Kipsisei & another v Services Board & 3 others (Environment & Land Case 03 of 2015) [2022] KEELC 3742 (KLR) (27 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3742 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA

ENVIRONMENT & LAND CASE 03 OF 2015

BN OLAO, J

JULY 27, 2022

BETWEEN

SOLOMON KIPCHOKE KIPSISEI ..... 1ST PLAINTIFF

ALEX PAUL KIPSISEI ..... 2ND PLAINTIFF

AND

LAKE VICTORIA NORTH WATER SERVICES BOARD ..... 1ST DEFENDANT

NDIWA K. CHEMARUM ..... 2ND DEFENDANT

CHARLES BARASA BERA ..... 3RD DEFENDANT

COUNTY GOVERNMENT OF BUNGOMA ..... 4TH DEFENDANT

RULING

[1] In a Judgment delivered on June 28, 2021, this Court dismissed the Applicants' suit in which they had sought the main order of a permanent injunction restraining the Respondent by themselves, their agents, worker or servants from interfering with the land parcel No Elgon/Kapsokwony/35 (the suit land) and a further order cancelling the registration of the land parcel No Elgon/ Kapsokwony/425 or creating any new titles.

[2] Instead, the Court entered Judgment for the 4th Respondent declaring it the owner of the land parcel No Elgon/Kapsokwony/425 as sought in it's Counter – Claim and also injuncted the Applicants from interfering with the said land. The Applicants were directed to meet the costs of their dismissed suit and the 4th Respondent's Counter – Claim.

[3] Aggrieved by that Judgment, the Applicants moved to the Court Of Appealand have filed at the Court's Kisumu Registry, Civil Appeal No 237 of 2021.

[4] The Applicants who are acting in person have now approached this Court vide their Notice of Motion dated March 31, 2022 in which they seek the following orders: -

1. Spent
2. That this honourable court be pleased to grant the Applicants stay of execution herein pending the hearing and determination of this application inter – parte and the Kisumu Court of Appeal Civil Appeal No 237 of 2021.
3. That costs of this application be provided for.

[5] The application which is not premised on any provisions of the law is predicated on the grounds set out therein and supported by the joint affidavit of Solomon Kipchoke Kipsiseiand Alex Paul Kipsisei(the Applicants).

[6] The gist of the application is that being dissatisfied with the Judgment herein, the Applicants have filed Civil Appeal No 237 of 2021. That the appeal has high chances of success and meanwhile, the 4th Respondent has already commenced the execution process in respect of it's costs. The Applicants will therefore be prejudiced, will suffer irreparable damage and their appeal will be rendered nugatory if the orders sought are not granted and their appeal succeeds.

[7] Annexed to the notice of motion are the following documents: -

1. The 4th Respondent's Bill of Costs dated March 15, 2022 and the Deputy Registrar's directions on the taxation.
2. The Memorandum of Appeal in Civil Appeal No 237 of 2021.

When the application was placed before me on April 6, 2022, I directed that it be canvassed by way of written submissions. The Respondent were to file their responses and submissions within 21 days of service.

[8] Only the 4th Respondent filed grounds of opposition dated April 19, 2022 describing the application as an abuse of the process of this Court and that there can be no order of stay in respect of costs.

[9] The 4th Respondent also filed a replying affidavit by Mr Cyril Wayongo the County Attorney dated April 19, 2022 in which it is averred, inter alia, that this application has been filed 9 months after the Judgment delivered on June 28, 2021 which amounts to inordinate delay. That the application is only a knee jerk reaction and an afterthought after the 4th Respondent filed its Bill of Costs. That the Applicants have not shown what substantial loss they will suffer and in any event, the 4th Respondent has filed an application in the Court of Appeal seeking to strike out the Applicants' appeal No 237 of 2021. This application should therefore be dismissed with costs.

[10] Submissions have been filed both by the Applicants and by Mr Wekesainstructed by the firm of Wekesa Simiyu & Company Advocatesfor the 4th Respondent.

[11] The 1st, 2nd and 3rd Respondents did not file any responses to the application.

[12] I have considered the application, the rival affidavits and grounds of opposition as well as the submissions by the Applicant and the 4th Respondent.

[13] Although the Applicants have not cited the provision of the law on which the Notice of Motion dated March 31, 2022 is predicated, it is obvious that the relevant provision is Order 42 Rule 6(1) and (2) of

the *Civil Procedure Rules*. The Applicants are acting in person and such flaws are to be expected. That is why Article 159(2) (d) provides that: -

> " 159(2) "In exercising judicial authority, the Courts and tribunals shall be guided by the following principles –
>
> SUBPARA (a)
>
> (b) SUBPARA (c)
>
> (d) justice shall be administered without undue regard to procedural technicalities;"

[14] Similarly, Order 51 Rule 10(2) of the *Civil Procedure Rules* provides that: -

> " No application shall be defeated on a technicality or for want of form that does not affect the substance of the application."

Finally, Section 19(1) of the *Environment and Land Court Act* provides that: -

> " In any proceedings to which this Act applies, the court shall act expeditiously without undue regard to technicalities of procedure."

[15] The substance of this application is a stay of execution pending appeal. The relevant provision is Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* which reads: -

> " 6(1) "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 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 of stay 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." Emphasis mine.

[16] 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 order for stay of execution is granted.
3. File the application without unreasonable delay.

