Kwaro & 6 others v Zerubabbel Apartments Limited & 2 others (Environment & Land Petition E023 of 2021) [2022] KEELC 4934 (KLR) (23 September 2022) (Ruling)

Neutral citation: [2022] KEELC 4934 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND PETITION E023 OF 2021

A OMBWAYO, J

SEPTEMBER 23, 2022

IN THE MATTER OF ARTICLES 2 (1), 3 (1), 10 (10) AND (2), 12 (1), 19, 20, 21, 22 (1), 23, 24, 42, 50, 69 (1), (A), (D), (F), (G), 9H) AND (2), AND 70 OF THE CONSTITUTION OF KENYA AND IN THE MATTER OF CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 43, 69 AND 70 OF THE CONSTITUTION AND IN THE MATTER OF SECTIONS 3, 3A, 9, 12, 29, 30, 58, 59, 60, 63, 64, 67, 68, 69, 108, 109 AND 121 OF THE ENVIRONMENTAL MANAGEMENT AND CO-ORDIANTION ACT AND IN THE MATTER OF REGULATIONS 1, 2, 3, 4, 6, 7, 8, 9, 10, 11, 12, 13, 16, 17, 18, 19, 20, 21, 22, 23, 24, 28, 29, 31, 40, 42, 43 AND 47 OF THE ENVIRONMENTAL (IMPACT ASSESSMENT AND AUDIT REGULATIONS) 2003AND IN THE MATTER OF SECTIONS 55, 56, 57, 58, 59, 60, 61, 63 AND 67 OF THE PHYSICAL AND LAND USE PLANNING ACT, 2019AND IN THE MATTER OF SECTIONS 1, 2, 3, 4 5 AND 6 OF THE ACCESS TO INFORMATION ACT, 2016

BETWEEN

DANIEL KWARO ..... 1ST PETITIONER

REDEMPETER ODENY ..... 2ND PETITIONER

DAVID ODENY ..... 3RD PETITIONER

FARIDA KAITANY ..... 4TH PETITIONER

JAVAN KOUKO ..... 5TH PETITIONER

NISHI PANDIT ..... 6TH PETITIONER

ALLOICE OCHIENG ..... 7TH PETITIONER

AND

ZERUBABBEL APARTMENTS LIMITED ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF KISUMU ..... 2ND RESPONDENT

NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY .... 3RD RESPONDENT

RULING

1. Zerubbabel Apartments Ltd (hereinafter referred to as the applicants) have come to this court seeking orders that pending the hearing and determination of the intended appeal there be stay of execution of the ruling and orders issued by this honourable court. They further pray for costs of the application. The application is grounded on the facts that the appeal has very high chances of success and that the appellant is willing to abide by reasonable orders for security of costs. The application has been brought without unreasonable delay and utmost good faith. That unless the orders sought are granted the intended appeal will be rendered nugatory. The salient points in the supporting affidavit of Gad Omondi Opiyo are that the applicants have preferred an appeal and that the injunctive orders have stalled the project and have stopped construction on the subject property. The respondent will not suffer any prejudice if the orders are granted. The applicants claims that he would suffer irreparable loss if the orders are not granted.

Respondents Case

2. The respondents in reply state that they filed a petition concurrent with an application both dated November 1, 2021 in which they had sought temporary orders of injunction pending the hearing of and determination of the petition stopping the applicant herein from continuing with and/or causing any further developments on Kisumu/Municipality Block 12/137.

3. On February 24, 2022, the honourable court delivered its ruling on their application dated November 1, 2021 wherein the honourable court upheld their application and granted injunctive orders restraining the 1st respondent from causing any further developments on Kisumu/municipality Block 12/137 pending the hearing and determination of the petition.

4. That the applicant continued with the development even after the court delivered its ruling which caused the respondents to instruct their advocates to file an application for contempt of court and when the applicant got wind of the same, it approached their advocates for an out of court settlement and when the declined such request, the applicant opted to stop the construction and file the instant application and in the circumstances, the applicant is unworthy of any discretion of this honourable court.

