



REPUBLIC OF KENYA



**KENYA LAW**  
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**Govedi v Chege & 4 others (Environment and Land Case Civil Suit  
18 of 2018) [2023] KEELC 15706 (KLR) (23 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 15706 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 18 OF 2018**

**JO MBOYA, J**

**FEBRUARY 23, 2023**

**BETWEEN**

**FRIDAH AFANDI GOVEDI ..... APPLICANT**

**AND**

**STANLEY MUREGI CHEGE ..... 1<sup>ST</sup> RESPONDENT**

**ELIZABETH AKINYI ALUOCH ..... 2<sup>ND</sup> RESPONDENT**

**KENYA COMMERCIAL BANK LIMITED ..... 3<sup>RD</sup> RESPONDENT**

**SAVINGS AND LOAN KENYA LIMITED ..... 4<sup>TH</sup> RESPONDENT**

**IRENE OKOTH ODUDO ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

**INTRODUCTION**

1. Vide Notice of Motion Application dated 28<sup>th</sup> October 2022, the Plaintiff/Applicant has approached the Honourable court seeking for the following reliefs;
  - i. That this Notice of Motion Application be certified very urgent, service thereof be dispensed with, in any event, in the first instance; and the same be heard, determined and disposed of expeditiously, on priority basis; and in any event on or before 1st November 2022.
  - ii. That this Honourable Court do issue Order(s) of stay of all further proceedings in the Superior Environment and Land Court at Nairobi, Case No. 18 of 2018 between; Dr. Fridah Afandi Govedi vs Stanley Muregi Chege & 3 Others, pending hearing and determination of Civil Appeal No. E721 of 2022 against the Ruling delivered on 7<sup>th</sup> July 2022 by the Honourable Mr. Justice Oguttu Mboya in case No. ELC No.18 of 2018.
  - iii. That the Costs of this Application abide the results of the Appeal.



2. The instant application is anchored and premised on a raft of grounds, which have been alluded to and enumerated in the body thereof. Besides, the application is further supported by the affidavit of the Plaintiff/Applicant sworn on even date.
3. Upon being served with the instant application, the 1<sup>st</sup> Defendant responded vide Grounds of opposition dated the 18<sup>th</sup> January 2023, whilst the 5<sup>th</sup> Defendant/Respondent filed grounds of opposition dated the 8<sup>th</sup> November 2022. For clarity, the named Grounds of opposition forms part of the court record.
4. Other than the 1<sup>st</sup> and the 5<sup>th</sup> Defendant/Respondents, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants/Respondents do not appear to have filed any responses to the instant application. In any event no grounds of opposition or replying affidavit was obtainable from the e-filing portal of the judiciary.
5. Be that as it may, the instant application came up for hearing on the 24<sup>th</sup> November 2022, whereupon the parties agreed to canvass and dispose of the subject application vide written submissions. In this regard, the honourable court thereafter proceeded to and set timelines for the filing and exchange for the respective written submissions.
6. It is worthy to state and observe that pursuant to and in line with the directions given by the Honourable court, the Plaintiff/Applicant duly filed her written submissions. Besides, the 5<sup>th</sup> Defendant also complied and filed written submissions dated the 3<sup>rd</sup> February 2023.
7. However, the 1<sup>st</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Respondents herein did not file any written submissions, either within the set timeline or at all. For the avoidance of doubt, no such written submissions were discernable from the e-filing portal, as at the time of crafting the subject ruling.

