Githaiga & another v Karanja (Environment & Land Case E059 of 2021) [2023] KEELC 18398 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 18398 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE E059 OF 2021

JO MBOYA, J

MAY 31, 2023

BETWEEN

GRACE WANJIRU GITHAIGA ..... 1ST PLAINTIFF

PAUL KURIA GITHAIGA (SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE LATE JAMES GITHAIGA KURIA) ..... 2ND PLAINTIFF

AND

JOHNSON GITHII KARANJA ..... DEFENDANT

RULING

Introduction And Background

1. The plaintiffs/applicants' herein are the legal administrators of the estate of one James Githaiga Kuria, now deceased, who had hitherto entered into and executed a lease agreement with the defendant/respondent over and in respect of LR No's 209/18279 and 209/18289, respectively, which lease agreement was executed on the June 30, 2015; and same lapsed on or about September 2020 or thereabouts.

2. Instructively, upon the lapse and determination of the Lease agreement between James Githaiga Kuria, now deceased and the defendant/respondent, the heirs of the estate of the deceased tenants endeavored to procure a renewal of the lease, but the attempts to do so collapsed. In this regard, the heirs/administrators of the deceased tenants' remained on the demised premises albeit without any executed lease or otherwise.

3. Be that as it may, the plaintiffs herein filed and /or commenced the instant suit wherein same sought various reliefs, *inter-alia* a declaration that the impugned lease had (sic) been extended. However, at the conclusion of the suit, the honourable court found and held that the lease in question determined by effluxion of time and thus the court ordered that the plaintiffs/applicants herein do vacate and hand over vacant possession of the suit property to the defendant/respondent.

4. Following the delivery of the judgment of the court, the plaintiffs herein felt aggrieved and approached the honourable Court of Appeal with an application for stay of execution of the judgment and decree of this court. However, during the pendency of the said application, the plaintiffs/applicants returned to this court and filed the application dated the April 27, 2023; and in respect of which same have sought for the following reliefs;

    i. Pending the hearing and determination of the instant application, the honourable court be pleased to order and/or direct the maintenance of status quo in terms of occupation, possession and use, over and in respect of the suit property known LR 209/18279.

    ii. The honourable court be pleased to extend orders of stay of execution of the judgment and/or decree issued by this honourable court on the 9th day of February 2023, together with any consequential orders arising therefrom and/or attendant thereto, pending the hearing and determination of court of appeal, civil application No E074 of 2023.

    iii. In the alternative and without prejudice to the foregoing as to prayer (2) above, this honorable court issues orders of stay of execution of the judgment and/or decree issued on February 9, 2023 until the hearing and determination of the appeal before the Court of Appeal.

    iv. The honourable court be pleased to grant any such further and/or other orders as may be deemed just, appropriate and/or expedient be granted.

    v. Cost of this application do abide the appeal.

5. The instant application is premised and anchored on various grounds which have been alluded to at the foot of the application. Further, the application is supported by the affidavit of the 1st plaintiff/applicant sworn on April 27, 2023 and in respect of which the deponent has exhibited four sets of documents.

6. Upon being served with the subject application, the defendant/respondent responded thereto *vide* replying affidavit sworn on the May 13, 2023; and in respect of which same has averred, *inter-alia*, that the plaintiffs/applicants are playing lottery with the due process of the honourable court, insofar as same has since filed a similar application for stay of execution before the Court of Appeal.

7. The instant application came up for hearing on the May 17, 2023 and whereupon the advocates for the parties agreed to canvass and dispose of the application by way of written submissions. Furthermore, the parties agreed that owing to the urgency at the foot of the application same were to file and exchange written submissions within 7 days from the date of issuance of the directions.

8. Inevitably, the advocates for the parties proceeded to and duly filed their respective submissions. For good measure, the applicant filed written submission on the May 18, 2023, whereas the defendant/respondent filed written submissions dated the May 23, 2023.

Submissions By The Parties

a. Applicant's submissions.

9. The applicant herein filed written submissions dated the May 18, 2023 and in respect of which same has raised, highlighted and amplified three (3) issues for consideration and determination by the honourable court.

