



Nabakwana Farmers Co-operative Society Limited v Lois Holdings & another (Environment and Land Appeal 14 of 2021) [2022] KEELC 13386 (KLR) (6 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13386 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT AND LAND APPEAL 14 OF 2021
FO NYAGAKA, J
OCTOBER 6, 2022**

BETWEEN
NABAKWANA FARMERS CO-OPERATIVE SOCIETY LIMITED PLAINTIFF
AND
LOIS HOLDINGS LIMITED 1ST DEFENDANT
ESTATE OF JACKSON KIAMBA KIMBUI 2ND DEFENDANT

RULING

The application

1. The plaintiff moved this court vide its application dated June 23, 2022. It is anchored on sections 3A and 79G of the Civil Procedure Act seeking the following reliefs:
 - a. Spent
 - b. Spent
 - c. There be a stay of further proceedings herein until the hearing and determination of the intended appeal.
 - d. Costs of this application be provided for.
2. The application is supported by the grounds on the face of the motion and by further affidavit of Robert Nyongesa Makhanu, the plaintiff's secretary. The gravamen of the application is that the applicant whose registration and membership were evidenced by annexures marked as RNM1a and RNM1b being its registration certificate and register of members which were annexed to the affidavit in support of the application was dissatisfied with the ruling of the this court, delivered on February 14, 2022, dismissing the suit herein. A further undisputed fact was that it has since preferred an appeal against the said ruling. Both the notice of appeal and draft memorandum of appeal against the decision



were annexed to the affidavit and marked as RNM2a and RNM2b respectively. Subsequently, on February 15, 2022, it wrote a letter, annexed as RNM3, to the deputy registrar, requesting for typed proceedings. Riding on the interest of justice doctrine and that the applicant would suffer irreparable loss, it submitted that the application was merited.

3. Interestingly, the applicant further made reference to the court's impugned ruling at paragraph 15 citing that the court was in error in finding that the applicant had not filed written submissions. The same were annexed and marked as RNM4. As a consequence thereof, the applicant concluded that the trial court rendered a unilateral, unfair, 'totally' erroneous and unacceptable ruling in that it failed to consider the applicant's submissions. Finally, the applicant propounded that the court went 'overboard' for dealing with an interlocutory application that ultimately determined the suit altogether. It urged this court to grant the reliefs sought.

The response

4. The application was opposed by way of replying affidavit sworn by the 1st defendant/respondent. She deposed that since the ruling of the court delivered on February 14, 2022 struck out the suit in its entirety, with costs, and that the orders remained negative in character and incapable of execution. She contended that the application was an abuse of the process of the court since there were not proceedings capable of being stayed after judgment. She argued further that grant of an order of stay of proceedings was only available in cases involving interlocutory appeals and not final decrees.
5. The 1st respondent cited malice on the part of the applicant's members who, in spite of a court judgment entered in 2014, have never left or vacated the suit premises yet the court ordered their eviction. She lamented that the applicants have been oppressive and exploitative having utilized the suit land since 2004 when the suit praying for their eviction was filed.
6. She further outlined that on May 24, 2022 this court dismissed an application for stay of execution which annexed and marked as LNK1. Furthermore, she posited, the court considered all necessary and constituent issues in that application thereby rendering the applicant's submissions gratuitous, and the ruling was thus sound.

Submissions

7. The applicant filed 2 sets of submissions, on June 27, 2022 and July 19, 2022 respectively. However, I observe that the submissions are mirror reflections of each other. In summary the applicant rehashed the contents of its application. It clarified that the application was not hinged on the provisions of order 42, rule 2 of the Civil Procedure Rules. It beseeched this court to grant the reliefs sought.
8. The respondents filed their joint written submissions on July 22, 2022. They reiterated the contents set out in the 1st respondent's affidavit in reply. They submitted that the application was incompetent as it neither invoked nor relied on the provisions set out in order 42 of the Civil Procedure Rules. Resultantly, they urged that the application was for striking out as incompetent.
9. They submitted that the applicant was engaged in crafty machinations to hoodwink this court that it sought stay of proceedings when in real sense, it sought a stay of execution of eviction. Again, the argument was that the application was an abuse of the process of the honorable court. They reminded this court that in its antecedent ruling dismissing the applicant's application for stay, the court observed that the applicant had devised a scheme with intent to defeat enforcement by way of eviction. They urged this court to dismiss the application with costs.



