District Physical Planning Officer & 4 others v Langat (Constitutional Petition 1 of 2013) [2022] KEELC 3263 (KLR) (28 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3263 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CONSTITUTIONAL PETITION 1 OF 2013

MC OUNDO, J

JULY 28, 2022

BETWEEN

DISTRICT PHYSICAL PLANNING OFFICER ..... 1ST APPLICANT

DISTRICT SURVEYOR, KERICHO COUNTY ..... 2ND APPLICANT

DISTRICT LANDS OFFICER, KERICHO COUNTY ..... 3RD APPLICANT

DIRECTOR OF PHYSICAL PLANNING ..... 4TH APPLICANT

DIRECTOR OF SURVEY ..... 5TH APPLICANT

AND

DAVE KIPKORIR LANGAT ..... RESPONDENT

RULING

1. Upon delivery of a ruling on 2nd December 2021 where the court had found that the actions of the Applicantss herein ran afoul of the terms of the Court orders issued in its judgment of the 5th May 2015 and therefore they were in contempt of the said court orders, the Hon Attorney General on behalf of the said Applicantss has now filed this Application by way of Notice of Motion dated 20th January 2022 pursuant to the provisions of Section 1A, 1B, 3, and 3A of the *Civil Procedure Act*, Order42 Rule 6 (1) of the *Civil Procedure Rules*, Article 50 and 159 of the *Constitution* and all enabling provisions of the law seeking that the court defers temporarily the sentencing of the contemnors, pending the hearing and determination of an Application filed in the Court of Appeal.

2. The Application was based on the grounds therein as well as on the supporting affidavit of one Callen Masaka the Principle State Counsel dated the 20th January 2022.

3. The said Application was opposed by the Replying Affidavit of one David Kipkorir Langat on behalf of the Petitioner, dated the 9th March 2022.

4. The Application was disposed of by way of written submissions, wherein the Applicantss herein submitted that being dissatisfied with the finding of the court that they were in contempt of the court orders, they had filed an Appeal, as of right, to the Court of Appeal and if the orders they sought were not granted, their intended appeal would be rendered nugatory because the Applicantss would then be sentenced.

5. That the non-compliance of the court's orders was not deliberate but was due to difficult circumstances envisioned in the compliance. That the Applicantss' liberty and fundamental freedom was at stake and so was their reputation as civil servants hence in the interest of justice, they sought for the orders as prayed to be granted.

6. That based on the decided case in *Mbeki & Others v Macharia & Another* [2005] EA 206, the court had held that it would offend all notions of justice were the rights of a party prejudiced or affected without the party being afforded an opportunity to be heard. The Applicants had a right to be heard by the Court of Appeal and were therefore seeking for deferment of their sentencing until the said right was exhausted.

7. That the ruling being contested affected their personal liberty and integrity, and therefor if the orders sought were not granted, the prejudice that would be caused on them could not be compensated by way of any award of damages. That the Respondent would not suffer any prejudice as what he sought was his land and in any event he could be compensated by way of damages or given an alternative land.

8. That the non-compliance of the court order was due to the fact that the implementation of the amendment to the PDP (Part development Plan) would have affected not just the Decree holder but the entire area covered under the PDP. That it was a statutory process that involved various statutory and constitutional officers. That the contemnors were just but at the end of the process and therefore could not initiate the implementation orders on their own.

9. That the intended appeal was arguable and the Applicants ought to be granted an opportunity to have their day in the Court of Appeal. Reliance was placed on the holding in *Parliamentary Service Commission v Okoiti & Another* (Civil Application E349 of 2021) [2021] KECA 120 (KLR) (22 October 2021)(Ruling) That the Applicants having demonstrated that they had an arguable appeal which would be rendered nugatory were the orders not granted, that this Application be allowed in the interest of justice.

Respondent's submissions.

10. The Respondent's submissions was based on the Replying Affidavit sworn on 9th March 2022, by David Kipkorir Langat to the effect that there was no valid Notice of appeal in place before the Court of Appeal and therefore this court had no jurisdiction to consider the instant Application. Reference was made to the decided case in *Owners of Motor Vessel 'Lillian' v Caltex Oil Kenya Limited* [1989] pg 1-49.

