



**Magiya v Charo & 3 others (Environment and Land Appeal
25 of 2022) [2023] KEELC 855 (KLR) (15 February 2023) (Judgment)**

Neutral citation: [2023] KEELC 855 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT AND LAND APPEAL 25 OF 2022
EK MAKORI, J
FEBRUARY 15, 2023**

BETWEEN

JOHN MAGIYA APPELLANT

AND

**NYEVU KILANGO CHARO & 3 OTHERS & 3 OTHERS & 3 OTHERS & 3
OTHERS RESPONDENT**

*(Appeal against the Ruling of Hon. J.M. Kituku, SPM,
delivered on 22nd June 2022, in Kilifi ELC No. 351 of 2019)*

JUDGMENT

1. The application dated 27th July 2022 seeking orders inter alia:-
 - a. Spent
 - b. Spent
 - c. There be a stay of proceedings, and the ruling made by the Court at Kilifi Civil Case No. 351 of 2019, John Magiya v Kivumbi Kilango Charo, Nyevu Kilango Charo, Fatuma Shaban Ngowa, Sammy Kilango Charo and Lawrence Nyabiage Osugo delivered on 22nd June 2022 by Hon. J.Kituku (SPM), pending the determination of the appeal filed herein.
 - d. The costs for this application be provided for.
2. The said application is based on grounds alluded to on the face of the application and the supporting affidavit of one John Magiya and the supplementary affidavit therein, that is to say: -
 - a. The Applicant is dissatisfied with the ruling delivered by the Hon. J.Kituku on 22nd June 2022, has appealed to the High Court against the whole of the said ruling, which appeal is arguable with a high probability of success.



- b. If the said stay of proceedings is not granted, the Applicant's appeal will be rendered nugatory and the Applicant will suffer prejudice.
 - c. That unless this application is granted, the Respondent threatens to proceed with the defence hearing hence undermining the principles of fair hearing and justice to the detriment of the Applicant.
 - d. The Subordinate Court had rightly determined that the interlocutory judgment was regular, however, by the court's discretion it allowed the Respondent's application to set aside the interlocutory judgment and ordered that separate defences be filed orders that were never complied with.
 - e. To- date no defence has ever been filed, other than an annexure no defence has ever been served upon the Appellant, and therefore proceeding with the defence hearing is prejudicial to the Appellant.
 - f. That this application has been made without any unreasonable delay.
 - g. That this application ought to be granted in the interest of equity, justice and fairness.
3. The 1st to 3rd Respondents have responded to the Notice of Motion dated 27th July 2022 and have filed a replying affidavit deposed on 16th September 2022 while the 4th Respondent has opposed the same vide his replying affidavit sworn on 15th September 2022 and filed in court on the same day.
 4. The Respondents are of the view that the intended appeal is frivolous, vexatious, incompetent and unanswerable and meant to delay the smooth hearing of the pending case before the lower court.
 5. The only issue that falls for the determination of this court is whether to grant a stay pending appeal. Parties were directed to file written submissions. The Appellant and the 4th Respondents did while the 1st to 3rd Respondents have a replying affidavit in opposition.
 6. The Appellant submits that he instituted a suit claiming a liquidated sum of Kshs. 785,000/=, and interest thereon as an accumulated refund from the sale of land that did not happen due to the conduct of the Respondents jointly. The Summons to Enter Appearance were duly served and the Defendants entered appearance however, no defence was filed within the time prescribed by law, and therefore the appellant requested for interlocutory judgment.
 7. Interlocutory judgement was entered on the 18th September 2019, which was duly endorsed by the court on satisfaction that there was no defence on record. The notice of entry of judgement was duly served upon the Defendants Advocates on the 15th October 2019, that upon receipt of the notice of entry of judgment, the Defendants never indicated or objected or received under protest the said entry that the defence had been filed however, irregularly, further, upon perusal of the court file there was no payment receipt for the same, hence there was no defence on record other than an annexure to the application and even if it was on record the same was irregularly filed out of time and without leave which I believe was sneaked into the court file and date backing of the same and even the court receiving stamp with the sole aim of defeating the fair procedure and fair hearing, and as such the Respondents deserve no equity,
 8. The Appellant proceeds further to state that even after notice of entry of judgement was served, the Respondents continued to ignore the same until and when Warrants of Execution were issued and filed two applications dated 29th September 2020 and another dated 1st October 2020 seeking similar orders to set aside interlocutory judgment, over twelve 12 months later, irrespective of the respondents indolence the court in its discretion allowed the respondents to defend the suit with orders granted that



is - "the Defendants be allowed to file their separate defences and have the matter set for fresh hearing"
- vide the ruling of Hon. J.Kituku delivered on the 16th March 2021.