## **Submissions by the Parties**

### **a. Applicant's submissions**

8. The Applicant herein filed written submissions dated the 23<sup>rd</sup> November 2022 and same raised four salient and pertinent issues, for consideration by the honourable court.
9. Firstly, learned counsel for the Applicant has submitted that the Applicant herein was hitherto the registered owner/proprietor of all that parcel of land known as Apartment No. F7, erected on L.R No. 209/2679, (hereinafter referred to as the suit property), which same bought and purchased from an organization known as Integrated Properties Ltd.
10. In addition, learned counsel submitted that towards and in a bid to acquire the suit property, the Applicant herein procured and obtained Banking facility from the 4<sup>th</sup> Defendant herein. In this regard, learned counsel added that the Applicant was obliged to and indeed charged the title of the suit property to the 4<sup>th</sup> Defendant.
11. Secondly, learned counsel further submitted that in due time the Applicant and the 1<sup>st</sup> Defendant/Respondent developed a relationship culminating into a marriage, before the 1<sup>st</sup> Defendant/Respondent, went to live/reside with the Plaintiff in the named property.
12. Furthermore, learned counsel submitted that the Applicant herein thereafter entered into an arrangement with the 1<sup>st</sup> Defendant, whereby same (the Applicant) (sic) transferred the suit property to the 1<sup>st</sup> Defendant on the basis of a dummy agreement, with a view to enable the 1<sup>st</sup> Defendant/Respondent to assist the Applicant in redeeming the suit property from the 4<sup>th</sup> Defendant/Respondent.



13. However, learned counsel contended that despite the known circumstances under which the suit property was transferred to the 1<sup>st</sup> Defendant, the 1<sup>st</sup> Defendant fraudulently alienated and disposed of the suit property to the 5<sup>th</sup> Defendant.
14. As a result of the foregoing, learned counsel contended that the Applicant was thus constrained to and indeed file the instant suit, in a bid to salvage the suit property from the Defendants, who were intent on defrauding (sic) the Applicant of the suit property.
15. Additionally, learned counsel further submitted that after the filing of the instant suit, the Applicant thereafter proceeded to and testified before the honourable court, culminating into the close of her case. For clarity, learned counsel submitted that the Applicant's case was heard and closed on the 22<sup>nd</sup> September 2022.
16. Be that as it may, learned counsel has further contended that on or about the 21<sup>st</sup> April 2021, a new dimension arose, wherein the 2<sup>nd</sup> Defendant, who had hitherto been purported to be a Spouse of the 1<sup>st</sup> Defendant owned-up and disowned the statutory declaration/affidavit which was purportedly sworn by herself.
17. Arising from the foregoing, learned counsel for the Applicant has therefore submitted that the Applicant therefore felt that the new circumstances necessitated the filing of an application for amendment. In this regard, it was added that an application for amendment was thereafter filed vide application dated the 3<sup>rd</sup> June 2022.
18. Thirdly, learned counsel has submitted that subsequent to the filing on an application for amendment, same was heard and disposed of vide ruling rendered on the 7<sup>th</sup> July 2022, when the application was dismissed.
19. Nevertheless, learned counsel continued and submitted that upon the dismissal of the said application, the Applicant was aggrieved and thereafter filed a notice of appeal. In any event, counsel has added that the Applicant has since filed/lodged a substantive appeal vide court of appeal Civil Appeal no. E721 of 2022.
20. Fourthly, learned counsel has submitted that the said appeal which has since been filed and lodged raises arguable grounds of appeal, worthy of being interrogated by the honourable court of appeal. In this regard, it has been added that because of the pendency of the said appeal, it is appropriate and expedient that the subject proceedings be stayed to await the outcome of the appeal.
21. Additionally, learned counsel for the Applicant has submitted that unless the orders of stay of proceedings are granted as sought, the appeal, which is still pending before the Honourable Court of Appeal will be rendered nugatory.
22. In a nutshell, learned counsel for the Applicant has therefore submitted that the Applicant has established and satisfied the requisite conditions to warrant the grant of an order for stay of proceedings pending the hearing and determination of the named appeal.

#### **b. Submissions by the 5<sup>th</sup> Defendant/respondent**

23. The 5<sup>th</sup> Defendant/Respondent filed written submissions dated the 3<sup>rd</sup> February 2023 and in respect of which same has raised, highlighted and amplified five salient issues for consideration by the court.
24. First and foremost, learned counsel for the 5<sup>th</sup> Defendant/Respondent has submitted that the ruling that dismissed the Applicant's application seeking for leave to amend and which is the subject of appeal, was rendered on the 7<sup>th</sup> July 2022.



