



Kisotu (Suing as the legal representative of the Estate of the Late Gichuki Wanguyo) & another v Nchuul & 3 others (Environment and Land Appeal E006 of 2024) [2024] KEELC 6263 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6263 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT AND LAND APPEAL E006 OF 2024
CG MBOGO, J
SEPTEMBER 26, 2024

BETWEEN

HENRY KISOTU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE GICHUKI WANGUYO) 1ST APPELLANT
SAMMY CHIRA NG'ANG'A 2ND APPELLANT

AND

KOILEKEN NCHUUL 1ST RESPONDENT
GEORGE SANANKA OLE KATUMPE 2ND RESPONDENT
ONORO KEREMPE NCHOOL 3RD RESPONDENT
DENIS SARUNI KIRANTU 4TH RESPONDENT

RULING

1. Before this court for determination is the notice of motion dated 10th June, 2024 filed by the appellants herein and it is expressed to be brought under Order 51, Order 42 Rule 6 of the [Civil Procedure Rules](#) and Sections 1A, 1B and 3A of the [Civil Procedure Act](#) seeking the following orders: -
 - 1 Spent.
 2. That there be stay of further proceedings in Narok CMCC ELC No 95 of 2019 pending hearing and determination of this application.
 3. That this honourable court be pleased to grant leave to the applicant/proposed appellants to appeal to this honourable court against the entire ruling on Narok Chief Magistrates Land Court Case No 95 of 2019 delivered on 14th May, 2024 by Hon. H. M. Nyaberi.



4. That there be stay of further proceedings in the Narok Chief Magistrates Court ELC No 95/2019 pending the hearing and determination of the appellants intended appeal.
- 5 That the costs of this application be provided for.
2. The application is premised on the grounds on its face. The application is also supported by the affidavit of the 1st appellant/ applicant on even sworn date on his own behalf and on behalf of the 2nd appellant/ applicant herein. The 1st appellant/ applicant deposed that they are dissatisfied with the ruling of the lower court delivered on 14th May, 2020⁴ more so on nullification of the orders issued on 9th September, 2019 on the grounds that the interlocutory injunction had lapsed.
3. The 1st appellant/ applicant further deposed that the appeal has high chances of success owing to the fact that the lower court grossly misapprehended the law and facts in arriving at its decision. Further, he deposed that the trial court failed to appreciate the strict wording of the orders which affirmed continuity until determination of the suit, and, suo moto reviewing and setting aside the injunctive orders in place. He deposed that the orders issued on 9th September, 2019 vis a vis Order 40 Rule 6 of the *Civil Procedure Rules*, the law provides for the leeway for the court to extend the orders and further, that the trial court failed to appreciate that the 1st respondent had knowledge of the orders issued on 9th September, 2019 which should have been sufficient to infer contempt of court.
4. The 1st appellant/ applicant deposed that the 1st respondent who had full knowledge of the court orders has gone ahead to confirm that he disposed off his parcel No 408 to the 2nd respondent which gave rise to parcel known as Cis Mara/ Nairagie-Enkare/1786 and 1787. He deposed that it is unjustified for the respondents to encroach on the appellants land parcel known as Cis-Mara/ Nairagie-Enkare/ 84 and 277 in the pretext that it shares a common boundary. He also deposed that the trial court misapplied the principles of contempt, and failed to find the respondents accountable for disobeying court orders.
5. The application was opposed by the replying affidavit of the 1st respondent sworn on behalf of the 2nd respondent on 21st June, 2024. The 1st respondent deposed that the appellants filed the application for injunction as well as the plaint, and the injunctive order was issued ex-parte on 9th September, 2019. He further deposed that the orders issued on 9th September, 2019 were misinterpreted by the appellants and in essence that they prohibited him and the respondents from utilizing parcel Cis-Mara/Nairagie-Enkare/408 which on mutation had Cis-Mara/Nairagie-Enkare/1786-1789 prior to the filing of the matter before the trial court.
6. The 1st respondent deposed that the orders issued prohibited him from dealing with Cis-Mara/ Nairagie-Enkare/ 84 and 277, but the orders did not prohibit him from utilizing parcel nos. Cis-Mara/ Nairegie-Enkare/ 1786, 1787, 1788 and 1789. He deposed that the orders issued on 9th September, 2019 cannot be enforced since they are non-existent owing to lapse of the 12 months period. The 1st respondent also deposed that the orders cannot be construed as enforceable against him and the other respondents since he was not personally served with the same until the application for contempt was filed.
7. In conclusion, the 1st respondent deposed that the application lacks merit, is frivolous and an abuse of the court process meant to delay the hearing of the matter. He went on to depose that the appellants have no arguable appeal with high chances of success, and therefore it would be a futile exercise to grant the orders.
8. The application was canvassed by way of written submissions. The appellants/ applicants filed their written submissions dated 23rd July, 2024 where they raised two issues for determination as outlined below: -



