Mwangi v Kanyuru & 4 others (Environment & Land Case 167 of 2017) [2022] KEELC 2960 (KLR) (23 June 2022) (Ruling)

Neutral citation: [2022] KEELC 2960 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT & LAND CASE 167 OF 2017

LN GACHERU, J

JUNE 23, 2022

BETWEEN

GRACE RUGURU MWANGI ..... APPLICANT

AND

FRANCIS MWANGI KANYURU ..... 1ST RESPONDENT

JOSEPH MWANGI MAINA ..... 2ND RESPONDENT

SIPHIRA WAMBUI NDAIRE ..... 3RD RESPONDENT

MARY WANGARI MAINA ..... 4TH RESPONDENT

CHIEF LAND REGISTRAR MURANG'A ..... 5TH RESPONDENT

RULING

1 The applicant has moved this court by notice of motion, application, dated December 21, 2021, and filed on the December 22, 2021, for orders that; -

1. Spent
2. Spent
3. That upon hearing this application inter parties, this honorable court be pleased to grant temporary stay of execution against the ruling delivered by this honourable court on the December 16, 2021, pending the hearing and determination of the appeal preferred thereon.
4. That costs of this application be provided for.

2 The application is premised on the grounds stated on the face of it and the supporting affidavit of the applicant sworn on the December 21, 2021, together with the annexures thereof. The applicant is seeking to stay the orders of this court of December 16, 2021. The genesis of the demised ruling is the

applicant's application of October 27, 2021, which the applicant herein sought extension of time to enforce the orders of the court of July 29, 2021, wherein the court directed the applicant to within 90 days of the orders demonstrate that the instant suit was not *sub judice*. The application was declined and the applicant preferred an appeal *vide* a notice of appeal dated December 17, 2021.

3 It is the applicant's case that the execution of the said ruling will cause her to be displaced from her abode. She deponds that she has an arguable appeal and also that there is no prejudice that the respondent will suffer.

4 The notice of motion is contested through the replying affidavit of the 1st respondent sworn on the January 14, 2022. It is the respondents' disposition that there is no order capable of being stayed and the same will amount to suspending the ruling of the court. They deemed the application as an injunction and urged this court to dismiss the said application for want of compliance with order 42 rule 6 of the *Civil Procedure Rules*.

5 On January 19, 2022, the court directed that the application be dispensed with by way of written submissions. The matter came up for compliance severally and on all occasions, the applicant had not filed her submissions. On May 12, 2022, the court granted the applicant 7 days to file her submissions and as of June 20, 2022, as the court drafted this ruling, the applicant had not filed her submissions.

6 The 1st- 4th defendants/respondents filed their submissions on the January 31, 2022, wherein they raised two issues for determination by this court. The respondents submitted that the orders sought to be stayed are negative orders and this court cannot stay such orders. That as a result of the dismissal, and there being no counter-claim filed, granting the instant orders will amount to an injunction. Further, that this being a negative order, there is no decree capable of being executed and as such there is no substantial loss that the applicant will suffer. The respondents invited this court to the ruling of the court in ELCA 20 of 2017;- *Grace Ruguru Mwangi v Mary Wangari & 2 others*, where the court in considering the meaning of negative order quoted with approval the case of *Western College of Arts and Applied Science v Oruga and others* [1976], where the trial court found that the court having dismissed the suit, execution can only issue on costs and thus there is nothing arising for granting stay.

7 The applicant filed the instant suit in 2015 *vide* Nyeri ELC No 239 of 2015. Contemporaneously the plaintiff/applicant sought injunctive orders therein. The court in its ruling of February 25, 2015, dismissed the application for offending the provisions of section 6 of the *Civil Procedure Act*, and the court went ahead to stay the suit pending the determination of suits previously filed over the suit property. The respondents moved the court by an application dated February 15, 2021, seeking dismissal of suit for want of prosecution. The court in its ruling of July 29, 2021, dismissed the application, but gave the plaintiff 90 days to demonstrate that the suit was no longer subjudice. The plaintiff then filed an application dated October 27, 2021, seeking to extend time for compliance granted by court which application was dismissed. The applicant now seeks stay of the ruling of December 16, 2021, pending the hearing of the preferred appeal, the effect of the said ruling meant that the 90 days period expired.