11. That the Application was groundless and had been improperly premised to suggest that there was an appeal pending before the Court of Appeal. That the Applicants failed to exercise condor and full disclosure of material facts to necessitate the court to grant them stay orders. That since there was no existing appeal on record, their Application before the court was founded on nothing and was therefore without merit.

12. That the impugned ruling was delivered on 2nd December 2021, the Applicants preferred a Notice of Appeal on 24th December 2021, way after the 14 days as required under Rule 75(1) and (2) of the *Court of Appeal Rules*. The Applicants further filed an Application to be allowed to file an appeal out of time

which Application has not been prosecuted. The Notice of Appeal has not been regularized to date and is irregular for all purposes and even goes to the jurisdiction of the court to entertain this Application.

13. That the provisions of Order 42 Rule 4 of the *Civil Procedure Rules* are explicit. There is no valid Notice of Appeal in place in this case and therefore the court cannot even delve further to consider the application on merit. The Application is therefore ripe for striking out in limine.

14. That the grant of stay orders must be firmly grounded on the basis that if the court does not allow such Application, the appeal shall be rendered nugatory. That there was no existing appeal in the present instance as the Notice of Appeal filed on the 24th December 2021 was irregular and certainly defective and could not see the light of the day. That orders had been issued *vide* a judgment of the court way back in the year 2015 where the Applicants had not made any single attempt to comply with the same. The court cannot order stay of a Decree that is not subject of an appeal as was held in *Raymond M Omboga v Austne Pyan Maranga* Kisii HCCA of 15 of 2010.

15. That the Applicants had failed to disclose that both their Application to file the Appeal out of time had not been dispensed with and that their Notice of Appeal had not been regularized and therefore there was no existing Appeal. The non-disclosure therefore barred the Applicants from being granted the orders sought. That the Applicants ought to purge the contempt before they can be given audience by the court. That he who comes to equity must do equity and must also come with clean hands.

16. That the ruling delivered by the court on 2nd December 2021 is valid and enforceable as there has been no appeal preferred against it. The Application therefore lacked basis, had no legs to stand on and ought to be dismissed with costs.

Determination

17. I have considered the Application herein, the affidavit in response, the submissions as well as the well-researched authorities herein stated. The issue for determination is whether the said Application dated the 20th January 2022 seeking for stay of sentencing is merited and secondly whether the court has jurisdiction to entertain the Applicants' application.

18. The Application before me is brought under the provisions of Order 42 Rule 6 (1) of the *Civil Procedure Rules* which provide as follows;

> 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 subrule (1) unless—
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> (a) the court is satisfied that substantial loss may result to the Applicants 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 Applicants.

19. This Application concerns itself with the temporary deferment of the sentencing of the Applicants/ contemnors, which in essence is a stay of execution in civil proceedings. The Applicants contend that they would suffer substantial loss if stay of the sentencing is not granted, because their liberty and fundamental freedom as well as their reputation as civil servants is at stake. That further, their sentencing would render their Appeal nugatory.

20. The Respondent on the other hand has contended that the Application has no merit and is intended to delay the court process and deny him his long awaited fruits of a judgment that was delivered way back on the 5th May 2015. That further, the Applicants were found in contempt of court orders wherein they have never tried to purge the same. To add salt to the injury, that the Applicants had no valid Notice of Appeal in place before the Court of Appeal and therefore this court had no jurisdiction to consider the instant Application which is founded on nothing and therefore is without merit.

21. The purpose of stay of execution is to preserve the substratum of the case as was held in the case of *Consolidated Marine. v Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), where the Court held that:-

> " The purpose of the Application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the Appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory".

22. It is trite that for the Applicants to succeed in an Application for stay of execution, the onus was on them to satisfy the three conditions as set down under order 42 Rule 6(2) of the *Civil Procedure Rules* which conditions include:

i. The Court is satisfied that substantial loss may result to the Applicants unless stay of execution is ordered;

ii. The Application is brought without undue delay and

iii. 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 Applicants.

