Karani v Kenya Power Company Limited (Environment & Land Case 662 of 2012) [2023] KEELC 17902 (KLR) (23 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17902 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 662 OF 2012

JA MOGENI, J

MAY 23, 2023

BETWEEN

ROBERT KARANI ..... PLAINTIFF

AND

KENYA POWER COMPANY LIMITED ..... DEFENDANT

RULING

1. Before this Court for determination is the Defendant/Applicant's Notice of Motion Application dated 15/02/2023 brought pursuant to Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules* 2010 and all enabling provisions of the law. The Defendant/Applicant is seeking for the following orders: -

    a. Spent.

    b. Spent.

    c. That pending the hearing and determination of this Application this Honourable Court be pleased to grant an order of stay of execution of the Judgement of the Honourable Lady Justice Mogeni delivered on 13th February, 2023 and all consequential Orders arising therefrom.

    d. That this Honourable Court be pleased to grant an order of stay of execution of the Judgement of the Honourable Lady Justice Mogeni delivered on 13th February, 2023 and all consequential Orders arising therefrom pending lodgement of the intended Appeal.

    e. That this Honourable Court be pleased to issue an order for stay of proceedings pending the lodgement of the intended Appeal.

    f. That the costs of and incidental to this Application be provided for.

2. The application is premised on the grounds stated on the face of the application together with the Supporting Affidavit of Elna Mudibo, counsel representing the Applicant herein sworn on the 15/02/2023. I do not need to reproduce the same.

3. The application is opposed. There is a Replying Affidavit by Robert Karani, the Plaintiff herein, sworn on 2/03/2023.

4. On 9/03/2023, counsels agreed to file written submissions to the application and the Court gave directions on the same. At the time of writing this ruling only the Defendant/Applicant had filed its written submissions dated 17/03/2023.

Issues for determination

5. I have considered the instant application, the annexures thereto, the written submissions of the Defendant/Applicant and the cited authorities together with the relevant provisions of law and found that the issues for determination before this Court are whether the instant application is res judicata and Whether the orders for stay of execution pending appeal are merited.

Analysis and determination

Whether the instant application is res judicata

6. I have considered the plaintiff's contention on paragraph 5 of his Replying Affidavit in the nature of a Preliminary Objection to the effect that the application should be struck out for reasons that by virtue of the provisions of Section 7 of the *Civil Procedure Act*, the Court lacks jurisdiction to hear and determine the application for being res judicata.

7. Counsel for the Defendant contended that she sought stay of execution of the said judgement for Forty-Five (45) Days which oral application was countered by Counsel for the Plaintiff who stated that stay of execution of judgement can only be granted for Twenty-One (21) Days. That upon hearing submissions by Counsel for the parties, the Honourable Court stated that upon pronouncement of its judgement, it became functus officio hence incapable of issuing any further orders on the matter thus could not grant stay of execution of judgement. That it was against this backdrop that the instant Application has been filed to formally seek stay of execution of the judgement delivered.

8. Conversely, the Plaintiff/Respondent contended that it is not a disputed fact that on 13th February, 2023 counsel for the applicant made a similar application to this instant which the court dismissed as is confirmed at paragraph 3 and 4 of the Notice of Motion application. The Respondent went on further to state that this application is a res judicata.

9. Section 7 of the *Civil Procedure Act* provides as follows on the doctrine of res judicata-

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."

10. Having analysed the proceedings of 13/02/2023, it is demonstrated that it is true the Defendant's counsel sought for stay of 45 days. The plaintiff's counsel objected the said prayer but stated that stay can only be for 21 days. These proceedings are not in dispute. The Court notes that the plaintiff's counsel proposed that the defendant is granted 21 days instead of the 45 days sought. Further, the

Court directed that the defendant had the liberty to file formal application for stay. For these reasons, I draw the conclusion that the oral application was not heard and finally decided on merit and is therefore not res judicata.

11. This Court's finding therefore is that the present application is not res judicata.

Whether the orders for stay of execution pending appeal are merited.

12. The Court of appeal in the case of *Butt vs Rent Restriction Tribunal* Civil App No. NAI 6 of 1979, Madan, Miller and Porter JJA, while considering an application of this nature, had this to say:-

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

    ii. The general principal 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 that appeal court reverse the judge's discretion.

    iii. 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.

    iv. The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements."

13. It is clear from the wording of Order 42 Rule 6 (1) of the Civil Procedure Rules, for an applicant to succeed in an application of this nature, he must satisfy the above conditions, namely; (a) Substantial loss may result to the applicant unless the order is made; (b) The application has been made without undue delay; (c) such security as to costs has been given by the applicant.