1. Whether the appellants have met the conditions for the grant of a stay of execution and proceedings pending appeal and hearing of the application dated 10th June, 2024.
2. Whether the trial magistrate erred in law and fact in nullifying the orders issued on 9th September, 2019.
9. On the first issue, the appellants/ applicants submitted that the respondents have been encroaching and trespassing on their land despite the existence of the expunged order and this has caused significant damage and loss of use of the property. They went on to submit that if the proceedings are not stayed, the respondents will continue with the encroachment leading to ongoing and potential irreversible harm to the appellants' property rights. They submitted that the ruling delivered on 14th May, 2024 undermines the legal protections previously granted to them and which was meant to maintain the status quo until the determination of the suit.
10. The appellants/ applicants further submitted that the ruling by the trial court has disrupted their legal and equitable interests in the property, and the respondents continued interference is tangible and ongoing, which demonstrates that there is need to reinstate the orders to prevent further substantial loss. Further, they submitted that Order 42 Rule 6 of the *Civil Procedure Rules* reveals that it is the court that orders the kind of security the applicant should give, and that they are willing to commit any reasonable security proposed by the court. The appellants/ applicants further submitted that the application has been made without undue delay and thus meets the threshold set out under Order 42 Rule 6 of the *Civil Procedure Rules*. Reliance was placed in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR.
11. On the second issue, the appellants/ applicants submitted that the clear and uncontroverted wording of the court order was that it lasts until the determination of the main suit, and the court erred in finding that the injunctive orders dated 9th September, 2019 had lapsed. While relying on the case of *David Wambua Ngii v Silas Alembi & others* [2014] eKLR, the appellants/ applicants submitted that they have not in any way delayed the proceedings of the trial court, and that they have always complied with court orders. Further, they submitted that they could still have enjoyed the said orders even if the wording did not include until the determination of the suit since they have always been in court when required thus not among the issues intended to be cured under Order 40 Rule 6.
12. They further submitted that the existence of the orders was not in dispute, and the application dated 4th July, 2023 was an application for contempt to find the respondents to be in contempt of the said orders. They further submitted that the respondents being aware of the said orders, chose not to comply with the same. They went on to submit that parcels nos. 1786 and 1787 by the third respondents were excised from 408 which encroached on the appellants parcels of land nos. 84 and 277, which the respondents purchased while the orders were in existence. To buttress on this submission, the appellants/ applicants relied on the case of *Shimmers Plaza Limited v National Bank of Kenya Limited* [2015] eKLR.
13. The respondents filed their written submissions dated 31st July, 2024 where they raised two issues for determination as follows: -
 - a. Whether the applicants motion satisfies the requirements for grant of orders sought.
 - b. Who bears the costs of the application.
14. On the first issue, the respondents submitted that a decision on whether to grant stay of proceedings pending appeal by a court is discretionary, and that the appellants/ applicants must demonstrate that they have an arguable appeal with high chances of success. They submitted that the appellants/



applicants grounds for seeking stay of proceedings of the matter before the trial court are not tenable as the orders issued on 9th September, 2019 is not enforceable in law. It was submitted that it would not be in the interest of justice to stay further proceedings as the same will only serve the purpose of delaying the hearing to their detriment. They submitted that the appellants/ applicants have not demonstrated that they risk suffering substantial loss, and no grounds of appeal have been brought forth. The respondents relied on the case of *Kenya Wildlife Service v James Mutembei* [2019] eKLR.

