



REPUBLIC OF KENYA



**Kipkoech & 4 others v Cheruiyot (Environment and Land Appeal
13 of 2023) [2024] KEELC 4433 (KLR) (4 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4433 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 13 OF 2023**

JM ONYANGO, J

JUNE 4, 2024

BETWEEN

KENNEDY K KIPKOECH 1ST APPELLANT
SAMMY CHESOO CHESSIO 2ND APPELLANT
JOHANA KIPTOO ROTICH 3RD APPELLANT
GEOFFREY KIPROTICH RUTO 4TH APPELLANT
DAVID KIPKOECH KIPLAGAT 5TH APPELLANT

AND

CATHERINE JEPKORIR CHERUIYOT RESPONDENT

RULING

1. The Appellants filed an application dated 21st June, 2023 pursuant to Order 42 Rule 6 of the *Civil Procedure Rules* seeking a stay of proceedings in Eldoret CMELC Case No 86 of 2018- Catherine Jepkorir Cheruiyot v Kennedy K. Kipkoech and 4 others pending the hearing and determination of this appeal. They also sought an order of injunction restraining the Respondent from proceeding with the trial in the said case.
2. The application is based on the grounds set out in the Notice of Motion and the supporting affidavit of Kennedy Kipkoech (1st Appellant) sworn on the 21st June 2023. In the said affidavit the 1st Appellant traces the origins of this matter to the lower court where the Respondent filed a suit against the Appellants. By an application dated 14th March, 2023, the 1st Appellant filed an application under Order 2 Rule 15 of the *Civil Procedure Rules 2010* seeking orders inter alia that the plaint be struck out and the suit be dismissed. He also sought orders that the suit against the 5th defendant be found to be a nullity, the same having been instituted after his death and that the suit against the 4th defendant be found to have abated as no substitution had been made within a year after his death.



3. The application in the lower court came up for mention on 18th May, 2023 for purposes of confirming if the parties had filed their submissions. On the said date, the 1st Appellant's counsel instructed another advocate to hold his brief but the Respondent's counsel was not present. Despite the fact that the 1st Appellant's counsel was present, the trial magistrate proceeded to dismiss the application for want of prosecution as the parties had not filed their submissions. Being aggrieved by the dismissal of his application, the 1st Appellant and his co-Appellants sought leave to appeal and filed the instant appeal after which they filed the instant application seeking a stay of proceedings. It is the Appellants' contention that the appeal has high chances of success and if the application is not granted, the appeal shall be rendered nugatory. The 1st Appellant avers that the application has been made without undue delay and that it is in the interest of justice that the application be granted.
4. The application was opposed by the Respondent through her Replying Affidavit sworn on 21st July, 2023 in which she terms the Appellants' application as incompetent, frivolous, scandalous and an abuse of the court process. She adds that the Applicants are litigious persons who have been filing various applications thus delaying the trial of the suit in the lower court. She points out that the 1st Appellant has no *locus standi* to swear the supporting affidavit on behalf of his co-Appellants
5. The Respondent further avers that when the 1st Appellant's application came up for mention on 18th May 2023 to confirm if the parties had filed their submissions, neither the Appellants' advocates nor her advocate was present, hence the dismissal of the application. She deposes that on the said date, neither of the parties had filed their submissions.
6. She is of the view that the appeal does not raise any triable issues and that she would be prejudiced if the application was granted. She adds that the Applicants have not satisfied the conditions in Order 42 Rule 6 of the *Civil Procedure Rules*.
7. In response to the Replying Affidavit, the 1st Appellant filed a Supplementary Affidavit to which he annexed a copy of the authority donated to him by his co-Appellants authorizing him to swear affidavits on their behalf.
8. The court directed that the application be canvassed by way of written submissions and both parties filed their submissions which I have carefully considered.
9. In his submissions dated 15th August 2023 learned counsel for the Applicants summarizes the gist of the application and contends that the orders sought in the instant application call for the exercise of the court's exercise of its judicial discretion and therefore the court must consider the circumstances of the case and weigh the pros and cons of the application. He relies on the case of *Global Tours and Travel Limited*, Nairobi HC Winding Up Cause No 43 of 2000 where the court 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 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”.



10. Counsel further relied on the case of *Christopher Ndolo Mutuku & another v CFC Stanbic Ltd* (2015) eKLR where the Court held that:

“What matters in an application for stay of proceedings pending appeal is the overall impression the court makes out of the total sum of circumstances of each which should arouse almost a compulsion that the proceedings should be stayed in the interest of justice’

11. Additionally, counsel relied on the case of *UAP Provincial Insurance Co. Ltd v Michael John Beckett* (2004) eKLR where the court held that:

“In order for the applicant to succeed in an application of this nature before us, it is necessary for the applicant to satisfy us firstly that the pending appeal is an arguable one, which is not frivolous, and secondly, that if the stay of proceedings is not granted, the appeal when ultimately heard will be a futile exercise”

12. It is counsel’s contention that the appeal seeks to challenge the dismissal of the Appellants’ application seeking to strike out the plaint and of importance is the question as to whether the application could be dismissed for want of prosecution on a mention date.