14. The corner stone of the jurisdiction of the court under Order 42 of the Civil Procedure Rules is that substantial loss would result to the applicant unless a stay of execution is granted. See Gikonyo J in HCC NO. 28 of 2014, *Trans world & Accessories (K) Ltd –vs- Commissioner of Investigations & Enforcement*.

15. What constitutes substantial loss was broadly discussed by Gikonyo J in the case of *James Wangalwa & Another –vs- Agnes Naliaka Cheseto* HC Misc. No. 42 of 2012 OR [2012] eKLR where it was held inter alia that:-

> " 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. This is what substantial loss would entail, a question that was aptly discussed in the case of Silverstein vs. Chesoni, ...the issue of substantial loss is the cornerstone of both jurisdiction of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory"

16. Judgment was delivered on 13/02/2023 and the present application was filed on 15/02/2023. That is 2 days later. In my view, the present application was filed without delay.

17. Regarding substantial loss, the applicant fears that it may not recover the money if paid. Particularly, it is the Applicant's case that if the Orders sought herein are not granted and the Decretal sum is paid out to the Plaintiff/Respondent, the Plaintiff/Respondent would not be able to repay the amount in the event the Defendant/Applicant is successful in the Appeal thereby occasioning the Defendant/ Applicant, a reputable government institution, substantial financial loss and irreparable damage. That the Defendant/ Applicant is a Government parastatal which is entirely dependent on monies paid to it by citizens of this Republic in carrying out its operations and it is in the public interest that the said funds be safeguarded and such extreme and highly prejudicial consequences before the lodgement, hearing and determination of the Appeal would subvert the ends of justice and render the Appeal nugatory.

18. It is the Respondent's case that it is not evidential that the respondent shall be unable to pay out the decretal amounts to the applicant if the intended appeal succeeds.

19. The Court of Appeal in *Housing Finance & Company of Kenya –vs- Sharok Kher Mohammed Ali Hirji & Another* (2015) eKLR where the Court quoting their decision in *Kenya Hotel Properties Ltd –vs- Willesden Properties Ltd* (Civil Application Nai 322 of 2006(UR 178/06) stated that:-

> "The decree is a money decree and normally the Courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the Court ascertains that the respondent is not a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant. However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree."

20. In *Kamal Bhusan Joshi & 3 Others –vs- Wambugu, Motende & Company Advocates* (2016) eKLR the Court of Appeal again citing the case of *Standard Bank Ltd –vs- G.N. Kagia & Company Advocates* (Civil Application No. Nai 193 of 2003 (Unreported) stated that:-

> "If the Applicant's appeal ultimately succeeds, either wholly or partially, such success will not be totally effectual if the applicant will not easily recover the money it paid and if it has to institute other civil proceedings to recover the money. Such an eventuality should in the interest of justice be taken into account."

21. Whereas the applicant has not proved its claim that the applicant may not repay the said sum, the respondent has equally not demonstrated that he can repay if execution proceeds because he has not demonstrated his financial ability to repay by way of evidence. The court is left guessing whom to believe. In *Equity Bank Ltd vs Taiga Adams Company Ltd* [2006] eKLR, the court stated a follows:-

> "In the application before me, the applicant has not shown or established the substantial loss that would be suffered if this stay is not granted. The only way of showing or establishing substantial loss is by showing that if the decretal sum is paid to the respondent—that is execution is carried out-in the event the appeal succeeds, the respondent would not be in a position to pay-reimburse- as/he is a person of no means. Here, no such allegation is established by the appellant."

22. In *Elena D. Korir vs Kenyatta University* [2012] eKLR, Justice Nzioki Wa Makau had this to say: -

> " the application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & another vs Thornton & Turpin Ltd* [1993] KLR 365 where the Court of Appeal (Gicheru JA, Chesoni & Cockar Ag JA) held that "The High Court's discretion to order stay of execution of its order or decree is fettered by three conditions, namely:- Sufficient cause, Substantial loss would ensue from a refusal to grant stay, The applicant must furnish security, the application must be made without unreasonable delay.

In addition, the applicant must demonstrate that the intended appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo vs Straman EA Ltd* (2013) eKLR as follows: -

> " In addition the applicant must prove that if the orders sought are not granted and his appeal eventually succeeds, then the same shall have been rendered nugatory. These twin principles go hand in hand and failure to prove one dislodges the other".