25. On the other hand, counsel has added that despite the rendition and delivery of the said ruling on the 7<sup>th</sup> July 2022, the current application, which seeks stay of proceedings and essentially, which has a bearing on the ruling rendered on the 7<sup>th</sup> July 2022, was never filed until the 28<sup>th</sup> October 2022.
26. In the premises, learned counsel has therefore submitted that the current application was lodged and mounted with unreasonable and inordinate delay, amounting to over 80 days. Furthermore, learned counsel added that despite the evident and inordinate delay, the Applicant herein has neither explained nor accounted from the impugned delay.
27. In the circumstances, Learned Counsel has therefore submitted and contended that the instant application is barred and defeated vide the Doctrine of latches.
28. To underscore the importance of filing and mounting of an application for stay of proceedings without unreasonable delay, learned counsel for the 5<sup>th</sup> Defendant/Respondent has relied in the case of *Kanyota Holdings Ltd versus Kenya Sell Ltd* eKLR.
29. Secondly, learned counsel for the 5<sup>th</sup> Defendant has submitted that the mere fact that the Applicant herein has filed and/or lodged an appeal before the Court of Appeal, does not by itself found or provide a basis to warrant an order for stay of proceedings.
30. In addition, counsel has contended that if the mere filing of an appeal to the Court of Appeal, would found a basis for stay of proceedings, then any disgruntled litigant, would merely file a frivolous Appeal and thereafter implore the Honourable court to grant an order of stay of proceedings.
31. In respect of the forgoing submissions, learned counsel has invited the attention of the court to the decision in the case of *Tarbo Highway Eldoret versus Muniu* ( Civil Appeal E040 of 2021) (Parenthesis 2022)KHC 10197 (KLR), where the honourable court is reported to have held that the mere filing of an appeal does not warrant the grant of a stay of order of proceedings.
32. Thirdly, learned counsel has submitted that the issues which were raised at the foot of the application for leave to amend, were issues which had already been ventilated and tendered before the honourable court by the Applicant when she testified during her (Applicant's evidence in chief).
33. Furthermore, counsel has further submitted that the same issues, which now forms the basis of the appeal before the court are issues which are well captured in the Applicant's pleadings and hence, same can very well be dealt during cross examination.
34. In the premises, learned counsel has therefore submitted that the Appeal before the Court of Appeal can very well proceed, without an order or stay of proceedings and no prejudice, will be suffered by the Applicant herein.
35. At any rate, learned counsel has added that the continuation of the subject proceedings, will not prejudice the fair hearing and disposal of the appeal before the court of appeal. For clarity, it has been contended that the Applicant herein will not suffer any prejudice of inconvenience, howsoever.
36. To this end, learned counsel has cited and relied on the case of *Jinaani Nzioki Mbuiva versus Cabinet Secretary, Ministry of Land and Housing & 6 Others* (2021)eKLR, where the honourable court observed and held that there are circumstances where the continuation of the proceedings during the pendency of an appeal, will not prejudice the effective hearing and determination of the appeal.
37. The fourth issue, which has been raised and ventilated by learned counsel for the 5<sup>th</sup> Defendant relates to the point that the 5<sup>th</sup> Defendant has a right to Fair Hearing and fair trial, which includes inter-alia,



