Eldo Amani Self Help Group (Suing through its officials Sammy Njuguna Wachira & Stephen Kirunga Wachira) v Wanjau & another (Environment & Land Case 51 of 2016) [2023] KEELC 20004 (KLR) (25 September 2023) (Ruling)

Neutral citation: [2023] KEELC 20004 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 51 OF 2016

JM ONYANGO, J

SEPTEMBER 25, 2023

BETWEEN

ELDO AMANI SELF HELP GROUP ..... PLAINTIFF

SUING THROUGH ITS OFFICIALS SAMMY NJUGUNA WACHIRA & STEPHEN KIRUNGA WACHIRA

AND

CHRISTOPHER WANJAU ..... 1ST DEFENDANT

MINISTER FOR LANDS, UASIN GISHU COUNTY GOVERNMENT .... 2ND DEFENDANT

RULING

1. The Applicant moved the court vide a Notice of Motion dated October 26, 2022 seeking a stay of execution of the order, ruling and proceedings made herein on September 23, 2022 pending appeal. The application is predicated on the grounds set out on its face, the main one being that the Applicant has lodged an appeal against the said ruling. The application is also based on the supporting affidavit of Sammy Njuguna Wachira in which he deposes that he was dissatisfied with the ruling/order on costs and he has filed a Notice of Appeal to challenge the same.

2. The application is resisted by the Respondent through the Replying Affidavit of Christopher Wanjau, he 1st Respondent sworn on November 30, 2022 in which he deposes inter alia that the Applicant has not met the requirements for stay pending appeal and that in any event there can be no stay of a dismissal order which is negative in nature.

3. The application was disposed of by way of written submissions and both parties filed their submissions which I have taken into account.

4. The main issue for determination is whether the orders issued on October 26, 2022 should be stayed pending appeal.

5. Learned counsel for the 1st Defendant has contended that the Applicant has invoked the wrong provisions of the law as the application is expressed to be filed pursuant to the *Appellate Jurisdiction Act* and Rules 1, (2), 41 and 42 of the *Court of Appeal Rules*. I agree with counsel for the 1st Defendant that the above-mentioned provisions apply strictly to the Court of Appeal and not this honourable court.

6. Even if this court was to administer substantive justice in line with the provisions of Article 159 2(d) of the *Constitution*, would the Applicant qualify for an order of stay pending appeal?

7. It is not in dispute that the Applicant seeks to stay the order dismissing his application to reopen the case and re-call his witnesses for cross-examination. The order is thus negative in nature and it is not capable of being executed. This position was adopted by the Court in the cases of *Western College of Arts and Applied Sciences v E.P Oranga & 3 others* (1976) eKLR and *Catherine Njeri Maranga v Serah Chege & Another* (2017) eKLR.

8. Similarly, in the Applicant seeks to stay an order dismissing his application which is a negative order. This ground is sufficient to disallow his application. I will nonetheless consider the merits of the application.

9. With regard to the merits of the application, it is trite that in order to qualify for an order of stay pending appeal one must meet the requirement set out in Order 42 Rule 6 of the *Civil Procedure Rules*. In the case of in *Elena D.Korir vs Kenyatta University* (2014) eKLR Justice Nzioki wa Makau relied on the case of *Halal & another vs Thornton & Turpin Ltd* 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:- That Substantial loss would ensue from a refusal to grant stay, the applicant must furnish security and the application must be made without unreasonable delay."

10. I will now consider if the Applicant has met the three conditions for stay pending appeal. On the question of substantial loss, the Applicant has not demonstrated the substantial loss he would suffer if the application is not granted. Although counsel for the Applicant has submitted that the Applicant would suffer substantial loss if the order of stay is not granted, this has not been sufficiently articulated in the supporting affidavit. As pointed out in the case of *James Wangalwa &Another v Agnes Naliaka Cheseto* (20120 eKLR, the Applicant was expected;

> " ..to establish factors which show that the execution will create a state of affairs that will irreparably affect or negate the essential core of the applicant as the successful party in the appeal".

This he has not done. All he has done is lament that he has been drained financially owing to the costs of litigation.

11. Secondly, he has not offered any security for costs.

12. Lastly, the application though dated October 26, 2022 was filed on November 4, 2022 which is a period of 41 days after the impugned ruling was delivered. No explanation has been offered for the delay.

13. In view of the foregoing reasons, I am unable to exercise my discretion in favour the applicant. The application is totally devoid of merit and I dismiss it with costs to the 1st respondent.

DATED SIGNED AND DELIVERED THIS 25TH .DAY OF SEPTEMBER, 2023

.....

J.M ONYANGO

JUDGE

In the presence of;

Miss Akweyu for Mr. Omusundi for the Applicant.

Mr. Ogongo for the Respondent

Court Assistant: A. Oniala