10. Firstly, learned counsel for the applicants has submitted that even though this honorable court issued and granted an order of stay of execution for a limited duration of time, the court is still seized of the requisite jurisdiction to grant further orders of stay, irrespective of the fact that the applicants have since filed and lodged an application for stay of execution pending the hearing and determination of the appeal before the Court of Appeal.

11. Furthermore, learned counsel for the applicants has contended that this court has the requisite jurisdiction on account of the provisions of section 3A of the *Civil Procedure Act*, chapter 21, Laws of Kenya, which vests in the court inherent jurisdiction to *inter-alia* grant/issue such orders for purposes of meeting the ends of justice.

12. In the premises, learned counsel for the applicant has thus submitted that the fact that an application has been filed before the Court of Appeal does not take away and/or divest this court of the requisite jurisdiction as conferred by dint of section 3A of the *Civil Procedure Act*.

13. Secondly, learned counsel for the applicants has also submitted that the pendency of the application before the Court of Appeal does not amount to and/or constitute an infringement on the rule of *res-sub-judice* as provided for under section 6 of the *Civil Procedure Act*.

14. In any event, learned counsel has submitted that it is imperative to realize that the application before the Court of Appeal seeks a separate and distinct kind of stay of execution from the one that it is being sought before this honourable court. In this respect, learned counsel has drawn the distinction that whereas the application for stay before the Court of Appeal is pending the hearing and determination of the appeal; the one before this court relates to stay of execution pending the hearing of the application before the Court of Appeal.

15. Premised on the foregoing distinction, learned counsel for the applicants has thus contended that the doctrine of sub-judice therefore does not apply to the instant application.

16. Thirdly, learned counsel for the applicants has submitted that the applicants herein have established and demonstrated that same shall suffer substantial loss, unless the orders of stay are granted in the manner sought. Invariably, the applicants have contended that unless the orders of stay are granted, the respondent herein shall no doubt proceed to execute the judgment of the court by way of eviction.

17. In addition, learned counsel for the applicants has submitted that in the event of eviction, the applicants herein shall suffer detriment insofar as the relocation of their business from the suit property will impact on their financial standing and earnings.

18. In view of the foregoing, learned counsel for the applicants has thus implored the honourable court to find and hold that the applicants have established and demonstrated sufficient cause and basis to warrant the grant of the orders sought at the foot of the application dated the April 27, 2023.

a. Respondent's submissions:

19. On behalf of the respondent, written submissions dated May 23, 2023; have been filed. In particular, learned counsel for the respondent have raised, highlighted and canvassed three issues for determination by the honourable court.

20. First and foremost, learned counsel for the respondents has submitted that the applicants herein have since approached and filed an application for stay of execution of the judgment and decree before the Court of Appeal. For clarity, learned counsel added that the application before the Court of Appeal is dated the March 6, 2023.

21. Furthermore, learned counsel for the respondent has submitted that insofar as the applicants have since filed an application for stay of execution before the honorable Court of Appeal, same cannot therefore revert back to this honorable court and file a similar application for stay of execution, during the lifetime before the Court of Appeal.

22. Instructively, learned counsel for the respondent has thus submitted that the filing of the current application before this honorable court, albeit during the subsistence of the application before the Court of Appeal, constitutes and amounts to an abuse of the due process of the honourable court.

23. Secondly, learned counsel for the respondent has also submitted that whereas the applicant herein was at liberty to either file the application for stay of execution before this honourable court or the Court of Appeal, it has been submitted that the moment the applicants herein filed the application for stay before the Court of Appeal, same divested themselves of a right to approach this honorable court with a similar application for stay.

24. Owing to the foregoing, learned counsel for the respondent has thus contended that the filing of the current application, during the lifespan of a similar application before the Court of Appeal, constitutes to a violation of the doctrine of sub-judice. In this regard, counsel cited and relied on the provisions of section 6 of the *Civil Procedure Act*, chapter 21, Laws of Kenya.

25. Thirdly, learned counsel for the respondent has submitted that an order of stay of execution pending the hearing and determination of the appeal, cannot issue and/or be granted, unless the applicant can show and demonstrate that same is bound to suffer substantial loss as espoused *vide* order 42 rule 6(2) of the *Civil Procedure Rules 2010*.

