Cherop v Bowen (Civil Case E009 of 2022)
[2024] KEHC 12915 (KLR) (25 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12915 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL CASE E009 OF 2022

RN NYAKUNDI, J

OCTOBER 25, 2024

BETWEEN

SHARON JEMUTAI CHEROP ..... APPLICANT

AND

MATHEW BOWEN ..... RESPONDENT

RULING

Representation

M/s Reece Mwani & Company Advocates

M/s D.J Mengich & Company Advocates

1. Before me for determination is an application dated 13th September, 2024 expressed to be brought under the provisions of Section 1A, 3A, 79(a) and 95 of the *Civil Procedure Act*, Order 51 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules. The applicant seeks for orders to wit: -

    a. Spent

    b. That this Honorable Court be pleased to stay the orders exparte, issued by this Honorable Court on 21st August, 2024 pending the hearing and determination of this application.

    c. The costs of the application be provided for.

2. In support of the application is an affidavit sworn by Sharon Jemutai Cherop together with six grounds:

    a. That a ruling was delivered by this honorable court on 13th June 2024 and the applicant being dissatisfied with the said ruling preferred a review of the decision vide an application dated 10th July, 2024.

b. That the ruling on the application dated 10th July, 2024 was delivered on 21st August, 2024 which the applicant was dissatisfied and intends to appeal against the said ruling and has already made an application to the Court of Appeal for leave to file an appeal out of time.

c. That the failure to appeal within the requisite period was that the applicant was hopeful that the review preferred had great chances of success.

d. That the Respondent is acting maliciously by proceeding to appoint Majuwa Agencies solely without furnishing the Applicant's Counsel with the agencies Credentials despite various requests.

e. That it is crucial that the stay orders be granted so as to preserve LR. No. Uasin Gishu/Kimumu Settlement Scheme/4994 pending the hearing of this application and the matrimonial cause.

f. That it is in the interest of justice that the application be allowed.

3. As at the time of drafting this ruling, the respondent had not filed a response to the application so that the application as it stands is unopposed. I shall however consider the application through the lens of the perquisite law and offer a solution. Is the application merited?

Analysis and determination

4. The law governing the granting of orders for stay of execution pending appeal is as enumerated under Order 42 Rule 6 (1) and 2 of the Civil Procedure Rules which stipulates as follows: -

> " 6. (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 referred may apply to the appellate court to have such order 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 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."

5. Therefore, under Order 42 Rule 6(2) of the Civil Procedure Rules, an Applicant should satisfy the court that:

a. Substantial loss may result to him unless the order is made;

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

c. 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.

6. In Hamisi Juma Mbaya v Amakecho Mbaya [2018] eKLR it was held: -

> " The appellants need to satisfy the Court on the following conditions before they can be granted the stay orders:
>
> 1. Substantial loss may result to the applicant unless the order is made.
> 2. The application has been made without unreasonable delay, and
> 3. Such security as the Court orders for the due performance of the decree or order as may ultimately be binding on the applicant has been given by the applicant."

7. These principles were further enunciated in Butt vs Rent Restriction Tribunal [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

   a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

   b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

   c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

   d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

8. On the question of substantial loss, the court in James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eKLR spoke as follows:-

> " 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."

9. The applicant in this case contended that the orders issued regarding the parcel of land known as LR. No. Uasin Gishu/kimumu Settlement Scheme/4994 were premature in the sense that the said suit property which forms part of an ongoing matrimonial cause. The applicant in the initial application sought a review of this court's ruling and the same was denied. The applicant has not taken a step

further to demonstrate the substantial loss he would suffer. She has merely stated that the orders issued by the court were premature and as such of stay is not granted, the appeal will be rendered nugatory.

10. Having read through the application, I share the view that the impugned ruling delivered on 21st August, 2024 is in itself is a negative order and is incapable of execution. The Court of Appeal in the case of Co-operative Bank of Kenya Limited v Banking Insurance & Finance Union (Kenya) [2015] eKLR observed:

> " An order for stay of execution (pending appeal) is ordinarily an interim order which seeks to delay the performance of positive obligations that are set out in a decree as a result of a judgment. The delay of performance presupposes the existence of a situation to stay – called a positive order – either an order that has not been complied with or has partly been complied with."

11. On the same breadth, the court in Kanwal Sarjit Singh Dhiman v Keshavji Juvraj Shah [2008] eKLR the Court of Appeal while dealing with a similar application for stay of a negative order, held as follows:-

> " The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on 18th December 2006. The order of 18th December 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only."

12. Again, a negative order is one that is incapable of execution, and thus, incapable of being stayed. The orders as issued in the impugned ruling are not capable of being stayed. Therefore, the order being a negative order which did not order any of the parties to do anything or restrain from doing anything is incapable of execution and thus the court cannot order stay of execution of that negative order.

13. The question of security of costs is a discretionary one, essentially requiring the court to consider the unique circumstances of a case before it can make a decision as to stay. I have gone through the record and evidently, the applicant has not proposed any terms as to security to warrant stay of execution pending appeal.

14. There is an enormous difference in principle and in practice between what is being agitated and canvased before this court and those other pending issues before the trial court. The present status of affairs in HCC 922 filed way back on 20.7.2022 is all about determining the rights of the parties as they relate to LR No Uasin Gishu/Kimumu Settlement Swcheme/4994 and LR No 779/50. In the interim period instead of the parties exercising their rights of =adjudication under Article 50 (1) of *the constitution* together ancillary pre-trial rights to determine the subject matter in question for the last 2 years or so is a legal battle which leads to nowhere. The couple once married but now pursuing divorce in the magistrate's courts took the liberty to undertake a litigation before this court under the Matrimonial Causes Act. The circumstances surrounding the so called ex-parte order was underpinned on the strength of the pending proceedings before the trial court and other collateral issues which flow from the subject matter of the marital state. That question on escrow account was a structural interdict on a more nuanced approach considering the issues around the children and preservation of the marital estate pending conclusion of the current proceedings before this forum.

15. Declaration on stay is a discretionary power of the court which is based on sound, judicious, and judicial principles. What should the court have in mind? The legal right and legal character of the claim. Whether if stay is declined the applicant would suffer injustice or prejudice for that matter. Whether the person entitled to right to any property within the *matrimonial property Act* will suffer prejudice

or injustice if the order on stay is not granted to protect the state of that legal right. The comparative decision from India in Dalpat Kumar vs Prahlad Singh and Ors (1992) 1 SCC 719 pronounced itself on similar provisions as our order 40 Rue 1&2 of the Civil Procedure Rules on a court making a declaration on injunction which I find relevant to the present discourse: " Para 4- Order 39, Rule 1(c) provides that temporary injunction may be granted where, in any suit it is proved by affidavit or otherwise, that the defendant threatens to dispossess the plaintiff or otherwise cause injury to the plaintiff in relation to any property in dispute in the suit, the Court otherwise may by order grant temporary injunction to restrain such act or make such other order for the purpose of staying and preventing or dispossession of the plaintiff or otherwise causing injury to the plaintiff in relation to any property in dispute in the suit as Court thinks fit until the disposal of the suit or until further orders. Rule 1 primarily concerns with the preservation of the property in dispute till legal rights are adjudicated. Injunction is a judicial process by which a party is required to do or refrain from doing any particular act. It is in the nature of preventive relief to a litigant to prevent future possible injury. It is settled law that grant of injunction is a discretionary relief. The exercise thereof is subject to the Court satisfying that,

1. There is serious disputed question to be tried in the suit and that an act, on the facts before the Court, there is probability of his being entitled to the relief asked for by the Plaintiff/ defendant; 2. The Courts interference is necessary to protect the party from the species of injury. In other words, irreparable damage or injury would ensue before the legal right would be established in trial and

3. That comparative hardship or mischief or inconvenience which is likely to occur from withholding the injunction will be greater than would be likely to arise from granting it.

16. The owners of the court in this current suit is for the plaintiff to prove title to the property in question and the defendant to show any contribution made in acquiring or improving the status of the property during the subsistence of the marriage. That is the question the court is bound to enquire or investigate, first before going into any other questions that may arise in a suit. The legal position therefore is clear in so far as *Matrimonial Property Act* is concerned the strength of this case is not dependent on many interlocutory applications that could be filed and done by the parties for this court to expend judicial time. This court is awaiting for sufficient evidence for the plaintiff to discharge the onus vested in her irrespective of the question whether the impugned ex-parte order is set aside or not. I am of the view that on revisiting the same order it is a non - suited issue in so far as the subject matter of this court is concerned. An injunction or stay orders are born out of a judicial process where a party is required to do or to refrain from doing any particular Act. It is a remedy in form of an order of the court addressed to one of the cited parties to the suit or any other such person either prohibiting him or her from doing or continuing to do a particular Act which may render the entire proceedings an academic treatise or nugatory. There is nothing of the sort in the impugned order commonly referred to by the applicant as ex-parte. What followed from the spectrum of the proceedings was essentially a structural interdict for the parties before the magistrate's courts to determine the issues on merit and thereafter proceed to adduce evidence in civil case No. E009 of 2022. We are not told that the nature of the impugned order imposes such terms and conditions which are unreasonable make it impossible for the party seeking injunction or stay not to comply with the terms of the order. The locus classicus maxim that one who seeks equity must come with cleaner hands applies Mutatis Mutandis to this notice of motion dated 13.9.2024.

17. It is well settled principle of law that interim relief or orders can always be granted by the court exercising its judicious discretion as an ancillary relief to a party pending the hearing and final determination of the rights being pursued in the already filed suit or originating summon. Therefore

undoubtedly the court possesses such powers to grant interim ex-parte orders or at the inter-parties forum during the pendency of the suit.

18. The court is therefore called upon to carry out a balancing act between the rights of the two parties. The court has to decide on whether there is any justifiable reason to deny the Respondent's enjoyment of the decision. Having gone through the application and the pieces of evidence on record, I form the opinion that granting stay in the matter would not serve any significant purpose for reasons that the ruling dated 21st August, 2024 did not issue orders that are capable of being executed. The application dated September 13, 2024 is therefore dismissed for want of merit with no orders as to costs.

19. Orders accordingly.

DATED SIGNED AND DELIVERED AT ELDORET, THIS 25TH DAY OF OCTOBER 2024

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R. NYAKUNDI

JUDGE