Anyenda v Simidi & 12 others (Environment and Land Appeal 1 of 2023) [2023] KEELC 21845 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21845 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL 1 OF 2023

FO NYAGAKA, J

NOVEMBER 24, 2023

BETWEEN

WILLIAM W ANYENDA ..... APPLICANT

AND

ENOCK BULIMO SIMIDI & 12 OTHERS ..... RESPONDENT

(Being an appeal from the Ruling of the Senior Principal Magistrate, Hon. S. K. Mutai read on 3rd July, 2023 in Kitale CMC Land Case No. 50 of 2002)

RULING

1. By an Application dated 14/07/2023 and supported by an Affidavit sworn by the Appellant on the same date, the Appellant moved this Court under Order 42 Rule 6 of the *Civil Procedure Rules*, 2010. He sought the following orders:-

    1. ...Spent.

    2. ...Spent

    3. That upon inter partes hearing of the Application this honourable Court be pleased to confirm the stay order in No. 2 herein or grant the stay sought in prayer No. 2 while pending the hearing and determination of the pending appeal.

    4. That costs do abide the appeal.

2. To begin with, this Court underscores the fact that prayer 2 was for the interim grant of an order for stay of enforcement of the orders made by the lower court on 16/05/2022 pending the inter partes hearing of the instant Application.

3. The Application was based on the grounds that the Applicant was aggrieved by the ruling of 3/07/2023 in Kitale CMC Land Case No. 50 of 2002 and preferred the instant appeal. That he had in an

application dated 11/05/2023 sought an order staying the enforcement of ex parte orders given on 16/05/2022 together with all consequential orders, and a review and setting aside of the orders made on 16/05/2022. Further, that he had not been served with the Application dated 03/08/2021 on which the Court ruled on 16/05/2022.

4. He deponed further that the original decree in Kitale CMC Land Case No. 50 of 2022 had been perfected and the both the Respondent and other beneficiaries were only awaiting issuance of title deeds. The purported service of the Application dated 03/08/2021 was based on flawed service. That if the orders of 16/05/2023 shall be enforced they shall render the Appeal herein nugatory. That the ex parte order for committal of the Applicant to civil jail shall subject him to substantial loss and render the appeal herein an academic exercise. That the instant application was filed without undue delay and the Applicant was ready to furnish security as the Court shall order.

5. In his Affidavit the Appellant repeated the contents of the ground of the Application. In addition, he annexed as WWA 1, 2, 3, 4 and 5 copies of the Memorandum of Appeal, the Ruling of the Lower Court as made on 03/07/2023, the Application dated 03/08/2023, the Affidavit of Service, and the ex parte orders issued on 16/05/2022. He also annexed as WWA 6 and 7 copies of the Application dated 11/05/2023 and the Replying Affidavit to it. Further he annexed as WWA 8 a copy of an application dated 27/04/2023.

6. The Respondents opposed the Application through the Replying Affidavit of one Enock Bulimo Simidi on 21/07/2023. He deponed that the Application was premature, incompetent and backed up (sic) hence fit for dismissal. That it was shocking that the Applicant had not filed the Application in the subordinate Court had skipped that and moved this Court. That the Applicant had not exhausted all avenues, particularly seeking stay of execution in the lower Court as the law requires. That the Applicant has "jumped ships" and placed the cart in front of the horse (sic). That the orders the Appellant sought to challenge were in order. He deponed further that the instant Application was unmerited, defective, misconceived, and abuse of the process of the Court and bad in law. He deponed that the Appellant was duly served on 03/08/2021 and that he did not seek to cross-examine the Process Server hence the service was proper.

7. The deponent stated that the decree issued on 5/11/2002 contained terms, *inter alia*, that

    a. William W. Anyenda to bring the Government Surveyor to survey, excise and mark boundaries for the purchasers

    b. And also to take them to the Land Control Board to enable them obtain title deeds.

8. He annexed and marked as EBS 1 a copy of the decree which he deponed had never been implemented. That instead the Appellant decided to take a private surveyor by name Ben W. Situma to the ground to implement the decree yet that surveyor had no capacity to do so. That it was 20 years and the said appellant had refused to comply with the decree. His Application did not meet the threshold of a *prima facie* case with success. He stated that the orders sought could not be obtained and urged the Court to disallow the Application.

9. The Parties submitted on the Application. By submissions dated 1/08/2023 the Appellant began by summarizing the facts of the instant Application, also that he was never served with the Application dated 03/08/2021 and I need not repeat the summary here. He relied on the case of *National Nak Of Kenya v. Peter Oloo Aringo* [2004] eklr regarding serving by a process server.

10. He argued that for an application for stay there were three limbs which the Applicant was supposed to fulfil in terms of Order 42 Rule 6 of the *Civil Procedure Rules*. He listed them and relied on the cases

of *James Wangalwa & Another V. Agnes Naliaka Cheesto* [2012] eklr and *RWW v. EKW* [2019] eklr. He submitted that he had fulfilled the conditions.

11. On their part the Respondents submitted that Order 42 Rule 6 had not been complied with by virtue of the Appellant failing to move the lower Court for stay of execution first. It was their view that the Application was therefore a non-starter. They submitted that the Application dated 03/08/2021 was for contempt of Court and the Appellant ought to be punished for the disobedience. They repeated the contents of the deposition as to how the Appellant had purported to engage a private surveyor to implement the decree in issue and that it had taken 21 years for the decree to be implemented.

12. About the conditions the Applicant is required to fulfil in order to be granted stay of execution, they relied on the Ruling of this Court delivered in Kitale Elc No. 041 Of 2016 *Peter Muriuki Solomon V. Peter Midimo Agalo & 3 Others*.

13. I have considered the Application, both statutory and case law, the submissions of both parties and the facts herein. First, I note that the Respondents raised an important legal issue although through an Affidavit. If upon consideration thereof the legal point succeeds then it would dispose of the Application at the preliminary stage and there would be no need to analyze the merits thereof. Thus, this Court is of the view that three issues lie for consideration. One is whether the Application is incompetent and premature, two, whether the Application is merited, and three, who to bear the costs of the Application.

14. Regarding the first issue, the Respondent argued that the Applicant had not complied with Order 62 Rule 6 of the *Civil Procedure Rules* by first seeking the orders he sought herein in the trial Court. He deponed that he was shocked that the Appellant had put the cart before the horse or jumped ships (sic). My understanding of the latter was that the Applicant had jumped the gun. If the meaning of the Respondents' argument of the Appellant jumping ship were to be understood in its proper sense it would mean that the Appellant had abdicated duty or left his service or duty without being permitted. Herein the Applicant is deeply in the argument about the stay of proceedings and execution he sought.

15. The above misconception aside, the Respondents stated that the Appellant should have first applied in the trial Court for stay before coming to this Court and that having failed to do so, the Application was incompetent, premature and bad in law. They submitted as much.

16. On his part, the Appellant was completely quiet about that fact. He neither obtained leave of court to file an Affidavit to refute the deposition nor did he submit on it. It therefore means that indeed the Applicant did not first seek stay of execution in the trial Court before moving this Court. That fact being firmly established, the question is whether the Respondent's argument has a legal basis and backing. This turns the Court to the point of considering the provisions and import of Order 42 Rule 6 of the *Civil Procedure Rules*. This is against the backdrop that the instant Application being in relation to an Appeal preferred against a decision of a subordinate Court as established under Article 169 of the *Constitution of Kenya* the rules on stay of execution or proceedings are those under the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya. These are the *Civil Procedure Rules*, 2010 as amended in 2020.

17. The relevant provisions in the Rules in regard to appeals are Order 42 of the Rules. In particular, Order 42 Rule 6(1) provides that

> "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."

18. This Court has, for reason of emphasis, underlined the relevant phrases in the provision in relation to the instant Application. The above Rule is to the effect that before an Appellant aggrieved by an order or decree of a subordinate Court moves the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one to a Court subordinate to the Superior Court) moves the Superior Court for stay of proceedings or execution he/she/it should have moved the court appealed from for similar orders. This is not optional but a compulsory step. Only upon fulfilment of that step shall the Superior Court be seized of jurisdiction to handle an application for stay of proceedings or execution. This is clearly provided for in the sub-Rule that "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."

