Anyimu v Mukele & another (Environment & Land Case 24 of 2017)
[2022] KEELC 15051 (KLR) (25 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15051 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND CASE 24 OF 2017

BN OLAO, J

NOVEMBER 25, 2022

BETWEEN

ANTHONY KWENA ANYIMU ..... APPLICANT

AND

GABRIEL MUKELE & ANOTHER ..... RESPONDENT

RULING

1. Anthone Kwena Anyimu (the applicant herein) moved to this court *vide* his amended plaint dated June 24, 2019 seeking several orders against Gabriel Mukele and Wallance Wesonga (the 1st and 2nd respondents herein) including an order that the respondents be compelled to transfer to the applicant the land parcels No Marachi/Esikoma/1195, 1151 and 1233 (the suit land) for having been acquired fraudulently.

2. Upon hearing the parties, Omollo J delivered a judgement dated August 4, 2022 dismissing the applicant's suit with costs for having been filed out of time and for failure to prove fraud. Aggrieved by that judgement, the applicant filed a notice of appeal on August 23, 2022.

3. The applicant has now approached this court *vide* his chamber summons application dated August 22, 2022 predicted under the provisions of rule 3 of the *High Court (Practice and Procedure Rules)*. Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules* as well as all other enabling provisions of the Law.

   It seeks the following orders:

   1: spent

   2: spent

   3: spent

4: That this honourable court be pleased to stay execution of the judgment dated August 4, 2022 and all consequential orders pending the hearing and determination of the intended appeal.

5: That the costs of this application be provided for by the respondents.

The application is based on the grounds set out therein and is also supported by the applicant's affidavit dated August 23, 2022.

4. The gravamen of the application is that the judgment was delivered on August 4, 2011 via email and so the applicant did not have an opportunity to apply for an order of stay of execution pending appeal. That the applicant being dissatisfied with the said judgment has instructed his counsel to file an appeal which has high chances of success and if the orders sought are not granted, this appeal will be rendered nugatory if the respondents proceed to tax their bill of costs and execute the same. That the application has been made without any delay and the respondents will not suffer any prejudice.

5. The following documents are annexed to the application:

1. Notice of appeal dated August 23, 2022.

2. Letter by the applicant's counsel dated August 18, 2022 and addressed to the Deputy Registrar to furnish him with the proceedings herein for purposes of an appeal.

The application is opposed and the respondents have filed grounds of opposition dated October 11, 2022 raising the following:

1. That the judgement sought to be stayed dismissed the applicant's suit and being a negative order, is incapable of execution and therefore cannot be stayed.

2. That there is no valid notice of appeal and therefore no appeal on which the application can be anchored.

3. That the application is bad in law, a non-starter, misconceived and fatally defective.

When the application was placed before me on October 18, 2022, it was agreed that it be canvassed by way of written submissions to be filed on or before November 2, 2022. However, only the respondents filed their submissions as directed.

6. I have considered the application, the grounds of opposition and the submissions by counsel for the respondents.

7. It is clear from the judgement delivered on August 4, 2022 that the applicant's suit was dismissed with costs. Neither of the parties was ordered to do anything and all that remains is for the respondents to tax their bill of costs. Therefore, all that there is in the judgment is a negative order. Precedents have provided guidance that for an order of stay of execution to be warranted, there must be a positive order capable of being executed. In *Western College of Arts & Applied Sciences vs Oranga & Others* 1976 – 80 1KLR 63, the Court of Appeal held thus:

> "But what is there to be executed under the judgment, the subject of the intended appeal? The High Court has merely dismissed the suit with costs. Any execution can only be in respect of costs. In *Wilson v Church*, the High Court had ordered the trustees of a church to make a payment out of that fund. In the instant case, the High Court has not ordered any party to do anything or refrain from doing anything or to pay any sum."

In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah* 2008 eKLR, the Court of Appeal while considering an application for stay of a negative order held:

> " The 2nd prayer in the application for stay (of execution) of the order of the Superior Court made on December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the Superior Court did not order any of the parties to do anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs."

It follows therefore that the judgement dated August 4, 2022 having been a negative order, there can be no basis upon which this court can grant the order of stay of execution pending appeal.

8. It seems to me that what the applicant seeks to forestall is the taxation of the respondents' bill of costs. This is confirmed by the following averment in paragraph 5 of the applicant's supporting affidavit:

> " 5: "That I am apprehensive that the respondents are likely to proceed and tabulate their bill of costs and execute against me any time and the same will render the appeal nugatory."

As far as I can see form the record, the respondents are yet to file their bill of costs. Before such a bill is filed and taxed, this court has no information regarding the decision that the Taxing Master will arrive at once the bill is filed and taxed. What then is there to stay at this stage? Absolutely nothing. And to attempt to make any orders staying the execution of a yet to be filed bill of costs will be purely speculative and will amount to this court groping in the dark. Courts make decisions founded on facts and the law but not on conjecture and mere speculation.