- the right to have any proceedings commenced against her (5<sup>th</sup> Defendant) to be heard expeditiously, timeously and without unreasonable delay.
38. However, counsel has added that the grant of an order of stay of proceedings, either in the manner sought by the Applicant herein or at all, would occasion substantial delay in the hearing and final disposal of the subject suit.
  39. In the premises, learned counsel has contended that the grant of such an order will therefore unduly prejudice the rights and interests of the 5<sup>th</sup> Defendant/Respondent and by extension infringe upon the right to Fair trial as enshrined vide Article 50 (2) (e) of *the Constitution*, 2010.
  40. Furthermore, learned counsel has invited the court to take cognizance of the decision in the case of Attorney General & Another v David Wilson Baya Mweri alias David Wilson Baya Mweri (legal representative of the Estate of Moses Yaa Baya (deceased) (2021)eKLR, and to underscore that an order of stay of proceedings has serious and grave repercussions and hence ought not to be granted lightly.
  41. Finally, learned counsel has submitted that the appeal which has been filed and mounted by the Applicant herein vide court of appeal Civil Appeal no. E721 of 2022, does not raise or exhibit any worthy or arguable point of appeal.
  42. Put differently, learned counsel for the 5<sup>th</sup> Defendant/Respondent has contended that the appeal before the Court of Appeal is not arguable and thus no proper basis or foundation has been laid to warrant the grant of the orders of stay of proceedings.
  43. In view of the foregoing submissions, learned counsel for the 5<sup>th</sup> Defendant/Respondent has therefore submitted that the Applicant herein has neither met nor satisfied the stringent and exceptional conditions to warrant the grant of the orders of stay of proceedings or at all.
  44. In any event, learned counsel for the 5<sup>th</sup> Defendant/Respondent has added that the grant of the orders of stay of proceedings, either in the manner sought by the Applicant or otherwise, shall infringe upon and violate her (5<sup>th</sup> Defendant/Respondent) legitimate expectation, to have the subject suit heard and determined without undue delay.

#### **ISSUES FOR DETERMINATION**

45. Having reviewed and analyzed the contents of the application dated the 28<sup>th</sup> October 2022, together with the supporting affidavit thereto and having taken into account the various responses (read grounds of opposition and replying affidavit) filed by the adverse Parties; and having finally considered the written submissions filed on behalf of the named Parties, the following issues do arise and are thus worthy of determination;
  - i. Whether the Applicant herein has established and supplied a sufficient basis upon which the Jurisdiction of the Court can be invoked for purposes of an application for an order of stay of proceedings.
  - ii. Whether the Applicant herein has met or satisfied the Exceptional circumstances to warrant the grant of an order of stay of proceedings pending the hearing and determination of the Appeal before the Honourable Court of Appeal.



## ANALYSIS AND DETERMINATION

### ISSUE NUMBER 1

Whether the Applicant herein has established and supplied a sufficient basis upon which the Jurisdiction of this Honourable Court can be invoked for purposes of an application for an order of stay of proceedings.

46. It is common ground that the Applicant herein duly filed and lodged an application for leave to amend the Plaintiff and thereby sought to have the amended plaintiff deemed as duly filed. For clarity, a draft copy of the Amended Plaintiff was attached to the named application for leave to amend.
47. In addition, it is worthy to point out that the the application for leave to amend was dated the 3<sup>rd</sup> June 2022.
48. Furthermore, there is no gainsaying that the named application was heard and disposed of vide ruling rendered by this honourable court and which was rendered on the 7<sup>th</sup> July 2022, where the court proceeded to and dismissed the application for leave to amend.
49. Arising from the dismissal of the named application for leave to amend, the Applicant herein (sic) felt aggrieved and thereafter proceeded to and filed the requisite notice of appeal and thus intimating his desire to pursue an appeal before the Court of Appeal.
50. Subsequently, it is common knowledge that the Applicant herein thereafter filed and lodged this substantive appeal before the court of appeal. In this regard, the Applicant has supplied evidence pertaining to and concerning the existence of court of appeal civil appeal No. E721 of 2022.
51. It has become necessary and appropriate to supply the background alluded to in the preceding paragraphs, because the filing and existence of, inter-alia, a Notice of appeal or better still a substantive appeal, before the honourable Court of Appeal, would provide the requisite fulcrum upon which an application for stay of proceedings or stay of execution, (whichever, is applicable), can then be mounted.
52. Suffice it to point out that any Applicant, the current Applicant not excepted, who is keen to invoke and appropriate the jurisdiction of this honourable court, to partake of an order of stay of proceedings, can only do so, if and when same has mounted the requisite Notice of appeal, or better still, the substantive appeal.
53. To be able to appreciate and understand the requisite anchorage for an application for stay of proceedings pending an appeal, it is imperative to take cognizance of Order 42 Rule 6(1) of the Civil Procedure Rules, 2010, which provides as hereunder;

6. Stay in case of appeal [Order 42, rule 6.]

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.



