



Sifuna v Mulaya & another (Environment and Land Case Civil Suit 280 of 2015) [2023] KEELC 143 (KLR) (19 January 2023) (Ruling)

Neutral citation: [2023] KEELC 143 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 280 OF 2015
OA ANGOTE, J
JANUARY 19, 2023**

BETWEEN

DAVID K SIFUNA PLAINTIFF

AND

EMILY KIVALI MULAYA 1ST DEFENDANT

NELSON MUTURI NDEMBEYIA 2ND DEFENDANT

RULING

1. What is coming up for determination is the Plaintiff's/Applicant's Notice of Motion application dated October 11, 2022 seeking the following reliefs;
 - i. That leave be granted to the Applicant to file an appeal on the refusal of the Court to set aside the *ex-parte* proceedings of October 28, 2021 where the 2nd Defendant/Counterclaimant proceeded and closed his case.
 - ii. That pending the hearing and determination of the Intended Appeal, this Honorable Court be pleased to grant stay of all proceedings and arrest Judgment that is set to be delivered on the 2nd Defendants/Counterclaimants Counterclaim dated January 23, 2015.
 - iii. That the costs of, incidental to, this Application abide the Intended Appeal.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of David K Sifuna, the Plaintiff herein who deponed that vide its ruling of September 30, 2022, the court declined to reinstate the Plaintiff's suit dismissed on October 28, 2021 for non-attendance, set aside the *ex-parte* proceedings of October 28, 2021 and grant leave and enlarge time within which the Plaintiff could file a Reply to the 2nd Defendant's Defence and Defence to Counterclaim.



3. The Plaintiff deponed that he intends to appeal against the decision aforesaid and has to that end filed a Notice of Appeal dated October 5, 2022 as well as a letter of the same date requesting for certified copies of the proceedings; that pursuant to Order 43 (1) (h) and (y) of the Civil Procedure Rules, the right to appeal as sought herein exists as of a right with regards to the decision to decline to reinstate the Plaintiff's suit and refusal to enlarge time and that Order 43 (1) does not speak to refusal to set aside ex-parte proceedings and the Applicant, pursuant to the provisions of Order 43(2) seeks formal leave to appeal against the same.
4. According to the Plaintiff, the court dismissed the suit for non-attendance despite him giving legitimate reasons for his absence in court; that he seeks a stay of proceedings and an arrest of judgment on the Counterclaim that may be delivered at any time; that the subject matter constitutes matrimonial property which his family calls home and that he will be highly prejudiced if the Counterclaim is left unchallenged and evidence untested.
5. The Plaintiff swore that the court is likely to find in favour of the 2nd Defendant leading to the loss of his property; that the 2nd Defendant's Counterclaim is about enforcing an illegal and fraudulent contract and should be put to strict proof; that the application has been brought timeously and that he is ready and willing to deposit security and abide by any conditions as to security as ordered by the court.
6. The Plaintiff finally deposed that he has an arguable appeal as evinced in the Memorandum of Appeal; that the right to Appeal is a fundamental constitutional right and that as advised by counsel, an Application for stay of execution pending appeal is to preserve the subject matter in dispute so that the rights of an Appellant are safeguarded and a successful appeal is not rendered nugatory.
7. In response to the application, the 2nd Defendant filed Grounds of Opposition in which he averred as follows:
 - i. That the numerous Applications being preferred by the Plaintiff against the 2nd Defendant violate the Equality of Arms principle in litigation in the sense that the Plaintiff having been accorded an opportunity to challenge the court's decision to refuse an adjournment and such challenge having delayed judgment for over a year, the Plaintiff should allow the due process of the law to conclude by the Court delivering judgment.
 - ii. That the practice of arresting judgment is something unknown to the law.
 - iii. That the actions mounted by the Plaintiff to stay proceedings and arrest judgment continue to gravely prejudice the 2nd Defendant while the Plaintiff continues to enjoy the benefit of the suit property namely subdivision number 9967, original number 9690/7, Section 1 Mainland North while simultaneously enjoying the benefit of LR No Trans-nzoia/Kapamboi/193.
 - iv. That this Court cannot second guess its own decision by staying proceedings. The proper forum to agitate the Applicants application is the Court of Appeal.
 - v. That the overriding objective principles were intended to facilitate the just, expeditious and proportionate resolution of civil disputes. It is just and disproportionate to allow one party to litigation to delay the expeditious resolution of a dispute on allegations ruled upon twice, allegations that have caused a one year delay and still counting.



