



Kerongo & another v Kisii County Government & 6 others (Environment & Land Petition E001 of 2023) [2024] KEELC 5463 (KLR) (23 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5463 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND PETITION E001 OF 2023**

**M SILA, J
JULY 23, 2024**

BETWEEN

**THOMSON KERONGO 1ST PETITIONER
RIGENA HUMAN RIGHTS WATCHDOG ORGANIZATION . 2ND PETITIONER**

AND

**KISII COUNTY GOVERNMENT 1ST RESPONDENT
KISII COUNTY ASSEMBLY 2ND RESPONDENT
DIRECTOR, PHYSICAL PLANNING & URBAN DEVELOPMENT, KISII
COUNTY 3RD RESPONDENT
KENYA POWER & LIGHTING COMPANY LIMITED 4TH RESPONDENT
NATIONAL LAND COMMISSION 5TH RESPONDENT
LAND REGISTRAR, KISII COUNTY 6TH RESPONDENT
ATTORNEY GENERAL 7TH RESPONDENT**

RULING

(Application for stay of proceedings pending appeal; 4th respondent having filed a preliminary objection which was dismissed; 4th respondent filing an appeal to the Court of Appeal; principles to consider in an application for stay of proceedings pending appeal; court not persuaded that in the circumstances of the case it is proper to issue a stay of proceedings; court reasoning that the issues appealed from in the preliminary objection can still be subject of an appeal together with the merits of the decision if the applicant ends up being aggrieved by the judgment of the court hence no prejudice; application dismissed)



1. The application before me is that dated 23 May 2024 but filed on 18 June 2024 by the 4th respondent. It is an application seeking stay of proceedings in this petition pending hearing and determination of an appeal against the ruling of 7 May 2024 that dismissed the applicant's preliminary objection. The application is opposed by the petitioners.
2. To put matters into context, this petition was commenced on 23 March 2023. The way I appreciate the petition, subject to being convinced otherwise, is that the petitioner contests the manner in which the 4th respondent was allocated the land parcel Central Kitutu/Mwamanwa/698. The petitioner contends that this parcel of land was earmarked and reserved for Nyakemini Cattle Tripping and that on 23 December 1986 it was deliberated and agreed that the land will be set aside for the construction of Jogoo Market. The petitioner contends that the 1st respondent without conducting any public participation allocated the suit land to the 4th respondent. It is thus his case that this allocation of land to the 4th respondent did not follow due process as the land was reserved for a public market. In the suit, the petitioner inter alia seeks to have cancellation of the lease to the 4th respondent and the land to revert to its original state.
3. The 4th respondent raised a preliminary objection that this court does not have the requisite jurisdiction to hear the petition on the basis that the dispute is supposed to be heard by the Energy and Petroleum Regulatory Authority (EPRA) and the Energy Tribunal (the Tribunal) established by the *the Energy Petroleum Act*, 2019. In my ruling, I analysed the mandates of EPRA and the Tribunal as outlined in the Act and I did not see anything related to allocation of land. I found that the issues raised herein squarely relate to the process of allocation of land for which this court is the court with jurisdiction to hear the dispute. I dismissed the preliminary objection with costs of Kshs. 25,000/= to the petitioners payable within 14 days in my ruling of 7 March 2023. After I delivered the ruling I gave the respondents who had not replied to the petition, including the 4th respondent, 14 days to file their response to the petition and directed that the matter be mentioned on 24 April 2024 for directions on hearing of the petition. It would appear that the costs of Kshs. 25,000/= were not paid as directed and the petitioner appointed an auctioneer and moved to attach for the same. Subsequently an application dated 8 April 2024 was filed seeking for release of the motor vehicle attached. I was not persuaded to issue any stay orders. On 4 April 2024, parties appeared for directions and I further directed that the petition be heard on 18 July 2024. Before that date, this application was filed.
4. It is apparent that the 4th respondent/applicant now seeks that the proceedings herein be stayed as she pursues the appeal at the Court of Appeal. The supporting affidavit is sworn by Joseph Muchai its legal officer. He avers that the 4th respondent/applicant filed a Notice of Appeal dated 11 March 2024. That on 17 May 2024 the 4th respondent/applicant filed the appeal being Kisumu CoACA No. E121 of 2024. He avers that substantive steps to hear the appeal have been made and that no prejudice will be suffered which cannot be remedied by an award of costs.
5. The petitioner has opposed the application by filing a replying affidavit. He deposes inter alia that the applicant filed an application in the Court of Appeal being Civil Application No. E044 of 2024 which application is still pending and the Court of Appeal declined to issue any orders as prayed. He has attached the directions issued by the Court of Appeal. He deposes that the 4th respondent/applicant is not ready to proceed with the matter and is employing delaying tactics.
6. I directed parties to file written submissions and I have seen the submissions of counsel for the 4th respondent/applicant and the petitioner. I have taken the same into consideration before arriving at my decision.
7. Before I go far, there was mention that the 4th respondent/applicant filed an application before the Court of Appeal which is pending. Unfortunately that application was not attached and I am unable