5. According to the respondent, The applicant in the instant petition have failed to meet the threshold for the grant of the orders sought in their application as this application was brought 30 days after the ruling and order of this court granting an injunction with the result that the respondents were required to stop any further developments on the property rendering the instant application an afterthought. That the orders issued by this honourable court stopping further developments on the stopping further developments on the suit property and stopping any further occupation of the premises, are negative orders incapable of being executed against and as such no stay of execution can issue in respect to the said orders.

6. That the applicant has not demonstrated that it would suffer substantial loss if the stay is not granted in terms of order 42, rule 6 (2) (a) of *Civil Procedure Rules 2010*, and the issues now raised in paragraphs 21, 22, 23 and 24 were never raised in the Replying affidavit sworn by Gad Opiyo and filed in court on January 13, 2022, and hence it is obvious that these are new issues that the respondents were all along, aware of, but failed to bring to the attention of the court and now claim that they form a basis for the grant of the orders of stay of execution, pending appeal, when in reality, they seek to have this court review the said order to the detriment of the petitioners.

7. That the intended appeal shall not be determined on new facts that were not raised in the proceedings before this honourable court and as such the intended appeal has very slim chances of success.

8. That the petitioners are the ones who will suffer substantial loss since the effect of allowing the said application, is allowing the respondents to proceed with the project, in open violation of our constitutionally guaranteed right to a clean and healthy environment, which breach cannot be adequately compensated by any amount of damages, and hence they would be highly prejudiced as correctly found in this court's ruling of February 24, 2022 to be incapable of being compensated by an award of damages hence the proposal by the applicant that it is willing to abide by an order for security for costs cannot suffice in the circumstances.

9. That when the respondents elected to seek financing for this project, they knew that they were proceeding in open violation of the requirements as contained in the *Environmental Management and Co-ordination Act* requiring them to involve persons who are likely to be affected by their project and in fact, the injunctive orders issued by this court help them not to invest more money in a project that was not set up in compliance with the law.

10. That the *Constitution* under article 70 calls for the court to protect any threatened violation of the rights to a clean and healthy environment which this honourable court duly did by granting injunctive orders against a project that is likely to be in violation of the said constitutional provision and as such allowing the project to go on shall be in contrary to the spirit and provision of article 70 of the *Constitution*. That the applicant has not demonstrated that failure to grant the stay Order would render the appeal nugatory.

11. The respondents state that allowing the application and consequently granting the applicant liberty to continue with the development shall in fact render the intended appeal nugatory as there shall be no need for the applicant to prosecute the appeal once they are granted liberty to continue with the development as the only prayer the applicant seeks from the Court of Appeal is for the ruling of this honourable court to be set aside so that they can continue with the development which objective they shall have achieved in the unlikely event this application is allowed. In the circumstances, allowing the instant application and granting orders of stay of execution shall equally be of the effect of setting aside the ruling of the court delivered on February 24, 2022 and the applicant shall be at liberty to continue with the development on Kisumu/Municipality Block 12/137.

12. According to the petitioners, the instant application is merely disguised as an application for stay of execution but is in its real sense a deliberate attempt by the applicant to present new facts intended to circumvent the lacuna in their response to the application for temporary injunction to change the view of the court and further use this honourable court as a conduit of realizing the objective and prayers of their intended appeal without affording the petitioners a chance to be heard in the appeal.

13. That in the circumstances, by this honourable court allowing the instant application, it shall have sat as an appellate court and set aside its own decision. The applicant has not demonstrated that failure to grant the say order would render the appeal nugatory.

