Chepkiyeng v Laboso (Environment & Land Case 932 of 2012)
[2023] KEELC 22324 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22324 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT & LAND CASE 932 OF 2012

JM ONYANGO, J

DECEMBER 14, 2023

BETWEEN

HILLARY KIPCHUMBA CHEPKIYENG ..... PLAINTIFF

AND

ELIZABETH LABOSO ..... DEFENDANT

RULING

1. By a Notice of Motion dated 15th November, 2022 the Plaintiff/Applicant filed an application seeking a stay of execution pending appeal. The application is premised on the grounds that judgment was delivered against the Plaintiff on 11th September, 2019 and he has since filed a Notice of Appeal and applied for a copy of the typed proceedings. In the meantime, the defendant has commenced the process of execution by way of Notice to show cause.

2. In support of the application, the plaintiff filed a Supporting Affidavit sworn on the 15th November, 2022 in which he avers that his case was dismissed on 11th September, 2019 and he filed a Notice of Appeal dated 23rd September, 2019. He subsequently applied for a copy of the typed proceedings. In the meantime, he was served with a Notice to Show cause dated 14th October, 2022 demanding that he pays a sum of Kshs.416,299 and he fears that if a stay of execution is not granted, his freedom of movement will be curtailed and he shall suffer substantial loss as he will be required to pay the costs to the Defendant.

3. The application is resisted by the Defendant through her Replying affidavit sworn on the 18th November 2022. She deposes that the application is an afterthought and that it is brought in bad faith as this suit was filed way back in 2008 and judgment was delivered on 11th September, 2019 when the Plaintiff's suit was dismissed. The Defendant subsequently filed her Bill of Costs which was taxed at Kshs.357,154.80.

4. She further deposes that the Plaintiff's advocate was notified of the ruling on taxation and furnished with the Certificate of Costs. After the Plaintiff failed to pay the Defendant's costs, a Notice to Show Cause was served upon the Plaintiff but he failed to attend court on the date when it was scheduled to come up. Instead, he filed the instant application for stay of execution after a period of 4 years without any plausible explanation. It is her contention that the application does not meet the conditions for stay pending appeal and that the same should be dismissed with costs.

5. The application was canvassed by way of written submissions and both parties filed their submissions which I have carefully considered.

6. The only issue for determination is whether the Applicant has met the threshold for stay pending appeal.

Analysis And Determination

Order 42 Rule 6 of the *Civil Procedure Rules* sets out the principles that should guide the court in considering an application for stay pending appeal. The said provision stipulates as follows:

> 6.
>
> (1) 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.
>
> (3) Notwithstanding anything contained in sub-rule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
>
> (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

7. I will now proceed to determine whether the applicant has met the three conditions stipulated above.

8. With regard to substantial loss the court in *James Wangalwa & Another vs. Agnes Naliaka Cheseto* [2012] eKLR, the court observed as follows:

> "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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

9. In the instant case, the Applicant has merely stated that his freedom of movement will be curtailed if the Notice to Show Cause is effected and that he shall suffer substantial loss as he will be required to pay the costs to the Defendant. He has not demonstrated how the payment of costs would render the appeal nugatory. In any case as held in the *James Wangalwa case* (supra) execution is a lawful process. The Applicant must demonstrate what loss he shall suffer if he pays the costs. This he has failed to do.

10. The Applicant has not provided any good reason why the Respondent should be denied the fruits of her judgment. As was held in *Machira T/A Machira & Company Advocates v East African Standard* No. 2 (2002) KLR 63:

> "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".

11. It is my finding that the applicant has not demonstrated that he shall suffer substantial loss.

12. On the question of delay, the judgment herein was delivered on 11th September, 2019. The Applicant has filed this application more than 4 years after delivery of judgment without offering any explanation. The delay is inordinate and inexcusable. In the case of *Njoroge V Kimani* Civil application Nai E049 of 2022 (2022) KECA 1188 (KLR) 28 the Court of Appeal held that;

> "In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence

by showing sufficient cause and giving a full detailed and accurate accound of the causes of delay. In the end the explanation must be reasonable enough to excuse the default."

13. In the instant case, the Applicant has made no effort to explain the inordinate delay and he is therefore not deserving of the court's discretion.

14. Finally, with regard to the third condition which relates to security for costs, the applicant has not expressed his willingness to furnish security for costs.

In the case of *Kiplangat Kotut v Rose Jebor Kipngok* (2015) eKLR the Court observed as follows:

> " Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the Civil Procedure Rules, 2010 cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously. "

15. All in all, the applicant has not met the requirements in Order 42 Rule 6 of the *Civil Procedure Rules* to enable the court exercise its discretion in his favour.

16. The upshot is that the application is devoid of merit and it is dismissed with costs to the Respondent.

DATED SIGNED AND DELIVERED VIRTUALLY THIS 14TH DAY OF DECEMBER 2023

J.M ONYANGO

JUDGE

In the presence of;

1. Miss Kinyanjui for Mr. Mathai for the Applicant

2. Mr. Korir K.K for Miss Kipseii for the Respondent

Court Assistant: A. Oniala