



Kenya Electricity Transmission Company Limited v Matthew (Environment and Land Appeal E026 of 2024) [2024] KEELC 13446 (KLR) (20 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13446 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E026 OF 2024
OA ANGOTE, J
NOVEMBER 20, 2024**

**BETWEEN
KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED ... APPELLANT
AND
EARNEST KARAGANIA MATTHEW RESPONDENT**

RULING

1. Before this Court for determination is the Appellant’s Motion dated 4th March, 2024, brought pursuant to the provisions of Sections 3A, 3B, 6 and 63(e) of the Civil Procedure Act, Orders 42 Rule 6(6) and 51 Rule 1 of the Civil Procedure Rules, 2010 seeking the following reliefs:
 - i. Spent-That proceedings in Land Acquisition Tribunal Case No E005 of 2023 be stayed pending the hearing and determination of this Application inter-partes.
 - ii. That proceedings in the Land Acquisition Tribunal Case No E005 of 2023 be stayed pending the hearing and determination of the Appeal.
 - iii. Any other orders that this Court may deem fit in the interest of justice.
 - iv. Costs of this Application be provided for.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Samwel Rambo, the Appellant’s senior legal officer, who deponed that on 9th December, 2021, parties entered into a grant of easement with respect to a 30-metre wide wayleave corridor traversing Land Title number Nanyuki/Marura Block 8/5467 (Nturukuma) and that clause 11 of the grant of easement provides that all disputes of any nature arising therefrom shall be referred to arbitration by a single arbitrator to be agreed upon by the parties or appointed by the Chartered Institute of Arbitrators.
3. He averred that the above notwithstanding, the Respondent instituted a claim before the Land Acquisition Tribunal seeking extra compensation and that on the basis of the foregoing, on the 7th



February, 2024, they sought from the Tribunal a stay of proceedings pending reference of the dispute to arbitration.

4. He posited that their claim in this regard was that it was improper for the Respondent to have instituted the proceedings before the Tribunal in complete disregard of the provision mandating reference of disputes to arbitration and that on the 22nd February, 2024, the Chairperson of the Land Acquisition Tribunal delivered his Ruling dismissing the Application.
5. It is his contention that having dismissed the Motion for stay, the Tribunal has wrongly assumed jurisdiction and has proceeded to issue directions for hearing of the same; that they have embarked on preparation of the Record of Appeal and have requested for copies of the Tribunal's proceedings and that as advised by Counsel, the Appellant has an arguable appeal with high chances of appeal as evinced in the Memorandum of Appeal.
6. The deponent urges that the dispute which relates to an attempt by the Respondent to compel the Appellant to accede to its demand for additional compensation arising from the easement agreement is arbitrable and that the interests of justice dictate that the Motion is granted.
7. In response to the Motion, the Respondent filed a Replying Affidavit on the 11th March, 2024. He deponed that after instituting the suit and serving summons to enter appearance, they appeared before the Tribunal on 4th January, 2024 where the Appellant was directed to file the requisite response within a specific period; that the Appellant did not comply but instead filed a Preliminary Objection and that the Objection was dismissed on the 31st January, 2024 after which further directions for compliance were issued.
8. The Respondent deponed that the Appellant failed to comply with the timelines and instead filed a Motion dated 7th February, 2024 which they opposed vide a Replying Affidavit dated 12th February, 2024; that the Tribunal rendered a Ruling on 22nd February, 2024 dismissing the Motion and giving rise to this Appeal and that in rendering its Ruling, the Tribunal duly considered the relevant provisions of the law.
9. It was deponed that the Appellant is guilty of laches; that no documents having been filed in the Tribunal, his claim remains unopposed and there is no case capable of being transferred to arbitration and that the arbitration clause in the agreement seeks to limit the rights of the parties by stating that the arbitration shall be final. Both parties filed submissions which I have considered.

Analysis and Determination

10. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is whether the Appellant has satisfactorily discharged the conditions warranting the grant of stay of proceedings pending Appeal?
11. Black's Law Dictionary, Ninth Edition, defines a proceeding as:
 - “(1) The regular and orderly progression of a law suit, including all acts and events between the time of commencement and the entry of judgment; (2) any procedural means of seeking redress from a tribunal or agency; (3) an act or step that is part of a larger action; (4) the business conducted by a Court or other official body, a hearing.”



12. The general principles which guides the courts whenever they are invited to exercise the jurisdiction to stay proceedings are best summarized in Halsbury’s Law of England, 4th Edition, Vol 37 at pages 330 and 332 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 all reasonable doubt ought not to be allowed to continue.”

13. This was affirmed by the court in *Ferdinand Ndung’u Waititu vs Independent Electoral & Boundaries Commission (IEBC) & 8 Others* [2013] eKLR which persuasively stated thus:

“A stay of proceedings involves arresting or stopping proceedings. It is a tool used to suspend proceedings to await the action of one of the parties in regard to some step or some act (see Black’s Law Dictionary). This implies that the rationale for stay is the pendency of an act or step either required by the court or sought by a party. It may be grounded on a statutory provision or on the need of a party and based on a plea for the plenary exercise of the court’s discretion.”

14. The powers of this court to stay proceedings pending appeal and its jurisdiction in this regard is derived from Order 42 Rule 6 of the Civil Procedure Rules as well as the inherent jurisdiction reserved in Section 3A of the *Civil Procedure Act*. Order 42, rule 6(1) of the Civil Procedure Rules under the head Stay Pending Appeal provides:

“(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.”

15. In the case of *Global Tours & Travels Limited, Nairobi HC Winding Up Cause No.43 of 2000*, the court laid down the factors that ought to be considered on whether or not to stay proceedings 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” (emphasis added).



16. Similarly, the court in the case of Christopher Ndolo Mutuku & Another vs. CFC Stanbic Bank Ltd [2015] eKLR, held as follows:

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

17. In William Odhiambo Ramogi & 2 Others vs the Honourable Attorney General & 3 Others [2020] eKLR, a 5-judge Bench of the High Court, authoritatively laid out the principles established for the grant of stay of proceedings pending the hearing and determination of an appeal over an interlocutory application to a higher Court. They laid down the following six principles:

“First, there must be an appeal pending before the higher Court;

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;

Third, the Applicant must demonstrate that the appeal raises substantial questions to be determined or is otherwise arguable;

Fourth, the Applicant must demonstrate that the Appeal would be rendered nugatory if the stay of proceedings is not granted;

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

Sixth, the Applicant must demonstrate that the application for stay was filed expeditiously and without delay”

18. It is apparent from the foregoing that the grant of a stay of proceedings pending an appeal in an interlocutory matter is a rare and exceptional remedy. The court in making this determination must remain alive to the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined.

19. This has constitutional backing under Article 50 of *the Constitution* which guarantees every person the right to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as well as the principle that justice delayed is justice denied.

20. Whereas it is difficult to determine with mathematical precision when the Court will use this power, it is only to be used sparingly. This is to avoid grave injustice that may occur when proceedings are stayed.

21. By way of brief background, the Respondent instituted a suit before the Land Acquisition Tribunal on the 8th December, 2023. He sought vide the claim an order compelling the Appellant to compensate him for the buildings or structures erected on the suit property-parcel no Nanyuki/Marura Block 8/5467 Ntukuruma. It is the Respondent’s case therein that the Appellant constructed a wayleave through his property and whereas he was compensated for the loss of land, he was not compensated for the buildings.