26. In respect of the instant matter, learned counsel for the respondent has submitted that the applicants herein shall not be disposed to suffer any substantial loss or otherwise, if the orders of stay of execution pending the hearing of the appeal sought are not granted.

27. On the other hand, learned counsel for the respondent has added that the suit property lawfully belongs to and is registered in the name of the respondent and thus the respondent is entitled to recover vacant possession thereof, from the applicants, whose tenancy/lease lapsed and determined, long before the filing of the current suit.

28. Further and in any event, learned counsel for the respondent has also contended that the applicant herein is not entitled to an order of stay of execution, either in the manner sought or at all, insofar as same have neither provided nor offered to provide security for the due performance of the decree that may ultimately ensue.

29. Consequently and in this regard, learned counsel has contended that in the absence of provision of security, the applicants are not deserving the discretion of the honourable court.

30. In support of the foregoing submissions, learned counsel has relied on the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & another* (1986)eKLR and *Arun C Sharma v Ashana Raikundalia T/a Raikundalia & Co Advocates & 2 others* (2014)eKLR, respectively.

Issues For Determination

31. Having reviewed the application dated the April 27, 2023, the supporting affidavit thereof; as well as the replying affidavit filed in opposition thereto; and upon considering the written submissions filed by the parties, the following issues do arise and are thus worthy of determination;

    i. Whether the current application is barred and/or prohibited by dint of the doctrine of res-sub-judice as espoused *vide* section 6 of the *Civil Procedure Act*, chapter 21 Laws of Kenya.

    ii. Whether the current application constitutes an abuse of the due process of the honourable court

    iii. Whether the applicants herein have demonstrated and/or established the likelihood of substantial loss arising, if the orders sought are not granted.

Analysis And Determination

Issue number 1 & 2

Whether the current application is barred and/or prohibited by dint of the doctrine of *res-sub-judice* as espoused *vide* section 6 of the *Civil Procedure Act*, chapter 21 Laws of Kenya.

Whether the current application constitutes an abuse of the due process of the honourable court

32. It is common ground that upon the delivery of the judgment, which was rendered on the February 9, 2023, the applicants herein proceeded to and filed a notice of appeal, wherein same exhibited their desire and intent to appeal to the honorable Court of Appeal.

33. Other than the filing of the notice of appeal, it is also imperative to state and underscore that the applicants herein also filed an application for stay of execution of the judgment and decree of this honorable court before the Court of Appeal, in pursuance of the provisions of rule 5(2) (b) of the *Court of Appeal Rules*.

34. In addition, learned counsel for the applicants have stated that upon the filing of the said application, same was duly certified urgent and was ultimately scheduled for hearing on May 8, 2023. However, counsel has added that the scheduled hearing date aborted because the honorable court of Appeal was not sitting.

35. Furthermore, learned counsel for the applicants has submitted that subsequently the honorable court of appeal is yet to prioritize the hearing of the application seeking for stay of execution of the judgment and decree of this honorable court. In this regard, learned counsel has stated that the application before the Court of Appeal has thus remained in abeyance, awaiting further direction guidance.

36. It was the further submissions of learned counsel for the applicants that because the Court of Appeal has not deemed it fit and/or expedient to grant an order of stay of execution, same was therefore at liberty to revert back to this court and to seek interim protection by way of further orders of stay of execution.

37. In any event, learned counsel has contended that the court has the requisite jurisdiction to grant such orders and more particularly, on the basis of inherent jurisdiction, as espoused by section 3A of the *Civil Procedure Act*.

38. From the submissions by the applicants herein, one thing is evident and apparent. For good measure, there is no gainsaying that the applicants herein have since filed an application for stay of execution of the judgment and decree of this court, before the court of appeal. furthermore, it is admitted that the particular application is still pending hearing and determination.

39. Nevertheless and undeterred by the pendency of the application before the Court of Appeal, the applicants herein have still reverted to this court and are seeking orders of stay of execution of the judgment of this court, purportedly pending the hearing and determination of the application before the court of appeal.

40. To my mind, the golden thread that runs across the two sets of applications is that the applicants herein are seeking to procure and obtain an order of stay of execution of the judgment and decree of this honorable court; and thus to avert the implementation and enforcement of the terms of the decree. Simply put, the applicants are seeking for an order of stay of execution.

