



**Embakasi East Company Limited & another v Nairobi City Water
& Sewerage Company (Environment and Land Case Civil Suit
594 of 2015) [2023] KEELC 18566 (KLR) (6 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18566 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 594 OF 2015**

MD MWANGI, J

JULY 6, 2023

**IN RESPECT OF THE PLAINTIFFS' APPLICATION DATED 9TH MAY,
2023 SEEKING STAY OF PROCEEDINGS IN THIS MATTER PENDING
HEARING AND DETERMINATION OF AN APPEAL FILED IN THE
COURT OF THE APPEAL AGAINST A DECISION OF THIS COURT**

BETWEEN

EMBAKASI EAST COMPANY LIMITED 1ST PLAINTIFF

AARM INVESTMENT COMPANY LIMITED 2ND PLAINTIFF

AND

NAIROBI CITY WATER & SEWERAGE COMPANY DEFENDANT

RULING

Background of the Application

1. Before dealing with the application, it is imperative to give a brief summary of events that has informed the instant application. The Plaintiff instituted this suit on the June 25, 2015 vide a Plaint dated March 17, 2015. The Defendant on its part filed a Statement of Defence dated July 30, 2015 and filed on the same date. The matter was thereafter slated for Pre-trial conference way back on the 7th September, 2017 before the Deputy Registrar. The Plaintiffs on the said date confirmed that they had complied with Order 11 of the [Civil Procedure Rules](#). The Defendant was granted time to comply.
2. The matter was subsequently placed before Lady Justice Komingoi for directions. The Learned Judge granted the Defendant more time to comply with Order 11. When the matter was brought before this court, the court heard and determined the Preliminary Objection by the Defendant. The Court further granted the Defendant more time once again to comply with Order 11 of the [Civil Procedure Rules](#). The matter was mentioned numerously with the Plaintiff confirming compliance. After the



- Defendant confirmed compliance, the Plaintiffs were also granted corresponding leave to file any further documents if they deemed it necessary.
3. The matter was subsequently fixed for hearing. When it came up for hearing on the September 22, 2022, the Plaintiffs' Counsel informed court that they were not ready to proceed as their witness had been taken ill. The matter was then taken out of the hearing list on that day and rescheduled for hearing on the January 24, 2023.
 4. On the said date, both Counsel for the Plaintiffs and for the Defendant confirmed their readiness to proceed with the hearing. However, when the Plaintiffs' Witness was just about to take the stand, the Plaintiffs' Counsel made an application to have the matter referred back for pre-trial. This was to enable them file more documents in support of their case. The Court disallowed the application on the basis that parties have had more than enough time to comply. The matter had been pending in court for more than 7 years and that there was a final adjournment order on record.
 5. The matter therefore proceeded to hearing on the said date with each side calling one witness. However, before closing the Plaintiffs' case, the Plaintiffs' Counsel sought a review of the court's order disallowing the application to file a further list of documents comprising of titles and the CR 12 for the 2nd Plaintiff Company.
 6. The application was opposed by the Defendant's advocate arguing that it was an attempt to fill in evidentiary gaps as the Witness had already testified. The Court disallowed the Plaintiffs' application for lack of merit and directed parties to file their respective submissions within the timelines given. Parties did not comply on time but were granted leave to comply and the matter fixed for Judgement. Before the judgement date, the Plaintiffs filed the application now before the court. The Plaintiffs aver that they have filed an appeal against the decision of the court refusing them to file further documents.

The application

7. The Notice of Motion is dated 9th May, 2023 and is expressed to be brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act* (Cap 21), Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010*. Substantively, the Applicants seek stay of proceedings in this suit pending the hearing and determination of their appeal.
8. The application is premised on the grounds on the face of it in which the applicant reiterates the events as stated above. The Application is further supported by the Supporting Affidavit of Aden Alio Ibrahim deponed on the May 9, 2023. He avers that the Plaintiffs' Counsel while preparing for the hearing realized that copies of Titles L.R No 209/13413 and 13414 did not indicate the transfers to the 1st Applicant. That the Applicants had also inadvertently failed to attach a copy of the 2nd Applicant's CR 12 to prove that the 1st Applicant is a Shareholder of the 2nd Applicant Company.
9. He states that the Applicants being aggrieved with the two Rulings, filed a Notice of Appeal on the February 7, 2023 seeking to appeal from the said Rulings. They state that they have an arguable appeal as issues to be determined in this suit are; whether the Applicants are the proprietors of Land Reference Numbers 209/ 13413 and 13414 and whether the 1st Applicant is a director of the 2nd Applicant company. That informed the need to file the supplementary documents.
10. They argue that it is therefore in the interest of justice that there be stay of proceedings to allow their intended Appeal be heard and determined first.



