Kamundi v Mbare & another (Environment and Land Appeal E002 of 2022) [2023] KEELC 19041 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19041 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT CHUKA

ENVIRONMENT AND LAND APPEAL E002 OF 2022

CK YANO, J

JULY 26, 2023

BETWEEN

ALBAN NJOKA KAMUNDI ..... APPELLANT

AND

GEORGE MUNENE MBARE ..... 1ST RESPONDENT

EDWIN MURITHI KINYUA ..... 2ND RESPONDENT

RULING

1. The application before me for determination is the Notice of Motion dated 10th November, 2022 brought under Order 42 Rule 6, Order 51 Rules 1, 3 of the Civil Procedure Rules, 2010 and section 1A, 3A and 63 (e) of the *Civil Procedure Act* Cap 21,Article 50 and 159 of *the Constitution* of Kenya 2010 and all other enabling provisions of the law. The Applicant is seeking orders that:

    1. Spent.

    2. That there be a stay of execution of the judgement delivered herein on 9th November 2022, pending lodging, hearing and determination of the Applicant's intended appeal to the Court of Appeal.

    3. That costs of the application be provided for.

2. The application is supported by the affidavit of Alban Njoka Kamundi, the Applicant sworn on 10th November, 2022 and is premised on the grounds that:

    a. The Applicant is greatly aggrieved by the Judgement delivered by the Honourable court on 9th November 2022.

    b. The Applicant has also filed a Notice of Appeal at Nyeri and wishes to appeal against the whole of the said Judgement.

c. The Applicant is in danger of suffering irreparable loss and damage, if the application is not allowed.

d. That unless the orders sought are granted, the Applicant shall suffer substantial loss and his rights to access justice, under Article 48 of *the Constitution* of Kenya shall be contravened in that:-

i. During the pendency of the said appeal, the respondents will execute the said judgement to the Applicants detriment, in it, orders of payment of Kshs 200,000 in damages, the Applicant being forced to remove his structures and in default, eviction of the Applicants by the respondents.

ii. If the respondents execute the said judgement, both the application and the intended appeal will be rendered nugatory.

iii. As the court of appeal had held in *Madhupaper International Ltd v Kerr* (1985) KLR 840, this honourable court has jurisdiction to grant an injunction following its dismissal of an earlier application or after delivery of judgement if the interest of justice will be served by the preservation of the subject matter of the appeal...

iv. The jurisdiction of the Honourable court has been extended by order 40 rule 10 of the *Civil Procedure Rules* 2010 which empowers the court to make such orders for preservation of any property which is the subject matter of a suit as it deems fit; In Mombasa High Court Civil Suit No.274 of 2009 *Emma Muthoni Wambaa and Another v Joseph Kibaara Kariuki*, this Honourable court granted the Applicants an order of injunction pending the hearing and determination of the Applicant's appeal. Injunctions pending appeal were also granted in Nairobi Commercial & Admiralty Division Civil Suit No. 627 of 2012: *Technology Today & 2 others v Adrian Noel Carvalho & 5 others*.

v. As the Court of Appeal held in the case of African Safari Club v Safe Rentals Ltd, Court of Appeal at Nairobi Civil Application No. Nai 53 of 2010, after introduction in 2009 of the overriding principle by the amendments to both the *Civil Procedure Act* and *Appellate Jurisdiction Act*, principles governing stay of execution and injunction have been modified fundamentally: courts are enjoined to act fairly and justly to have regard to the Substantive of the matters before them and weigh the relative hardships of the parties before them; the application of this principle results in the maintenance of the status quo at the time of the said judgement.

vi. As held by the Court of Appeal in *Assanand and v Petit* (1989) KLR 242, the object of an injunction is to keep things in status quo so that if at the hearing of the appeal the Applicant obtains a judgement in their favour, the Respondents will have prevented dealing with the subject matter in such a way as to make that judgement ineffectual.

e. Following the judgement delivered on 9th November 2022, there is nothing the Respondents cannot do to defeat the objects of both the suit and the intended appeal.