9. According to the Appellant, the orders issued by Hon. J. Kituku were never complied with, during pre-trial the Respondents never indicated that they would rely on the draft defence or any alleged or purported defence and that they were not complying with the orders as previously ordered, it alleged that the Appellant did not raise the issue of existence or non-service of the defence at the time of pre-trial and it's the Appellant's view that it's not the duty of the Appellant to control or take charge on how the Respondents conduct their case, there are clear guidelines and procedures which need be adhered to and not whimsical or flouted at will, therefore, the matter proceeded to hearing as it is, at the Defence hearing the Plaintiff raised the objection there being no valid defence on record or even served with the defence, there was no evidence of payment for the same, no evidence of service, and the Appellant actually provided a copy that was annexed to the application to the court,
10. The Appellant made an application that in the circumstances the Defendants need to close the case there being no defence and having not complied with the previous orders of the Court, however, on the contrary, the court ruled that there is a defence on record hence this appeal and the court is invited to peruse the Lower Court file.
11. On the law, the Appellant contends that the conditions of granting an order for a stay of execution and stay of proceedings are as provided in Order 42 Rule 6 of the Civil Procedure Rules. The Appellant need to demonstrate the threshold of being granted an order for a stay of proceedings pending the hearing of the appeal.
12. The appellant being aggrieved by the decision of the trial court preferred an appeal and raised five (5) grounds of appeal basically challenging the finding and the rationale of the court that there is a valid defence on record and dully served without the parties demonstrating the same either by producing receipt of the payment of the same or service of the same, whereas all documents were duly received by the other party - why not a statement of defence? And if so is the defence on record regular, were the orders of setting aside interlocutory judgement compiled with and what is the repercussion thereof?
13. The Appellant is of the view that the aforesaid are the issues raised that the Lower Court overlooked or did not consider, and humbly submits that the same forms arguable issues to be determined at the main appeal hereof.
14. The Appellant avers that the administration of justice also entails fair procedures to all parties and is not designed to favour a party and from the conduct, it is evident that the Respondents are ill-bent on undermining the fair trial of the entire suit. The court, therefore, has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for a stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously.
15. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory as rightly held by Hon. Gikonyo J. addressing the question of an order for a stay of proceedings being an important consideration in the case of *Lucy Waitthera Kimanga & 2 Others v John Waiganjo Gichuri* [2015] eKLR. The question of whether or not the appeal is debatable must be decided on appeal rather than the appeal's likelihood of success. This is because the Appellate Court is the appropriate authority to consider the merits of the appeal at this point, thus the court should proceed with extreme caution. The only issue the court should be considering at this point is whether or not the appeal will be rendered nugatory.



16. Going further, an arguable appeal only needs to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed as was held in the case of *Co-operative Bank of Kenya Ltd v Banking Insurance of Finance Union* (Kenya) [2015] eKLR.
17. The Appellant opines further that from the filed respective replying affidavits none has demonstrated what prejudice they will suffer if the orders sought for stay of proceedings in, the Lower Court are granted, in any event, it is the Appellant bound to suffer a prejudice considering time taken in determining the subject matter due to indolence of the Respondents.
18. The Appellant further contends that the appeal has been made within the reasonable time proceedings have been typed, the record of appeal is ready and served upon the parties and now awaits admission and directions from this court.
19. The Appellant has relied on the authority in the case of *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR (Hon. Kamau J.) which espouses the parameters to consider in granting a stay pending appeal.
20. The Respondents in their averments and submissions are of the view that there is on record statement of defence dated 4th October 2019 filed by all the Defendants in Kilifi Elc No.351 of 2019 John Magiya-v- Kivumbi Kilango Charo and 4 others. Further, all the five Defendants filed their witness statements and documentary exhibits in compliance with Order 11 of the Civil Procedure Rules before the suit was fixed down for hearing before the trial court.
21. The Appellant - an Advocate of the High Court, acting in person testified as PW1 and called all his witnesses who testified as PW2, PW3 and PW4 before closing his case. The Appellant and his witnesses were all crossed examined by the Defendants' Counsels as the matter proceeded as a defended cause before the trial court. That it is therefore frivolous, vexatious and totally without merit for the Appellant to object to the Defendants to be heard in defence of the suit where they have participated actively in cross-examining the Appellant and his witnesses during the trial.
22. The right to a fair hearing is guaranteed under Article 25(c) of the *Constitution* and Article 50(1) of the *Constitution*, and equal access to justice under Article 159(2) (a), (b), (d) and(e) of the *Constitution* are available to the Defendants and the same cannot be denied to the Defendants as alleged by the Appellant.
23. Respondents state that the Appellant has intentionally omitted one Kivumbi Kilango Charo the 1st Defendant in the primary suit yet the order he is seeking affects the 1st Defendant Kivumbi Kilango Charo and her legal representatives. Hence, the appeal as drawn and filed is incompetent for failure to join all the parties in the primary suit, which is still pending further hearing and determination before the trial court. That the 1st Defendant in Kilifi Court Civil case 351 of 2019 Kivumbi Kilango Charo died on 23rd April 2022 as per the annexed copy of the burial permit and copy of her National Identity Card. The failure to join the 1st Defendant Kivumbi Kilango Charo in the present appeal will be prejudicial and an affront to justice as the 1st Defendant is a necessary party in the primary suit and in this appeal. The 1st Defendant Kivumbi Kilango Charo (deceased) has not been substituted in the primary suit hence no further proceedings can take place until she has been substituted. The respondents think that the present Application is intended to delay the determination of the primary suit.
24. At the heart of the current application is whether this court can order at this stage the halting of proceedings on a matter that has progressed and is at the defence stage. The Appellant and his witnesses have heard their day in court. The appellant's case is closed. It was the turn of the Respondents to



