Wekesa v Murunga (Appeal E023 of 2021) [2022] KEELC 2377 (KLR) (29 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2377 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

APPEAL E023 OF 2021

BN OLAO, J

JUNE 29, 2022

BETWEEN

JOSEPH BARASA WEKESA ..... APPELLANT

AND

BRAMWEL MURUNGA ..... RESPONDENT

(Being an application for stay of proceedings and execution of Decree and Judgment in Kimilili Principal Magistrate's Court Elc Case No 17 of 2018 pending hearing and determination of the appeal.)

RULING

[1] What calls for my determination is the Notice of Motion dated August 20, 2022 (this must be a typographical error because the application was filed on January 25, 2022) in which Joseph Barasa Wekesa (the applicant) seeks the following orders: -

(a) Spent

(b) Spent

(c) That there be a stay of proceedings in Kimilili Pmc Case No 17 of 2018 pending the hearing and determination of appeal.

(d) That there be a stay of execution of Decree and Judgment in Kimilili Elc Case No 17 of 2018 pending the hearing and determination of the appeal.

(e) That costs of this application be provided.

[2] The application is premised on the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and Sections 3 and 3A of the *Civil Procedure Act*, the grounds on the face thereof and is also supported by the Applicant's affidavit dated January 20, 2022.

[3] The gravamen of the application is that Bramwel Murunga(the Respondent) has obtained an *ex – parte* Judgment against the applicant in Kimilili Principal Magistrate's Court Elc Case No 17 of 2018 and has now commenced the execution process. A Decree has been extracted requiring the applicant to remove the structures erected on the road of access leading to the respondent's land parcel No Kimilili/ kimilili/4971. An application by the Applicant dated May 15, 2019 seeking orders to set aside the said Judgment and allow the Applicant leave to file a defence was dismissed vide a ruling delivered by Hon G. Adhiambo – Principal Magistrate Kimilili on 25th November 2021 and which is the subject of Bungoma Elc Appeal No E023 OF 2021.

[4] Meanwhile, execution is proceeding and a warrant for his arrest has been issued and if the is committed to civil jail, that act will be null and void and against the *Constitution*. Annexed to the Notice of Motion are the following documents: -

1. Memorandum of Appeal arising out of the ruling of Hon. G. Adhiambodelivered on November 25, 2021in Kimilili Pm's Court Elc Case No 17 of 2018.

2. Warrant of arrest issued onMarch 4, 2021against the applicant.

The application is opposed and therespondent's Counsel Vivian Ratemo has by her affidavit dated February 24, 2022averred, inter alia, that the applicant has been indolent and his appeal does not raise any triable issues. That the warrant of arrest was issued regularly after the applicant failed to appear in court and this application is only meant to delay the course of justice.

(5) It is important at this point to add that much of what is averred in the 37 paragraph replying affidavit by Ms Ratemo is basically a chronology of the history of the suit from the time it was filed in the Subordinate Court on July 19, 2018, the service of summons upon theapplicant who however only filed a Memorandum of Appearance but failed to file a defence resulting in entry of Judgment and decree and, subsequently, the assessment of costs. Only then did theapplicant file an application to set aside the ex – parte Judgment which the he did not prosecute yet it had been filed under Certificate of Urgency. That application was accordingly dismissed with costs which were taxed by consent at Kshs. 25,000/= of which the applicant paid Kshs. 20,000/=. A Notice to show cause was issued but he failed to turn up and a warrant for his arrest was obtained. Theapplicant's application dated 16th July 2021 seeking to reinstate his application to set aside the ex – parte Judgment was also dismissed and is the subject of the pending appeal.

[6] Theapplicant was finally arrested on January 18, 2022 but colluded with the arresting officers who released him. Therefore, there is no reason to grant the orders sought.

[7] When the application was placed before me on January 26, 2022, I directed that it be served and canvassed by way of written submissions.

[8] Those submissions were filed by Mr Kituyi instructed by the firm of A. W. Kituyi & Company Advocates for theapplicant and by Ms Ratemo instructed by the firm of K. Ratemo & Associates Advocatesfor the Respondents.

[9] I have considered the application, the rival affidavits together with the annextures thereto as well as the submissions by Counsel.

[10] Although that issue was not raised by Counsel for the Applicant, I must first consider whether it was proper for Ms Vivian Ratemto swear the replying affidavit instead of her client the respondent herein and whether that renders the said replying affidavit defective. Whereas there is nothing in Order 19 Rule 3 and 9 of the *Advocates Practice Rules* which bars an advocate from swearing an affidavit in a

matter in which he or she is acting for any of the parties, as a general rule, an Advocate should avoid deponing on contentious issues. However, there is nothing wrong in an advocate swearing an affidavit on purely legal issues or formal and un – controverted matters. In the case of *Magnolia Put Ltd v Synermed Pharmaceiticlas (k) Ltd* 2018 eKLR, the court addressed this issue as follows: -

> " Whereas there is nothing barring an advocate from swearing an affidavit in appropriate cases, where the matters deposed to are agreed or on purely legal positions, advocates should refrain from the temptation of being the avenue through which disputed facts are proclaimed. The rationale for the said principle is to insulate the advocate, an Officer of the court, from the vagaries of litigation which, on occasions, may be very unpleasant. By swearing an affidavit on such issues, an advocate subjects himself to the process of cross – examination thus removing him from his role of legal Counsel to that of a witness a scenario which should be avoided like plague. In my view, however innocent an averment may be, Counsel should desist from the temptation to be the pipe stem through which such an averment is transmitted."

I agree with that general principle. There may be a situation where a party is not readily available and what is required in answer to an application could be purely legal issues or formal and un – contested matters. To bar an Advocate from swearing an affidavit in such a scenario may only impede, rather than advance, the cause of justice. That would also, in my view offend the right to a fair hearing and militate against the duty to dispense justice without undue technicalities as enshrined in articles 50 and 159(2) (d) respectively of the *Constitution*.

(11) I have looked at the replying affidavit sworn by Ms Vivian Ratemo on February 24, 2022. It is essentially a chronology of the events that occurred in Kimilili Principal Magistrate's Court Elc Case No 17 of 2018 from the time the suit was filed by the Respondent upto the time a warrant of arrest was issued against the applicant. Those events are confirmed by the annextures filed herein and, to a large extent, by theapplicant's own supporting affidavit. In the circumstances, the replying affidavit by Ms Vivian Ratemo is properly on record.

(12) The Applicant's Notice of Motion is anchored on Order 42 Rule 6 of the *Civil Procedure Rules* and sections 3 and 3A of the *Civil Procedure Act*. He seeks the following orders: -

1. Stay of proceedings in Kimilili Principal Magistrate's Court ELCCaseNo 17 of 2018 pending the hearing and determination of the appeal.

2. Stay of execution of the Decree and Judgment in Kimililiu Principal Magistrate's Court ELC Case No 17 of 2018 pending the hearing and determination of the appeal.

   Order 42 Rule 6 (1) (2) of the *Civil Procedure Rules* provides that: -

   > " 6(1): "No appeal or second appeal shall operate as a stay of execution or proceeding 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."
   >
   > 6(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,

(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." Emphasis added.

[13] It is clear from the above that a party seeking the grant of an order of stay of execution pending appeal must satisfy the following conditions: -

1: Show sufficient cause.

2: Demonstrate that he will suffer substantial loss unless the orders for stay of execution is granted.

3: Approach the Court without unreasonable delay.

4: Offer security.

[14] The importance of establishing substantial loss was re – emphasized by Platt Ag J.A (as he then was) in the case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410 where he said: -

> "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 it's 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." Emphasis added.

[15] Whether or not to grant a stay of execution pending appeal is a matter of judicial discretion which, as is often said, must be exercised on sound basis rationally but not whimsically or capriciously. In so doing, the Court must bear in mind the need to balance between the two competing interests of a party who has a Judgment in his favour and another party who is desirous of exercising his right of appeal. The onus however is on the party seeking such a remedy to meet the threshold set out in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*. As this Court is considering an application for stay of execution of a decree arising from the decision of a Subordinate Court pending an appeal to this Court, I must bear in mind that the purpose of granting such an order is to preserve the subject matter in dispute so that the appeal, if successful, is not rendered nugatory.

[16] Guided by the above precedents and the relevant law, the starting point, in my view, must be whether infact there is any appeal filed against the decree and Judgment in Kimilili Principal Magistrate's Court Elc Case No 17 of 2018 whose execution this Court should stay pending the hearing and determination of the said appeal. A casual look at the Memorandum of Appeal annexed to the Notice of Motion shows that the appeal is not against the Decree and Judgment of the Subordinate Court. Rather, it is against the ruling delivered by that Court on November 25, 2021dismissing the Applicant's application to set aside the ex – parte Judgment. This is how the Memorandum of Appeal reads: -

> "Memorandum Of Appeal
>
> This is an appeal from the Ruling delivered by Principal Magistrate's Court In KimililionNovember 25, 2021 by Honourable G. Adhiambo PM vide Kimilili PM'S E & L Case No 17 of 2018 dismissing Applicant's application."

[17] The Ruling delivered by Hon. G. Adhiamboon November 25, 2021and which is the subject of the appeal only dismissed the Applicant's Notice of Motion dated July 16, 2021 which sought two main orders, i.e.: -

1. That the warrant of arrest issued against the applicant be lifted.

2. That thecourt do reinstate the applicant's Notice of Motion datedMay 15, 2019 which sought the setting aside of the ex – parte Judgment.

The bottom line, therefore, is that there is no appeal pending or intended arising out of the Decree and Judgment in Kimilili Principal Magistrate's Court Elc Case No 17 of 2018 upon which any orders of stay of proceedings or execution can be anchored. And in the absence of such an appeal or intended appeal, this application has no foundation and must collapse.