19. From the above provision, an Appellant can only apply to the Appellate Court to set aside the order (of stay of execution or proceedings) of the Court appealed from if he/she/it is aggrieved by such an order. It means further that he/she/it or the adverse party must have moved the subordinate Court, the Court shall have rendered itself on the application, and the party is aggrieved by the decision of that Court and moves the Appellate Court. An appellant ought not and should never side-step the subordinate court and attempt successfully to move the appellant for orders he/she should have sought formally in that court. This is akin to forum shopping and a direct call for a breakdown of the rule of law. Laws are enacted for the proper ordering of and to avoid arbitrariness in actions of people in society. While rules of procedure are not to be mistresses to stress and commandeer or constrain free moral agents of reason they were designed for orderliness, fairness and justice. It would be a dark day for judges and judicial officers to encourage infractions of the law which they took oath to uphold. Thus, in *Nicholas Kiptoo Arap Korir Salat Vs. Independent Electoral And Boundaries Commission & 6 Others* [2013] eklr Kiage JA of the Court of Appeal held:

> "I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

20. From the above excerpt, it is clear that both substantive and procedural laws and indeed any other that is constitutional ought to be followed by all and sundry within the republic. Thus, in regard to compliance with Order 42 Rule 6(1) of the *Civil Procedure Rules*, the learned judge in *Vipingo Ridge Limited V Swalehe Ngonge Mpitta* [2021] eklr held:-

> "A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders

before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.

12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other."

21. Also, in *Pius Mbithi& Another V Daniel Mutiria & Another* [2017] eklr, it was held,

> "I read and understand the rule to dictate that the first port of call by an application for stay pending appeal is the trial court and that once it considers and determines the application then an aggrieved party has the liberty to approach this court and have the orders so issued set aside. 17. Put in the context of the matter before me it is clear that the trial court has not been afforded the opportunity to hear and determine any application for stay. That being the position, and being a court of law applying the law as enacted, this court must tell the applicant that the law is for all to be observed and not be side-stepped. I am in no doubt that the application seeking stay before this court as the appellate court is prematurely made and does not lie."

22. Additionally, in *Mwangi V Mokaya* (environment And Land Appeal 17 Of 2022) [2022] Keelc 14835 (klr) (17 November 2022) (ruling) this Court held that

> "A plain grammatical or textual reading of this terminology reading of the text above, particularly, the underlined phrase is to the effect that a party is not permitted to skip the must important point as the first point of call: the respective trial magistrate or judge against whose order or judgment an appeal is preferred. After he or she has moved the Court and his Application is granted or not, depending on how he views the decision, then he/she will file another application in the Court appealed to. It is upon this step having been taken that the application for stay of proceedings in the trial can be considered by the appellate Court. Absent of this step, the application filed for stay of execution or proceedings directly to the appealed to is improper."

23. In the instant Application, it has not been denied or even submitted on to the contrary that the Appellant did not move the trial court first for its determination on whether or not it was to grant an order of stay of enforcement of the orders of the trial court as made on 16/05/2021. It therefore means that the instant Application was made contrary to the requirements of Order 42 Rule 6(1) of the *Civil Procedure Rules*. It means further that as the Respondent argued, the Application is premature, incompetent and bad in law.

24. The upshot is that this Court need not consider the merits or otherwise of an Application that is incurably defectively incompetent. The Court can do no more than to strike it out with costs to the Respondents.

25. Since the above is the finding of the Court, in the interest of justice this Court issues a conditional order of stay of enforcement of the order of the trial Court dated 26/05/2021 to the effect that the enforcement is suspended for twenty-one (21) days only in order for the Appellant to move the appropriate court for appropriate orders in default of which these orders shall lapse automatically.

26. Additionally, and in order for this Court to consider the instant appeal in terms of Order 42 Rules 2 and 11 of the *Civil Procedure Rules*, 2010, the Appellant is directed to file the order appealed from

within the next 14 days of this order and move this Court within that period to consider the Appeal accordingly.

27. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM THIS 24TH DAY OF NOVEMBER 2023.

HON. DR. IUR FRED NYAGAKA

JUDGE

In the presence of:

1. Mr. Kiarie Advocate for the Appellant

2. Respondent Mr. Simidi in person