41. Suffice it to point out that the applicants herein have tried their lack before the Court of Appeal and upon realizing that the Court of Appeal is not granting any interim orders; same have now reverted to this court, with the pious hope that this court would close its eyes and grant an order of stay of execution of the decree, at the instance of the applicants.

42. Surely, it behooved the applicants herein to exercise a right of election as to whether to start with this honorable court and procure an order of stay or otherwise, as provided for in terms of order 42 rule 6(1) of the *Civil Procedure Rules*, before venturing to approach the honourable Court of Appeal.

43. However, once the applicants venture forward and approach the honourable Court of Appeal with an application under rule 5(2) (b) of the *Court of Appeal Rules*, the applicants herein cannot thereafter revert before this honourable court and seek to mount a similar application like the one before the Court of Appeal or substantially similar thereto.

44. Worse still, the applicants herein cannot revert back to this honorable court and seek near similar orders of stay, albeit during the subsistence of the application for stay of execution before the Court of Appeal. In my humble view, if the applicants herein wanted to revert back before this court then same ought to have withdrawn the application before the Court of Appeal.

45. Insofar as the application before the Court of Appeal is still alive and subsisting; it is my humble view that the filing of the current application amounts to an infringement on the doctrine of res-sub-judice. in this regard, the provision of section 6 of the *Civil Procedure Act*, chapter 21 Laws of Kenya are instructive and appropriate.

46. For ease of reference, the said provisions of section 6 (supra)state thus;

> 6. Stay of suit
>
> No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court.

47. On the other hand, it is worthy to recall that the ingredients that underscores and/or underpin the applicability of the doctrine of res-sub-judice, were elaborated upon by the Supreme Court in the case of *Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (interested parties)* where the court had occasion to pronounce itself on the subject of sub judice. It aptly stated: -

> (67) The term 'sub-judice' is defined in Black's Law Dictionary 9th Edition as: "Before the court or Judge for determination." The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

48. Arising from the foregoing, there is no gainsaying that the applicants herein cannot be allowed to sustain and pursue the two sets of applications for stay of execution pertaining to and concerning the said judgment and decree. Clearly, the subsistence of the two (2) application at the same time is prohibited by the doctrine of sub-judice.

49. Consequently and in the premises, I come to the conclusion that the current application, which was filed long after the filing of the one before the Court of Appeal, cannot be allowed to subsist.

50. Additionally, by filing the current application, whilst knowing that the previous application was still pending before the Court of Appeal, the applicants herein were indulging and engaging in acts/ activities that amounts to an abuse of the due process of the court. In this regard, the application similarly runs afoul the doctrine of abuse of the due process of the court.

51. Without belaboring the issues of abuse of the due process of the honourable court, it is instructive to restate and reiterate the holding in the case of *Satya Bharma v The Director of Public Prosecution and another* (2018)eKLR, where the court stated and observed as hereunder;

> 22. The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.[12]
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> 23. The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been

or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

(a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.

(b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.

(c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.

(d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.

(e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.[13]

(f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.[14]

24. In the words of Oputa J.SC (as he then was)[15] abuse of judicial process is:-
"A term generally applied to a proceeding which is wanting in bona fides and is frivolous vexations and oppressive. In his words abuse of process can also mean abuse of legal procedure or improper use of the legal process."

25. Justice Niki Tobi JSC observed:-[16]

"that abuse of court process create a factual scenario where appellants are pursuing the same matter by two court process. In other words, the appellants by the two court process were involved in some gamble a game of chance to get the best in the judicial process."

52. Further, inevitably and in summation, the current application thus ought to be struck out for contravening the twin doctrines of res sub-judice and abuse of the due process of the court.

Issue number 3

Whether the applicants herein have demonstrated and/or established the likelihood of substantial loss arising, if the orders sought are not granted.

53. It is not lost on this court that what the applicants herein are primarily seeking is an order of stay of execution (sic) pending appeal, even though same is ingeniously worded to be the one pending the hearing and determination of the application before the honorable Court of Appeal.

54. Clearly, the applicants herein are inviting the honourable court to engage with the question of stay of execution ex-post delivery of a judgment and long after the filing of a notice of appeal. In this regard, it is important to state and underscore that the current application is anchored on the basis of order 42 rule 6(2) of the *Civil Procedure Rules, 2010*.