23. Execution in a matter of contempt proceedings will only come to the end after the sentence has been handed down to the contemnors. To the extent that when the Court has not punished the contemnor, there is really nothing specific that the Court can stay with respect to execution. The consequences which are the orders the Court may make as the sentence at this stage are not known and therefore execution cannot ensue. (see *Stephen Mbugua Gituthi & 2 others (All Applicants suing on their own behalf and on behalf of 57 other Applicantss) v National Land Commission & another* [2021] eKLR)

24. The Applicants' contention is that if the stay orders are not granted, they stood to suffer substantial loss in that their liberty, fundamental freedom as well as their reputation as civil servants will be at stake.

25. It is trite law that in an Application seeking stay of execution the Applicants need not only state that they would suffer substantial loss if the orders sought were not granted but must go further to show the kind of substantial loss they would suffer if the respondent executed the Decree (see *Charles Wahome Gethi v Angela Wairimu Gethi* [2008] eKLR). In the present case, the Court is yet to pass down its sentence and therefore, there is really nothing specific that the Court can stay with respect to execution

as the court has not yet punished the Applicants/contemnors. Punishment is the final stage in these proceedings and therefore since at this stage it is not known what orders the court would make, the Applicants cannot plead prejudice and/or substantial loss by a sentence whose nature and severity they know nothing about.

26. In *Wendano Matuu Co Ltd & 2 others v Joshua Kimeu Kioko & 6 others* [2020] eKLR the Court had held that;

> "...This Court has already found the Defendants guilty of contempt of Court and has directed them to appear before it for purposes of mitigation and sentencing and hence it is prudent for the Applicantss to approach the appellate Court for orders of stay. Further, the contempt proceedings are at the tail end and which have taken a criminal dimension and that this Court cannot abdicate from its responsibility to punish an offender who has been found guilty by deferring the sentence now due. It is only a higher Court that is seized with jurisdiction to grant orders of stay of sentence..."

27. The Applicants claim for substantial loss is therefore unfounded as the Court is yet to pass sentence and as such, the Application is premature. This said and done, I need not consider the other two conditions as set under order 42 Rule 6(2) of the *Civil Procedure Rules*. That Appeal to the Court of Appeal can only lie upon sentencing. The Applicants will still have a right of Appeal as against the order on sentence and therefore I see no prejudice that will be visited to them.

28. Now looking on the flip side of the coin and more specifically on whether the court has jurisdiction to entertain the Applicants' application. The Applicants have submitted that they had an arguable appeal which would be rendered nugatory were the orders they seek not granted. I find that indeed the impugned ruling was delivered on 2nd December 2021, wherein the Applicants were found to be in contempt of court orders. Subsequently they had preferred a Notice of Appeal on 24th December 2021 to the Court of Appeal which Notice was beyond the 14 days stipulated under Rule 75(1) and (2) of the *Court of Appeal rules*which requires "any person who desires to appeal to the Court to give notice in writing within 14 days of the date of the decision against which it is desired to appeal."The Court of Appeal found that the said Notice of Appeal filed on 24th December 2021 had been improperly filed and therefore there was no application before it. (The honorable court.)It is also on record that the Applicants had further filed an Application dated the 14th January 2022 in the Court of Appeal, seeking to be allowed to file an appeal out of time. The said Application has not been prosecuted and in essence therefore as the matter stands, there is no appeal existing.

29. The supreme Court in *James Mbatia Thuo & Ephantus Mwangi v Kenya Railways Corporation & Attorney General of Kenya* [2018] eKLR held as follows:

> ''In the absence of an appeal, or an application for extension of time, accompanied by a memorandum of appeal, the rejected application had no legal basis. We therefore see no reason to interfere with, or upset the decision by the Honorable Registrar rejecting the application."

30. Further in the case of *University of Eldoret & Another v Hosea Sitienei & 3 Others* [2020] eKLR the Supreme Court had also held as follows:

> "In the absence of a subsisting appeal as we have found above, the prayers for stay in both applications are superfluous. The principles for grant of orders of stay were enunciated in Board of Governors, Moi High School Kabarak & Another case (supra) the principle objective of which being to preserve the subject matter of an appeal. The applicant must

satisfy the Court that the intended appeal is arguable and not frivolous, and that unless the stay order sought is granted, the appeal or intended appeal would be rendered nugatory."

31. There being no subsisting appeal and in line with my earlier findings herein above, consequently, I find that the Application lacks merit and the same is hereby dismissed with costs to the Petitioners.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 28TH DAY OF JULY 2022

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE