



REPUBLIC OF KENYA



**Agola v Ngodhe (Sued as the administrator to the Estate of Zakayo Ngodhe - Deceased)
(Land Case Appeal E025 of 2024) [2024] KEELC 5924 (KLR) (18 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
LAND CASE APPEAL E025 OF 2024
GMA ONGONDO, J
SEPTEMBER 18, 2024**

BETWEEN

DAVID ALIEDO AGOLA APPELLANT

AND

**JOSEPH ODERO NGODHE (SUED AS THE ADMINISTRATOR TO THE
ESTATE OF ZAKAYO NGODHE - DECEASED) RESPONDENT**

RULING

1. This ruling is in respect of an application by way of Notice of motion dated 5th June 2024 brought under, inter alia, Sections 1A and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Orders 40 Rules 1 and 2 and 50 Rules 1 and 2 of the Civil Procedure Rules, 2010 by the appellant/applicant, David Aliedo Agola through M/s Aluoch Odera and Nyauke Advocates seeking the following orders;
 - a. Moot
 - b. Upon hearing this application inter-parties, there be stay of the lower court proceedings pending hearing and determination of the appeal.
2. The application is founded upon five grounds as *infra*:
 - a. The subordinate court made a ruling on 30th May 2024 which ruling the applicant disagrees with and has since filed appeal.
 - b. The appeal essentially challenges the subordinate court's jurisdiction and as such it is in the interest of justice that the proceedings at the lower court be stayed pending appeal.
 - c. If the proceedings are not stayed and the court proceeds to give orders adverse to the applicant, the applicant will suffer substantial loss.
 - d. It is in the interest of justice that the application is allowed.



- e. No party will be prejudiced if this application is allowed.
3. The application is anchored on the applicant's supporting affidavit of six paragraphs sworn on even date, alongside the annexed document marked as DAA-01 which is; a copy of the Memorandum of Appeal dated 4th June 2024.
 4. Briefly, the applicant laments that he filed an application at Mbita Principal Magistrate's Court on the basis that the suit before it, to wit, Environment and Land Case No. E016 of 2024, is *res judicata*. That the application was disallowed vide a ruling delivered on 30th May 2024 by Hon. M. Agutu (PM) thereby, prompting the appellant to lodge the instant appeal. Thus, the applicant sought a stay of the lower court proceedings pending hearing and determination of the appeal.
 5. The respondent through Owenga Ombuya and Company Advocates filed a Replying Affidavit opposing the application. He deponed in part that Environment and Land Case No. E016 of 2024, is not *res judicata* Environment and Land Case No. 21 of 2019. That the parties and subject matter in both suits are different. Thus, he urged the court to uphold the finding of the trial court.
 6. Hearing of the application proceeded by way of written submissions pursuant to the court's directions of 4th July 2024.
 7. The applicant's counsel filed submissions dated 12th July 2024 and clarified that the instant application is lodged under Order 42 Rule 6 of the Civil Procedure Rules, 2010 and not Order 40 of the same Rules as earlier indicated. Learned Counsel submitted that the appeal challenges the jurisdiction of the trial court to hear and determine the matter therefore, the ends of justice will not be met if the trial court proceeds with the matter. That unless a stay order is issued herein, the trial court could issue orders that are adverse to the applicant during the pendency of the appeal, thereby occasioning him irreversible loss.
 8. Further, counsel submitted that the appeal has overwhelming chances of success. Thus, counsel urged the court to allow the application unconditionally. Reliance was placed on the case of *John Gachanja Mundia -v- Francis Muriira and Another*, (2016) eKLR, Civil Application No. 42 of 2015, to buttress the submissions.
 9. The respondent's counsel filed submissions dated 22nd July 2024 and submitted inter alia; that an appeal does not act as a stay and that the applicant has failed to demonstrate that substantial loss will be occasioned to him if the stay order sought herein is not granted. Counsel reiterated that the suit filed at the lower court to wit, Environment and Land Case No. E016 of 2024, is not *res judicata* Environment and Land Case No. 21 of 2019 since parties to the two suits as well as the subject matter are different.
 10. Also, it was submitted that the cause of action is equally different. That the appeal lodged by the appellant/applicant herein is frivolous. That therefore, the instant application does not satisfy the conditions to warrant stay of execution pending appeal as set out in Order 42 Rule 6 of the *Civil Procedure Rules, 2010*. Counsel relied on various authoritative pronouncements including the case of *John Florence Maritime Services Ltd. & another -v- The Cabinet Secretary Transport and Infrastructure & 3 others*, [2021] KESC 39 (KLR), among others, to fortify the submissions.
 11. In the foregone, the following issues fall for determination;
 - i. Whether the instant application is merited.
 - ii. What orders can the court issue herein, to meet the ends of justice?



12. It is noteworthy that the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified. However, the conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) of the [Civil Procedure Rules, 2010](#).
13. Order 42 Rule 6 (2) (*supra*) provides in part thus:
 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.
14. The question of whether or not to grant an order for stay of proceedings is a discretionary one. Notably, this discretionary power must be exercised judiciously. The court has to consider whether it is in the interest of justice to order a stay of proceedings, whether the appeal is arguable and whether if the application for stay is refused, the appeal, if successful, would be rendered nugatory; see [Lucy Waitibera Kimanga & 2 Others v John Waiganjo Gichuri](#) [2015] eKLR.
15. This Court is cognizant of the appellant's unfettered right of appeal which he has sought to exercise. That right has to be balanced against the right of the respondent to equal treatment in law and to have his case determined without unreasonable delay, see Articles 10 (2)(b) and 159 (2)(b) of the [Constitution](#) of Kenya.
16. Thus, the law on stay of proceedings pending appeal will be concerned with the sole question of whether it is in the interest of justice to order a stay of proceedings. In deciding whether to order a stay, the court should essentially weigh the pros and cons of granting or not granting the order. It will also consider 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.
17. According to [Halsbury's Law of England](#), 4th Edition. Vo. 37 page 330 and 332:

“...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...”
18. In the instant case, I note that the application for stay of proceedings was filed expeditiously. The Ruling the appellant is appealing against was delivered on 30th May 2024. The Memorandum of Appeal was filed on 7th June 2024, while the present application was filed on 12th June 2024.
19. A perusal of the aforesaid Memorandum of Appeal led this court to the conclusion that the appeal is indeed arguable and not frivolous as the question before this appellate court is whether the trial court has jurisdiction to hear and determine the matter before it.
20. In the premises, it is my considered view that the appeal will be rendered nugatory, if an order for stay of proceedings does not issue. Besides, orders issued in the appeal may have serious effects on the entire case at the trial court and make the orders made therein nugatory and the exercise futile.



21. Consequently, the application by way of Notice of motion dated June 5, 2024 is hereby allowed as prayed.
22. Costs of this application to abide the outcome of the appeal.
23. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA BAY THIS 18TH DAY OF SEPTEMBER 2024.

G.M.A ONGONDO

JUDGE

Present

Ms. Odera Aluoch, Learned Counsel for the Applicant

Mr. Achando, Learned Counsel for the Respondent

Luanga, Court Assistant

