 - e. This Honorable Court be pleased to issue an order of stay of execution of the Ruling and Order given on 16th June 2023 and all consequential orders in Thika CMELC No. 117 of 2018 Jacinta Njeri Mwangi & Others versus Priscilla Nyambura Njue at the Chief Magistrates Environment and Land Court at Thika pending hearing and determination of the instant Appeal.
 - f. The Honorable Court be pleased to give such further or other directions as it may deem fit and just to grant.
 - g. Costs of the application be in cause.
2. The Application is premised on the grounds that the Applicant is dissatisfied with the Chief Magistrate's Ruling dated 16/6/2023 dismissing with costs her Application dated 16/9/2022. As a result, she has filed her Memorandum of Appeal and believes that her appeal has a high probability of success and raises pertinent issue touching on the pecuniary jurisdiction of the trial Court to determine the suit whose subject value is Kshs. 45M. That unless this Court intervenes by staying the proceedings in Thika CMELC No. 117 of 2018; Jacinta Njeri Mwangi & Others v Priscilla Nyambura Njue, the trial Court hearing set for 28/9/2023 may result in adverse orders against the Applicant. Further that unless stay of execution is granted, his appeal will be rendered nugatory and he stands to suffer irreversible prejudice.
 3. The Application is supported by an Affidavit of even date of Priscilla Nyambura Njue, the Applicant. Reciting the above aforementioned grounds, the Applicant annexed copies of the impugned trial Court Ruling dated 16/6/2023 and copy of his Memorandum of Appeal dated 16/7/2023 as PNN1 and PNN1 (sic) respectively. She beseeched the Court to exercise its discretionary powers in her favor and grant the Application.
 4. The Application is opposed by the 1st and 2nd Respondents only.
 5. The 1st Respondent Jacinta Njeri Mwangi swore her Replying Affidavit on 28/11/2022. She deponed that the instant Application is vexatious and frivolous aimed at derailing the hearing of the suit. She averred that the suit was initially filed in Nairobi High Court vide a Complaint dated 30/7/2010 and later the High Court sua moto transferred the suit to Thika Chief Magistrate's Civil Case. That the Respondent later amended her Complaint dated 8/4/2022. That the Applicant's advocates are derailing the hearing and conclusion of the suit; the Applicant is guilty of disobeying Court orders by subdividing the suit property and staying the trial Court proceedings will cause the Respondent grave injustice.
 6. Equally the 2nd Respondent David Wang'ang'a Mwangi filed his Replying Affidavit sworn on 12/2/2024. Rehashing the background of the filing of the suit as averred by the 1st Respondent, he deponed that the Appellant Motion dated 16/9/2022 at the trial Court sought to rely on a valuation report dated 22/8/2022 valuing the suit property at Kshs. 45M yet the purchase price of the suit property in 2020 when the suit was filed was Kshs. 800,000/-. That it is against that backdrop that the High Court transferred the suit to Thika Chief Magistrate's Civil Case. That the Applicant's appeal is not arguable and no explanation has been tendered to explain why the instant Motion was inordinately filed. He urged the Court to dismiss the Application with costs.
 7. On 22/9/2023 parties were directed to canvass the Application by way of written submissions.



8. The Applicant through the firm of Muma & Kanjama Advocates filed submissions dated 20/11/2023 while the 1st Respondent's submissions by the firm of Gichina Macharia & Co. Advocates submission are dated 17/4/2024. The 2nd and 3rd Respondents did not file any submissions.
9. The Applicant drew a singular issue for determination; whether this Court should stay the trial Court proceedings. Answering the issue in the affirmative, the Applicant submitted that he has unfettered right of appeal and the prayer for staying proceedings is in exercise of the discretionary powers of this Court derived from Order 42 rule 6 (1) of the Civil Procedure Rules. That the foundational grounds of granting such a prayer were stated in the case of *Re Global Tours & Travel Ltd HCWC NO. 43 OF 2000*.
10. On arguability of her appeal, the Applicant emphasized that the appeal raises a jurisdictional issue as enumerated in her Memorandum of Appeal. That an arguable appeal is not one that must succeed but it should raise a serious question of law or a reasonable argument deserving consideration by the Court as was held by the Court of Appeal in the case of *Winfred Nkuene Kirirmi v Jecinta Gakii* [2020] eKLR. Regarding the nugatory aspect of the appeal, the Applicant argued that if the trial Court proceeds for hearing and later Judgment, and the Applicant succeeds on appeal, then the subordinate Court would have delivered Judgment devoid of jurisdiction. Lastly the Applicant submitted that the Application has been timeously filed.
11. On the other hand, the 1st Respondent drew three issues for determination; whether stay of proceedings in the trial Court should be granted; whether stay of execution of the Orders issued on 16/6/2023 should issue and who bears costs of the Application. Citing Order 42 Rule 6 (1) of the Civil Procedure Rules she submitted that the Applicant has not met the threshold for stay of proceedings as prayed. That the Applicant's intended appeal is a ploy to delay the hearing of the suit which is contrary to the spirit of Article 159 of *the Constitution* of Kenya. That the Applicant's objection to the lower Court jurisdiction is without basis as the suit was transferred there sua moto from Nairobi High Court. That if the Applicant is aggrieved, the appropriate route is either to appeal or review the transfer order issued on 18/6/2018.
12. Regarding the prayer for stay of execution pending appeal, the 1st Respondent cited Order 42 Rule 6 (2) of the *Civil Procedure Rules* and highlighted that the Applicant has not satisfied the threshold spelt out therein. That the Applicant will not suffer any substantial loss if the order for stay of execution is declined but if allowed, it is the 1st Respondent who will suffer immense prejudice in delaying justice. Further that stay of execution can only arise against positive orders and not against negative orders as herein. The cases in *Paul Hibro Isatu v Bagasi Nabosu & 2 Others* [2020] eKLR and *Kenya Commercial Bank v Tamarind Meadows Limited & 7 Others* [2016] eKLR were cited in support of that proposition. In conclusion the 1st Respondent urged the Court to dismiss the Application with costs.
13. The main issue for determination is whether the Application is merited addressed as follows.

Stay of proceedings

14. The law on stay of proceedings is generally provided for in Section 6 of the *Civil Procedure Act* to the effect that where an issue is directly and substantially in issue in proceedings between the same parties, another Court ought to stay its proceedings in respect of such suit.
15. The Civil Procedure Rules alludes to stay of proceedings under Order 42 Rule 6(1) as follows;

“Stay in case of appeal [Order 42, rule 6.]



1. 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.”

16. In the case of *Global Tours & Travel Limited v Five Continents Travel Limited* [2015] eKLR where it was held that:-

“... 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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the case, 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 timeously.”

17. Moreover, in the case of *William Odhiambo Ramogi & 2 Others v The Honourable Attorney General & 3 Others* [2019] eKLR the Court laid out the principles our Courts have established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. See: *Kenya Shell Limited v Benjamin Karuga Kibiru & Another* [1986] eKLR; *Global Tours & Travels Limited* (Nairobi HC Winding Up Cause No. 43 of 2000); *David Morton Silverstein v Atsango Chesoni* [2002] eKLR: The Court laid down the following six principles:

- a. First, there must be an appeal pending before the higher Court;
- b. Second, where such stay is sought in the Court hearing the case as opposed to the higher Court to which the Appeal has been filed and there is no express provision of the law allowing for such an application, the Applicant should explain why the stay has not been sought in the higher Court. This is because, due to the potential of an application for stay of proceedings to inordinately delay trial, there is a policy in favour of applications for stay being handled in the Court to which an appeal is preferred because such a Court is familiar with its docket and is therefore in a position to calibrate any order it gives accordingly;
- c. Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;
- d. Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;



- e. Fifth, the Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal; and
 - f. Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay.
18. Additionally, the Court in the case of Kenya *Wildlife Service v James Mutembei* [2019] eKLR 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...”
19. The *Halsbury’s Law of England* 4th Edition Vol. 37 pages 330 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.”
20. Flowing from the above jurisprudence, it is emerging that whether or not to grant an order for stay of proceedings is a discretionary judicial power. This discretionary power must be exercised judiciously and sparingly. The Court has to consider if it will be in the interests of justice to grant the same. In this case the Applicant urges this Court to stay proceedings in the trial Court pending the hearing and determination of her appeal. The appeal challenges the Ruling dated 16/6/2023 annexed as PNN1. The Applicant has also demonstrated lodging her Appeal vide a Memorandum of Appeal dated 17/7/2023. The 1st and 2nd Respondents oppose the pray for stay of proceedings accusing the Applicant of tactically delaying the hearing of the suit by filing numerous applications.
21. The Court of Appeal in the case of *Stanley Kang’ethe Kinyanjui v Tony Keter* [2013] eKLR stated that whether or not an appeal would be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible or if it is not reversible whether damages would reasonably compensate the parties aggrieved. In this case the jurisdiction of the trial Court has been impugned. Jurisdiction is a question of law; it either exists or not. It goes to the root of a matter before a Court of law and can be raised at any time by any party or Court sua moto. In the event that it is established that the Court lacked jurisdiction then automatically the proceedings before it will be rendered null and void. See the Supreme Court decision in *Lemanken Aramat v Harun Meitamei Lempaka & 2 Others*



[2014] eKLR and Court of Appeal Judgment in *Phoenix of E.A. Assurance Company Limited v S. M. Thiga T/A Newspaper Service* [2019] eKLR.

22. The upshot of the going therefore is that this Court is persuaded that this is a ripe case calling for stay of the trial Court proceedings pending the determination of the Applicant's appeal.

Stay of execution

23. The legal provisions for stay of execution pending appeal are anchored in Order 42 rule 6 (1) & (2) of the *Civil Procedure Rules* that;-

- “(1) 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.
- (2) 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.”

24. As rightly pointed out by the 1st Respondent, a reading of the impugned Ruling does not contain any positive orders that warrant this prayer. The Ruling simply dismissed the Applicant's Motion dated 16/9/2022 that sought dismissal of the Respondents' suit. See the Court of Appeal decisions in *Jennifer Akinyi Osodo v Boniface Okumu Osodo & 3 Others* [2021] eKLR and particularly in *Kausbik Panchamatia & 3 Others v Prime Bank Limited & Another* [2020] eKLR the Court reiterated and which I fully adopt, that;

“...that a negative order is incapable of being stayed because there is nothing to stay. It therefore, follows that in light of the above threshold we have no mandate to grant a stay order in the manner prayed for by Applicants.”

25. The prayer for stay of execution of the Ruling rendered on the 16/6/23 being negative orders is not available.
26. The Court has noted the dilatory conduct of the Applicant in the manner in which she is conducting the trial of the suit. This Court like the trial Court frowns on parties that put the hearing of a case in disarray the last minute when they had time to raise all the preliminaries. For that reason the Applicant should be condemned to pay costs for the application.
27. Final orders for disposal;-



- a. The Application is allowed in terms of Prayer (d) only.
- b. The Applicant to file and serve his Record of Appeal within 14 days of today's date.
- c. The Appeal be listed for hearing within 45 days of today's date.
- d. Failure to comply with either of the above (a) and (b) the orders herein shall lapse automatically.
- e. Costs shall be in favour of the 1st and 2nd Respondents.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 6TH DAY OF JUNE, 2024
VIA MICROSOFT TEAMS.**

J G KEMEI

JUDGE

Delivered online in the presence of;**

Mutisya HB Kanjama S.C for the Applicant**

1st Respondent – Absent**

Ms. Oseko HB Mugo for 2nd and 3rd Respondents**

Court Assistants – Phyllis & Oliver

