



Mburugu & another v James Kibaki & Maingi M’ithara Mburu (Suing as the Legal Representative of the Estate of Mathew M’nabea - Deceased) & 3 others (Environment & Land Case E051 of 2024) [2024] KEELC 13860 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13860 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E051 OF 2024
CK YANO, J
DECEMBER 19, 2024**

BETWEEN

JOHNSTONE MBAABU MBURUGU 1ST APPELLANT

CATHERINE GAKII MBAABU 2ND APPELLANT

AND

JAMES KIBAKI & MAINGI M’ITHARA MBURU (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF MATHEW M’NABEA - DECEASED) 1ST RESPONDENT

DISTRICT LAND ADJUDICATION & SETTLEMENT OFFICER MBWAA ADJUDICATION SECTION 2ND RESPONDENT

DIRECTOR OF CRIMINAL INVESTIGATIONS TIGANIA WEST SUB COUNTY 3RD RESPONDENT

THE ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. By a notice of motion dated 29th July, 2024 brought pursuant to Section 1A (1) & (2), 1B (1) (a) &(b), 3,3A and 63(e) of the *Civil Procedure Act* and Order 51 Rule 1 of the Civil Procedure Rules, 2010, the appellants/applicants seek for orders that the court be pleased to issue an order of stay of any further proceedings in Meru CMC ELC No. E003 of 2024 pending the hearing and determination of this application, and thereafter pending the hearing and determination of the appeal herein and that the costs of the application be provided for.
2. The applicant’s motion is premised on several grounds and supported by the affidavit of Johnson Mbaabu Mburugu sworn on 29th July, 2024 in which it was contended that on 17th January, 2024,



- the 1st respondents filed Meru CMC ELC No. E003 of 2024 against 2nd to 4th respondents herein. That simultaneously with the filing of the plaint, the 1st respondents also filed a notice of motion application under certificate of urgency dated 17th January, 2024 and subsequently obtained an ex-parte order of injunction. That upon being served with the summons to enter appearance and the pleadings, including the said application, the applicants' entered an appearance and subsequently filed a notice of preliminary objection to the suit and the said application. That the applicants also filed a replying affidavit and statement of defence.
3. That after hearing the said notice of preliminary objection, the trial court dismissed the same vide its ruling delivered on 17th July, 2024 and set down the motion for hearing on 7th August 2024. The applicants state that the basis of the said objection was the court had no jurisdiction to hear the matter and the same ought to be struck out on the grounds that the 1st respondents filed the suit without obtaining the requisite consent of the Land Adjudication & Settlement Officer Tigania West Sub – County where Mbwaa Adjudication section is situated as provided under Section 30 (1) of the [Land Adjudication Act](#), that the 1st respondents did not exhaust the dispute resolution mechanism provided under the [Land Adjudication Act](#) and that the suit and application were incompetent and an abuse of the court process.
 4. The applicants averred that the appeal herein is challenging the ruling of the learned trial magistrate in dismissing the notice of preliminary objection. That it is only just and fair that the orders sought herein are granted as no prejudice will be occasioned to the 1st respondents if the same are granted. The applicants contended that unless the orders sought are granted, the applicants will suffer irreparable loss in view of the fact that the orders sought in Meru C.MC ELC No. E003 OF 2024 have an impact of stalling the adjudication process of their several parcels of land. That although the 1st respondent stated that the said parcels of land are situated in Ruiriri Rwarera, the correct position is that the same are situated within Mbwaa adjudication section, Tigania west sub-county. The deponent has annexed copies of the plaint, notice of motion, a court order, notice of preliminary objection, replying affidavit, statement of defence and ruling in Meru CMC ELC No. E003 OF 2024.
 5. When the application came up for hearing on 1st October, 2024 Mr. Nyamu Nyaga advocate appeared for the applicants while Mr. Munene Kirimi advocate was present for the respondents. Learned counsel, Mr. Munene Kirimi for the respondents informed the court that he had not yet received sufficient instructions from his clients and requested for 7 days to file a response. He also proposed that the application be heard by way of written submissions. The court granted the respondents' counsel the request made and directed the respondents to file and serve their response within 7 days from 1st October, 2024. The court further directed that thereafter the application be canvassed by way of written submissions to be filed within 7 days each. The matter was fixed for mention on 5th November, 2024 to confirm compliance with the court's directions and to fix a ruling date. On 5th November, 2024, only Mr. Nyamu Nyaga learned counsel for the applicants appeared. The respondents' counsel was absent and the respondents had also not filed any response. The parties had also not filed any submissions. Counsel for the applicants stated that he would entirely rely on the supporting affidavit.
 6. I have considered the application. This application is for stay of proceedings in Meru CMC ELC NO. E003 of 2024 pending the hearing and determination of the appeal herein. The appeal arises out of the subordinate court's ruling delivered on 17th July, 2024 dismissing the applicant's notice of preliminary objection dated 5th February, 2024. In the said preliminary objection, the applicants herein wanted to have the suit and application before the subordinate court struck out on the grounds that it was filed by the 1st respondents herein before obtaining consent of the land Adjudication And settlement Officer as provided under Section 30 (1) of the [Land Adjudication Act](#) since the subject parcels of land were



under an adjudication section. The applicant further contended that the court lacked jurisdiction since the 1st respondents had not exhausted the dispute resolution mechanisms provided under the [Land Adjudication Act](#).

7. Stay of proceedings pending appeal is purely a matter of judicial discretion that is exercised in the interests of justice depending on the justice of each case. It has been stated that stay of proceedings should not be confused with stay of execution pending Appeal. Stay of proceedings is a grave judicial action which seriously interferes with the right of access to justice, right to be heard without delay and overall, right to fair trial. Therefore, the test for stay of proceedings is high and stringent.
8. In the case of Global Tours & Travels Limited, Nairobi Winding up cause No. 43 of 2000 (Unreported) it was stated thus:-

“...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 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.”

9. In the case of Christopher Ndolo Mutuku & another Vs CFC Stanbic Bank Ltd [2015] it was observed that:-

“... 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 case, which should arise almost a compulsion that the proceedings should be stayed in the interest of justice...”

10. In the case of Grain Bulk Handlers Limited Vs Mistry Jatra Parbat & Company Limited [2006] eKLR, it was held as follows:-

“... the discretion in granting an order of stay of proceedings lies with the court, and it is one to be exercised in the interest of justice taking into account the matter before court”.

11. The instant application was filed on 30th July, 2024 while the ruling the subject of the appeal was delivered on 17th July, 2024. In my view the application was filed timeously.

12. The ruling appealed against was in respect of the dismissal of the applicants’ notice of preliminary objection dated 5th February, 2024 which stated as follows:-

- a) a) That both the said suit and application dated 17th January, 2024 be struck out with costs for being incompetent, frivolous, bad in law and an abuse of the court process.
- b) The plaintiff/respondents didn’t comply with section 30(1) of the [Land Adjudication Act](#), Cap 284 Laws of Kenya.
- c) The plaintiffs have failed to exhaust the remedies provided under [Land Adjudication Act](#), Cap 284 Laws of Kenya particularly in view that they are claiming interest in the subject parcel of land on behalf of the Estate of Mathew Nabea M’Nabea – deceased.



- d) That the court lacks jurisdiction to hear and determine the suit and the notice of motion dated 17th January 2024 as the plaintiffs have failed to comply with Section 30(1) of the Land Adjudication Act Cap 284 and/or failed to exhaust the process provided for under the Act.”
13. That preliminary objection was in response to the respondents’ application dated 17th January, 2024. Besides the notice of preliminary objection, the applicants averred that they also filed a replying affidavit in response to that application dated 17th January, 2024. That application is yet to be heard and determined. Indeed the applicants stated that the application was scheduled for hearing on 7th August 2024, but by then this court had issued interim orders of stay of proceedings. It is clear that the appeal herein is an interlocutory appeal.
14. In the case of Ezekiel Mule Musembi Vs H.Young & Young (EA) Limited [2019] eKLR, the court quoted the decision in Henry Bukomeko & 2 others Vs Statewide Insurance Co. Ltd Uganda Supreme court Civil Appeal No. 13 of 1999 where it was stated inter alia follows-;
- “... That where an interlocutory is taken great care must be exercised in getting the appeal on as quickly as possible, in order that the trial may proceed with minimum delay. It is obvious that the longer an interlocutory appeal intervenes in the trial, the greater is the risk that the trial may be prejudiced. Therefore, rule 4 of the court of appeal rules would be read as requiring an intending appellant to show sufficient cause in the light of the fact that the appeal is an interlocutory appeal which must be brought forward as soon as possible...”
15. In this case, the respondent’s application dated 17th January, 2024 and the suit is yet to be heard by the trial court. Therefore, the main issue in the application and suit in the lower court are yet to be determined on merit. The applicants have not demonstrated the loss they will suffer if stay of proceedings is not granted as sought. Indeed, the applicants can still file a substantive appeal at a later stage and raise the issues herein after the hearing and determination of the respondents’ application or the suit. It is therefore my view that the applicants have not shown sufficient reason to warrant the stay and they will not suffer any loss as alleged since they still have an opportunity to oppose the respondents’ application dated 17th January, 2024 and possibly the suit. I am not convinced that the appeal will be rendered nugatory if the proceedings in the trial court are to continue.
16. In the instant case, it is my considered opinion that it would not be in the interest of justice to exercise the court’s discretion and grant stay of proceedings as it will only serve the purpose of delaying the matter. An order for stay of proceedings in my view will be in violation of Article 159 of the Constitution and Section 1A and 1B of the Civil Procedure Act which obligate the courts to determine matters expeditiously.
17. Accordingly, it is my finding that the application is devoid of merit and is dismissed. Since the application was not opposed, I order that parties bear their own costs.
18. It is so ordered.

DATED SIGNED AND DELIVERED AT MERU THIS 19TH DAY OF DECEMBER, 2024

In the presence of

Court Assistant – Tupet

Muthamia holding brief for Nyamu Nyaga for applicants/appellants

Munene Kirimi for respondent



C.K YANO
JUDGE

