Yego & 3 others v Ogada & 3 others (Miscellaneous Application 136 of 2020) [2024] KEHC 13604 (KLR) (31 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13604 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

MISCELLANEOUS APPLICATION 136 OF 2020

RE ABURILI, J

OCTOBER 31, 2024

BETWEEN

REV SILAS YEGO ..... 1ST APPLICANT

REV GEOFFREY KICHURE ..... 2ND APPLICANT

REV JOHN KITALA ..... 3RD APPLICANT

AIC KENYA ..... 4TH APPLICANT

AND

ELD AMOS NYAIGA OGADA ..... 1ST RESPONDENT

ELD MARTIN ORWA OBUYA ..... 2ND RESPONDENT

ELD JOSHUA DUME AYIECHO ..... 3RD RESPONDENT

ELD DAVID OUKO ONYANGO ..... 4TH RESPONDENT

RULING

1. The applicants filed an application dated 9th August 2024 under Certificate of Urgency in which they sought the following orders

    a. Spent

    b. Spent

    c. That the court be pleased to grant the applicants leave to file an appeal against the ruling of Lady Justice R.E. Aburili delivered on 8th August 2024.

    d. That the Honourable Court be pleased to grant order of stay pending hearing and determination of this application.

e. That the execution of the decision/ruling of the Lady Justice R.E. Aburili in Miscellaneous Application No. 136 of 2020 herein delivered on 8th August 2024 be stayed until the determination of the intended appeal.

f. That costs of this application be provided for.

2. The application is predicated on the grounds on its face as well as the Supporting Affidavit of Amos Nyaiga Ogada dated 9th August 2024. The applicants' case is that they were aggrieved by this court's ruling of 8th August 2024 where it ordered for release of security deposited into court vide ruling of 22nd October, 2020 as a condition for stay of execution of the contempt orders issued by the lower court in Kisumu CMCC No. 555 of 2018.

3. Further, that unless the stay sought is granted, the applicants stand to suffer irreparable loss considering that they have an arguable appeal based on good and reasonable grounds of appeal against the ruling delivered on 8th August 2024 which appeal would otherwise be rendered nugatory.

4. The respondents on their part filed a replying affidavit dated 5th September 2024 sworn by one Abraham Mulwa in opposition to the application. It was the respondents' contention that the application was fatally defective on the grounds that the applicants had not annexed the orders/rulings sought to be stayed.

5. It was further averred that it was impossible to ascertain whether the applicant's intended appeal had good chances of success on appeal as they had not annexed a copy of the Memorandum of Appeal. The respondents further averred that the applicants had failed to demonstrate the substantial loss, if any that may result unless stay is granted and that they had not demonstrated that the respondents would be unable to satisfy the amount deposited in court.

6. The respondents further contended that the court had already determined the issue of contempt in the lower court and as such, the applicants' application ought to be dismissed with costs.

Analysis & Determination

7. I have considered the two-pronged application, together with the oral submissions of the parties' counsel which mirror the affidavits filed. The issue for determination is whether the prayers sought are merited.

8. On whether I should grant leave to appeal from the ruling of 8/8/2024, Rule 39 of the Court of Appeal Rules, 2022 provides that:

> " Application for leave to appeal in civil matters (1) In a civil matter—
>
> a. where an appeal lies with the leave of the superior court, application for such leave may be made—
>
> i. informally at the time when the decision against which it is desired to appeal is given; or
>
> ii. by motion or chamber summons according to the practice of the superior court, within fourteen days of such decision;
>
> b. where an appeal lies with the leave of the court, application for such leave shall be made—

i. in the manner laid down in rules 44 and 45 within fourteen days after the decision against which it is desired to appeal; or

ii. where application for leave to appeal has been made to the superior court and refused, within fourteen days after such refusal."

9. When deciding whether to grant leave to appeal to the Court of Appeal in Kenya, this court will consider whether the application is frivolous, vexatious, or an abuse of the court process. The court will also consider whether the application shows a grave error in the decision that would cause substantial prejudice to the applicant or is detrimental to the interests of justice.

10. This case was not an appeal. It is a miscellaneous application. The respondents sought for interim measures to stop the implementation of the contempt of court order issued by the lower court. It was anticipated that they would appeal but there is no appeal pending. These proceedings were closed since there was no issue, substantial and or substantive pending for determination. The parties returned to the lower court and they settled the contempt proceedings without reference to the security which was deposited in this court. What this court did was to refund the depositors their money. By the applicants hanging onto money deposited by the adverse party without any lawful cause, I find the applicants to be vexatious and the application to be frivolous. It is an abuse of court process and the application is meant to escalate a dispute that is nonexistent. Litigation must come to an end. Parties cannot litigate forever.

11. Even assuming the security deposited into this court as ordered by Cherere J was a fine that the respondents would, if fined by the lower court in the contempt proceedings, would be required to pay, which is not the case here, such fine would be revenue for the state and not costs awarded to the applicants.