[18] It follows therefore that the only appeal pending before me is the one against the ruling delivered onNovember 25, 2021in Kimilili Principal Magistrate's Court ELC Case No 17 of 2018. As I have already stated above, in that ruling, the trial Magistrate declined to lift the warrant of arrest issued against the Applicant for failure to attend court and also dismissed the applicant's Notice of Motion seeking to reinstate an application to set aside the ex parte Judgment entered against him. The applicant was required to demonstrate that he will suffer substantial loss if the orders sought are not granted. From the copy of Decree annexed to the respondent's Counsel's replying affidavit, the substantive order issued against the Applicant, other than for the costs, was an order of mandatory injunction compelling him to remove the structures which he has erected on the access road leading to the Respondent's parcel of land being Kimilili/kimilili/4971 within 21 days of service of the Decree upon him. It is not clear how the execution of that Decree will cause the applicant substantial loss. It is not surprising therefore that nowhere in his Notice of Motion or supporting affidavit has the Applicant referred to any substantial loss which he may suffer if those structures are removed. Indeed, there is no mention of any loss substantial or otherwise.

[19] The Applicant has however dwelt largely on his impending arrest and his main case is that if he is arrested, that will amount to circumventing justice and also deny him his freedom. This is how he has deponed in paragraphs 5, 6, and 7 of his supporting affidavit: -

> " 5: "That pending the determination of the appeal, the respondent herein has obtained warrants of arrest to have me committed to civil jail. A copy of warrants is annexed hereto marked 'JBWB'."
>
> 6: "That therefore the said warrant of arrest is to circumvent justice and render the appeal nugatory."
>
> 7: "That the warrant of arrest issued to commit me to civil jail is illegal, null and void as the same is to deny me freedom and liberty which is against the *Constitution* of Kenya."

[20] To begin with, the committal of a party to civil jail is neither illegal, null and void or un – constitutional as alleged by the applicant. Section 38(d) of the *Civil Procedure Act* provides that among the ways in which a Decree may be executed is: -

> " by arrest and detention in prison of any person."
>
> It is also clear from the provision of Order 22 Rule 34(1) and 35 of the *Civil Procedure Rules* that where a Judgment debtor appears before the court in obedience to a Notice to Show Cause or upon arrest, he is given an opportunity to explain why he should not be committed to civil jail. And even then, such committal is usually a last resort when the court is satisfied

that the debtor is in a position to pay the debt but has refused to do so or has absconded or is intent on obstructing or delaying the execution of the decree. Therefore, the arrest of the applicant is not an end in itself. He will have an opportunity to demonstrate to the trial Magistrate why he should not be committed to civil jail. I therefore do not see how his arrest can be said to be illegal or unconstitutional or amount to substantial loss.

[21] The applicant was also required to approach the court without unreasonable delay. The orders sought to be stayed were issued on November 25, 2021 and this application was filed on January 22, 2022. Taking into account the fact that time does not run between 21st December and 13th January of the following year, I am persuaded, albeit reluctantly, to make a finding that there was no unreasonable delay in the circumstances of this case. The Applicant has therefore surmounted the hurdle of moving the court without unreasonable delay.

[22] The applicant was also required to offer security for the due performance of any decree or order that may ultimately be binding upon him. A perusal of the warrant of arrest issued against him shows that he is required to pay the respondent a decretal sum of Kshs. 281, 175/= being costs. Since there is no appeal against the main decree that ordered him to remove the structures erected on the road of access leading to the respondent's land, this court is entitled to assume that the applicant has complied with that part of the decree. As a sign of demonstrating that the application for stay of proceedings and execution is made in good faith and in the interest of justice but not simply to scuttle and delay the cause of justice, the Applicant should at least have offered to deposit in court part of the decretal sum. Alternatively, he should have given an undertaking to abide by any terms that this court imposes as a condition for granting the orders sought. The applicant has not done any of the above. He is mainly concerned about staying the execution of the warrant of arrest which, as is now clear, is a lawful process and cannot be described as illegal, null and void or un – constitutional as he would like this court to believe. The applicant has therefore also failed to meet the requirement as to security.

[23] Finally, the order sought by the applicant is a discretionary one to be granted only in deserving cases. Being an equitable remedy, the applicant must also approach the court with clean hands. It has been averred, without rebuttal, that not only has the applicant failed to attend court following the issuance of a Notice to Show Cause but further, that having been earlier arrested on January 18, 2022, he colluded with the police who released him instead of presenting him to court. That is not the conduct of a person who expects this court to exercise it's discretion in his favour. It is the conduct of a party who has no respect for the Judicial process. He cannot therefore run back to the same process for protection when he is not prepared to obey and comply with court orders.

[24] Ultimately, having considered all the evidence herein, I make the following disposal orders: -

1. The Notice of Motion dated January 20, 2022 is devoid of merit and is dismissed with costs.
2. For avoidance of doubt, the interim orders of stay issued on January 26, 2022 are vacated.
3. The Applicant shall present himself before the trial Magistrate at Kimilili Court on July 6, 2022 at 9 am in compliance with the warrant of arrest.

BOAZ N. OLAO.

J U D G E

29TH JUNE 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA BY WAY OF ELECTRONIC MAIL ON THIS 29TH DAY OF JUNE 2022.

BOAZ N. OLAO.

J U D G E

29TH JUNE 2022.