- vi. That the Court has a duty to further the overriding objectives by ensuring timely disposal of proceedings. The Court having rejected the application for adjournment and having affirmed the rejection, the Court served notice that it intended to dispose off the matter timeously. The Court cannot in the circumstances backtrade in its own expressed intention by staying proceedings and delivery of judgment.
 - vii. That the discretion to stay proceedings where a court has rejected an application for adjournment cannot be invoked easily and lightly by the same court rejecting the application for in doing so, the Court will instinctively be getting entrapped into the mischief it sought to arrest in the first instance when it declined adjournment.
 - viii. That the commending directions would be to deliver judgment to pave way for the aggrieved party to challenge both the interlocutory orders made in the proceedings and the final judgment and decree.
 - ix. That the Courts have a duty to fulfill the intentions of the parties under a contract or agreement. It is manifestly clear from the agreement between the Plaintiff and the 2nd Defendant dated February 14, 2014, that the Plaintiff and the 2nd Defendant intended and covenanted and/or the Plaintiff undertook to allow a summary process in the transfer of the suit property. Whilst the summary judgment application was declined by the Court, it would be unfair to continue keeping the 2nd Defendant out of the benefit of the suit property for 8 years and still counting.
 - x. When the pendency of proceedings benefit a party to the proceedings and such party appears to want to escalate the proceedings to continue benefitting from such an eventuality, the Court has a duty to call such a party's bluff and reject Applications whose outcomes facilitate the escalation of proceedings.
 - xi. The wisdom in limiting the right of appeal against an order refusing to stay proceedings is to facilitate a fair adjudicative process that allows proceedings to be conducted seamlessly to their logical conclusion. The Court must interpret the plea to stay proceedings in a purposive manner that doesn't arise an absurdity fortified by the fact that no appeal lies as of right against an order refusing to stay proceedings.
 - xii. The Plaintiff having abandoned the application for injunction dated December 17, 2014 by which application the 2nd Defendant was restrained from disposing off, alienating, selling or in any way dealing with the suit property, it would be unjust and a travesty of justice to put the proceedings herein in abeyance pending appeal while the Plaintiff has refused to voluntarily execute a transfer of the suit property.
8. The Plaintiff/ Applicant filed submissions on the November 22, 2022. Counsel submitted that one of the orders sought to be appealed against, being the Court's decision to decline to set aside *ex-parte* proceedings of October 28, 2021 where the 2nd Defendant/Counter claimant proceeded and closed his case is not appealable as of a right necessitating the present Application.



9. It was submitted by the Plaintiff's counsel that the Court is vested with jurisdiction to stay proceedings pending Appeal pursuant to Order 42 Rule 6 of the *Civil Procedure Rules*; that an Applicant under Order 42 Rule 6 aforesaid is obligated to prove that substantial loss may be occasioned unless the order is made; that the Application has been made without unreasonable delay; that such security as the Court orders for due performance as may ultimately be binding on the Applicant has been given.
10. It was submitted that in the present case, the suit property is matrimonial property which the Plaintiff resides on with his family; that he will suffer substantial loss if stay is denied and judgment entered against him and that further, the Counterclaim which is un-opposed seeks orders with far reaching consequences and which may result in conversion of the matrimonial property.
11. It was the submission of counsel that the 2nd Defendant, having not denied that the suit property is the Plaintiff's matrimonial home and that if judgment is entered against him he will be rendered homeless rendering the Appeal nugatory, it follows that substantial loss has been proven. Counsel relied on the case of *Port Florence Community Health Care v Crown Health Care Limited [2022] eKLR* and *Ezekiel Mule Musembi v H Young Company (EA) Limited [2019]eKLR*, where the courts stayed proceedings pending Appeal to avoid rendering the Appeals nugatory.
12. According to counsel, the present application has been filed timeously; that; he is able and willing to comply with any condition on security for the due performance of the Ruling to be appealed from; that the Plaintiff has demonstrated through his Memorandum of Appeal, an arguable appeal; that the failure to attend court on October 28, 2021 was not by design and that the Plaintiff had given a plausible reasons of his absence, which explanations qualify as sufficient cause.
13. The Plaintiff's counsel cited the case of *Attorney General v Law Society of Kenya & Another [2013] eKLR* which defined sufficient cause as the burden placed on a litigant usually by a court, rule or order to show why a request should be granted or an action excused and the case of *PMM v JNW [2020] eKLR* where the Court opined that sufficient cause should receive a liberal construction in order to advance substantial justice. The 2nd Defendant did not file submissions.