23. On whether or not the application was brought without undue delay, I have already observed that in my view a delay of 2 days is not inordinate. Unreasonable delay depends on the circumstances of each case. In *Jaber Mohsen Ali & Another vs Priscillah Boit & Another* [2014] eKLR the court held:-

> " The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgement could be unreasonable delay depending on the judgement of the court and any order given thereafter. In the case of Christopher Kendagor vs Christopher Kipkorir, HC ELC 919 of 2012, Eldoret the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, application ought to have come before expiry of the period given to vacate the land"

24. I find that there has not been inordinate delay in both filing the application and prosecuting it.

25. Apart from proof of substantial loss the applicant is enjoined to provide security. The Defendant/ Applicant states that it is willing to abide by any conditions set by this Honourable Court for the grant of the Orders sought herein. However, the Respondent is of the opinion that the applicant has failed to show good faith in failing to provide security before this Honourable Court when seeking the orders of stay of execution. To me, I opine that there is therefore an offer of security coming from the applicant in satisfaction of the said requirement. It is trite law that the failure by the court to make an order for security for due performance amounts to a misdirection which entitles an appellate court to interfere with the exercise of the discretion in granting stay. However, the offer for security must come from the applicant as a price for stay. See Carter & Sons Ltd. (Supra).

26. In the above cited case of Equity Bank Ltd (Supra) it was held that:-

> " .....of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought.....let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay..." which principle was also emphasized in Carter & Sons Ltd (Supra)

27. The importance of complying with the said requirement in my view was well emphasised in *Machira t/a Machira & Co Advocates vs. East African Standard (No 2)* [2002] KLR 63 where it was held that:-

> " To be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court".

28. Having carefully considered the application before me and the law, I am persuaded that the applicant has satisfied the conditions stipulated under Order 42 Rule 6 and in the circumstances I allow the application.

29. I am fortified in my finding by the following excerpt from Halsbury's Laws of England 4th Edition, Vol. 37 pages 330-332 wherein the learned writers observe that:-

> " The stay of proceedings is a serious, grave and fundamental interference in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceedings beyond reasonable doubt should not be allowed to continue."

30. In the case of Global Tours and Travels Ltd WC No. 43 of 200 (UR) it was held that:-

> " .....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 interests of justice. Such discretion is unlimited save that by virtue of its character as a judicial discretion; it should be exercised rationally and not capriciously or whimsically. The sole question is whether, it is in the interests 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 the order. And in considering those matters, it should bear in mind such factors as the need for expeditious disposal of the 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 timeously."

31. In considering whether a money decree or a liquidated claim would render the success of the an appeal nugatory, the court of appeal in the case of *Kenya Hotel Properties Ltd vs. Willesden Properties Ltd* Civil Application number NAI 322 of 2006 (UR) had this to say:-

> " The decree is a money decree and normally the courts have felt that the success of the appeal would not be rendered nugatory if the decree is a money decree so long as the court ascertains that the respondent is not in a "man of straw" but is a person who, on the success of the appeal, would be able to repay the decretal amount plus any interest to the applicant./

However, with time, it became necessary to put certain riders to that legal position as it became obvious that in certain cases, undue hardship would be caused to the applicants if stay is refused purely on grounds that the decree is a money decree. The court however was emphatic that in considering such matters as hardship, a third principle of law was not being established at all."

32. In this application, what appears to be at stake is recovery of judgement sum if it is paid to the respondent. Whereas the applicant alleges that the respondent may not repay the amount in the event the Defendant/Applicant is successful in the Appeal thereby occasioning the Defendant/ Applicant, a reputable government institution, substantial financial loss and irreparable damage, I am persuaded that the respondent did not fully demonstrate his ability to repay the said sum but also the Applicant did not provide evidence to back up their allegations.

33. Having fully considered the facts of this case, the arguments submitted by both parties and the relevant law and authorities, I am persuaded that the position adopted in the above cited case of Butt –vs- Rent Restriction Tribunal (Supra) (Madan, Miller and Porter JJA) while considering an application of this nature is good law, that is; (i) The discretion of the court should be exercised in such a way as not to prevent an appeal. (ii) The general principal 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 that appeal court reverse the judge's discretion. (iii) A judge should not refuse a stay if there are god grounds for granting it merely because in his opinion a better remedy may become available to the applicant at the end of the proceedings. (v)The court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

34. The upshot is that applying the above principles, I hereby allow the application before me and order as follows: -

    a. The Application dated 15/02/2023 is allowed in terms of Prayer (c), (d) and (e).

    b. The Applicant/Defendant shall deposit the entire decretal sum in a joint fixed deposit interest earning account to be opened in the joint names of the advocates of both parties herein as security for the due performance of the decree within thirty (30) days from the date of this Ruling.

    c. Failure to comply with order (b) hereinabove, Order (a) hereinabove shall automatically lapse.

    d. Costs of the Application to abide the Appeal.

    It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF MAY 2023.

MOGENI J

JUDGE

In the Virtual presence of :-

Ms. Mudibo for the Applicant/Defendant

Mrs Murage for the Plaintiff/Respondent