



Mary Oketch t/a Gospel Miracle & Healing Power Church & another v Seline Anyango t/a Celly Star Academy (Civil Appeal E141 of 2021) [2023] KEHC 1427 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEHC 1427 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E141 OF 2021
JN KAMAU, J
FEBRUARY 23, 2023**

BETWEEN

**MARY OKETCH T/A GOSPEL MIRACLE & HEALING POWER
CHURCH 1ST APPELLANT**

CHARLES OGANA (CARETAKER) 2ND APPELLANT

AND

SELINE ANYANGO T/A CELLY STAR ACADEMY RESPONDENT

(Hon WK Onkunya)

RULING

Introduction

1. In their Notice of Motion dated December 8, 2021 and filed on December 9, 2021, the Appellants herein sought an order for stay of execution of the Ruling that was delivered on December 1, 2021 by Hon WK Onkunya pending the hearing and determination of his Appeal herein.
2. Mary Oketch swore an affidavit in support of the application on December 9, 2021 on her own behalf and on behalf of the 2nd Appellant herein. The Appellants averred that the Learned Magistrate directed them to comply with the order of the Business Premises Rent Tribunal (hereinafter referred to as 'BPRT') that was issued in BPRT Tribunal Case No E011 of 2021 that restrained them from interfering with the peaceable learning and occupation of the Respondent herein.
3. They further contended that in 2012, the Respondent approached them to store some school items as she looked for a suitable place to put up a school after being chased from where she operated a school.
4. They averred the Church entered into a friendly agreement with her in which it charged her a monthly fee of Kshs 15,000/= which was inclusive of security, water and electricity charges, to store her items



but she refused to pay the same. They were emphatic that there was no tenancy agreement between her and the Church to operate a school within the Church premises.

5. They contended that she moved to the BPRT after they insisted that she clears the arrears before she could remove all her property that was in their custody. It was their averment that they were unable to comply with the order because she had misled the BPRT as she was not operating from the Church.
6. They further asserted that the Learned Magistrate had no jurisdiction to determine the contempt application in which they were to be fined or sentenced to jail as a result of which they would suffer substantial loss. It was also their contention that they had a strong and arguable appeal with firm and good chances of appeal.
7. In her Further Affidavit that she swore on March 14, 2022 and filed on March 15, 2022, the said Mary Oketch annexed a copy of the Ruling of the BPRT that was delivered on February 16, 2022 in which it found and held that there had never been a tenancy agreement between the Church and the Respondent. They therefore urged this court to allow their application as prayed.
8. In opposition to the said application, on June 9, 2022, the Respondent herein filed Grounds of Opposition of even date. She termed the present application as bad in law as the Appellants had refused to obey the court orders, that it was full of innuendos, that it failed to disclose material facts, that it was filed in bad faith as it had sought to circumvent Kisumu Misc 338 of 2021 in which the Applicants had been ordered to purge their contempt and open the premises. She thus urged this court to dismiss the said application with costs to her.
9. The Appellants' Written Submissions were dated and filed on May 19, 2022. They filed Further Written Submissions dated June 20, 2022 and filed on June 21, 2022. The Respondent's Written Submissions were dated July 9, 2022 and filed on June 9, 2022 (sic). The Ruling herein is based on the said Written Submissions which both parties relied upon in their entirety.

Legal Analysis

10. The Appellants reiterated that there was never a tenancy agreement between the Church and the Respondent herein and that as at the time of the issuance of the order, the Respondent was not operating within the Church premises.
11. They submitted that if they were found to have been in contempt of the Tribunal, they were likely to suffer substantial loss. In this regard, they placed reliance on the case of *Nation Media Group vs Child Welfare of Kenya (2021) eKLR* where the court therein held that the contemnors therein were likely to suffer substantial loss as there was no guarantee that the court would condemn them to pay a fine and that the likelihood of the contemnors losing their person liberty through a custodial sentence was true.
12. They added that they had filed their application without unreasonable delay as the Ruling was delivered on December 1, 2021 and they filed the present application on December 9, 2021.
13. It was also their submission that the Learned Magistrate had no jurisdiction to adjudicate upon the issue of contempt of court. They further averred that she did not consider the submissions they filed in the matter she was handling.
14. The Appellants further argued that the issue of whether or not they had continued to act in contravention of court orders and hence they should be denied audience was arguable and formed the substratum of the subject of the Appeal. It was their averment that in the event the order for stay of execution was not granted, it would render the Appeal herein nugatory.