9. On that basis alone, this application is for dismissal.

10. Most importantly however, the law governing the grant of the orders sought by the applicant is Order 42 rule (1) and (2) of the *Civil Procedure Rules* which provides that:

> " 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 form 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 form, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such orders 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) 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
>
> (3) 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 added.

The applicant was therefore required to establish the following in order to be entitled to an order of stay of execution pending appeal:

1: show sufficient cause.

2: Demonstrate that if the order of stay of execution is not granted, he will suffer substantial loss.

3: Approach the court without unreasonable delay.

4: Offer security for the due performance of any decree that may be binding upon him.

In *Kenya Shell Ltd v Benjamin Kibiru* 1982 – 88 1kar 1018 [1986 KLR 410], PLATT Ag JA (as he then was) underscored the importance of an applicant establishing substantial loss in order to justify an order of stay of execution pending appeal.

He said:

> " 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 form is the cornerstout 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 added.

In *Machira & Company Advocates v. East African Standard* (no 2) 2002 2KLR63, Kuloba J addressed the same requirement in the following words:

> " 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 ensure and that if it comes to pass, the applicant is likely to suffer substantial injury 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)." Emphasis added.

The judge went on to add that:

> " Moreover, a court will not order a stay upon mere vague speculation; there must be the clearest ground of necessity disclosed on evidence.....
>
> Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of prosecuting the appeal or intended appeal. So really, stay is normally not to be granted save in exceptional circumstance."

11. The applicant filed this notice of appeal on August 23, 2022 and this application on August 26, 2022. He has therefore satisfied the requirement of showing sufficient cause and also approached the court without unreasonable delay.

12. However, he was required to satisfy all the four requirements set out under Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules* in order to justify the grant of the remedy sought. He has only satisfied two of them. In *Ravji Halai & Another v Thornton & Turpin (1963) Ltd* Ca Civil Appeal No 15 of 1990 (1990 KLR 365), the Court of Appeal said the following with regard to the jurisdiction of this court while considering such an application.

> " That High Court's discretion to order a stay of execution of it's order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly, the

court must be satisfied that substantial loss would ensure from a refusal to grant a stay and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay."

And as has already been stated earlier on this ruling, "substantial loss.....is the cornerstone" for the grant of an order of stay of execution pending appeal. Nowhere in his 10 paragraph supporting affidavit has the applicant made any reference to the nature of "substantial loss", if any, that he is likely to suffer if the order for stay of execution pending appeal is not granted. He appears to be more preoccupied with the possibility that the respondents may tax their bill of costs and execute the same. But as I have already stated, that is mere speculation. In any event, even if the respondents were to tax their bill of costs and execute the same and the applicant subsequently succeeds in his appeal, there is nothing to suggest that the respondents are too impecunious as to be incapable of refunding any costs that they may have been paid thus rendering the applicant's loss "substantial."

13. The arguability or otherwise of the applicant's appeal and it's chances of success cannot be a consideration when this court is considering an application for stay of execution arising from it's own judgement. And although the judgment sought to be appealed was delivered by another judge (OMOLLO J), this court would be wading into dangerous territory by trying to interrogate whether or not the Applicant has "a good and arguable appeal with high chance of success" and therefore his "appeal will be rendered nugatory" if the orders sought are not granted as he has deponed in paragraph 8 of his supporting affidavit. That can only be a consideration if this court is considering an application for stay of execution pending an appeal from a Subordinate Court that will be determined by this Court. Not an appeal that will be determined by the Court of Appeal from this court's decision.

14. Finally, the applicant was required to furnish security for the due performance of any such decree or order as may ultimately be binding upon him. Again, nowhere in his supporting affidavit or even the grounds upon which the application is anchored has the Applicant made any offer of security or even stated that he is willing to abide by any terms that this court may order as a condition for the stay. As was stated in *Wycliff Sikuku Walusaka v Philip Kaita Wekesa* 2020 eKLR",

> " The offer for security must of course come form the applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not 0respondent's right to enjoy the fruits of his judgment"

As is now clear form paragraph 5 of the applicant's supporting affidavit, his motivation in filing this application is primarily meant to scuttle the filing and taxation of the respondents' bill of costs. But even as he does so, he is himself not in a position to state with any degree of certainty what amount the bill of costs will eventually be taxed at and, more importantly, whether that sum will infact be substantial. And what if the respondents elect to forego their costs? Would't this court have acted in vain?

15. That up-shot of all the above is that the notice of motion dated August 22, 2022 is bereft of merit. It is dismissed with costs to the respondents.

BOAZ N. OLAO

JUDGE

25TH NOVEMBER, 2022.

RULING DATED, SIGNED AND DELIVERED AT BUSIA BY WAY OF ELECTRONIC MAIL ON THIS 25TH DAY OF NOVEMBER 2022.

BOAZ N. OLAO

JUDGE

25TH NOVEMBER, 2022.