54. From the foregoing provisions, what becomes apparent and evident is, that the mere fact of filing an Appeal does not by itself constitutes an order of stay of proceedings or better still stay of execution, whichever is appropriate.
55. However, the fact that an Appeal has been filed and or otherwise lodged, would thus provide an enabler or fulcrum upon which an application for stay of proceedings, or better still, stay of execution of Execution pending Appeal, can be mounted.
56. Nevertheless, for purposes of an Appeal to the honourable Court of Appeal, it is deemed that an appeal shall have been duly filed and lodged once the Applicant has filed and mounted the requisite Notice of appeal in accordance with Rule 75 of the Court of Appeal Rules, 2010.
57. In this regard, the provisions of Order 42 Rule 6(4) of the Civil Procedure Rules are succinct and imperative. For clarity, same provides as hereunder;
- (4) For the purposes of this Rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
58. Having reproduced and taken into account the provisions of Order 42 Rule 6(1) and (4) of the Civil Procedure Rules 2010, what becomes evident and crystal clear is that the moment an Applicant is able to show and establish that same has filed the requisite Appeal, including a Notice of Appeal, where appropriate, then such a person can thus approach the court with an application for stay of proceedings.
59. Be that as it may, the Advocate for the 5<sup>th</sup> Respondent has made heavy submissions and contended that the appeal which has been filed before the Court of Appeal does not raise or exhibit any worthy ground. For coherence, it has been contended that the named appeal is not arguable.
60. I wish to add that the same position has also been taken and amplified by the 1<sup>st</sup> Respondent in terms of his grounds of opposition dated the 18<sup>th</sup> January 2023, wherein same has contended inter-alia, that the proposed appeal does not have any or any reasonable chance of success as it raises no arguable point.
61. Despite the submissions raised and ventilated by counsel for the 5<sup>th</sup> Defendant/Respondent and which has been mirrored in the grounds of opposition filed by the 1<sup>st</sup> Defendant/Respondent, it is my humble view that this honourable court is not seized of the competence and jurisdiction to interrogate the arguability or otherwise of an appeal which is pending before the Honourable Court of Appeal.
62. To my mind, the arguability or otherwise of the appeal before the Court of appeal, is an issue that squarely falls within the competence, jurisdiction and purview of the Court of Appeal.
63. In this regard, the counsel for the Defendants/Respondents, are better advised to await the requisite opportunity and to ventilate the arguability of the appeal or otherwise at the appropriate forum.
64. To my mind, all that this honourable court is called upon to authenticate with a view to acquiring the requisite jurisdiction to entertain an application for stay of proceedings or better still stay of execution pending appeal, whichever is applicable, is whether an appeal or better still a Notice of Appeal, has been filed an mounted by the Applicant.
65. In this regard, it suffices to state and observe that the moment there is evidence of an Appeal or a Notice of an appeal, validly filed in accordance with the Rules of the Court of Appeal, then it is deemed that the Applicant has established a sufficient basis and anchorage for purposes of filing an application for stay of proceedings.



66. Additionally, it is the existence of the said appeal or Notice of Appeal, which clothes this Honourable court with the requisite Jurisdiction to entertain and adjudicate upon the impugned application.
67. In this regard, it is imperative to take cognizance of the holding of the case of Ezekiel Mule Musembi versus H. Young & Company (E.A) Limited [2019] eKLR, where the honourable court stated and held as hereunder;

“It is not in doubt that this Court has powers to stay proceedings pending appeal and this jurisdiction is derived from both Order 42 rule 6 of the Civil Procedure Rules as well the inherent jurisdiction reserved in section 3A of the *Civil Procedure Act*. See George Oraro vs. Kenya Television Network Nairobi HCCC No. 151 of 1992”

“This jurisdiction is meant to avoid a waste of valuable judicial time; prevent the court from duplication of efforts and prevent multiplicity of suits and applications being filed and where if the stay is not granted and defendant were to succeed it would have rendered the appeal nugatory. In such applications the Court aims at ensuring that the object of the application is not rendered nugatory and that substantial loss and irreparable harm is not suffered by the applicant once the Plaintiff proceeds with the suit and the appeal succeeds. Obviously the decision whether or not to grant stay of proceedings being discretionary, the application must be made without unreasonable delay. Whereas I agree that delay is neither the sole factor nor the predominant factor to be considered.....”