f. That the applicant has a constitutional right of appeal and it will be in the interest of justice and fairness that the court should not be a hurdle to the applicant desires to seek another opinion in the court of appeal regarding the issues raised in this cause.

g. That the applicant feels strongly that he is likely to succeed in the intended appeal, therefore the court should preserve the subject matter of the suit.

h. The honourable court has jurisdiction to preserve the subject matter of the suit.

i. It is in the interest of justice, equity and fairness that the honourable court do grant the orders sought so as to preserve the subject matter of the appeal.

j. That if the orders sought are not granted, the Applicant will suffer extreme and irreparable loss and damages.

k. That the prayers sort (sic) are the best and the most apt in the circumstances.

3. In his supporting affidavit, the applicant has repeated the above grounds.

4. The application is opposed by the 1st Respondent through a Replying Affidavit sworn by the 1st respondent on 5th April, 2023 in which he avers that he has the authority of the 2nd Respondent to make and swear the affidavit on his behalf. He states that the application is frivolous, vexatious and an abuse of the court process. That the application and in extension the appeal thereof is one of the many calculated strategies by the Applicant to frustrate the Respondents from benefiting from end of justice.

5. The 1st Respondent has deponed that the applicant is a frivolous and vexatious litigant who has come to the court with unclean hands and therefore, not entitled to the grant of the prayers he is seeking.

6. The 1st Respondent further avers that the appeal that has been filed by the Applicant is manifestly incompetent and incurably bound to fail. The Respondents pointed out that to demonstrate the Applicant's sustained mischief, Chuka Chief Magistrate's ELC case No.51 of 2019 that is the basis of this litigation process filed in 2019 under a certificate of urgency and a notice of motion dated 16th September 2019 whereby the matter was first fixed for inter-partes hearing on 2nd october ,2019 and the defendant entered appearance through his advocates, david john mbaya & co on 1st october ,2019. that the applicant has variously been represented in the Lower Court by David John Mbaya & Co. Elijah K. Ogoti & Co. Muthomi Gitari & Co, Ojwang Sombe and currently M'Njau Mageto, not to mention the many times the applicant has sought to act in person which manifestly has been a way of either stalling or frustrating progression in the matter.

7. Relying on advise, the respondent aver that for an applicant to be granted orders such as the ones sought by the Applicant herein, they must have demonstrated that the appeal has high chances of success and that in view of the gist of the issues in dispute in the subject matter and putting in consideration the substantive pleadings in the main suit in the trial court's file, the Applicant's Appeal has nil chances of success rendering the instant application a mere academic exercise and a waste of time for both the Respondent and the Honourable Court.

8. Further and relying on advise the respondents aver that the case law cited by the Applicant in paragraph d(iii) under the grounds supporting the Application supports their case, in particular the part where it states thus, "...the question is whether the Applicant has made out sufficient case to have the Respondent restrained pending the trial" and that the Applicant has not made out a sufficient case. "... the question is whether the judgment that had been given is one which successful party ought to be free act despite the pendency of an appeal..."

9. The respondents believe the issue in dispute which is unblocking of an access road that is on a road reserve, that there exists an urgency in the matter brought to court. That the applicant has in no way whatsover demonstrated the availability and/or existence of a prima facie case in the form of the intended appeal with any plausible chances of success and believe that the intended appeal is a mere academic exercise aimed at by whatever means available delaying conclusive settlement and finally bringing the matter to rest as he continues enjoying unmerited advantage of use of the illegally occupied

road reserve that provide access to the Respondents parcel of land by way of endless court processes and litigations.

10. The respondents state that in the event that the Honorable Court is inclined to grant an order for stay of execution of the judgment, the provisions of Order 42 Rule 8 of the *Civil Procedure Act* do not apply in the instant case and the Applicant ought to be ordered to deposit/provide reasonable security to the Respondents in order to ensure and safeguard the Respondents interests.