Analysis and disposition

10. The application seeks to stay proceedings pending the hearing and determination of an intended appeal. According to [*Halsbury's Law of England, 4th Edition. Vol 37 at page 330 and 332:*](#)

' The stay of proceedings is a serious, grave and fundamental interruption in the right that a party has to conduct his litigation towards the trial on the basis of the substantive merits of his case, and therefore the court's general practice is that a stay of proceedings should not be imposed unless the proceeding beyond all reasonable doubt ought not to be allowed to continue.'

'This is a power which, it has been emphasized, ought to be exercised sparingly, and only in exceptional cases.'

'It will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity. The applicant for a stay on this ground must show not merely that the plaintiff might not, or probably would not, succeed but that he could not possibly succeed on the basis of the pleading and the facts of the case.'

11. From the said passage, the general aphorism is that stay of proceedings remains a decision vested upon the court on its own discretion. It is generally not allowed unless exceptional circumstances demand the exercise of the discretion. The exceptional cases must be demonstrated by the proponent or party benefiting from those orders.
12. In the present case, the applicant seeks stay of proceedings pending the appeal that it has preferred. Regrettably, in the substance of its application, the applicant furthered rather, grounds in support of his appeal, instead of justifying the grant of the orders sought. I wish to remind the parties that a court shall not and ought not to sit on appeal of its own decision. Consequently, I am only restricted to the analysis of the merits of this application and not beyond as I am devoid of jurisdiction to discuss the merits or demerits of the intended appeal.
13. As rightly pointed out by the respondents, the application has been lodged after termination of the proceedings herein in their entirety. The court is functus officio except only in post judgment steps. While I agree with the respondents that same is not feasible owing to the fact that the proceedings herein terminated on February 14, 2022, I note that following the resultant orders striking out the suit with costs, the respondents filed a bill of costs on April 1, 2022.
14. I make two observations from this; firstly, if at all the applicant was intent on staying proceedings, and in this case, the bill of costs currently being assessed, then this is not the proper forum for grant of the orders sought. This is because assessment of costs is a sui generis litigious process vested in the powers of the taxing master.
15. Keiwua JA in the Court of Appeal case of [*M G Sharma -vs- Uhuru Highway Development Limited \[2001\] eKLR*](#) held:
- ' I think that approach was quite irregular, the application to stay that case, ought in the first place to have been placed before the deputy registrar of the superior court and the prayer for stay urged and if granted it was only then, the balance of the application to have the case struck out, should have been referred to the learned judge. In the absence of such an order from the deputy registrar, steps taken to have the file placed before the learned judge, were in my judgment ineffective to divest the deputy registrar of jurisdiction to have the bill of costs



taxed or to confer jurisdiction to the learned judge because what had been done appears to me to have been a nullity.'

16. It was incumbent upon the applicant then to file that application before the taxing master as this court is functus officio. Be that as it may, and taking cue to my second observation, following the filing of the bill of costs on April 1, 2022, the applicant responded to the same by filing a response on May 17, 2022. In fact, on the very day the applicant filed a response, parties appeared before the taxing master for assessment of costs. Peculiarly, the applicant deliberately failed to seek the stay of proceedings it now seeks before this court.
17. The conduct of the applicant as demonstrated is but vexing to this court. It initially filed an application for stay of execution of the eviction of the judgment-debtors in the related file, namely, Kitale ELC No 77 of 2004, between, Lois Holdings Limited vs Ndiwa Tamboi & 184 Others, whose pleadings and prayers were considered when this court determined the suit herein, striking it out. In the application, dated February 26, 2021, the prayer was that the execution be stayed pending the determination of the suit herein, which was struck out as stated above. Ruling therein was delivered on May 24, 2022. The application was found unmeritorious hence dismissed. It now approaches this court to stay proceedings that are non-existent as far as this court is concerned. The applicants herein are intent circumventing the proper process of obtaining justice. As stated earlier, the conduct of taxation proceedings is not the preserve of this court unless by way of a reference, which is not the case herein.
18. The upshot is that not only is the application an afterthought as it was never filed before the proper court at the earliest opportune time, it is also incompetent and baseless. I am not satisfied that the applicant has met the threshold for the grant of the orders sought. Consequently, the application must fail. The application dated lacks merit and is hereby dismissed with costs to the respondents.
19. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 6TH DAY OF OCTOBER, 2022

HON. DR. *IUR* FRED NYAGAKA

JUDGE, ELC KITALE