8 Having highlighted the foregoing and considering the written submissions and authorities cited by parties, the issues for determination by this court are

i. Whether the application meets the threshold for grant of stay

ii. Who should pay costs for the application?

i. Whether the application meets the threshold for grant of stay

9 The law on stay of execution pending appeal is laid down in order 42 rule 6 of the *Civil Procedure Rules*. It is trite that no appeal can operate as stay and hence an application for stay shall be made to court by the desiring parties. The principles for grating of stay are well laid down in order 42 rule 6(ii) which provides:

ii. 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

10 The Supreme Court in application No 5 of 2014;-*Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR when determining an issue of stay held:

> "Before a court grants an order for stay of execution, the appellant, or intending appellant, must satisfy the court that:
>
> (i) the appeal or intended appeal is arguable and not frivolous; and that
>
> (ii) Unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory.
>
> (88) These principles continue to hold sway not only at the lower courts, but in this court as well. However, in the context of the Constitution of Kenya, 2010, a third condition may be added, namely:
>
> (iii) That it is in the public interest that the order of stay be granted
> Basing our minds on the foregoing, the applicant must demonstrate that:
>
> i. The application has been made without unreasonable delay
>
> ii. She will suffer substantial loss
>
> iii. The appeal is not frivolous
>
> iv. The appeal will be rendered nugatory

11 The impugned ruling was delivered on the December 16, 2021, while the instant application was filed on the December 21, 2021. Notably the applicant filed a notice of appeal on December 17, 2021. Once a court issues orders, there is always an existing uncertainty as to what time execution can issue as a result therefore an aggrieved party is required to take immediate action to avoid execution by staying the orders of court.

12 Borrowing from Nairobi civil case No 32 of 2010, *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR, the court in considering what amounted to inordinate delay had this to say "whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable"

13 This court associates itself fully with holding. The applicant filed the application five days after the ruling. while delay even for a day can be delay, this court does not find that the applicant is guilty of any unreasonable delay.

14 On the second limb of substantial loss, the applicant averred that she has made extensive investments on the suit property which she contended that the suit land houses her extended family. Plat GA J as he then was in *Kenya Shell Limited V Benjamin Karuga Kibiru & another* [1986] eKLR held "Substantial loss in its various forms is the corner stone of both jurisdictions for granting a 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"

15 Substantial loss was defined by the court in *Tropical Commodities Suppliers Ltd and others v International Credit Bank Limited (in liquidation)* (2004) EA LR 331 to mean;

> Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value or a loss that is merely nominal..."

16 To establish the loss, this court has to interrogate the evidence presented by the applicant. Save for deponding that she lives on the suit property with her extended family and has made humongous investment, the applicant did not file in this court any evidence to buttress her claim. It is not therefore enough to suggest that the applicant will suffer loss as the court has to be furnished with evidence as to the loss that will be suffered and the injury that will be occasioned to the applicant. The court in *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR held:

> It is not enough to merely put forward allegations or assertion of substantial loss, there must be empirical or documentary evidence to support such contention. It means that the court will not consider mere assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and appropriate evidence of substantial loss".

17 It cannot be gainsaid that the applicant presented no evidence in support of her claim for substantial loss. If at all there are any developments or buildings erected on the suit property, photographic evidence would have been at least one of the mechanisms of leading evidence. This court does not see what it ought to prevent, the mere assertion of substantial loss without substantiating cannot be the reason this court will infer substantial loss. If the subject matter of the suit was at risk, the court would have been otherwise persuaded. To this end, the court finds and holds that the applicant has not demonstrated the substantial loss that she will suffer.

18 On whether the appeal will be rendered nugatory, this court appreciates that preserving the subject matter of the intended appeal is important. The onus is on the applicant to demonstrate that the appeal will be rendered nugatory. The Court of Appeal in the case of *Shah Munge & Partners Ltd v National Social Security Fund Board of Trustees & 3 others* [2018] eKLR, when considering whether to allow an application for injunction and stay pending appeal looked at the definition of "nugatory" as was defined in Reliance *Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232 and the court opined that nugatory has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling, essentially one which is of little or no legal consequence.

19 Instantly, there is no evidence as to who is currently occupying the land to determine whose right will likely suffer. The applicant is by law mandated to demonstrate how the success of the appeal will have no significance, since the substratum of the appeal will be interfered with or lost. There is no evidence as

to an attempted execution by the respondents herein if any, there is no order capable of being executed. In *James Wangalwa & Another v Agnes Naliaka Cheseto*{2012},the court found that substantial loss is what has to be prevented by preserving the status quo because such loss would render an appeal nugatory. This court is not alive to the current status of the land or the rights of the applicant that will be likely taken away. That being the case, the applicant has failed to demonstrate how the appeal will be rendered nugatory should it succeed.

