



**Oketch & another v Okwiri (Environment and Land Appeal  
17 of 2022) [2023] KEELC 105 (KLR) (19 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 105 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT AND LAND APPEAL 17 OF 2022  
A OMBWAYO, J  
JANUARY 19, 2023**

**BETWEEN**

**FREDRICK OKETCH ..... 1<sup>ST</sup> APPELLANT**

**HANNINGTON RABURU JUMA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**PHILGONA AKOTH OKWIRI ..... RESPONDENT**

**RULING**

**BRIEF FACTS**

1. The appellant filed the instant application dated April 8, 2022 seeking orders this honorable court be pleased to stay further proceedings together with all consequential orders thereto in Kisumu CMELC No E012 of 2021 pending hearing and determination of this appeal. That this honorable court do issue any other orders as it deems fit and just to meet the ends of justice. That cost of this application be provided for.
2. The application was based on grounds set out and supported by the Affidavit of Hannington Raburu Juma sworn on April 8, 2022.
3. It was stated that on February 22, 2022 the subordinate court rendered its ruling and dismissed their preliminary objection dated September 17, 2021. That being aggrieved by the said ruling, they have since appealed against it.
4. That unless this court orders a stay of proceedings and all consequential orders, the subordinate court will begin hearing Kisumu CMELC No E012 of 2021 yet it has no jurisdiction to entertain the said suit.



5. It was further stated that the appellants have an arguable appeal with chances of success and that the proceedings in Kisumu CMELC no E012 of 2021 will be rendered a nullity if the appeal succeeds. That it is undesirable to have concurrent proceedings in two different courts.
6. In conclusion, the appellant stated that the respondent shall suffer no prejudice if the present application is allowed.

### **Respondent's Grounds of Opposition**

7. The respondent herein filed her grounds of opposition dated May 11, 2022 in opposition to the appellants' notice of motion application dated April 8, 2022 on the following grounds:
  1. The application is a complete abuse of the court process for reasons that the Appellants have filed an appeal from a ruling on a preliminary objection without the leave of court thereby rendering the intended appeal incompetent.
  2. The application is without merit and incompetent for not meeting the threshold for grant of the orders sought.
  3. That the intended interested parties do not have any stake, legal or otherwise, in relation to the issues raised in the suit by the parties.
  4. The application is an unwitty attempt to deny the respondent access to justice and is an impingement on the respondent's right to a fair trial without delay.
  5. The application is bad in law and unnecessary as the issues raised in the purported appeal are issues that can be canvassed and interrogated in a full trial before the subordinate court that is clothed with the jurisdiction to determine the matter to its conclusion thereby rendering the appeal unlikely to succeed.
  6. It is believed that if this court grants stay of proceedings, the intended appeal which has been filed is a calculated delaying tactic by the appellant/applicants which goes against the timely, cost-effective and proportionate dissolution of disputes in order to ensure access to justice by parties as provided for under article 159 of the [Constitution of Kenya](#) is achieved.
  7. Allowing this application would be in the best interest of justice and would cause more harm than good.
  8. The application is a dump on the spirit of the oxygen principle which is meant to avoid unnecessary miscarriage of justice by allowing courts more discretion to administer justice without undue regard to procedural technicalities.
8. The respondent seeks that the application be dismissed with costs.

### **Submissions**

9. Parties did not file their respective submissions to the application.

### **Analysis and Determination**

10. This court has looked into the application and the grounds of opposition filed by the parties and is of the view that the main issue for determination is whether this court should stay the proceedings in Kisumu CMELC No E012 of 2021 pending the hearing and determination of this Appeal.



11. In the case of *Global Tours & Travels Limited*; Nairobi HC Winding up Cause No 43 of 2000 Ringera, J (as he then was) stated 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”.

12. In the case of *Kenya Wildlife v James Mutembei* [2019] eKLR held 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 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”.

13. Further the Court of Appeal in the case of *David Morton Silverstein v Atsango Chesoni* [2002] eKLR the court held as follows:

“The court is not laying down any principle that no order for stay of proceedings will ever be made; that would be contrary to the provisions of rule 5 (2) (b) of the court’s own rules. But as the court pointed out in the case we have already cited, each case must depend on its own facts and the facts of this particular case before us, as were the facts in the earlier case, do not show that the appeal will be rendered nugatory if we do not grant a stay”.

14. It is this court’s view that the power to grant stay of proceedings is a discretionary one exercisable by the court upon consideration of the facts and circumstances of each case. The same should be entertained only in the most deserving cases as it impacts the right to expeditious trial.

15. The appellants contend that they have an arguable appeal with chances of success and that if the proceedings in kisumu CMELC No 12 of 2012 are not stayed, then the pending appeal will be rendered a nullity.

16. The respondent on the other hand contends that the application is incompetent for not meeting the threshold for grant of the orders sought. Further, that the appellants filed an appeal from a ruling on a preliminary objection without leave of court.



17. This court notes that from the orders being sought, the appellant desires that this court exercises its appellate power to the ruling while at the same time, staying the proceedings to allow time for appeal.
18. It is this court's view that the appellants have not established the prejudice it would face if this court was not to grant stay of proceedings in the lower court. Furthermore, this court has perused the memorandum of appeal and is of the view that the grounds as raised by the appellant can either succeed or not.
19. This court therefore finds that the stay orders sought are not merited. Thus, the prayer for the stay of proceedings is not allowed.
20. In the upshot, the application dated April 8, 2022 is hereby dismissed with costs to the respondent.

**RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT KISUMU THIS 19<sup>TH</sup> DAY OF JANUARY, 2023.**

**AO OMBWAYO**

**JUDGE**