take the witness stand when an issue was raised that the respective defences by the parties could have been sneaked on the court file and rubber-stamped backwards to achieve the orders the court made in allowing the defences in place deemed duly filed. The Appellant states he was never served with the respective defences by the parties but was served with other documents. The court ruled that the defences were properly on record and that the parties ought to proceed to hearing. These orders by the trial court seem to have offended the Appellant who opines that the defendants should not get a hearing at all and that he will be prejudiced if the defendants are allowed to testify as ordered by the Magistrate hence the current application and the intended appeal.

25. I have considered the averment, submissions and authorities cited by the warring parties. The current Application involves a stay of proceedings in a matter that is actively pending before a Magistrates Court. The conditions for the grant of such a stay has been well captured and reiterated by Hon. Kamau J. in the case of *Port Florence Community Health Care v Crown Health Care Limited* [2022] eKLR as follows: -

“Both the Appellant and the Respondent were in agreement on the conditions of granting an order for stay of execution and stay of proceedings as provided in Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. On its part, the Appellant relied on several cases amongst them the case of *Kenya Power & Lighting Co Ltd v Esther Wanjiru* [2014] eKLR while the Respondent placed reliance on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR amongst other cases to argue that the Appellant had not met the threshold of being granted an order for stay of proceedings.

11. Notably, the conditions under which either the trial court or an appellate court may order stay of proceedings pending an appeal have not been specified. However, the conditions under which an order for stay of execution are clearly spelt out in Order 42 Rule 6(2) of the *Civil Procedure Rules*.
12. Order 42 Rule 6(1) of the *Civil Procedure Rules* states that :-

“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.

13. No order for stay of execution shall be made under subrule (1) unless—
- a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”



14. The court therefore has to rely on the settled principles on when proceedings may be stayed pending appeal. The question of whether or not to grant an order for stay of proceedings is a discretionary one. This discretionary power must be exercised judiciously. The court has to consider if it will be in the interests of justice to grant the same. The underlying interest ought to be that the appeal should not be rendered nugatory. Gikonyo J addressed the question of an order for stay of proceedings being an important consideration in the case of *Lucy Waitthera Kimanga & 2 Others v John Waiganjo Gichuri (Supra)*.
15. This aspect of being rendered nugatory must be hinged on the fact of whether or not the appeal is arguable on appeal and not whether the appeal will be successful. The reason for this is that at this stage, a court ought to be very cautious not to look into the merits or otherwise of the appeal as that is under the purview of the appellate court. At this stage, the court should only be concerned with the question of whether or not the appeal will be rendered nugatory.
16. Going further, this court was cognisant of the fact that an arguable appeal only needed to raise a single bona fide point worthy of consideration and need not be one that must necessarily succeed as was held in the case of *Co-operative Bank of Kenya Ltd v Banking Insurance of Finance Union (Kenya)* [2015]eKLR.
17. As the Court of Appeal also held in the case of *UAP Insurance Company Ltd v Michael John Beckett* [2004] eKLR, all an applicant is required to show is that he has an arguable appeal which is not frivolous and that the appeal will be rendered nugatory if the stay of proceedings is not granted.
18. In the case of *David Morton Silverstein v. Atsango Chesoni (Supra)*, the Court of Appeal citing *Kenya Commercial Bank Ltd v. Benjoh Amalgamated Ltd & Another* [1998] e KLR held that it is not the law that a stay of proceedings cannot be granted but that each case depends on its own facts.
19. Further in the case of *Niazsons (K) Ltd. v. China Road & Bridge Corporation (Kenya)* [2001] e KLR, Onyango-Otieno, J (as he then was) held that:-