4. Offer security.

The centrality of substantial loss in such an application was set out by PlattAg JA (as he then was) in the case of *Kenya Shall Ltd v Kibiru & another*1986 KLR 410 at page 416 as follows: -

> " "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 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." Emphasis mine

[17] Whether or not to grant an order of stay of execution pending appeal is a matter of judicial discretion which, as is often stated, must be exercised on sound basis, rationally but not capriciously or whimsically. In so doing, the Court must bear in mind the needs to balance between the two competing interests of a party who has a Judgment in his favour and is therefore entitled to enjoy the benefits of the decree and also the interest of the other party who is desirous of exercising his right of appeal. The onus, however, is on the party seeking such an order to meet the threshold set out in Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*.

[18] The duty of this Court was also re – emphasized by the Court of Appeal in the case of *Vishram Halai v Thornton & Turpin[1963] LTD* 1990 KLR 365 where it said: -

> " "Thus, the superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly the applicant must furnish security. The application must, of course, be made without unreasonable delay."

[19] The Applicants have already filed an appeal at the Court Of Appeal Kisumubeing appeal No 237 of 2021. They have therefore demonstrated sufficient cause. It is on record that the 4th Respondent has filed an application to strike that appeal. That is not a matter for this Court to consider. What is relevant for purposes of this application is that infact such an appeal has been filed.

[20] The Applicants have also set out in ground (e) of their application that they are prepared to abide by any conditions which this Court will impose upon them for the due performance of any decree that may ultimately be binding on them. I am therefore satisfied that the Applicants have satisfied two (2) conditions set out in the law. However, to be entitled to the orders sought, the Applicants must satisfy all the four (4) conditions not just some of them.

[21] On the condition of "substantial loss "such an application, the Applicants have averred in paragraph 6 of their joint affidavit as follows:

> " 6: "That we will be greatly prejudiced if this application is not granted as we will suffer irreparable damage in the execution of the decree herein which the 4th Respondent may not be able to compensate in monetary terms in the event that the appeal succeeds."

In paragraph 7 of his replying affidavit Cyril Wayongothe 4th Respondent's Attorney has averred as follows in response to the above: -

7: "That further to paragraph 6 of my affidavit herein, the Notice of Motion of the plaintiffs in this case and their affidavit fails to disclose any substantial loss that the plaintiffs would suffer in the event this Honourable Court fails to issue a stay of execution in this matter pending appeal."

Other than merely alleging that they will "suffer irreparable damage," the Applicants have not stated what type of damage it will be. As GachuhiAg JA (as he then was) stated in *Kenya Shell v Kibiru*(supra): -

> " "In an application of this nature, the applicant should show what damages it would suffer if the order for stay is not granted."

Similarly, in *Machira t/a Machira & Co Advocates v East African Standard* (No 2) 2002 2 KLR 63, Kuloba J stated as follows at page 67.

> " "If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial loss by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal)."

Other than alleging that they "will suffer irreparable damage" if a stay is not granted, the Applicants have not shown what irreparable damage will ensue if this application is not allowed. It is not enough simply to plead "irreparable damage" or indeed "substantial loss." The Applicant must go further and demonstrate the loss and that it will be substantial. That has not been done.

[22] It is also clear that the applicants' suit having been dismissed, what the 4th Respondent is executing is essentially the award of costs as the land parcel No Elgon/Kapsokwony/425 is already occupied by a dam. The 4th Respondent's Bill of Costs is yet to be taxed and in any event, there is no evidence to suggest that the 4th Respondent is so impecunious as to be incapable of refunding any such taxed costs should the Applicants' appeal succeed.

[23] The Applicants have been unable to surmount the hurdle of substantial loss and for that reason alone, this application is for dismissal.

[24] Further, the Applicants were required to file the application "without unreasonable delay."The Judgment sought to be appealed was delivered on June 28, 2021 and this application was filed on March 31, 2022nine (9) months later. Of course what is or is not "unreasonable delay" is a matter to be determined on the basis of the particular circumstances of each case. There is no mathematical formula for determining what delay is unreasonable. However, any delay must be explained to the satisfaction of the Court. A delay of nine (9) months is clearly unreasonable in the circumstances of this case taking into account that following the delivery of the Judgment herein on June 28, 2021, the Applicants filed a Notice of Appeal dated July 2, 2021 and which was lodged in this Court on July 13, 2021. It is not clear why it took them nine (9) months to file this application, a delay which is not only unreasonable but has not even been explained.

[25] The applicants have been unable to demonstrate that they approached this Court without un – reasonable delay.

[26] Finally, the remedy sought being an equitable one, the Applicants must prove that they have moved to the Court in the interest of justice as they pursue their right of appeal. Such an application should not appear to be only tailored to scuttle the execution process. It should be made in good faith. It is not lost to this Court that the Applicants only filed this application on March 31, 2022 some two (2) weeks after the 4th Respondent had filed its Bill of Costs dated March 15, 2022. It is not surprising therefore that in his replying affidavit at paragraph six (6),Cyril Wayongo has described the application as "only a knee – jerk reaction an afterthought" after the 4th Respondent filed it's Bill of Costs. That is correct. And if the applicants' intention was to put a halt to the taxation of the 4th Respondent's Bill of Costs, that remedy is not available to them in the circumstances as there is a procedure for challenging a Bill of Costs.

[27] The up – shot of all the above is that the Applicants' Notice of Motion dated March 31, 2022 is devoid of merit. It is accordingly dismissed with costs to the 4th Respondent.

BOAZ N. OLAO.

J U D G E

27TH JULY 2022.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 27TH DAY OF JULY 2022 BY WAY OF ELECTRONIC MAIl.

BOAZ N. OLAO.

J U D G E

27TH JULY 2022.