20 Apart from filing the notice of appeal, the applicant has not presented before this court any memorandum of appeal to show that there is a live appeal. This court is alive to the provisions of the Court of Appeal practice directions and specifically rule 82 of the said rules which require that an appeal is instituted by filing of memorandum of appeal and record of appeal. Additionally, rule 83 provides that a party who does not file an appeal within the stipulated time after filing notice of appeal is deemed to have withdrawn the notice of appeal. That being the law and practice within the apex court, this court is not well guided whether there is an appeal that is actively before the said court, given the fact that the notice of appeal was filed on December 17, 2021, six months ago.

21 To determine whether a matter is frivolous or not, this court will align itself with the findings of in *Madison Insurance Company Limited v Augustine Kamanda Gitau* [2020] eKLR, where the court though faced with different facts considered what amounts to frivolous as;-

> A matter is frivolous if (i) it has no substance; or (ii) it is fanciful; or (iii) where a party is trifling with the court; or (iv) when to put up a defence would be wasting court's time; or (v) when it is not capable of reasoned argument"

22 Applying the foregoing principles in the present case, this court cannot determine whether the appeal is frivolous or not for the reason that there is no memorandum of appeal capable of yielding any evidence.

23 On security for costs, the purpose of it is to ensure due performance of the decree. The applicant averred that she is ready to deposit such security as may be advised by court. Having failed to satisfy the foregoing conditions, a grant for security of costs will be of no legal effect and this court shall not grant. Justice Kuloba R as he then was in *Machira T/A Machira & Co Advocates v East African Standard (No 2)* [2002] KLR 63 when dismissing an application for stay had this to say;

> This means that in whatever we do in the civil courts, we must, so far as is practicable, ensure that the parties fight it out on level ground on equal footing, attempt to minimize and save costs, ensure expeditious and fair disposal of the case in hand, allotting to every case an appropriate share of judicial resources as account is taken of the need to allot those resources to other cases, and the way a case is dealt with must be proportionate to (a) the amount of money involved, (b) the importance of the case, (c) the complexity of the issues, and (d) the financial position of the respective parties. In the exercise of any power under any rule, or in its interpretation, we must strive to give effect to this overriding objective; and it is the duty of the parties to help the court in the furtherance of the overriding objective to yield justice and fairness".

24 The court could not agree anymore with the learned judge, the applicant's conduct towards the process of doing justice is against the spirit of overriding objectives on the just and expeditious disposal of matters. To this end, the applicant has not met the requisite principles for grant of orders for stay as such, the application is unmerited.

25 On who should pay costs, section 27 of the *Civil Procedure Act* gives this court the discretion to award costs. Also costs follow the events. While that is the case, the court will be guided by *inter-alia* the conduct of the parties towards the suit and the subject matter of the suit (See Nyeri Civ No 17 of 2014

Cecilia Karuru Ngayu v Barclays Bank of Kenya & another, the application is dismissed with costs to the respondents.

26 Even so, this court is alive to the legal effects of the orders of July 29, 2021. The said orders crystalized on the October 30, 2021, and there being no time extended, the suit was technically dismissed. Staying the impugned ruling will have no legal effect since the orders of the court of July 29, 2021 crystalized. A dismissal is a negative order that cannot be stayed. This court is well guided by the Court of Appeal decision in Nairobi civil application No 55 of 2015;- *George Ole Sangui & 12 others v Kedong Ranch Limited* [2015] eKLR, where it was held;-

> the dismissal order cannot be enforced and is not capable of execution. It is not a positive order requiring any party to do or to refrain from doing anything. It does not confer any relief. It simply determined the suit by making a finding that the claimant was not entitled to the reliefs or orders sought and dismissed the suit against the respondent. That was not a positive order that required any party to do or refrain from doing anything. It was not capable of execution or enforcement. The act of dismissal of the suit could not be stayed. It is our finding that to the extent to which the application seeks stays of the order of the dismissal of the suit it cannot be granted"

27 The upshot of the foregoing is that the applicant's application dated December 21, 2021, is found to lack merit and the said application is dismissed entirely with costs to the 1st – 4th defendants/ respondents.

28 It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 23RD DAY OF JUNE,2022.

L.GACHERU

JUDGE

Delivered online in the presence of;

Joel Njonjo - Court Assistant

Plaintiff/Applicant – Absent

M/s Murira H/B for Mbuthia for the 1st – 4th Defendants/Respondents

5th Defendant/Respondent – Absent

L.GACHERU

JUDGE