Replying Affidavit

11. The Application is opposed by the Defendant who filed a Replying Affidavit sworn by one Patrick Njue Muriithi, the Legal Officer of the Defendant company, deponed on the June 5, 2023. The deponent states that the application is frivolous, misconstrued, bad in law and an abuse of the court process. He also restates the chronological events leading to the filing of the instant application. Further, he depones that the purpose of a pre-trial conference under Order 11 of the Civil Procedure Rules is to ensure that parties identify issues for determination and file their particulars in support of their respective cases before certifying the matter ready for hearing. They pray that the Plaintiffs' application be dismissed with costs.

Court's directions

12. The court directed that the application be canvassed by way of written submissions. Both parties complied. The Applicants' submissions are dated June 20, 2023 whereas the Respondent's submissions are dated June 16, 2023.

Issues for determination

13. Having considered the application, the Supporting Affidavit thereto, the Replying Affidavit and the rival submissions thereon, the court is of the view that the sole issue for determination is whether the Applicants have met the threshold for grant of stay of proceedings.

Analysis and Determination

14. A decision on whether or not to grant stay of proceedings is discretionary and this Court has powers to stay proceedings pending an Appeal. This jurisdiction is derived from the provisions of Order 42 rule 6 (1) of the Civil Procedure Rules.
15. In the case of *Re Global Tours & Travel Ltd* HCWC No 43 of 2000 Ringera, J (as he then was) held 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 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...”
16. For this court to grant an order of stay of proceedings, it ought to be convinced that the Applicants have an arguable Appeal with high chances of success such that, if stay of proceedings is not granted the Appeal will be rendered nugatory amongst the other considerations.



17. Section 75(1) of the *Civil Procedure Act* provides for the orders against which an appeal would lie as of right and/or with the leave of the Court. It provides that:

“An appeal shall lie as of right from the following orders, and shall also lie from any other order with the leave of the court making such order or of the court to which an appeal would lie if leave were granted-

- a. An order superseding an arbitration where the award has not been completed within the period allowed by the court;
- b. An order on an award stated in the form of a special case;
- c) An order modifying or correcting an award;
- d) An order staying or refusing to stay a suit where there is an agreement to refer to arbitration;
- e) An order filing or refusing to file an award in an arbitration without the intervention of the court;
- f) An order under section 64;
- g) An order under any of the provisions of this Act imposing a fine or directing the arrest or detention in prison of any person except where the arrest or detention is in execution of a decree;
- h) Any order made under rules from which an appeal is expressly allowed by rules.

18. Section 75 of the *Civil Procedure Act* must be read together with the provisions of Order 43 Rule 1 of the Civil Procedure Rules which sets out the orders and rules in respect of which appeals would lie as of right. Order 43 Rule 1(2) provides that an appeal shall lie with the leave of the Court from any other order made under the Rules other than the ones listed under rule 1(1).

19. In the instant case, the Applicants have purportedly appealed against the refusal by this court to allow them leave to file a supplementary list of documents. The order, as stated in the chronology of events above, was as a result of an oral application that was made under the provisions of Order 11 of the *Civil Procedure Rules, 2010*. The said Order 11 is not listed under rule 1(1) as one from which an appeal lies as of right.

20. As such, the Applicants ought to have sought leave of this court before filing the appeal.

21. Order 43 Rule 1(3) of the *Civil Procedure Rules* provides that; -

“An application for leave to appeal under Section 75 of the Act shall in the first instance be made to the court making the order sought to be appealed from, either orally at the time when the order is made, or within fourteen days from the date of such order.”

22. The Applicants herein proceeded to file their appeal without leave of the court. The above requirement is couched in mandatory terms. In the case of *Serephen Nyasani Menge v Rispah Onsase* [2018] eKLR,



Mutungi J stated as follows in regard to the necessity for parties to seek leave of the Court before filing appeals-

“where leave to appeal is a pre-requisite before an appeal can be lodged, failure to seek and obtain the leave is fatal and consequently no competent appeal can be lodged against such an order.”

23. It therefore follows that the purported appeal by the Applicants is incompetent. Consequently, without a competent appeal, the applicants’ application for stay of proceedings ‘crumbles on all its fours’.
24. The upshot is that the Plaintiffs’ application dated May 9, 2023 is unmerited and the same is dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY OF JULY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Mose for the Respondent.

Ms. Mwaura for the Applicant.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