22. The Appellant filed a Preliminary Objection on 4th January, 2024 which was dismissed on the 31st January, 2024. The Appellant thereafter filed an Application on the 7th February, 2024 asking that the proceedings before the Tribunal be stayed and the matter be referred to arbitration.
23. It opined that the dispute, having arisen from the grant of easement with respect to a 30 metre- wide wayleave corridor ought to have been referred to arbitration pursuant to Clause 11 thereof.
24. The Tribunal rendered a decision on 22nd February, 2024 in which it dismissed the application noting that the filing of the Preliminary Objection was a procedural step removing the claim from the ambit of Section 6(1) of the *Arbitration Act*; and that the application for stay was not filed timeously and was as an afterthought.
25. Beginning with the issue of timelines, the impugned ruling was delivered on 22nd February, 2024 whereas the present application was filed on the 4th March, 2024. This constitutes a period of approximately 14 days and there is no delay in this regard.
26. As to arguability, the Court has considered the Memorandum of Appeal annexed to the record of appeal. The same is based on several alleged errors by the Tribunal, to wit, the Tribunal erred in failing to uphold the arbitration agreement in the grant of easement; erred in failing to find that the Motion of 7th February, 2024 was filed timeously pursuant to Section 6(1) of the *Arbitration Act* and erred in finding that that the filing of a preliminary objection dated 4th January 2024 by the Appellant challenging its jurisdiction amounted to a procedural step in the context of section 6 (1) of the *Arbitration Act*, 1995.
27. Further, it is contended vide the Memorandum of Appeal that the Tribunal erred in law in finding that the application dated 7th February 2024 had been filed after significant delay in the context of section 6 (1) of the *Arbitration Act*, 1995 and that it equally erred in law by acting without jurisdiction when it dismissed the application dated 7th February 2024 outside the 60-day timeline provided in section 133C (3) of the *Land Act*, 2012 for the Tribunal to resolve complaints.
28. Considering the foregoing, and without making any pre-determination on the matter, the Court harbors no doubts that the appeal is arguable. It is trite that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court and one which is not frivolous.
29. Moving to whether the Appeal will be rendered nugatory, the Court finds guidance in the exposition by the Court of Appeal in Stanley Kangethe Kinyanjui vs Tony Ketter, Salim Suleiman, Mawji Patel, Innocent Maisiba Toyo, Deputy Registrar High Court of Kenya at Eldoret, Paul Gicheru Of Gicheru & Co. Advs & Commissioner of Land [2013] KECA 378 (KLR) which noted:

“In considering whether an appeal will be rendered nugatory the court must bear in mind that each case must depend on its own facts and peculiar circumstances. *David Morton Silverstein v Atsango Chesoni, Civil Application No. Nai 189 of 2001*.

... The term “nugatory” has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.

Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved”



30. As aforesaid, the Appellant contests the Tribunal's jurisdiction to entertain the matter averring that as per the contract entered into with respect to the grant of easement, the first port of call should have been arbitration and the Tribunal erred in not finding so. Appellant avers, inter alia, that the Tribunal ought not have assumed jurisdiction. The Appellant is also concerned that should it be forced to defend the suit, it will remove itself from the ambit of arbitration further complicating matters.
31. In the circumstances, the Court considers that the failure to stay proceedings will render the Appeal nugatory. In the event this Court appeal overturns the decision then the entire proceedings of the court will be rendered a nullity because without jurisdiction, the court of tribunal acts in vain. [See Nyarangi J in Owners of Motor Vessel "Lilian S" v Caltex Oil (Kenya) Ltd. (1989 KLR)]. Allowing the Tribunal to proceed under the cloud of a jurisdictional uncertainty undermines the integrity of the process.
32. Section 1A of the Civil Procedure Act seeks the just, expeditious, proportionate and affordable dissolution of disputes. These principles serve as the foundation of the Courts' commitment to efficiency and fairness. In the circumstances, proceeding with the matter before the Tribunal while an appeal on jurisdiction is pending would run counter to these objectives and could result in a significant waste of judicial time and resources.
33. It is also noted in this regard that the Tribunal's matter has yet to commence. In the end, the Court is convinced that the prayer for stay of proceedings is warranted and proceeds to grant the following orders:
 - i. An order does hereby issue staying the proceedings before the Land Acquisition Tribunal Case No E005 of 2023-Erneast Karagania Matthew vs Kenya Electricity Transmission Company Limited(KETRACO) pending the hearing and determination of this Appeal.
 - ii. The order of stay is granted on condition that the appeal is set down for hearing within 90 days, excluding the days when the court will be on recess.
 - iii. Costs shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 20TH DAY OF NOVEMBER, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

No appearance for Appellant

No appearance for Respondent

Court Assistant- Tracy