68. Notwithstanding the foregoing, it is not lost on this court that even where sufficient cause or basis, in terms of the existence of an Appeal or Notice of an appeal, has been shown, it does not mean that an order of stay of proceedings shall be issued or be granted.
69. For the avoidance of doubt, the point that I have underscored is that the existence of such appeal or Notice of appeal, constitutes the door way through which an applicant is now at liberty to access the Jurisdiction of the court and thereafter to endeavor to convince the court that there exists exceptional and peculiar circumstances that would warrant the grant of the orders of stay of proceedings.
70. Be that as it may, it is imperative to point out that whether or not the Applicant herein has established and satisfied the requisite ingredients/ exceptional circumstances, to warrant the grant of the named orders, shall be the subject of deliberations in the next issue hereinafter.

## **ISSUE NUMBER 2**

Whether the Applicant herein has met or satisfied the exceptional circumstances to warrant the grant of an order of stay of proceedings pending the hearing and determination of the appeal before the Honourable Court of Appeal.

71. Before venturing to address and analyze whether the Applicant has met, established and satisfied the requisite ingredients necessary, prior to and before an order of stay of proceedings pending appeal can be granted, it is appropriate to consider the nature and implications of such an order.
72. To this end, it is necessary to restate and reiterate that an order of stay of proceedings is a serious and grave order, given the consequences attendant thereto, more particularly, that the grant of such an order has the effect of suspending or holding in abeyance further proceedings in the matter and thus likely to occasion undue/elaborate delay in the hearing and conclusion of the impugned matter.



73. Given the implication and consequences of such an order, various superior court have hitherto held and stated that an order of stay of proceedings therefore ought to issue sparingly and with necessary circumspection; and only when exceptional circumstances has been established and proved.
74. Additionally, it has also been stated and observed that an order of stay of proceedings pending appeal is a discretionary order and therefore ought to be granted judiciously and in the Interests of justice.
75. In view of the foregoing statements, it becomes necessary to sample various decisions which have hitherto been issued and rendered as pertains to the relevant factors/circumstances that govern the issuance of orders of stay of proceedings pending appeal.
76. Firstly, it is imperative to take cognizance of the decision in 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”.

77. In the case of Kenya Wildlife Service Vs James Mutembei (2019) eKLR, Gikonyo J quoted Halsbury's Law of England, 4th Edition.Vol.37 page 330 and 332, that:

“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”.

78. Other than the foregoing, the considerations attendant to and relevant prior to a grant or denial of an order of stay of proceedings were also calibrated in the case Timothy Kisina Kithokoi versus Elijah Kitele & another [2022] eKLR, where the court stated and observed as hereunder;

It is therefore clear that in determining whether or not to grant an order for stay of proceedings, the court must bear in mind the general rule that once a suit is filed, proceedings ought to continue without interruption until the suit is determined. This is premised on the right of every person to a fair trial which includes the right to have the trial begin and conclude without unreasonable delay as enshrined in Article 50(2) (e) of *the Constitution*



as well as the principle that justice delayed is justice denied, being a cardinal principle that guides courts in the exercise of judicial authority. It is against this background that orders for stay of proceedings ought to be sparingly granted and only in exceptional circumstances that demonstrate that there are compelling reasons and it would go against all that is deemed just and fair to proceed with the suit. The threshold for such proof is beyond reasonable doubt.

79. Recently, the issue of stay of proceedings was revisited in the case of Turbo Highway Eldoret Ltd v Muniu (Civil Appeal E040 of 2021)[2022] KEHC 10197 (KLR) (30 June 2022) (Ruling), where it was held and stated as hereunder;

...whether the fact that a party had preferred an interlocutory appeal is entitled to a stay of proceedings cannot, therefore, merely be based on the fact that the Trial Court might consider what the appellant considers to be erroneous conclusions in its judgment. If the rule were otherwise, it would seriously impede proceedings in the trial Courts. This is because a party who is keen on obstructing a case from proceeding would simply prefer multiple appeals against interlocutory rulings by the Trial Court and then seek stay of proceedings in the Trial Court. The rule is more exacting for a party requesting for a stay of proceedings. In particular, an Applicant must demonstrate that there are exceptional circumstances which make the stay of proceedings warranted as opposed to having the case concluded and all arising grievances taken up on a single appeal. The Applicant has not met this high threshold in this case.

