



Freudenthal & another v Ryrrie & another; Philiphs & another (Interested Parties) (Environment & Land Case 51 of 2023) [2024] KEELC 6095 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6095 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 51 OF 2023
EK MAKORI, J
SEPTEMBER 25, 2024**

BETWEEN

EMMANUEL FREUDENTHAL 1ST PLAINTIFF

KAMINI KUMAR MENON 2ND PLAINTIFF

AND

SONIA RYRIE 1ST DEFENDANT

CHARLES BRUCE ARTHUR 2ND DEFENDANT

AND

MICHAEL MAX PHILIPHS INTERESTED PARTY

JULIA MARY BUCKNAIL INTERESTED PARTY

RULING

1. For determination before this Court is the Defendant/Applicants' Notice of Motion Application dated 5th June 2024, brought under the provisions of Section 1A, 1B, and 3A of the [Civil Procedure Act](#), Order 42 Rule 6 of the Civil Procedure Rules Cap 21 and which application seeks among other things the following orders: -
 - i. Spent;
 - ii. Spent;
 - iii. Spent;
 - iv. That pending hearing and determination of the appeal filed herein, the Court does grant a stay of the further proceedings in this suit
 - v. That the cost of this application is provided for.



2. The application is supported by the Supporting Affidavit of Charles Bruce Arthur Ryrie, the 2nd Defendant/Applicant herein, sworn on even date.
3. In response, the Plaintiffs/Respondents filed a Replying Affidavit sworn by the 1st Plaintiff/Respondent on 18th June 2024.
4. In disposing of the application, The Court directed parties to file written submissions.
5. The dominant issue that this Court has to determine is whether to grant a stay of the proceeding pending appeal and who will bear the costs.
6. The factors to consider before issuing orders of a stay pending appeal are as enunciated in the case of *Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021)* [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) where Prof. Joel Ngugi J. (as he then was) cited with approval the case of *William Odhiambo Ramogi & 2 others v the Honourable Attorney General & 3 others* [2019] eKLR, where the High Court, authoritatively 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. He held as follows:

“18. In *William Odhiambo Ramogi & 2 Others v the Honourable Attorney General & 3 Others* [2019] eKLR, a 5-judge Bench of the High Court, after looking at our jurisprudential scan on the question of stay of proceedings, authoritatively 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: They 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 led, 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 led expeditiously and without delay.”
7. Mirroring those principles in this matter, it will be reckoned that this Court, on the 24th of April, made an interlocutory ruling on attachment before judgment in the following manner:

“In the instant case, applicants have systematically shown that the suit property and the agreement entered between the parties is in jeopardy. The ownership documents are in the hands of a 3rd party. The applicants through evidence have shown that the 2nd respondent has gone on a spree of selling properties here in Kenya the latest being parcel No. Nairobi Block 218/82(formerly LR No. 5917/6), which unknown to the applicants has long been transferred to the interested party. What remains as per the current application is log book No. KAD 361Y Subaru Leon 1989. The respondents have not answered whether they will be in a position to indemnify the respondents in case this matter goes in favour of the applicants.

I am satisfied that the applicant has shown that the respondent is not only disposing of the properties here in Kenya but also relocating to New Zealand.

Considering the circumstances in this case, it is my finding that the applicants have proved that there is a need for attachment before judgment and I will propose to issue the following orders:

- a. Logbook for Motor Vehicle No. KAD 361Y Subaru Leon 1989 be deposited in this Court as security for the amount claimed in the main suit.
- b. The costs for the current application and that of the interested parties dated 12th February 2024 be borne by the respondents.”
8. Those findings aggrieved the Applicant to file an appeal (sic) to the Superior Court. The property this Court decreed to be attached before judgment Motor Vehicle No. KAD 361Y Subaru Leon 1989. In his averment, the applicant, in his affidavit dated 5th June 2024 in paragraph 6, concedes:

“That the Motor Vehicle registration No. KAD 361Y Subaru Leon 1989 Model had already been sold well before the filing of this suit. Thereby, the Applicants will not be in a position to comply with the orders made by the Court herein.”

9. That means that the substratum of the entire case and the order to be appealed against has been rendered otiose, and, therefore, there is nothing to stay.
10. Consequently, the application dated 5th June 2024 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 25TH DAY OF SEPTEMBER 2024.

E. K. MAKORI

JUDGE

In the Presence of:

Ms. Ndirangu, for the Plaintiff/Respondent

Mr. Gikandi for the Defendant/Applicant



Happy: Court Assistant