15. On the second issue, the respondents submitted that this court should dismiss the application and award costs in their favour.
16. I have considered the application, the replying affidavit and the written submissions filed by the parties as well as the authorities cited. In my view, the issue for determination is whether this court ought to grant stay of further proceedings in CMCC ELC No 95 of 2019 pending the hearing and determination of the intended appeal.
17. Order 42, Rule 6 (1) and (2) of the *Civil Procedure Rules* provides as follows: -
 - “(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 subrule (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. From the above provision of the law, it will be observed that a court may issue a stay of proceedings after an appeal has been filed though the mere filing of an appeal does not mean that the proceedings must be stayed. The same provision provides that the court must be persuaded that there is sufficient cause to do so.
19. In this case, the appellants/ applicants contended that if the proceedings before the trial court are not stayed, they will be deprived of their continued use of the land arising from the encroachment and interference of the suit properties by the respondents.
20. The principle for granting stay of proceedings which in my view applies to the instant case is whether the application has been made without unreasonable delay. The reason is that unlike stay of execution, which requires that three conditions be met before grant of stay of execution, the same is quite different for stay of proceedings pending appeal.



21. The appellants/ applicants herein being dissatisfied with the ruling delivered by Hon. H. M. Nyaberi on 14th May, 2024, filed their memorandum of appeal dated 10th June, 2024. The said appeal challenges the ruling of the trial court in dismissing their notice of motion dated 4th July, 2023.
22. Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, 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.”
23. In *Re Global Tours & Travels Limited*, (Nairobi High Court Winding Up Cause No 43 of 2000), Ringera, J (as he then was) opined as follows: -
“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. 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.”
24. In addressing my mind to the above principles in the cited authorities and bearing in mind the nature of what is before this court i.e. an appeal arising from a ruling dismissing an application for contempt and taking into consideration that the courts must ensure that justice is done, I find it necessary to exercise my discretion in favour of the appellants/ applicants.
25. I note that the memorandum of appeal and the instant application have been filed without delay and it would only be fair that the parties are heard. On whether there is substantial loss to be suffered by the appellants/ applicants, the appellants decried continued encroachment of their land which they have suffered loss as a result of failure to utilize the same. Whereas both parties have largely dealt with issues best fit to be argued in the appeal, it is my finding that there is loss to be suffered by the appellants/ applicants.
26. Whether or not the memorandum of appeal has high chances of success, it is not for this court to delve into at this stage. However, looking at the grounds of appeal annexed to the application, I do not find the memorandum appeal is not frivolous. The memorandum of appeal raises grounds which ought to be ventilated in the interest of justice. I do also realize that the appellants/ applicants are yet to file their record of appeal. However, considering the rights of a party to be heard even on appeal, this court would only operate so within timelines to ensure that the successful party does not take advantage of the stay to the detriment of the other party.



27. In this case, the parties ought to ensure expeditious disposal of the appeal within the timelines provided hereunder.
28. The notice of motion dated 10th June, 2024 is thus allowed in the following terms: -
- i. The memorandum of appeal dated 10th June, 2024 annexed to the application herein is deemed as duly filed.
 - ii. That a stay of further proceedings in the Narok Chief Magistrates Court ELC No 95 of 2019 is hereby granted pending the hearing and determination of the appeal and shall subsist for a period of 6 months from the date hereof.
 - iii. The appellants/ applicants shall deposit a sum of Kshs. 300,000/- as security for costs in a joint interest earning account within 45 days from the date hereof.
 - iv. The appellants/ applicants to file and serve their record of appeal within 14 days from the date hereof.
 - v. Further mention on 19th November, 2024 to confirm compliance with orders iii and iv above.
 - vi. Costs to be in the cause.

Orders accordingly.

DATED, SIGNED & DELIVERED VIA EMAIL ON THIS 26TH DAY OF SEPTEMBER, 2024.

HON. MBOGO C.G.

JUDGE

26/09/2024.

In the presence of: -

Mr. Meyoki – C.A

