Mtsonga & another v Miringu (Environment and Land Appeal E029 of 2023) [2023] KEELC 22397 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22397 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT AND LAND APPEAL E029 OF 2023

FM NJOROGE, J

DECEMBER 14, 2023

BETWEEN

CHARLES MTSONGA ..... 1ST APPLICANT

FELISTER SIDI KABATHE ..... 2ND APPLICANT

AND

GEORGE KIRU MIRINGU ..... RESPONDENT

RULING

1. The Applicants, acting in person, moved this court by way of notice of motion dated 26th June 2023 for orders that this honourable court be pleased to order stay of execution of the ex-parte judgment dated 2nd November 2020 and any consequential orders in the ruling delivered on 15th June 2023 pending appeal and that costs be provided for.

2. In support of the application are the grounds enumerated on the face of it and the affidavit sworn by Charles Mtsonga on even date wherein he deposed that ex-parte judgment in the primary suit Malindi CMCC No. 142 of 2019 was delivered on 2nd November 2020. Thereafter, his counsel one Ms. Kemunto filed an application dated 9th July 2021 to set it aside. Vide a ruling dated 9th March 2022, that application was allowed on conditions inter alia that the Applicant pay thrown away costs within 2 days. The deponent added that since that ruling was to be delivered on notice, the Applicants were neither informed nor served with the same until 17th March 2022 when they immediately paid to the Respondent thrown away costs.

3. He further deposed that the Applicants now intend to file an appeal against the ex-parte judgment as per the draft memorandum of appeal annexed to the application, but they were apprehensive that the Respondent will proceed with execution which will render their appeal nugatory and cause substantial loss to them.

4. In opposition, the Respondent filed a Replying Affidavit on 7th July 2023 wherein he deposed that the firm of Mouko & Company Advocates entered appearance in the primary suit on behalf of the Applicants herein but failed to file any defence thereafter. Subsequently, ex-parte judgment was entered in 4th June 2021 and decree issued on the even date. Thereafter the Applicants successfully moved the lower court for stay orders granted on 9th March 2021. He further stated that the Applicants failed to meet the conditions issued in that ruling and filed their defence on 17th March 2022 some 374 days late. The Respondent added that on 11th October 2022, the Applicants filed another application for stay which was eventually dismissed on 15th June 2023 following the Respondent's notice of preliminary objection. The Respondent contested the allegation that the issue between the parties is a boundary dispute and stated that the Applicants' averments that they will be rendered homeless is misleading. He urged the court to dismiss the application with costs for being res judicata.

5. Parties agreed to canvass the application by way of written submissions.

6. At this point the Applicants appointed the firm of Katsoleh & Company Advocates vide a notice of appointment dated 10th July 2023. They filed their written submissions on 21st July 2023 wherein counsel argued that if stay is not granted and ex-parte judgment is enforced, the Respondent will wrongfully evict the Applicants and alienate the suit property. Counsel relied on the cases of *Absalom Dova v Turbo Transporters* [2013] eKLR and *RWW v EKW* [2019] eKLR.

7. Counsel urged the court to be guided by the principles of natural and substantial justice enshrined under Article 23(3) (d) and 159 (2) (d) of the *Constitution* and Section 3 (2) of the *Judicature Act*.

8. On his part, counsel for the Respondent while relying on the cases of *East African Excavation Co. Ltd v Nutech System & Trading Co. Ltd* [2021] eKLR and Malindi High Court Appeal No. 6 of 2022 *Victor Mecha Mogambi & another v Omar Komora Ali* [2023] (UR) submitted that the power to set aside a regularly entered judgment is discretionary and that failure by the Applicants to attend court could not be cured by Article 159 of the *Constitution* which also guarantees the Respondent's rights under Article 47 (1) (2) (a), 48, 50 (2) (e) and 60 (1) (b) & (c) therein.

9. Counsel added that should the court allow the application, a sum of Kshs. 400,000/- should then be deposited as security for fees already incurred by the Respondent.

