



**Machio v Wandako (Environment and Land Miscellaneous Application
E032 of 2022) [2023] KEELC 15934 (KLR) (28 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15934 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E032 OF 2022
DO OHUNGO, J
FEBRUARY 28, 2023**

BETWEEN

AGNETA NYAROTSO MACHIO APPLICANT

AND

CHARLES ISIMBISHIRA WANDAKO RESPONDENT

RULING

1. The applicant moved the court through Notice of Motion dated November 25, 2022, seeking the following orders:
 1. [Spent]
 2. [Spent]
 3. That there be immediate unconditional stay of proceedings in Mumias Chief Magistrate ELC no 36 of 2022 pending hearing and determination of this appeal.
 4. That costs of this application be provided for.
2. The application is supported by an affidavit sworn by the applicant who deposed that being dissatisfied with the ruling delivered in Mumias Law Courts in MCELC Cause no 36 of 2022 on October 26, 2022, he duly filed a Memorandum of Appeal. She annexed a copy of Memorandum of Appeal filed in Kakamega ELC Appeal no 57 of 2022. That the ruling dismissed the applicant's preliminary objection which had raised *res judicata* and scheduled the matter for mention on February 13, 2023 for purposes of taking directions and fixing a hearing date. She added that she is apprehensive that her appeal will be rendered nugatory if the hearing proceeds. She therefore prayed that the application be allowed.
3. Although evidence of service was availed, the respondent neither filed a response nor attended the hearing of the application. Counsel for the applicant relied on the material on record and urged the court to allow the application.



4. I have carefully considered the application, the supporting affidavit, and the submissions. The sole issue that arises for determination is whether the orders sought ought to be issued.
5. Stay of proceedings is a serious matter, since it brings to a halt, albeit temporarily, the smooth flow of the process of dispensation of justice. Consequently, it is a relief that must be granted sparingly and only in exceptional circumstances. Even more circumspection is required before stay of proceedings pending determination of an appeal is granted since delay in the appeal will only exacerbate the situation in so far as early determination of the matter appealed from is concerned.
6. Some guiding principles have also been identified by the authors of *Halsbury's Law of England*, 4th Edition Vol 37 page 330 and 332 thus:

“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.”

7. A decision on whether to grant stay of proceedings is discretionary but must be exercised judiciously and on sound principles, as is shown above. Ringera, J (as he then was) discussed the principles in the case of *Re Global Tours & Travel Ltd* HCWC no 43 of 2000 Ringera, J 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 case, 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...”

8. The applicant has already filed an appeal, Kakamega ELC Appeal no 57 of 2022. The order that is appealed against is one dismissing a preliminary objection that raised *res judicata*. Needless to restate, *res judicata* is a jurisdictional issue. If the court hearing the appeal ultimately finds that the plea of *res judicata* was properly taken, then there would have been unnecessary wastage of scarce judicial time and resources in hearing and determining Mumias MCELC Case no 36 of 2022 only for the appellate court to uphold *res judicata*, set aside the judgment and possibly strike out the suit. There is also the risk that if stay of proceedings is not granted, the appeal will be rendered nugatory. I find that the applicant has demonstrated an arguable appeal and that it is in the interest of justice to order a stay of proceedings.



9. I bear in mind that to hear and determine Kakamega ELC Appeal no 57 of 2022, the original record of the subordinate court in Mumias MCELC Case no 36 of 2022 will have to be availed before the appellate court. Either way, some delay will in any case occur, primarily due to the pending appeal. Since the appeal is pending before this court, this court will proactively take steps to minimise delay.
10. I find merit in Notice of Motion dated November 25 2022 and I therefore make the following orders:
 - a. Proceedings in Mumias Chief Magistrate ELC no 36 of 2022 are hereby stayed pending hearing and determination of Kakamega ELC Appeal no 57 of 2022.
 - b. Costs of Notice of Motion dated November 25, 2022 shall be in Kakamega ELC Appeal no 57 of 2022.

DATED, SIGNED, AND DELIVERED AT KAKAMEGA THIS 28TH DAY OF FEBRUARY 2023.

D O OHUNGO

JUDGE

Delivered in open court in the presence of:

Mr Magina holding brief for Ms Kegehi for the applicant

No appearance for the respondent

Court assistant: E Juma**