11. The respondents urged the court to dismiss the application with costs.

12. The application was canvassed by way of written submissions

Appellant/applicant's Submissions

13. The Application was canvassed by way of written submissions. The Applicant submitted inter alia, that the judgment delivered by the subordinate Court on 28th January 2022 was based on an ex-parte hearing for eviction and payment of damages of 200,0000/= and the Appeal challenging the decision of the subordinate Court before this Court was dismissed on 9th November 2022 and the stay order in place was automatically vacated. That the appellant was aggrieved by the judgment delivered by this Honourable Court on 9th November 2022 and filed a Notice of Appeal to the Court of Appeal at Nyeri against the whole of the said judgment and that indeed by the time of filing the submissions the Applicant had already filed Appeal in the Court of Appeal at Nyeri, though the number is not shown.

14. The appellant cited the provisions of order 42 Rule 6 which stipulate 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.

15. The Appellant submitted that the purpose of granting orders of stay of execution is to maintain the status quo and preserve the subject matter for the appeal not to be rendered nugatory.

16. The Appellant relied in the case of Migori Elc Appeal No. 32 Of 2020 Pamela Awuor Ochieng and another versus Elisha odari Ogony [2021] eKLR in which it was stated:

> "The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi),the Court held that:

-"The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory."

17. The Applicant submitted that the instant Application was filed in Court on 10th November 2022, one day after judgment on 9th November 2022 without unreasonable delay within the meaning of Order 42 of the *Civil Procedure Rules* and that the Applicant has also moved fast and has already filed an appeal before the Court of Appeal in Nyeri.

18. The Applicant further states that the subject matter in the Subordinate Court case and the Appeal before this Court is land whereof the Respondents were seeking for Orders of evicting the Appellant from his Plot Numbers Plot numbers 25 and 26 to create an access road to LR .Karingani/ Mugirirwa/3573,3575,3612 and 3925 and submitted that the act of eviction ordered by the subordinate court and confirmed by this Honourable court on appeal is final in nature.

19. The Appellant states that he faces imminent eviction from his Plot Number 25 and 26 Kerege market on account of a claim for access road which was never proved on merit before the magistrates court and the Appellant having been indisposed on the date of hearing.

20. The Applicant submitted that the present possession of the subject plot numbers 25 and 26 by him is not disputed and can be deduced from the pleadings particularly for the fact that the Respondents had sought for eviction orders and that the intended eviction will cause substantial loss to the Appellant who operates his residential house businesses from thereon.

21. The Applicant also relied in the case of Embu Elc Appeal No. 1 Of 2021*john Mugo and another Versus Benson Nyaga Mugo*[2022] eKLR which held:

> " From the applicants case and by the respondent's own admission of some sort of presence by the applicants either as trespassers or otherwise on the suit parcel of land, it is evident that in the event the appeal proceeds and the applicants are evicted from the land and probably even have the land disposed then this would render the present appeal nugatory and an academic exercise. It is trite law that the purpose of status quo is to preserve the subject matter and in land cases preserving the suit parcel of land which may easily exchange hands pending the appeal and of course ensuring that the appeal is not rendered nugatory or an academic exercise. I accordingly find that the applicant has established substantial loss".

22. The Applicant submitted that he has established his likelihood of him suffering substantial loss in the event the orders of stay of execution are not granted and urged the court to find so and grant the orders sought.

23. The Appellant further submitted that he seeks to exercise his unalienable constitutional right of Appeal to the Court of appeal and seeks a stay of execution/eviction to allow him ventilate his issues before the Court of Appeal without fear of eviction before the Appeal is heard and determined thereby rendering his appeal nugatory. The appellant relied on the case of Kisumu Civil Appeal No. 149 OF 2009 *Peter Lolwe Ombee Versus Dalmas Okatch Randa* [2011] eKLR, where it was held:

> " Applying the above two principles to the lower courts stand, this court finds that the right to be heard should not have been withheld because in as much as the plaintiff was entitled to prove his claim, the defendant had an equal right to disprove it, which disproving could only be done with his participation...In addition to the afore set traditional principles, this court cannot loose sight of the current constitutional provisions which give the defendant/

appellant the right of access to justice presence of technicalities not withstanding and have his cause heard however hopeless it may be. The court is further enjoined by the same constitutional Provision to render justice without undue regard to technicalities, vide article 22 (3) (d) and 159 (2) (d). These read:- "Article 22 (3)(d)the court while observing the rule of natural justice should not be unreasonably restricted by procedural technicalities, 159 (2) (d) justice shall be administered without undue regard to procedural technicalities".