80. Having considered and reviewed the various decisions, which have been reproduced in the proceeding paragraphs, various conditions are discernible, evident and distillable. In this regard, it is worthy to state that prior to and or before an Applicant can partake of an order of stay of proceedings, same must establish and prove, inter-alia, the following.

- i. Show and establish sufficient cause/basis, essentially as underscored vide Order 42 Rule 6 (4) of the Civil Procedure Rules, 2010.
- ii. File and mount the relevant application timeously and with due promptitude.
- iii. Show and establish the prejudice or inconvenience likely to arise or accrues, if the order is not granted.
- iv. Establish and demonstrate peculiar and exceptional circumstances attendant to the case beforehand.
- v. Appreciate that the order of stay of proceedings does issue sparingly and with necessary circumspection.
- vi. In any event, that the issuance of the order is at the discretion of the court.

81. Having taken into account the foregoing observations, it is now appropriate to return back into instant matter and discern or decipher whether the Applicant has established the requisite and exceptional circumstances to warrant the grant of the orders sought.

82. Additionally, it is also important to ascertain whether the continuation of the current proceedings (read further hearing of the Defendant's case and consequential determination thereof), would prejudice the hearing and determination of the pending appeal before the honourable Court of Appeal.



83. Before determining the two named questions, it is important to recall that the Applicant herein had sought leave to amend her *Plaint*, with a view to filing an amended *Plaint*, a copy of which was attached to the application for amendment. For clarity, the draft amended *plaint* was dated the 3<sup>rd</sup> June 2022.
84. From the intended amended *Plaint*, the Applicant herein had sought to introduce three additional claims/reliefs, inter-alia, an award of Monetary compensation for loss of investment and rental income of approximately Kes.100, 000/= Only, from the 29<sup>th</sup> January 2016 until actual re-transfer of the suit property unto her.
85. I am alive to the fact that this honourable court rendered a considered ruling and proceeded to dismiss the application for leave to amend. Consequently, the Applicant herein was denied or deprived of the opportunity to file the requisite amended *Plaint*.
86. Furthermore, I am privy to the fact that the impugned ruling, which is the subject appeal held inter-alia, that the nature of the amendments, which were sought to be introduced, were so massive and in any event, were bound to alter and change the character of the Applicant's case hitherto filed before this honourable court.
87. True to it, the intended amendment were indeed massive. In fact, if same were to be allowed, then the pleadings would automatically be re-opened and the Defendants would be called upon to file amended *Statement of Defense*, as well as further *List and Bundle of documents*.
88. Similarly, both the Applicant and the Defendants herein, would also be forced to re-consider the witness statement filed and perhaps, would be obliged to, inter alia, to file additional witness statement.
89. Be that as it may, the scenario captured vide the preceding paragraphs, was averted when this honourable court declined to grant leave to amend.
90. However, now that the Applicant has approached the Court of Appeal vide Court of Appeal Civil Appeal No. E721 of 2022, the honourable court of appeal will be called upon to re-calibrate on the issues of amendments and the outcome contained vide the impugned ruling.
91. Without seeking to prophesy as to the outcome of the appeal before the Court of Appeal, but knowing that it can go either way, there is a likelihood that if, and I say if, the Court of Appeal were to reverse the ruling of this honourable court and by extension, grant the leave to amend, then such an order would have ripple effects.
92. Suffice it to point out that if the appeal before the Court of Appeal were to succeed, then the Applicant herein would have a right to amend the *plaint* and serve it upon the Defendants/Respondents, who will (sic) similarly be constrained to file amended pleadings.
93. In my humble view, such a scenario, would render superfluous, any proceedings and determinations, that may have been taken in respect of the instant matter, during the pendency of the appeal.
94. Additionally, it is also imperative to state that though the Defendant/Respondent and in particular the 5<sup>th</sup> Defendant/Respondent, has submitted that the issues pending before the court of appeal can be dealt with by the Applicant in the course of cross examination, however I wish to underscore that there are reliefs at the foot of the intended amendment, which cannot be granted unless the amendment is perfected.
95. In the premises, it is not tenable to say that all the issues which are pending before the court of appeal vide appeal E721 of 2022, can be resolved and addressed by way of cross examination.



