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Kenya Airways Limited v Shutu (Environment & Land Case 10 of 2008) [2022] KEELC 3142 (KLR) (8 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3142 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MALINDI

ENVIRONMENT & LAND CASE 10 OF 2008

MAO ODENY, J

JUNE 8, 2022

BETWEEN

KENYA AIRWAYS LIMITED .... PLAINTIFF

AND

JAPHET NOTI CHARO SHUTU .... DEFENDANT

RULING

1. This ruling is in respect of a notice of motiondated October 26, 2021by the defendant/applicant seeking the following orders: -
    1. Spent.
    2. That the firm of Richard O & Company Advocates be allowed to file their Notice of change of advocates in place of the firm Tonia Mwania & Co Advocates to act for thedefendant/applicant herein.
    3. That the status quo obtained prior to judgment be maintained pending the hearing and determination of the application dated the October 27, 2020.
    4. That the application dated the October 27, 2020be listed down for hearing on priority basis.
    5. That costs to this application be provided for.
2. Counsel agreed to canvas the application vide written submissions which were duly filed. The applicant relied on the grounds on the face of the application and the supporting affidavit sworn by the defendant on October 26, 2021where he deponed that following judgment and decree issued by this court on March 14, 2019, the firm of Richard O & Co Advocates filed an application dated 2October 7, 2020on behalf of the defendant. but before they could prosecute the same, the defendant opted to engage the firm of Tonia Mwania & Co Advocates to act on his behalf in the subsequent appeal Civil Appeal No 32 of 2021. That the latter firm, erroneously filed a notice of change of advocates in this suit together

with an application for stay and that due to that confusion, the application dated October 27, 2020is yet to be heard and determined.

3. He further deponed that a warrant to give vacant possession has been issued to the officer in charge Malindi Police Station and that the property in dispute is at the risk of demolition and urged the court to grant an order of status quo to be maintained pending the hearing and determination of the appeal.

4. It should be noted that the application dated October 27, 2020 was withdrawn on May 7, 2021 by the firm of Richard O & Co Advocates and filed another application dated May 7, 2021 seeking orders inter alia, stay of execution of the decree herein pending the hearing and determination of the Civil Appeal Case No 32 of 2020- Japhet Noti Charo v Kenya Airways Authority.

5. In response to the application theplaintiff filed a replying affidavitsworn on August 31, 2021 by Laura Wandera, the plaintiff's legal officer whereby she deponed that there was no valid appeal against the plaintiff/decree holder to sustain the application for stay since the plaintiff was referred in the appeal as an Authority as opposed to a company.

6. It was her averment that the defendant did not meet the conditions for grant of stay as the application was filed more than 2 years after the judgment was delivered amounting to inordinate and unjustifiable delay. Further that the defendant has not provided or undertaken to provide any security for the due performance of the decree including the certificate of costs taxed at Kshs 2,994, 277/-; and that any loss that the defendant will allegedly suffer will be due to his own illegal action of constructing a house despite there being a temporary injunction issued by this court on March 7, 2008 and confirmed on October 23, 2009.

Defendant's Submissions

7. The defendant largely reiterated the contents of his affidavit and submitted that his appeal has overwhelming chances of success and therefore, this court should stay allow proceedings pending the hearing and determination of the appeal and that article 159 of the *Constitution* cures the typographical error highlighted by the plaintiff in respect of the Plaintiff's name.

Plaintiff's Submissions

8. Counsel for the plaintiff identified 3 issues for determination and submitted that rule 9 of the *Oaths and Statutory Declaration Rules* requires that all exhibits to affidavits be sealed under the seal of the Commissioner for Oaths and marked with serial letters for identification. That the exhibits in the defendant's affidavit were only stamped but not serialized as required.

9. Counsel urged the court to expunge the documents from the court record together with the affidavit and relied on the cases of *Kenya National Union of Nurses v Kiambu County Public Service & 5 others* [2019] eKLR; *Chris Munga N. Bichage & 2 others v IEBC & 2 others* [2017] eKLR.

10. On whether the defendanthas met the threshold for the grant of an order for stay, counsel relied on order 42 rule 6 of the *Civil Procedure Rules* which requires a defendant to establish sufficient cause or an arguable appeal; that he shall suffer substantial loss if the stay is not granted; that the application was made without unreasonable delay; and finally the provision of security for the due performance of the decree.

11. Counsel relied on the case of *John Mbaabu & another v Kenya Revenue Authority* [2020] eKLR and further submitted that although the defendant claims that he resides at the suit property where he has erected his dwelling house, it is important to note that way back on March 7, 2008, the court issued an order of injunction restraining him from continuing with any construction of the suit property which

order was confirmed on October 23, 2009 by H Omondi J (as she then was). The development was in contravention of the court order hence the defendant cannot seek for the protection of the court.