“Where the appeal may have very serious effects on the entire case so that if stay of proceedings is not granted the result of the appeal may well render the orders made nugatory and render the exercise futile, stay...should be granted.”
20. The prayer for stay of proceedings is an equitable relief. An applicant must have come to court with clean hands. It is therefore important for the court to consider whether or not the application for stay of proceedings has been filed expeditiously.”
26. The intended appeal seeks to repress the trial Magistrate’s exercise of discretion by allowing defences filed as duly filed and part of the trial pleadings and record. The effect will be stalling the continuation of that matter at that level. The background of the matter is already stated by the parties that the Appellant raised the issue that the defences could have been sneaked into the court record and ought to be expunged from the record and the court closes the case for the defence and render its judgment without hearing the defence at all. The issue of sneaking those defences has not been demonstrated



in this court. That issue can also be resolved at the conclusion of the primary suit. As to the effect of relying on pleadings not yet paid for, it is not an issue to be addressed at this level yet. My view would be that still the Appellant has a chance to ventilate the same at the final submissions of both his case and the defence. This court has no capacity to tell whether for sure the defences were sneaked into the court file to achieve certain outcomes. It is a moot issue.

27. Unlike the grant of stay under Order 42 rule 6 of the Civil Procedure Rules, I cannot order for security – there is no judgment or decree yet. Whether the appeal is timeous – is also not an important consideration in the stoppage of pending proceedings – but rather the effect it will have on the pending suit. The test as laid in the *Port Florence Community Health Care Case* (*supra*) is whether there is a bona fide appeal which will be rendered nugatory if stay orders are not issued at this stage and whether the trial court exercised its discretion injudiciously as to render the impugned decision untenable. The only issue at the centre of the appeal is the decision by the trial court to allow filed defences and witness statements to form part of the trial in the primary suit. The trial court thought it wise to hear all the parties on merit. From what I have, the defences and statements for the defence were in place and in the court file and within the knowledge of the Appellant. He chose to raise the issue of exclusion of the same when the defence was called to testify.
28. As correctly stated by the Respondents it has not been demonstrated to this court or even the trial court the prejudice it will pose to the Appellant if the Respondents were heard on merit and a judgment delivered after hearing all sides. It settles the equality of arms principle. It leaves all parties to the suit gratified. The court itself is seen as an impartial arbiter in swinging the justice pendulum.
29. In my view, it will be more prejudicial if Respondents who have filed their defences and witness statements are locked out of a hearing. It will offend the right to be heard as contemplated under Art. 50(1) of the *Constitution* In *Catherine Chepkemoi Mukenyang v Evanson Pkemei Lomaduny & another* [2022] eKLR Hon. Ogola J. opined as follows on the right to be heard: -
 - “ 36. Article 50(1) provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal or body.
 37. The twin rules of natural Justice that no man shall be a Judge in his own cause (Nemo Judex in causa sua) and that no man shall be condemned unheard (audi alteram partem) are cardinal principles of law which are fundamental in our Justice system. They are basically an embodiment of the duty to act fairly.”
30. For this court to reverse the exercise of discretion by the trial court as held by the Court of Appeal – Hons. Musinga, Gatembu & Murgor JJ.A in the case of *Kenya Human Rights Commission & another v Attorney General & 6 others* [2019] eKLR: -
 - “ As was espoused in the established case of *Mbogo & Another v Shah*, [1968] EA, p.15;
 - “An appellate court will not interfere with the exercise of the trial court’s discretion unless it is satisfied that the court in exercising its discretion misdirected itself in some matters and as a result arrived at a decision that was erroneous, or unless it is manifest from the case as a whole that the court has been wrong in the exercise of judicial discretion and that as a result there has been misjustice.”
31. By allowing the Respondents to be heard on merit and reckoning, the already filed Defences and statements to be relied on by them, in my view the trial court exercised its discretion fairly and in



tandem with Art. 25(c), Art. 50(1) and Art. 159(2) (a), (b), (d) and (e) of the Constitution on equal access to justice for all. It would have been worse if the trial court acted otherwise. To fetter its discretion at this time will lead to serious prejudice and hamper the smooth conclusion of the primary suit. It will amount to superintending the operations of the Magistrate and his Case Management Strategies before him. It will not sit well. The primary suit will be distorted, and gaping fissures will emerge at the conclusion of the case – the defence would not have been heard on merit.

32. I do not see the prejudice that the Appellant will be occasioned if the Respondents are heard on merit. In fact, it will buttress his case and lead to a speedy resolution of the same. If any issues arise thereafter then an appeal is preferred as of right to this court.
33. The upshot is that the application dated 27th July 2022 is hereby dismissed with costs to the Respondents.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 15TH DAY OF FEBRUARY 2023.

E. K. MAKORI

JUDGE

In the Presence of:

M/s Magiya Appellant

In the Absence of:

M/s Ragira & Kinaro Advocates for Respondents