to tell what it is all about. However, if by any chance it is an application seeking similar orders as those sought herein, the application before me would be an abuse of the court process as one cannot maintain two applications seeking similar orders in two different courts. However, I will give benefit of doubt to the 4th respondent/applicant as I have not seen the contents of that application.

8. Stay of proceedings has been acknowledged to be a drastic order which ought only to be given in exceptional circumstances as it restricts the constitutional right of being heard. I can do no better than quote the dictum of Gikonyo J in the case of *Kenya Wildlife Service v James Mutembei*, Meru Civil Appeal No. 40 of 2018, (2019) eKLR where the good judge stated as follows :

“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 proceedings is high and stringent.”

9. The good judge went further to quote *Halsbury’s Law of England*, 4th Edition, Vol. 37 page 330 and 332, inter alia 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...”.

10. When the court issues a stay of proceedings it stalls the right of a litigant to be heard. It means the litigation will take longer than it would otherwise take. Yet Article 159 (2) (b) of the *Constitution* pronounces that one of the principles that courts should adhere when exercising judicial authority is that “Justice shall not be delayed.” It is therefore paramount for an applicant seeking stay of proceedings to point out what prejudice he/she will suffer if stay is not granted, and the Court must be persuaded that there will be a serious negative impact to the applicant or other party, which cannot be remedied if the matter proceeds. In the submissions of counsel for the 4th respondent/applicant it is submitted that it would not serve the interest of justice to proceed compared to the inconvenience of waiting just a while longer since the case will be heard once the appeal is dispensed with. It is urged that there will be waste of judicial time and resources should the matter proceed with chances of being reopened once the appeal succeeds.
11. My take is that it is not a given that the appeal will succeed. In fact, my own view of the preliminary objection is that it was a frivolous and uncalled for objection. I may of course be wrong and the Court of Appeal could very well reverse that. If the appeal succeeds the court will strike out this suit. However, I am alive to the fact that matters in the Court of Appeal take a notoriously lengthy period of time given the backlog in that court. I had directed that this case proceeds on the basis of affidavit evidence and submissions. It is therefore a matter that is expected to only take a few months to conclude. If this court holds for the petitioner, the 4th respondent still that the right to appeal even on the same issue raised in the preliminary objection. If she succeeds on appeal, the matter will end there. In essence she has avenue to appeal on the same issues in the preliminary objection while appealing on the merits of the decision if she is aggrieved by the judgment of this court. In my opinion, given that this is expected to be a short proceeding, it is far better to proceed with the case to its conclusion, and if any party is aggrieved, to appeal on all issues to the Court of Appeal rather than employ the drastic remedy of stay of proceedings which will only lead to delay in conclusion of the matter. I see no prejudice absolutely to the 4th respondent/applicant if the matter proceeds and if aggrieved she can file an appeal on everything



which can be decided in one sitting of the Court of Appeal rather than in multiple sittings. The only inconvenience, if the Court of Appeal allows the appeal is that this court will have proceeded to hear a case that it ought not to hear. But as I have said, this is expected to be a short proceeding, and that risk is far outweighed compared to a litigant waiting for years for an interlocutory appeal to be heard. I think it is better to use judicial resources to proceed rather than keep a litigant waiting in court so that an appeal on an interlocutory matter, that may very well fail may, be heard.

12. Given the above it is apparent that I am not persuaded to allow this application. It is hereby dismissed with costs to the petitioners. I direct the matter to proceed to its logical conclusion.
13. Orders accordingly.

DATED AND DELIVERED THIS 23 DAY OF JULY 2024

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