12. Counsel therefore urged the court to dismiss the application with costs as the defendant has not met the threshold for grant of an order of stay of execution and further that the defendant has had more than two years to vacate the suit premises outside the 45 days ordered in the Judgment of March 14, 2019.

Analysis and Determination

13. This is a very old matter which was filed in 2008 and a judgment delivered in 2019. I notice that the firm of Richard O & Company Advocates has all along represented thedefendant in this suit. They filed the application dated October 27, 2020, later field another one dated May 7, 2021and the present one dated October 26, 2021.

14. Interestingly, between May 7, 2021and October 26, 2021the defendant appointed another firm, Tonia Mwania & Associate Advocates, who filed a notice of change of advocates onMay 20, 2021. According to thedefendant, this was a mistake since the latter firm was to take over the appeal case.

15. The issue for determination is whether the defendant has satisfied the conditions for grant of stay of execution as provided for under order 42 rule 6 of the *Civil Procedure Rules*. The court has the discretion to grant or refuse to grant the orders of stay but such discretion must be judicious in nature as was held in the case of *Kenya Power & Lightining Company Ltd v Esther Wanjiru Wokabi* [2014] eKLR : -

> " Order 42rule 6(2) lays down the conditions which an applicant must satisfy in order to deserve the orders of stay of execution pending appeal. However, the court stated that it noted that the conditions set out in order 42 rule 6 (2) only serve as guidelines which the court can use as beacons in exercising its unfettered discretion in deciding whether or not to grant stay of execution pending appeal depending on the circumstances of each case."

16. The applicant must satisfy the conditions set out under order 42 rule 6 of the C*ivil Procedure Rules* namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

17. In the case of *Carter & Sons Ltd v Deposit Protection Fund Board & 2 others* Civil Appeal No 291 of 1997 at Page 4 the Court of Appeal held that: -

> " the mere fact that there are strong grounds of appeal would not, in itself, justify an order for stay, the applicant must establish a sufficient cause secondly the court must be satisfied that the substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security and the application must, of course, be made without unreasonable delay."

18. The applicant states that he will suffer substantial loss of Kshs 150million if his dwelling is demolished. As earlier stated, it is on record that this court gave an order stopping any construction of structures in 2008 but the Applicant in contravention of the order continued with the construction which he now wants the court to offer protection. The court cannot sanitize what was done in contravention of a court orders. The applicant has also not established the substantial loss that he will suffer apart from stating that he will lose Kshs 150 Million which has not been supported by any valuation of proof.

19. In the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, the court held that:

> "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 6of 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."

20. The applicant has deponed that the respondent has already put the execution process in motion that the warrant of execution has been served on the OCS Malindi Police Station. This alone is not sufficient proof of substantial loss which can tilt in favour of the applicant. The applicant must go a step further to show that if the orders sought are not granted it will render the appeal nugatory. This has not been done by the applicant.

21. The court must also balance the interest of the applicant who is seeking to preserve the status quo pending the hearing of the appeal so that his appeal is not rendered nugatory and the interest of the respondent who is seeking to enjoy the fruits of his judgment as was held in the case of *Samvir Trustee Limited v Guardian Bank Limited* Nairobi (Milimani) HCCC 795 of 1997 explained: -

> "For the applicant to obtain a stay of execution, it must satisfy the court that substantial loss would result if no stay is granted. It is not enough to merely put forward mere assertions of substantial loss, there must be empirical or documentary evidence to support such contention. It means the court will not consider assertions of substantial loss on the face value but the court in exercising its discretion would be guided by adequate and proper evidence of substantial loss..."

22. The other issue of concern is the delay in filing this application. This application was filed 2 years after the judgment complained about and no reasons have been advanced to explain the delay in filing the application.

23. The judgement in this case was delivered on March 14, 2019and the defendant filed a notice of appeal on the same date but did not make any application for stay of execution until first on October 27, 2020, approximately 19 months later. The defendant did not even endeavor to have that application prosecuted timeously.

24. In the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR the court held that : -

> "Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir Eldoret E&L 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land".

25. In this case the applicant was granted 45 days to vacate the suit land but upto now he has not vacated and filed this application 2 years after the date of judgment and long after the lapse of the 45 days sanctioned by the court. I find that there was inordinate delay which is inexcusable. This application is therefore dismissed with costs to the plaintiff.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 8TH DAY OF JUNE, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.