Analysis and Determination

10. Having considered the application, affidavits, submissions and authorities presented by the parties herein, I find that the sole issue for determination is whether the application dated 26th June 2023 is merited.

11. I must first point out the elaborate conflict in dates as pleaded by the parties. The Applicants averred that the impugned ex-parte judgment was delivered on 2nd November 2020. This is also the date indicated in the ruling said to be dated 9th March 2021. However, a perusal of a copy of the judgment on record reveals that the ex-parte judgment and decree were delivered on 4th June 2021. Again, the ruling said by the Respondent to be dated 9th March 2021 seems to be the wrong one. I say so because that ruling was in respect of an application dated 9th July 2021 to set aside the judgment of 4th June 2021. It is therefore improbable that the ruling was delivered on 9th March 2021 even before the impugned judgment. Therefore, for purposes of this opinion I will refer to the ruling dated 9th March 2022 as exhibited by the Applicants and the judgment dated 4th June 2021.

12. Further, a perusal of the heading and contents of the annexed draft memorandum of appeal reveals that the Applicants intention is to appeal the ruling delivered on 15th June 2023. The Applicants did

not attach that ruling in the supporting affidavit. However, the same was annexed in the Respondent's replying affidavit.

13. In the said ruling dated 15th June 2023, the Applicants, in an application dated 27th October 2022, had sought orders to set aside the ex-parte judgment therein and to be allowed to file their pleadings in defence of the primary suit. The lower court declined to issue the orders sought. The court observed that since the orders sought were previously granted in the ruling of 9th March 2022 and on condition that the Applicants file their pleadings within 2 days therefrom, and having failed to comply, their application was therefore an abuse of the court process.

14. It is that ruling that prompted the filing of the present appeal and application. The powers of this court to grant an order for stay of execution pending appeal are anchored under Order 42 rule 6 of the *Civil Procedure Rules* which provides: -

> "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.
>
> No order for stay of execution shall be made under subrule (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 burden was on the Applicants to demonstrate that they meet the threshold outlined in Order 42 rule 6 above. Firstly, the Applicants were to demonstrate to this court that they stand to suffer substantial loss if stay is not granted. It is now settled that the cornerstone consideration in the exercise of the court's discretion in such cases is whether the Applicants have demonstrated the likelihood of suffering substantial loss if stay is denied. One of the most enduring decisions on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & Another* [1986] KLR 410 where the principles were enunciated as follows: -

> "2. In considering an application for stay, the Court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.
>
> 3. In applications for stay, the Court should balance two parallel propositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory."

16. The learned Judge continued to observe that: -

> "It is usually a good rule to see if Order XLI Rule 4 of the *Civil Procedure Rules* can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the cornerstone of both jurisdictions for granting stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the Respondents should be kept out of their money."

17. The Applicants' main claim is that unless an order to stay execution pending appeal is granted, the Respondent is likely to execute the judgment of the subordinate court by illegally and wrongfully evicting the Applicants and alienating the suit property thereby rendering the appeal nugatory. Concerning this claim, I am not convinced that the Applicants have demonstrated with particularity how any impending execution would be illegal or lead to substantial loss. It must be remembered that execution is a lawful process and the mere fact that it is carried out is not *ipso facto* evidence of substantial loss. Equally, the right of execution, where it has accrued cannot be stayed, except for a just cause, and with conditions. The Applicants were duty bound to demonstrate how substantial loss would arise. They failed.

18. In any event, it is clear from the lower court's proceedings that the Applicants' conduct has been marred with laxity in defending the suit. It is also evident that there is no pending action warranting stay of execution in the ruling dated 15th June 2023, save for the order of costs, in respect of which, again, substantial loss was not demonstrated.

19. In the given circumstances, I find no merit in the notice of motion dated 26th June 2023, and it is hereby dismissed with costs. The matter shall be mentioned on 21/2/24.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 14TH DAY OF DECEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI