



REPUBLIC OF KENYA



Urithi Housing Co-operative Society Limited & another v Mayieka & 104 others (Civil Appeal E632 of 2024) [2025] KEHC 721 (KLR) (Civ) (30 January 2025) (Ruling)

Neutral citation: [2025] KEHC 721 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E632 OF 2024

JN MULWA, J

JANUARY 30, 2025

BETWEEN

URITHI HOUSING CO-OPERATIVE SOCIETY LIMITED 1ST APPELLANT

SAMUEL NGUNDO MAINA 2ND APPELLANT

AND

**MARY KEMUNTO MAYIEKA & 104 OTHERS & 104 OTHERS & 104 OTHERS
& 104 OTHERS RESPONDENT**

RULING

1. By the Notice of Motion Application dated 25TH June 2024 the applicants/appellants seek for the following orders-
 - i. Spent.
 - ii. Spent.
 - iii. That pending the hearing and determination of the appeal herein, this Honourable Court be pleased to order a stay of proceedings in Co-operative Tribunal Cause No. 55 Of 2021 -Mary Kemunto Mayieka & 104 Others -V- Urithi Housing Co-Operative Society Ltd & Another.
 - iv. That costs of this application be provided for.
2. The application is premised on the grounds on its face and supported by an affidavit sworn on an even date by the applicants Advocate Mr. George Mwangi Kamau.
3. It is the applicants' deposition that in the course of the trial, the Honourable Tribunal declined and/or disallowed the applicants request to have more claimants/respondents testify in the case as opposed to one of them representing the rest of the claimants.



Further, it is averred that on the day the matter was slated for hearing, the Appellants raised two legal issues and requested the Honourable Tribunal to consider them before commencement of the hearing; the said issues being as hereunder;

- a. Whether Isaac Mukuru (the sole witness) was competent to act as a witness in contracts where he was not privy to,
 - b. Whether allowing the witness to proceed in absence of all the other Claimants would violate the Respondents right to fair hearing which encapsulates the right to cross examination.
4. Additionally, on the same day, the Advocate made arguments in support of the two legal questions and requested the Tribunal to consider them before the hearing of the case commences as Eighteen (18) of the Claimants stated that they had not authorized the witness to plead and represent them but which request the Tribunal turned down.
 5. The applicants therefore urge the court to allow their application and stay the proceedings stating that if the orders are not granted, the case shall proceed to conclusion which will render the appeal nugatory, if successful.
 6. The respondents objected to the application via a replying affidavit sworn on 30th July, 2024 by their four representatives who averred that the appellants/applicants were at all material times the registered owners of Mavoko Town Block 3/73993 and on which land the 1st appellant started to develop a Project christened Urithi Housing Co-operative Society Osten Terrace Gardens Apartments comprising of Residential Apartments.
 7. The respondents further averred that by various contracts made on diverse dates, the appellants agreed to assign and the respondents agreed to take the Leasehold Properties being the apartments at various considerations but in the same terms of sale. In addition the respondents by their Advocates filed submissions to buttress their objections Mr. George Mwangi Kamau Advocate for the/Appellants sought to refer to his Affidavit in support of the application therein sworn on 25th June,2024 and sought to reiterate the contents and averments therein. He averred that the application has merit and the same ought to be allowed with and identified one issue for determination;
 - a. Whether the Appellants/Applicants have met the threshold for grant of stay of proceedings in Co-operative Tribunal Cause No. 55 of 2021-Mary Kemunto Mayieka & 104 others -vs- Urithi Housing Co-operative Society Ltd & Another?
 8. The respondents submitted that stay of proceedings is a grave matter to be entertained only in the most deserving cases as it impacts the right to expeditious trial. It is a discretionary power exercisable by the Court upon consideration of the facts and circumstances of each case, stressing that stay of proceedings is discretionary and sought to rely on the cases of Gichuhi Macharia & Another V Kiai Mbaki & 2 Others [2016] eKLR the Court highlighted the case of Global Tours & Travels Limited; Nairobi Hc Winding Up Cause No. 43 OF 2000 Ringera J, (as he then was) stated that: -

“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”.