Analysis and determination

14. When this suit came up for hearing on October 28, 2021, this court dismissed the Plaintiff's oral application for adjournment, dismissed the Plaintiff's case, and proceeded to hear the 2nd Defendant's counter claim. The Plaintiff then filed an application dated December 13, 2021 for setting aside the order of October 28, 2021 and the subsequent proceedings, which application the court dismissed vide its Ruling dated December 30, 2022.
15. One of the orders the Plaintiff is seeking in the current application is for leave be granted to the Applicant to file an appeal on the refusal of the Court to set aside the ex-parte proceedings of October 28, 2021 where the 2nd Defendant/Counterclaimant proceeded and closed his case. This prayer has not been opposed by the Defendants, and the same is allowed.
16. In the second limb of the Plaintiff's application, the Plaintiff is seeking for stay of all proceedings and arrest Judgment that is set to be delivered on the 2nd Defendant's Counterclaim dated January 23, 2015. According to the Plaintiff, the subject matter constitutes matrimonial property which his family calls home and that he will be highly prejudiced if the Counterclaim is left unchallenged and evidence untested.
17. The Plaintiff swore that the court is likely to find in favour of the 2nd Defendant leading to the loss of his property; that the 2nd Defendant's Counterclaim is about enforcing an illegal and fraudulent contract



- and should be put to strict proof; that the application has been brought timeously and that he is ready and willing to deposit security and abide by any conditions as to security as ordered by the court.
18. The prayer for stay of proceedings was strenuously opposed by the 2nd Defendant who averred that the actions mounted by the Plaintiff to stay proceedings and arrest judgment will continue to gravely prejudice the 2nd Defendant while the Plaintiff continues to enjoy the benefit of the suit property and that the overriding objective principles were intended to facilitate the just, expeditious and proportionate resolution of civil disputes.
 19. According to the 2nd Defendant, it is unjust and disproportionate to allow one party to litigation to delay the expeditious resolution of a dispute on allegations that have been ruled upon twice; that the court has a duty to further the overriding objectives by ensuring timely disposal of proceedings and that the court having rejected the application for adjournment, it served notice that it intended to dispose off the matter timeously.
 20. The general principles which guide the courts whenever they are invited to exercise 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.”
 21. It is apparent from the foregoing that the order for stay of proceedings is discretionary in nature, and should be granted in exceptional cases. Considering that a stay of proceedings leads to serious, grave and fundamental interruption in the right that a party has to conduct his litigation, the court has to consider if indeed the order of stay will facilitate the overriding objectives of the *Civil Procedure Act* of ensuring timely disposal of proceedings.
 22. One of the reason the court gave when it declined to adjourn the hearing of this matter was because its an old matter. That being so, and considering that it is more than one year since this court made that decision, this court ought to finalize the trial herein by delivering its Judgement.
 23. Indeed, the Plaintiff will not be prejudiced in any manner if this court goes ahead and delivers its Judgment. This is so because after the delivery of the Judgment, which is long overdue, the court will pave way for the aggrieved party to challenge both the interlocutory orders made in the proceedings and the final Judgment.
 24. In the event the Court of Appeal sets aside the proceedings of October 28, 2021, it follows that the Judgment of this court will also fall by the way side.
 25. That being the case, it is the finding of this court that the Plaintiff's application dated October 11, 2022 is not merited. Save for prayer number (i) which is allowed, the remaining prayers are dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 19TH DAY OF JANUARY, 2023.

O A ANGOTE

JUDGE



In the presence of;

Mr Situma for Plaintiff

Mr Muturi for the 2nd Defendant

Court Assistant - June