15. On her part, the Respondent submitted that despite having been served with the order of December 1, 2021, the Appellants refused to comply with the same and therefore they had no audience of this court until they had purged the contempt.
16. She relied on several cases amongst them *Fred Matiang'i The Cabinet Secretary Ministry of Interior and Co-ordination of National Government vs Miguna Miguna & 4 Others [2018] eKLR* where the common thread was that court orders had to be obeyed and that courts must deal decisively with contemnors.
17. She asserted that he who alleges must prove and that the onus was on an applicant to demonstrate substantial loss. In this regard, she referred this court to the case of *Machira t/a Machira & Co Advocates vs East African Standard (No 2) (2002) KLR 63* where it was held that a stay will not be granted if no pecuniary or tangible loss was shown.
18. She averred that in the event this court was to find that the Appellants had demonstrated that there was an arguable appeal, then the court ought to direct them to deposit a sum of Kshs 200,000/= as conditional stay (sic). She relied on the case of *Firoze Nurali Hirji vs Housing Finance Company of Kenya Ltd & Another [2012] eKLR* where the court therein directed the applicant to deposit an unconditional bank guarantee as a condition for the order for stay of execution.
19. She asked that this court condemns the Appellants to pay costs of the present application. She referred this court to Judicial Hints on Civil Procedure where Kuloba J (as he then was) and to the case of *Manindra Chandra Nandi vs Awimi Kumar Acharjya [ILR (1921) 48 Ca 427]* where the common thread was that costs were not to punish the defeated party but rather to reimburse the successful party for the amounts expended on a case.
20. In their Further Written Submissions, the Appellants asserted that the right to appeal was a constitutional right as was held in the case of *Sarah N Sakwa vs Elizabeth Wamwanyi t/a Namukhosi Ltd & Another [2017] eKLR*.
21. They also relied on the case of *Mukuma vs Abuoga (1988) KLR 645* where it was held that substantial loss had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
22. They further averred that the order that was issued on 1st December 2021 was non-monetary and hence the condition for security for the due performance of the decree did not arise as was held in the cases of *Sarah N Sakwa vs Elizabeth Wamwanyi t/a Namukhosi Ltd & Another (Supra)* and *Praxades Okutoyi vs Medical Practitioners and Dentists Board [2008] eKLR*.
23. A perusal of the Memorandum of Appeal showed that the question of whether or not the Learned Magistrate had jurisdiction to hear the contempt of court proceeding formed the sub stratum of the Appeal herein. It was for that reason that the court opted not to analyse the Respondent's submissions in that regard as the same was an issue that had to be substantively dealt with during the hearing of the Appeal herein. What was of concern to this court at this juncture was whether or not the Appellants had demonstrated that they had met the threshold to be granted an order for stay of execution pending appeal.
24. Before an order for stay pending appeal under Order 42, Rule 6(2) of the *Civil Procedure Rules, 2010* could be granted, an applicant has to demonstrate the following:-
 1. That substantial loss may result unless the order is made.
 2. That the application has been made without unreasonable delay.



3. Such security as the court orders for the due performance of the decree has been given by the applicant.
25. The three (3) conditions for the grant of an order for stay of execution must be met simultaneously as they are conjunctive and not disjunctive.
26. The order the Appellants intended to appeal against was issued on December 1, 2021. They filed the present application on December 9, 2021. The present application was therefore filed without any delay. They had therefore satisfied one of the conditions for being granted an order for stay of execution pending appeal.
27. To ascertain if security which was the third condition to be satisfied before an applicant could be granted an order for stay of execution pending appeal, this court looked at the order of December 1, 2021 for guidance. It noted that the Learned Magistrate stated as follows:-
 1. That before handing down any sanction for the said disobedience I do accommodate the contemnors and give them fourteen (14) days to comply with the court order of September 1, 2021.
 2. That mention of the matter be on December 17, 2021.
28. The order of December 1, 2021 from the BPRT stated that:-
 2. The Respondents either by themselves, their agents and/or servants are restrained from interfering with the peaceable learning and occupation of Celly Star Academy pending the hearing and determination of this application.
 3. Inter partes hearing on September 27, 2021.
29. Notably, deposit of the security for the due performance of such decree or order as may be binding upon an applicant who seeks an order for stay of execution is given to safeguard the interests of a respondent in the event the applicant was not successful in its appeal. As the Appellants correctly submitted, the order it sought to appeal was non-monetary and security could not be given.
30. Going further, as they also correctly argued, if they were sentenced to jail for failure to comply with the order of September 1, 2021, then there was likelihood of them suffering substantial loss, which was one of the prerequisites of being granted an order for stay of execution pending appeal. However, there was no indication that a sanction for failure to obey the court order had been granted.
31. Going further, it was apparent to this court that neither the order of the Learned Magistrate or that of the BPRT could be stayed. It was for that reason that when hearing the Appellants' present application this court granted a status quo order, the status as at December 10, 2021 at 12.35 pm being that no sanction to comply with the order of September 1, 2021 had yet been given to enable hear this matter on merit.
32. In granting the said order on December 10, 2021, this court had at the back of its mind the provision of Section 3A of the *Civil Procedure Act* Cap 21 (Laws of Kenya) that stipulates as follows:-

' Nothing in this Act shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice (emphasis court) or to prevent abuse of the process of the court.'
33. Having considered the affidavit evidence and the Written Submissions by the respective parties, this court found and held that the circumstances of the case herein did not fall within the ambit of an order



for stay of execution as there was no evidence of a positive order having been granted either by the BPRT or the Learned Magistrate.

34. The Appellants were at liberty to bring an application seeking appropriate orders to safeguard their liberty as they ventilate their appeal.

Disposition

35. For the foregoing reasons, the upshot of this court's decision was that the Appellants' Notice of Motion application dated December 8, 2021 and filed on December 9, 2021 was not merited and the same be and is hereby dismissed with costs to the Respondent.

36. It is so ordered.

DATED AND DELIVERED AT KISUMU THIS 23RD DAY OF FEBRUARY 2023

J. KAMAU

JUDGE