9. In pointing out the principles that need to be met before granting stay the Respondents cited the case of Ndabi *V Kimotho & Another (Civil Appeal 16 of 2023)* [2023] KEHC 17717 (KLR) (19 May 2023) (Ruling); thus-

“Therefore, the test from the above authorities is one that sets out the following parameters for a Courts exercise in discretion, in deciding whether or not to grant a stay of proceedings as sought in this application: - a. Whether the Applicant has established that he/she has a prima facie arguable case; and b. Whether the Applicant has established sufficient cause to the satisfaction of the court that it is in the interest of justice to grant the orders sought. In an application for stay of proceedings, the Court must consider the overriding objective, and balance the interests of the parties to the suit, since the Court is enjoined to always place the parties on equal footing. Since the overriding objective aims, inter alia, to facilitate the just, expeditious, proportionate, and affordable resolution of the civil disputes governed by the Act, the balancing of the parties’ interest is paramount in an application for stay of Proceedings pending appeal.”

10. They further cited the case of Noor Ahmed Noor & 158 Others V Kenya Railways & Another [2016] KLR, the Environment and Land Court posited thus: -

“From the foregoing, the salient requirements of an appearance of one of several Plaintiffs or Defendants, are to have a (i) written document (ii) signed by Plaintiffs or Defendants authorizing one of them to (iii) appear, plead or act, which must be (iv) filed in the case. On perusal of the Plaintiffs’ bundle of documents in the Court record, there is a document titled “Authority to Act (Under Order 1 Rule 12 of the Civil Procedure Rules). The content therein is very clear, that: the undersigned from the date thereof until the determination of the suit authorize Noor Ahmed Noor the 1st Plaintiff, to act, appear, execute/sign documents/pleadings relating to the suit and to instruct counsel/advocate on their behalf to prosecute the suit. The Authority is accompanied by a list of all the Plaintiffs who appended their signatures. Whilst it is not an express requirement, the Authority also has the descriptions of the firm from which it is drawn and filed and whom to be served upon. I am satisfied that the provisions of Order 1 Rule 13 have been met and consequently find that the point of objection fails.”

11. The Respondents therefore urged the Court to dismiss this instant Application for lack of merit with costs.

Analysis and Determination

12. The court has considered the application, the supporting and supplementary affidavit filed by the applicants and the respondents submissions in support of the application.

The only issue flagged for determination in the court’s view is as hereunder;-

Whether the Appellants/Applicants have met the threshold for grant of stay of proceedings in Co-operative Tribunal Cause No. 55 of 2021-Mary Kemunto Mayieka & 104 others -vs- Urithi Housing Co-operative Society Ltd & Another?



13. It is the applicant’s case that Isaac Mukuru, their sole witness was not competent to act as a witness in contracts where he was not privy and that allowing the witness to proceed in absence of all the other Claimants violated the respondent’s right to fair hearing which encapsulates the right to cross examination.
14. On the other hand, the respondents contended that all the Claimants (save for the 18 who have not participated in the tribunal proceedings), signed an Authority to act on their behalf dated 27 January 2021, which was filed alongside the Statement of Claim and that the contents therein are very clear, that: the undersigned from the date thereof until the determination of the suit authorize Elijah Isaac Mukuri, Floridah Kagendo Kithinji, Evaline Wanjiru Kibuchi and Hezron Mganga Mbogo, to act, appear, execute/sign documents/pleadings relating to the suit. The Authority is accompanied by a list of all the Claimants who appended their signatures.
15. Article 159(2)(d) of *the Constitution* provides that;
- In exercising judicial authority, the courts and tribunals shall be guided by the following principles— justice shall be administered without undue regard to procedural technicalities.
16. This court has powers to stay proceedings under its inherent jurisdiction reserved in section 3A of the *Civil Procedure Act* which provides as follows: -
- “Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”
17. The court in Kenya Wildlife Service vs. James Mutembei [2019] eKLR cited with approval the case of Re Global Tours & Travel Ltd HCWC No. 43 of 2000 where Ringera, J (as he then was) held that:
- “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 the case....and whether the application has been brought expeditiously.”
18. The said court further held that:
- “Stay of proceedings is a grave judicial action which seriously interferes with the right of a litigant to conduct his litigation. It impinges on 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.”
19. It is not disputed that the respondents herein were all Claimants- in Nairobi Co-operative Tribunal Case No. 55 of 2021 (save for the 18 who have not participated in the tribunal proceedings) signed an Authority to Act dated 27 January, 2021 which was filed alongside the Statement of Claim. It is further not disputed that that the contents therein were very clear, that;
- The undersigned from the date thereof until the determination of the suit authorize Elijah Isaac Mukuri, Floridah Kagendo Kithinji, Evaline Wanjiru Kibuchi and Hezron



Mganga Mbogo, to act, appear, execute/sign documents/pleadings relating to the suit. The Authority is accompanied by their signatures by a list of all the Claimants who appended.

20. In the case of Grace Ndegwa & Others vs. Hon. Attorney General – Civil Appeal No. 228 of 2002 (unreported) , Grace Ndegwa swore the verifying affidavit on behalf of about 1484 plaintiffs. It was contended in Grace Ndegwa’s case that the verifying affidavit was defective because there was no authority signed by other plaintiffs authorizing her to act on their behalf. There was however a document signed by most of the plaintiffs in that case authorizing Grace Ndegwa and seven other persons to deal with the advocates for the plaintiff. This Court found the document to be sufficient authority to Grace Ndegwa by the persons who had signed it.

21. Order 1 Rule 13 of the Civil Procedure Rules 2010, provides as hereunder:

1. Where there are more plaintiffs than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding, and in like manner, where there are more defendants than one, any one or more of them may be authorized by any other of them to appear, plead or act for such other in any proceeding.

2. The authority shall be in writing signed by the party giving it and shall be filed in the case.

22. These rules leave no doubt that one or more of the plaintiffs can validly file a signed authority to act and the correctness of the averments of the statement of claim on behalf of the other plaintiffs with their authority in writing.

In light of the law and the authorities cited above, the grant of stay of proceedings is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of each case. Further, the court must balance the parties’ rights to ensure that justice is served.

23. The appeal herein challenges the ruling by the Cooperative Tribunal and particularly the issue of a single witness to represent the remaining 103 claimants when it was clear that a number of the claimants had not signed the authority to plead. The court notes that there are 104 claimants who desire to testify before the tribunal. Of interest is the sole witness - Isaac Mukuru- who is alleged to have not been a signatory to the contract subject of the case before the Tribunal case.

24. The question therefore that arises is whether the evidence of this sole witness would be sufficient to elucidate the 103 claimants case sufficiently if indeed he was not privy to the contracts in issue. The plaintiffs/claimants did not think so.

25. The court has perused the issues raised and argued by the applicants to persuade it to allow more witnesses to testify, and which it rejected. The court has perused the ruling and also interrogated the reasons for the ruling. It is trite that a party who has no privity to a contract is not competent to testify on the contents of the contract.

26. Article 50 of the Kenya Constitution 2010 mandates courts to give a fair hearing to all parties in a dispute including being accorded sufficient time to begin and conclude without unreasonable delay. That however does not include denial to a party to call witnesses as it may wish to testify on its behalf. Looking at the claimant’s numbers, and the issue raised as to the competency of the sole witness who testified for the claimants, there is no reason or at all why the Tribunal denied a few more witnesses to testify for the claimants.

Rushing through a hearing without according all necessary witnesses a chance to testify cannot be said to be a fair hearing by any stretch of imagination, in the court’s mind.



27. The holdings in the cases of *Gihuhi Macharia & another v Kiai Mbaki & another* and *Ndabi v kimotho & another* (supra) are clear that to grant or denial an order of stay of proceedings pending appeal depend upon circumstance of each case and is upon the court's discretion. The court is also implored to consider the rival interests of the parties which is a paramount tenet in the consideration for stay of proceedings pending appeal.
28. Provisions of Order 1 rule13 of the Civil Procedure Rules which allows one or more of the parties to plead and act on behalf of other parties in a suit should not be confused with witnesses in the case. As much as the rule allows select parties to plead on behalf of all others, it does not deny parties who wish to testify such a chance, save that in a matter with many plaintiffs or defendants as is the case of the claimants in this case, it would suffice if a few claimants testify on behalf of the rest, (and definitely not all the 104), if their evidence would be same.
29. The court has noted the Respondents' submission that all the claimants' claims are the same save for the plot numbers. However, it is not for a court of law or a tribunal to dictate to the parties how to prosecute their cases, including how many witnesses to call.
30. In the case of *Julianne Ulrike Stamm v Tiwi beach Hotel Ltd(1998)Eklr*, the court held that it is for the plaintiff's counsel to decide how to prosecute his case, in consideration of the limited judicial time available to the court/tribunal.
See also the case of *MRM aka RLM V SMRM (2024)eKLR* for the same holding.
31. In the end and for the foregoing, the court is sufficiently persuaded to allow the applicants/appellants application dated 25/6/2024 in terms of prayer number 3, with no order on costs on the application.
Orders accordingly.

DELIVERED SIGNED AND DATED AT NAIROBI THIS 30TH DAY OF JANUARY 2025.

JANET MULWA
JUDGE