55. To the extent that the application is premised on the said provisions, it behooves the applicants to satisfy the requisite threshold for the grant of an order of stay and in particular, to demonstrate that same is disposed to suffer substantial loss.

56. Imperatively, it has been stated and underscored, times without number that substantial loss is the cornerstone to the granting of an order of stay of execution pending the hearing and determination of an appeal. Consequently, the critical ingredient that must be established and proved by any applicant, relates to the existence/likelihood of substantial loss occurring.

57. In this respect, it is worthy to take cognizance of the succinct explanation and holding in the case of *Kenya Shell Ltd versus Benjamin Karuga Kibiru & another* (1986)eKLR, where the court of appeal (per Plat JA as he then was), stated and held as hereunder;

> "It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money".

58. With the foregoing elaboration in mind, it is now appropriate to interrogate whether the applicants herein, have indeed established or demonstrated that there is a likelihood of substantial arising or occurring, in the event that the orders sought are not granted.

59. In this respect, the contention by the applicants is to the effect that insofar as same have been carrying out and/or undertaking business within the suit property, the change of business location for small traders (read applicants) may potentially affect their business and also impact upon their financial positions and earnings.

60. Owing to the foregoing contention, it is the applicants submissions that an order of stay of execution out to issue so as to preserve the applicants occupation, possession and business within the suit property, irrespective of whether or not there is an existing lease/tenancy agreement.

61. If I understand the applicants correctly, same are contending that the execution of the judgment of the court and the recovery of vacant possession of the suit property by the respondent who is the owner thereof shall culminate into loss of earning for the applicants.

62. In my humble view, if the applicants were to suffer any loss of business and by extension loss of earnings, as a result of the execution of the judgment herein, then such loss of earnings, which are quantifiable and ascertainable, can very well be computed and paid out, if the appeal were to succeed.

63. Consequently and in the premises, the nature and kind of loss that has been adverted to by the applicants herein, does not, in my humble view, meet the threshold of what constitutes substantial loss either as known to law or at all.

64. For good measure, it is worthy to recall and underscore that substantial loss does not mean and/or connote any other ordinary loss that may arise and/or ensue, merely because the lawful process of execution of a decree has been commenced or undertaken. Instructively, there is no gainsaying that the execution of a court process will no doubt culminate into some negative consequence.

65. Nevertheless, there are other consequence that are attendant to and which do arise from execution of decrees, that can very well be dealt with and remedied by, *inter-alia* restitution, reparation or indemnity by award of costs, subject to the outcome of the appeal/intended appeal.

66. In view of the foregoing statement, it is thus evident and apparent that the mere fact that the applicants may loss business and by extension earnings; if same are evicted, does not *ipso facto* translate to substantial loss.

67. Nevertheless and in the absence of substantial loss, I come to the inescapable conclusion that the applicants herein are not entitled to the remedy sought at the foot of the said application or otherwise.

Final Disposition

68. Be that as it may, it is appropriate to state that any party keen to procure and obtain an order of stay of execution of execution pending appeal/ intended appeal; is vested with a right of election as established by dint of order 42 rules 6(1) of the *Civil Procedure Rules, 2010*.

69. Owing to the foregoing and in this regard, such an applicant must perform/ exercise his/her right carefully and deliberately.

70. Nevertheless, once an applicant does exercise his/her right, same must be alive to the consequences of the choice taken; in this case, a choice taken, may very well put in place the application of various legal doctrines, *inter-alia* sub-judice and res-judicata.

71. Notably, the applicant herein having gone to the Court of Appeal, same cannot by sidewind revert to this honourable court. In this regard, the entire application constitutes an abuse of the court and same be and is hereby dismissed.

72. Finally, the costs of the application be and are hereby awarded to the respondent and same shall be agreed upon; and in default taxed by the Deputy Registrar of the honourable court.

73. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31ST DAY OF MAY, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court Assistant.

Mr. Otieno h/b for Mr. Oruenjo for the Plaintiff/Respondent.

Mr. Guandaru Thuita for the Defendant/Applicant.

N/A for the Interested Party.