24. The Appellant submitted that he is willing to abide by any conditions set by the court on the issue of security bearing in mind that the subject matter of the claim in the subordinate and this Court is land (for access road) whose valuation has not been presented to the Court. That the Court has duty to do justice to the parties and that in the instant case, justice demands that the prevailing status quo be maintained to allow the parties ventilate their issues before the Court of Appeal freely.

25. The Appellant/Applicant relied in the case of HCCC Civil Suit No.101 OF 2011*Wachira Karani-Versus-Bildad Wachira* [2016] eKLR where the Court stated:

'The court is not powerless to grant relief when the ends of justice and equity so demand, because the powers vested in the court are of a wide scope and ambit.[23] The inherent power, as observed by the Supreme Court of India in *Raj Bahadur Ras Raja vs Seth Hiralal* [24]"has not been conferred on the court; it is a power inherent in the court by virtue of its duty to do justice between the parties before it." Lord Cairns in *Roger Vs Comptoir* D' Escompts De Paris stated as follows:-

"One of the first and highest duties of all, Courts is to take care that the act of the court does no injury to any of the suitors and when the expression 'Act of the court' is used it does not mean merely the act of the primary court, or of any intermediate court of appeal, but the act of the court as a whole from the lowest court which entertains jurisdiction over the matters up to the highest court which finally disposes of the case."

26. Therefore, the Applicant submitted that his application for stay pending appeal has merit and urged the court to allow the same with costs.

Respondents' Submissions

27. The respondents pointed out that they have very clearly stated why they are opposed to the application and the reasons why the application ought not be allowed and that a look at the conduct and how the applicant has consistently acted at various instances regarding the proceedings in respect of the subject matter hereof clearly showed the numerous schemes employed by the Applicant to frustrate the proceedings and conclusion of the matter for reasons privy to himself but which the Respondents believe were occasioned by the Applicant's realization and knowledge that he does not have a good case.

28. The Respondents submit that the Appeal and the Application are frivolous, vexatious and abuse of the court process whose only purpose is to delay conclusive settlement of the matter and to frustrate the successful litigants from benefitting from reliefs granted by the court. It is the respondents' submission that the application is an ill-informed misadventure and it is frivolous, vexatious and an abuse of the court process. The respondents relied on the case of *County Council of Nandi vs. Ezekiel Kibet Rutto & 6 Others* [2013] eKLR which determined what is frivolous and scandalous

29. The Respondents further submitted that it is now generally agreed and accepted that matters before court have a shelf life and timeframes within which they must be heard and determined and that the Applicant's acts of frustrating the process all through cannot be justified, cannot be tolerated and cannot be excused and that the applicant herein has brought the application with unclean hands which deprives him the right to benefit from an equitable remedy that is a discretion of the court.

30. The Respondents submitted that for the applicant to obtain a stay of execution, he has a duty to satisfy the court that substantial loss would result if no stay is granted and that the Applicant herein has failed to demonstrate the manner in which he would suffer substantial loss if the Respondents were allowed to execute the decree as established in the case of *Everlyn Jebitok Keter vs. Henry Kiplagat Muge & 2 Others* (2011) eKLR and *Rocky Driving School Limited vs. Cute Kitchen Limited* (2015) KLR.

31. The Respondents further submitted that Stay of Execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 and relied in the Court of Appeal case in *RWW vs. EKW* (2019) eKLR which addressed itself on this as hereunder:-

> "The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.
>
> Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

32. The respondents also relied on the Court of Appeal case in *Vishram Ravji Halai vs. Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, which outlined the requirements for granting stay of execution pending appeal and held that, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.

33. The respondents submitted that looking at the pleadings and trial proceedings from which the appeal is premised they believe that the Applicant's appeal has no possible chances of success hence it is devoid of a sufficient cause.

34. The respondents further submitted that the purpose of security was clearly enunciated in A*run C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated:-

> "The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the *Civil Procedure Rules* acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

35. The respondent also relied on the decision in *Gianfranco Manenthi & Another vs. Africa Merchant Assurance Company Ltd* [2019] eKLR, which stated thus:-

> "... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security.

> In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the appeal fails.
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> Further, Order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... Thus the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine. Counsel for the applicant submitted that he is ready to provide a bank guarantee as security for due performance of the decree."

36. The respondents submitted that as demonstrated in *James Wangalwa & Another vs. Agnes Naliaka Cheseto*, the three (3) conditions for granting stay of execution pending appeal must be met simultaneously. That they are conjunctive and not disjunctive.

37. The Respondents associated themselves with some of the positions articulated in the case law cited by the Applicant in the Application and in particular the part where applicant stated that he has made out sufficient case to have the Respondents restrained pending the trial and submitted that the Applicant herein has not made out a sufficient case. That the question of whether the judgment that had been given is one which successful party ought to be free to act despite the pendency of an appeal, the respondents argued that, considering the issue in dispute, which is the question of the unblocking of an access road that earmarked on a road reserve there still exists the urgency that brought this matter to court.

38. It is the respondents' submissions that the Applicant's Application and the appeal are schemed to serve no judicious purpose and is merely calculated to unduly buy more time for the Applicant to allow him an opportunity to continue unlawfully enjoying use of a road reserve that he has illegally blocked while endlessly inconveniencing the Respondents and denying them access and use/ ability to develop their properties.

39. The respondent submitted that the Applicant's application hereof be disallowed and dismissed with costs.

Analysis And Determination

40. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the *Civil Procedure Rules*. 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.

41. In determining whether sufficient cause has been shown the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant 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.

42. From the record, the judgement appealed against was made on 9th November, 2022 and the application herein was filed on 10th November, 2022. This was after a period of about one day. The application no doubt was filed timeously.

43. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant, I wish to refer to the case of *Kenya Shell Limited vs Benjamin Karuga Kigibu & Ruth Wairimu* (1982-1988) KAR 108 where the Court of Appeal stated:

> "It is usually a good rule to see if Order 41 Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay."

44. In the present case, the Applicant has stated that he will suffer substantial loss and the appeal rendered nugatory because he faces imminent eviction from his Plot Number 25 and 26 Kerege market on account of a claim for access road which was never proved on merit before the magitrates court and the Appellant having been indisposed on the date of hearing. In this case, I am satisfied that unless the orders sought herein are granted, the Applicant may be evicted and which action no doubt will result in substantial loss and may render the appeal nugatory.

45. The applicant has also stated that he is ready to give security as the court may order. The court will therefore grant conditional stay.

46. Therefore, the court finds merit in the application dated 10th November, 2022 and allows the same in the following terms:

    a. Stay of execution of the decree in Chuka Elc Appeal Case No. E002 of 2022 is granted pending the hearing and determination of the appeal herein.

    b. The Applicant shall provide security of Kshs.200,000/= to the Respondents within a period of thirty days from the date of this ruling.

    c. The said amount to be deposited into a joint interest earning account in the names of the respective advocates in a reputable bank of their choice.

    d. In default of compliance with the provisions of such security, the stay orders granted herein shall lapse automatically.

    e. Costs of the application shall be borne by the applicant.

47. Orders accordingly.

DATED, SIGNED AND DELIVERED at CHUKA THIS DAY 26TH JULY, 2023.

IN THE PRESENCE OF:

CA: Martha

Ms. Musyimi h/b for Kirimi for Respondents

N/A for Mageto for Appellant

C. K. YANO

JUDGE