



**Oyieko v Henry & 4 others (Environment & Land Case 48 of 2019)
[2024] KEELC 7371 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 7371 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 48 OF 2019
MAO ODENY, J
NOVEMBER 7, 2024**

BETWEEN

CAROLINE ACHIENG OYIEKO PLAINTIFF

AND

FRANKLINE NJERU HENRY 1ST DEFENDANT

HENRY KIPLAGAT MAIYO 2ND DEFENDANT

NIMO KORANE MOHAMMED 3RD DEFENDANT

BENSON KABUGI GICHUKI 4TH DEFENDANT

MICHAEL ELIJAH KABIRU 5TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 28th June, 2024 by the Plaintiff/Applicant seeking the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honorable Court be pleased to stay any proceedings of the counterclaim herein and/or further proceedings and/or hearing and/or any action thereof pending the hearing and determination of the intended appeal from the Order/Ruling dated the 6th June 2024 to the Court of Appeal.
 - d. That cost of this application be provided for.
2. The application was supported by the annexed affidavit of Caroline Achieng Oyieko who deponed that on 6th June, 2024, the Honorable court delivered a ruling which while allowing her to file a reply



to the counterclaim and lead evidence in response thereto, inexplicably refused to reinstate her suit. She further stated that the suit and the counterclaim are inextricably connected and it is not tenable to prosecute separately which is the scenario likely to arise if her appeal succeeds.

3. The 2nd and 3rd Defendants filed a Replying affidavit sworn by Henry Kiplagat Maiyo on 29th July, 2024 where he deponed that the Applicant has not met the conditions for stay of proceedings. He deponed that a counterclaim is separate and independent of the matter that gave rise to it and where a suit is stayed, discontinued or has been dismissed, and the counterclaim maintained, a defendant is not barred from proceeding with the counterclaim.

Plaintiff/applicant's Submissions

4. Counsel for the Applicant filed submissions dated 14th August, 2024 and identified the issue for determination as whether or not the application for stay of proceedings is merited?
5. Mr. Kisila submitted that the application has been brought without undue delay, thus will save judicial time, the intended appeal is arguable and in the event it succeeds, the proceedings in the counterclaim and consequential orders if any might be rendered futile and it works in the best interest of both parties and the Honorable court.
6. Counsel relied on the cases of Mocha Hotel Ltd vs Kwanza Estates Ltd [2023] KEELC 21729 (KLR) and Re Global Tours & Travels Limited, (Nairobi High Court Winding Up Cause No 43 of 2000) and submitted that the ruling against which the intended appeal is made to challenge was delivered on 6th June, 2024 while the application for stay orders is dated 28th June, 2024 hence it was filed timeously.
7. Counsel relied on the case of Charles N. Ngugi vs ASL Credit Limited [2022] eKLR. and submitted that in the event the counterclaim succeeds, an order of eviction will inevitably be made and will have a negative impact upon the Plaintiff hence the applicant stands to suffer irreparably if the order for stay of proceedings is not granted.
8. It was counsel's further submission that the order for stay of proceedings sought herein is a peculiar one as the Applicant claims that Mr. Kalji Vajil Patel and Ganishyam J Patel donated the suit land and that she has resided on the said parcel for over 12 years thus entitled to proprietorship by way of adverse possession.
9. Counsel submitted that on the other hand, the 2nd and 3rd Respondents claim that they are the legal owners of the suit parcel and as such the applicant should be evicted from the said parcel. It was counsel's further submission that due to the uniqueness of the matter and in the event the Honorable Court finds that the Applicant has not clearly demonstrated that she will suffer irreparable loss, the application still stands as merited.
10. Counsel relied on the cases of Deacons (East Africa) Plc Limited v Modern Techno Fitness Gym Limited & another [2021] eKLR and Ocean Engineering Works Ltd & another vs [SBM Bank of Kenya Ltd \(Civil Appeal 112 of 2021\)](#) [2024] KEELC 4724 and urged the court to grant the orders as prayed with costs to the Applicant.

2nd and 3rd Defendant/respondents' Submissions

11. Counsel for the 2nd and 3rd Respondents/Defendants filed submissions dated 9th October, 2024 and identified the following issues for determination:
 - a. Whether the grounds raised by the Applicant/Plaintiff in her application dated 28th June, 2024 merit an award of the orders sought?