96. In the premises, what becomes crystal clear is if the current proceedings were to go on, during the pendency of the appeal and thereafter the appeal succeeds, the resultant consequence would render the totality of the proceedings void, inconsequential and of no use.
97. Certainly and in this regard, the time spent in undertaking of the impugned proceedings, would no doubt, have been wasted.
98. In view of the foregoing consideration, what becomes apparent and evident is that despite the serious and grave implications, (including the inordinate delay that may arise), this is one matter that may call for an order of stay of proceedings.
99. To underscore the scenario that may arise or accrue if the orders of stay sought are not granted, it is worthy and apt to sample the scenario bespoken to in the case of *Elias Mwangi Mugwe versus Public Procurement Administrative Review Board. Kenya Revenue Authority, Trademark East Africa, Attorney General, Webb Fontaine Group FZ- LLZ & Bull Sas Ltd [2016] eKLR*, the Court held thus

“On the other hand if the appeal pending before the Court of Appeal is allowed and the Court of Appeal finds that this Court was wrong in upholding the decision by the Board that the Request for Review before it was time barred the matter would have to be remitted back to the Board for hearing on merit. However the proceedings before the Board would be murkier if by then the High Court would have determined that the Board ought to have upheld the said two objections in which event the decision of the Court of Appeal which is limited to the issue of limitation would be inconsequential.

If this Court were to proceed with this petition and arrive at a decision that the process of tendering was in order and the High Court in the pending appeal finds that in fact said two preliminary objections ought to have been allowed, we would end up with two conflicting decisions from the Court.....

That finding would turn judicial process into a circus. In my view that scenario ought to be avoided at all cost..... Therefore having considered the issues raised in this petition vis-à-vis pending legal proceedings, it is my view that in order to preserve the dignity of the judicial process. this petition ought not to proceed at this stage...

In the premises, I direct that the hearing of this petition be stayed pending the hearing and determination of the High Court Civil Appeal No. 356 of 2015 and/or the appeal pending before the Court of Appeal or further orders of this Court.”

100. To surmise, it is my finding and holding that the continuation of the current proceedings may ultimately be rendered nugatory and of no consequence, if the appeal before the Court of Appeal were to be allowed.
101. In this regard, the consequences of such an outcome, which is one of the possible ways capable of arising, would render the time spent herein, namely, in the prosecution of the matter herein, a wastage of precious judicial time.
102. To this end, I find and hold that despite the serious and grave consequences, attendant to an order of stay of proceedings; and having undertaken the delicate balance, it is in the Interest of Justice that the order sought be granted.



## **FINAL DISPOSITION**

103. Having analyzed and duly considered the various perspectives attendant to and involved in the subject matter, I have formed an opinion that the application for stay of proceedings herein is meritorious.
104. Consequently and despite the serious and grave consequence of an order of stay of proceedings; and the effect thereof in averting the expeditious hearing and determination of the impugned proceedings as envisaged vide the Provisions of Article 159 (2) (b) of *the Constitution*, 2010, I am minded to allow the instant application.
105. In a nutshell, the application dated the 28<sup>th</sup> October 2022 be and is hereby allowed. However, costs of the application shall abide the outcome of the appeal before the Court of Appeal.
106. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF FEBRUARY 2023.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

**Benson Court Assistant**

**Mr. Munika for the Plaintiff/Applicant**

**Mr. T G Gichuki for the 1<sup>st</sup> Defendant/Respondent**

**Mr. Amollo for the 3<sup>rd</sup> and 4<sup>th</sup> Defendant/Respondent**

**Mr. Wakwaya for the 5<sup>th</sup> Defendant/Respondent**