14. That what is at stake is a competition between the applicant's financial conveniences and the respondents' right to a clean and healthy environment and going by the supremacy ofthe *Constitution*, this honourable court should uphold the respondent's right to a clean and healthy environment and public participation as provided for under articles 10 (2) (a), (b), (c), 69, and 70 which are grater rights as compared to the Applicant's financial conveniences and the right to Appeal under section 66 of the *Civil Procedure Act* as read with order 42 rule 6 of the *Civil Procedure Rules*.

Determination and Analysis

15. I have carefully considered the application, the supporting affidavit and submissions on record. The applicable provisions of law are order 42 rule 6 that provides as follows:-

16. Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

    (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.

    (2) No order for stay of execution shall be made under subrule (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."

17. The application was brought to court 30 days after the Judgment and 28 days after the lodging of the notice of appeal. I do consider 30 days delay not inordinate as the same was timeously in the circumstances of this case. This being a petition where such drastic orders were sought the application for stay of execution pending appeal was filed timeously.

18. On whether the Judgment debtor is likely to suffer substantial loss, I do find that the 1st respondent/ applicant has demonstrated that the respondents will suffer substantial loss in terms of the contract it had with the Gad Works Ltd for the development of the multi billon storey building on the suit parcels of land and the same cannot be reversed if she succeeds on appeal. Moreover, on the same issue of substantial loss, this court is alive to the fact that there is need to balance between the petitioner's interest to a clean and healthy environment and the respondent's proprietary interest.

19. *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589. This was the position of Warsame, J (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited Nairobi* (Milimani) HCCC 795 of 1997 where he expressed himself as hereunder:

> " Every party aggrieved with a decision of the High Court has a natural and undoubted right to seek the intervention of the Court of Appeal and the court should not put unnecessary hindrance to the enjoyment and exercise of that right by the defendant. A stay would be overwhelming hindrance to the exercise of the discretionary powers of the court...The court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgement. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against

the applicant/defendant...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...Whereas there is no doubt that the defendant is a bank, allegedly with substantial assets, the court is entitled to weigh the present and future circumstances which can destroy the substratum of the litigation...At the stage of the application for stay of execution pending appeal the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrive within the corridors of the court. Justice requires the court to give an order of stay with certain conditions."

20. On the first principle, Platt, Ag JA (as he then was) in *Kenya Shell Limited v Kibiru* [1986] KLR 410, at page 416 expressed himself 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 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".

On the part of Gachuhi, Ag JA (as he then was) at 417 held:

> "It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment."

21. On security, it is true that order 42 rule 6 of the *Civil Procedure Rules*, requires the applicant to offer security for the due performance of the decree and the court is entitled to take into account the fact that no such security has been offered in deciding an application thereunder. The position taken by the court in *Mwaura Karuga t/a Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] eKLR, is relevant where it was held that:

> "... the security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words ''ultimately be binding' are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the *Civil Procedure Rules* includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick."

22. The court finds guidance in the holding in *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR, where the court observed:

> "... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails.
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> Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine."

23. The law is that where the applicant intends to exercise its undoubted right of appeal, and in the event it were eventually to succeed it should not be faced with a situation in which it would find itself unable to recover in damages. Likewise, the respondent who has a decree in his favour should not, if the applicant were eventually to be unsuccessful in its intended appeal, find it difficult or impossible to realize the decree.

24. This is the cornerstone of the requirement for security. The issue of adequacy of security was dealt with by the Court of Appeal in *Nduhiu Gitahi v Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 where the Court of Appeal expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgment has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to

tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".

25. I do find that the applicants are willing to furnish security for costs. The upshot of the above is that the application is allowed in terms that there be a conditional stay of execution of the orders in the ruling issued on the February 24, 2022, thus the applicant will be allowed to complete the construction of the building to pre-empt a financial loss, however the applicants/ respondents their agents or purchasers shall not be allowed to enter the premises until the appeal is heard and determined. The applicant to deposit security for costs whose value shall not be less than One Million Kenya shillings (1,000,000) or to pay in court a similar amount in cash. Costs of the application to be in the appeal.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 23RD DAY OF SEPTEMBER, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.