13. He further contends that unless the proceedings are stayed the trial court runs the risk of engaging I an exercise in futility. Reliance was placed on the case of *Niazsons (K) Ltd v China Road and Bridge Corporation (Kenya) Ltd* (2001) eKLR where the court held that:

“Where the appeal may have very serious effects on the entire case so that if a stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, a stay should be granted”

14. On his part, learned counsel for the Respondent filed his submission dated 13th October 2023 in which he submitted that a stay of proceedings is a grave judicial action and as such a much higher standard and stringent test ought to be applied, only exercising the court’s discretion sparingly and in exceptional cases. He relied on the case of *Kenya Wildlife Service v James Mutembei* (2019) eKLR where the court cited *Halsbury’s Laws of England* 4th Edition Vol 37 at p.330 as follows:

“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 proceedings, beyond 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”

15. It is counsel’s contention that the appeal is merely intended to delay the hearing of the suit in the lower court which goes against Article 159 of the *Constitution* of Kenya. He faulted the Applicants for failing to annex a copy of the order appealed against and the proceedings leading up to the appeal.

16. He submitted that the prayer for stay of proceedings is an equitable relief and an applicant must come to court with clean hands. He was of the view that the Applicants had concealed some facts from the court were therefore not deserving of the orders sought.

17. On the question as to whether the appeal would be rendered nugatory if the order of stay was not granted, counsel relied on the case of *Turbo Highway Eldoret Ltd v Muniu* (Civil Appeal No E040



of 2021) (2022KEHC10197(KLR) (30th June 2022 (Ruling) where Ngugi J (As he then was) held as follows:

“Whether the fact that a party had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the Trial Court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek stay of proceedings in the Trial Court.

18. Counsel further relied on the case of *Peter Kariuki Mburu & another v Neema Shah* (20120 eKLR where the court held that:

“It would not be in the interest of justice to exercise the court’s discretion and grant a stay of proceedings as the same will only serve the purpose of delaying the suit CMCC No 908 of 2019 that is pending in the lower court to the detriment of the Respondent. I am therefore not satisfied that the Applicants have demonstrated that they have an arguable appeal to warrant issuance of the orders being sought”

19. Having prudently considered the application, replying affidavit and the rival submissions as well as the law on stay of proceedings and authorities cited to me, the only issue for determination is whether the Applicants have met the threshold for stay of proceedings.

Analysis and Determination

20. The principles for stay of proceedings pending appeal were set out in the case of *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* [2019] eKLR as follows:

- 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.



21. In the instant case, the Applicants have submitted that the appeal would be rendered an exercise in futility if the proceedings in the lower court are not stayed. Having looked at the Grounds of Appeal, I note that the appeal challenges the manner in which the application was dismissed on a date set for mention to confirm if parties had filed their submissions. Although, the proceedings of the lower court were not annexed to the application, the court took the trouble to peruse the lower court file to establish what transpired on 18th May, 2023 when the application seeking to strike out the plaint came up for mention.
22. Contrary to what the Respondent has deposed, in her affidavit that both counsel did not appear on the said date, the proceeding of 18th May 2023 indicate that counsel for the Applicant did appear and he indicated to the court that the matter was for mention to confirm the filing of submissions, however, neither of the parties had filed their submissions. What is not recorded is whether he sought more time to file his submissions and a supplementary affidavit as stated in the Applicant's supporting affidavit. Be that as it may, the fact that the application was dismissed for want of prosecution on a mention date in the presence of the Applicant's counsel is a serious ground of appeal and it cannot be dismissed as frivolous.
23. It is also noteworthy that the application dated 14th March, 2023 which gave rise to the appeal raises issues of abatement of the suit against the 4th defendant and the striking out of the suit against the 5th defendant who was ostensibly sued after his demise. If these facts are true then these are weighty issues which cannot be wished away and the suit in the lower court allowed to proceed as the proceedings would end up being nullified.
24. For the above reasons, I am persuaded that this is one of the instances where the justice of the case dictates that the proceeding of the lower court be interrupted by staying the proceedings pending the hearing and determination of the appeal.'
25. Consequently, the application is granted and the proceedings in CMELC Case No 86 of 2018 are hereby stayed pending the hearing and determination of the appeal herein. In order to expedite the appeal, the Record of Appeal shall be filed within 30 days.
26. The costs of the application shall be borne by the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 4TH DAY OF JUNE, 2024

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J.M ONYANGO

JUDGE

In the presence of;

Mr. Osewe Atieno for the Respondent

No appearance for the Appellants/Applicant

Court Assistant: Brian