- b. Who bears the costs of this application?
12. Counsel relied on Order 42 Rule 6 (2) of the Civil Procedure Rules, 2010 and the cases of Lucy Waithera Kimanga & 2 others vs John Waiganjo Gichuri [2015] eKLR and Kenya Wildlife Service vs James Mutembi [2019] eKLR and Global Tours & Travels Limited; Nairobi HC Winding Up Cause No 43 of 2000 and submitted that the trial court should bear in mind whether it is in the interest of justice to grant an order of stay of proceedings pending appeal.
 13. Counsel submitted that the Plaintiff/Applicant's application is aimed at defeating and obstructing the ends of justice by deliberately prejudicing the expeditious disposal of the counterclaim hence defeats the purpose for which such orders are issued.
 14. Mr. Samora submitted that the Plaintiff/Applicant has failed to demonstrate the exceptionality of her appeal and that a counterclaim is a standalone suit separate and independent of the primary suit from where it emanates. Counsel relied on Order 7 Rule 13 of the Civil Procedure Rules, Section 35 of the *Limitation of Actions Act* and the cases of Muna and 5 others vs Boscardin and 5 others [2022] KEELC 3133 (KLR) and Ocean Engineering Works Ltd and another vs SBM Bank of Kenya Ltd [Civil Appeal 112 of 2021] [2024] KEELC [4724] eKLR.
 15. According to counsel, the Plaintiff/Applicant has failed to demonstrate that the intended appeal would be rendered otiose if the trial court proceeds with the hearing of the counterclaim and relied on the case of Stanley Kang'ethe Kinyanjui vs Tony Ketter and 5 others [2013] eKLR. Counsel urged the court to dismiss the application with costs.

Analysis and Determination

16. The issue for determination is whether the Applicant has met the threshold for stay of proceedings pending appeal of the order dated 6th June 2024.
17. In Halsbury's Law of England, 4th Edition. Vol. 37 page 330 and 332, describes stay of proceedings as:

“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.”
18. It is incumbent upon the Applicant to show that she has exceptional circumstances that warrants the court to order stay of proceedings. The court gave a ruling dated 6th June 2024 allowing the plaintiff/Applicant 14 days to file a response to the counterclaim, a list of documents and witness statement. The court further reopened the 2nd and 3rd defendants' case for purposes of cross-examination by the plaintiff, were granted leave to call additional witnesses and file additional documents if necessary. The court however ordered that the order of 28th July 2022 dismissing the plaintiff's suit for non-attendance and/or want of prosecution stands. The plaintiff was ordered to pay the 2nd and 3rd defendants thrown away costs of Kshs 100,000/ within 14 days. This is the gist of the applicant's grievance in this application.



19. Counsel for the Applicant submitted that the application falls under exceptional circumstances and that the applicant has established sufficient cause why the order of stay of proceedings should be allowed. Further that the suit and the counterclaim are inextricably connected and it is not tenable to prosecute separately and that it would be unfair to allow the counterclaim to proceed in the exclusion of the main suit upon which the counterclaim is pegged.
20. Order 7 Rule 13 of the Civil Procedure Rules provides as follows:
- “If, in any case in which the defendant sets up a counterclaim the suit of the plaintiff is stayed, discontinued or dismissed, the counterclaim may nevertheless be proceeded with.”
21. Similarly, in the case of *Muna & 5 others v Boscardin & 5 others* [2022] KEELC 3133 (KLR), the court stated as follows at paragraph 34:
- “Thus, if the law treats a suit and counterclaim as separate for purposes of delineating the genesis of a cause of action, so it should for purposes of continuance and determination of that those causes of action. It goes without saying then that a counterclaim is a separate entity from a suit. It resides in independence but when tried together fate calls on them to merge as one judgment.”
22. It therefore follows with due respect to counsel that the argument that a suit and counterclaim are one or tied together is flawed as per the above case. A suit and counterclaim though filed together are separate suits. What happens when a party withdraws a suit where there is a counterclaim, does the counterclaim survive the withdrawal of the suit or it dies a natural death? In such a scenario the defendant will proceed with a counterclaim.
23. The court is not dealing with the merits or the demerits of the issue of refusal to reinstate the plaintiff’s suit that was dismissed for non-attendance/want of prosecution as this falls within the jurisdiction of the Court of Appeal, which the Appeal lies. I will therefore not comment on it.
24. This is a matter where the plaintiff’s case has not been heard and the Applicant is desirous of seeking justice by way of an appeal to the Court of Appeal. If the defendants proceed with the counterclaim and a judgment is rendered then the appeal will be rendered an academic exercise. However, this is not a ground for stay of proceedings as a judgment can be set aside as was held in the case of *Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021)* [2022] KEHC 10197 (KLR) (30 June 2022) (Ruling) the court stated as follows:
- “I am not persuaded, however, that the appeal will be rendered nugatory by the mere fact that the trial may proceed and a judgment on merits given. A judgment given is capable of being stayed. Whether the fact that a party had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the Trial Court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek stay of proceedings in the Trial Court.”
25. The exceptional circumstance for granting a stay of proceedings in this case is on the issue to be determined in the Appeal whether the court ought to have set aside the order of 28th July 2022



dismissing the plaintiff's suit for non-attendance and allowed the reopening of the defence case granting leave to file additional documents and witness statements.

26. I have considered the application, the submissions by counsel together with the relevant authorities and find that the application has merit hence is hereby allowed as prayed. Costs of the application in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 7TH DAY OF NOVEMBER 2024.

M. A. ODENY

JUDGE