12. For the above reasons, I find that the application for leave to appeal from the ruling of 8/8/2024 is not deserved and it is hereby dismissed.

13. Turning to the issue of stay of execution, having dismissed the prayer for leave to appeal, it follows that the prayer for stay is spent.

14. However, even assuming that the applicants are entitled to leave to appeal which has been denied, it is trite law that an appeal does not operate as an automatic stay of execution. The conditions which a party must establish in order for the court to order stay of execution are provided for under Order 42 Rule 6(2) of the Civil Procedure Rules. Order 42 Rule 6 of the Civil Procedure Rules stipulates: -

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 orders set aside.

2. No order for stay of execution shall be made under sub rule 1 unless: -

a. The Court is satisfied that substantial loss may result to the 1st 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.

15. Thus, under Order 42 Rule 6(2) of the Civil Procedure Rules, an applicant should satisfy the court that:

1. Substantial loss may result to him/her unless the order is made;

2. That the application has been made without unreasonable delay; and

3. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

16. Substantial loss was clearly explained in the case of James Wangalwa & Another vs Agnes Naliaka Cheseto [2012] eKLR: -

> " No doubt in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal...the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

17. The applicants are silent in their affidavit on how they stand to suffer substantial loss. It is trite law that execution is a lawful process and it is not a ground for granting stay of execution. The applicants are required to show the manner in which execution will irreparably affect them or will alter the status quo to their detriment therefore rendering the appeal nugatory. The monies deposited in this court were in respect of contempt proceedings in the lower court. The respondents to this application are the ones who paid the money into court, not the applicants herein and the money was not in settlement of any debt. The respondents contended that the contempt was purged and the matter settled in the lower court. There is nothing apparent to demonstrate that the lower court matter is pending and therefore this court did order that what the respondents paid into this court be refunded. Furthermore, this was not an appeal.

18. This court closed the file after it became apparent that there was no issue pending before this court for determination and asked the parties to return to the lower court but reserved any pronouncement on the deposited monies. This was in line with the ruling of Cherere J of 22nd October, 2020. The contempt took place in the lower court and after the said contempt was purged, a fact which was not denied by the applicants, there is no order for a fine or other order for costs which the applicants could enforce by holding onto the monies paid into this court as security.

19. The money was paid into court by the respondents and not the applicants hence it is not shown how the applicants can suffer substantial loss if the said money is released to the respondents who deposited it into court. The applicants have failed to demonstrate substantial loss in my considered view.

20. Turning to the issue as to whether the instant application was made without unreasonable delay, it is clear that the applicants have complied with this limb. The ruling impugned by the applicants was given on the 8.8.2024 and the instant application filed on the 13.8.2024, this is a difference of 5 days and in my view reasonable.

21. As for security, the purpose of security was explained in the case of Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR the court stated: -

> " The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.....Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

22. Evidently, the issue of security is discretionary and it is upon the court to determine it and set its terms. The applicant has not offered any security for the performance of the decree.

23. However, it is imperative that the right of appeal must be balanced against an equally weighty rigid right of the plaintiff to enjoy the fruits of the judgment delivered in his favour. In the case of Samvir Trustee Limited vs Guardian Bank Limited [2007] eKLR the court stated: -

> " The Court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgment. It is a fundamental factor to bear in mind that a successful party is prima facie entitled to fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion."

24. Thus, the Court in granting stay has to carry out a balancing act between the rights of the parties. The issue that arises is whether there is a just cause for depriving the respondents their right to accessing the money which they deposited into this court and where there is no reason to hold onto such monies.

25. I reiterate that in the instant case, the stay sought is the stay of release of monies deposited in Court by the respondents prior to purging themselves of contempt orders issued against them in the lower court. The respondents already purged themselves of the contempt charges brought against them and as such, and as there was nothing else pending in the suit in the court below and before this court and the lower court did not order the applicants to pay a fine or costs of the proceedings, and neither did this court make any such punitive orders against the respondents, I find no material which the applicants are sensationally running to the Court of Appeal to challenge.

26. On whether the intended appeal from the impugned ruling is arguable, this court will not delve into that only to mention that this court has not been favoured with a draft memorandum of appeal for its perusal to ascertain whether there is a just cause for depriving the respondents their right to accessing the money deposited into court. This was not money owed to the applicant and therefore the applicants will not suffer any loss leave alone substantial loss if the stay is declined.

27. Having found that the applicants have not satisfied the threshold for grant of stay pending appeal, I reach the conclusion that the prayer for stay must fail.

28. Accordingly, it is my finding and holding that the application dated 9.8.2024 lacks merit and is hereby dismissed with an order that each party shall bear their own costs of the application, the parties being fellow church congregants.

29. This file is closed. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF OCTOBER, 2024

R.E. ABURILI

JUDGE