Kang'ethe v Bore & another (Environment & Land Case 68 of 2014) [2023] KEELC 18371 (KLR) (15 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18371 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT & LAND CASE 68 OF 2014

MC OUNDO, J

JUNE 15, 2023

BETWEEN

PAUL MAINA KANG'ETHE ..... PLAINTIFF

AND

DANIEL VICTOR BORE ..... DEFENDANT

AND

HEZRON KIMELI CHERUIYOT ..... RESPONDENT

RULING

1. Pursuant to delivery of judgment in this matter on the June 30, 2022, the applicant has now filed an application by way of notice of motion dated July 12, 2022 brought under the provisions of order 22 rule 22, 51 (sic) rule 1 and 13(2) of the *Civil Procedure Rules*, section 1A, 1B, 3 and 3A of the *Civil Procedure Act*, and all enabling provisions of the law where he has sought for orders of stay of execution of the said judgment, pending the filing and hearing of his appeal.

2. The application is supported by the grounds set on its face as well as on the supporting affidavit of the applicant sworn on the July 12, 2022 to the effect that he was aggrieved by the judgment and intended to appeal against the same. That no prejudice would be suffered by the respondents if stay of execution was granted and further that the right of appeal was a constitutional right that actualized the right to access to justice, protection and benefit of the law. That should the orders sought not be granted, the respondent could proceed to have the land transferred to himself thereby rendering the appeal nugatory.

3. The said application was opposed *vide* the 3rd party/ 2nd respondent's replying affidavit dated the September 20, 2022 in which the 2nd respondent sought for the said application to be dismissed and/ or struck out for reasons that the applicant had not shown the kind of substantial loss he was likely to suffer should stay of execution not be granted. That he had not provided any security and the

application was not made timelessly and without unreasonable delay. That he could therefore not rely on an intended appeal to act as a stay as this was contrary to the provisions of order 42 rule 6 of the *Civil Procedure Rules*. That he had not demonstrated that the appeal was arguable and would be rendered nugatory should the stay of execution not be granted. That the applicant was mischievous and was on a forum shopping as he had filed a similar application dated July 21, 2021 before the Court of Appeal sitting in Nakuru in civil application No E043 of 2022. That the applicant was out to frustrate him from the enjoying the fruits of the judgment.

4. On October 18, 2022, parties took directions to have the application disposed of by way of written submissions.

5. As I write this ruling, I note two issues herein emerging. The first one is that having taken directions to dispose of the application by way of written submissions, the applicant herein did not comply with the court's directions and although on the November 24, 2022 counsel holding brief for the applicant's counsel had informed the court that the submissions had been filed on November 23, 2022, the said submissions were neither in the registry nor in the court file.

6. The second issue is that although the defendant/1st respondent herein did not file his response to the application by the applicant herein seeking for stay of execution of the court's judgment, yet he had filed his written submission dated November 23, 2022 opposing the said application.

Third party/2nd Respondent's Submissions.

7. In opposing the application, the third party/2nd respondent framed their issue for determination as follows;

    i. Whether a stay of execution of the judgment delivered on June 30, 2022 should issue.

8. The third party/2nd respondent relied on the provisions of order 42 rule 6 (1) and (2) of the *Civil Procedure Rule* as well as the decision in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR to submit that there were an elaborate guidelines in place that dealt with an application for stay of execution. That the discretionary relief of stay of execution pending appeal was designed on the basis that no one would be worse off by virtue of an order of court which order would not introduce any disadvantage but administer justice deserved by the case.

9. That in order for one court to stay execution the applicant ought to have met the conditions to wit; sufficient cause, substantive loss would ensue from the refusal to grant stay, furnishing of security, and the application has been made without unreasonable delay.

10. That substantial loss did not mean normal and ordinary loss which every judgment debtor was subjected to when he lost the case. That in the present circumstance, the applicant had not been in actual occupation of the suit property having had sold the same in 1991 and therefore it was clear that he would not suffer any substantial loss that could not be remedied by way of damages.

11. On the issue as to whether the applicant had an arguable appeal, the third party/2nd respondent relied on the decision in *Global Tours and Travel Limited v Five Continents Travel Limited* [2015] eKLR to submit that the applicant did not attach any memorandum of appeal to his application and therefore it was not easy to discern whether or not he had an arguable appeal. To this effect, the court could not engaged on speculation of issues that he intended to raise in the appeal and therefore it was safe to conclude that the said intended appeal raised no arguable issues.

12. The applicant had not been in possession of the suit land. the orders of the court were to the effect that he transfers the land to the 1st respondent and should the applicant therefore succeed in his appeal, the land registrar would be ordered to reverse the entry and the appeal would not be rendered nugatory.

13. On the issue of there having been furnished security, the third party/2nd respondent, while placing reliance on the provisions of order 42 rule 6(1) (2) of the *Civil Procedure Rules* submitted that this provision of the law imposed mandatory conditions for due performance of the orders as may ultimately be binding on the applicant. That the applicant had not offered any security. That all in all, the applicant had not met the grounds for stay and therefore the application ought to be dismissed with costs.

Determination.

14. It is now a settled practice under the new constitutional dispensation that filing of written submissions is the norm as written submissions serve the purpose of expedience and amounts to addressing the court on the evaluation of the evidence of each party and analysis of the law. It is therefore trite that an applicant who fails to file his submissions on an application as ordered by the court is deemed as a party who has failed to prosecute his application and therefor that application is liable for dismissal. The filing of submissions having been ordered, and this court having extended time for compliance on several occasions without compliance, the failure by the applicant to exercise the leave granted to them to file written submissions clearly demonstrates inertia and inordinate delay, lack of interest and/or seriousness on the applicant's part in the prosecution of the matter.

15. Indeed the Court of Appeal in *Rowlands Ndegwa and 4 Others v County Government of Nyeri and 3 others; Agriculture, Fisheries and Food Authority & another (interested parties)* [2020] eKLR, citing with approval the decision of the High Court in, *Winnie Wanjiku Mwai v Attorney General & 3 others* [2016] eKLR, observed as follows:

> "With regard to dismissal for want of prosecution, there are indeed no hard and fast rules as to the manner in which the inherent power and discretion to dismiss an action for want of prosecution is to be exercised. It is however generally accepted that dismissal will be invited if there should be a delay in the prosecution of the action and the respondent is prejudiced by the delay with attention also being paid to the reasons for the inactivity...."

16. The mode of hearing having been chosen by the applicant and the same having been adopted by the court, and there having been no compliance, I am persuaded to dismiss the main motion, however be that as it may, as a court of Law, I have a duty in principle to look at what the application is about and what it seeks.

17. The Supreme Court of Kenya in *Gideon Sitelu Konchellah v Julius Lekakeny Ole Sunkuli & 2 others* [2018] eKLR had held as follows;

> "A replying affidavit is the principal document wherein a respondent's reply is set and the basis of any submissions and/or list of authorities that may be subsequently filed. Absence of this foundational pleading, the replying affidavit, it follows that even the written submissions purportedly filed by the 1st respondent on August 17, 2018 are of no effect. ''

18. It is to this effect that the court finds that the defendant/1st respondent's written submissions are of no effect in the absence of his foundational pleading, the replying affidavit herein.

19. All said and done, I have carefully considered the application by the applicant, the supporting affidavit, the replying affidavit as well as the written submissions made by the parties counsel. I find two issues for determination arising therein namely:

    i. Whether the applicant has satisfied the court on conditions for grant of stay of execution pending appeal.

    ii. What orders this court should make.

20. On the issue of whether the applicant is deserving of the orders of stay of execution pending the hearing and determination of the appeal herein, the law applicable is order 42 rule 6 of the *Civil Procedure Rules* which stipulates as follows:

    ''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 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.''

21. There are three conditions for granting of stay order pending an intended appeal under order 42 rule (6) (2) of the *Civil Procedure Rules* to which :

    a. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;

    b. The application is brought without undue delay and

    c. 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.

22. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the applicant to demonstrate what kind of substantial loss he would suffer were the stay order not made in his favour.

23. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma v Abuoga* (1988) KLR 645 where their lordships stated that;

    " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

24. The applicant contends that he would suffer irreparable loss if he is not granted the stay as the execution would create a state of affair that would affect the chances of success of the appeal. Keeping in mind

that the applicant has not been in either possession or occupation of the suit land, no evidence was been provided on the kind of irreparable loss he would suffer if the order of stay was not granted.

25. As regards the second condition, upon perusal of the court record, the court finds that the plaintiff/ applicant filed the application for stay of execution on July 12, 2022 some 48 days after the judgments had been delivered on the June 30, 2022. I find the delay of 18 days was not inordinate in the circumstance.

26. On the last condition as to provision of security, I find that order 42 rule 6 (2) (b) of the *Civil Procedure Rules* stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending appeal is that (s)he must furnish security. The applicant has not furnished security for due performance of such decree or order as may ultimately be binding on him.

27. The grant of stay remains a discretionary order that must also take into account the fact that the court ought not to make a practice of denying a successful litigant the fruits of their judgment.

28. In the persuasive decision, the court in the case of *Loice Khachendi Onyango v Alex Inyangu & another* [2017] eKLR held that;

> " The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the applicant. In determining whether sufficient cause has been shown, the court should be guided by the three pre-requisites provided under order 42 rule 6 of the Civil Procedure Rules. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the applicants unless stay of execution is granted; and thirdly 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...."

29. I have considered whether there exists any special circumstances which can sway my discretion to either grant or refuse the application for stay wherein I have also balanced the scales of justice which in my view would not render the appeal nugatory while at the same time ensuring that the successful party is not impeded from the enjoyment of the fruits of his judgment. The two conditions necessary for grant of orders for stay of execution to issue under order 42 rule 6(2) of the *Civil Procedure Rules* having not been met by the applicant and further in regard to the provisions of the law as stipulated under section 3A of the *Civil Procedure Act*, I am not inclined to grant the order of stay of execution so sought.

30. The application dated July 12, 2022 is herein dismissed with costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 15TH DAY OF JUNE 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE