Mbatia & another v Director General, National Environment Management Authority (NEMA) & 101 others (Environment and Land Appeal 34 of 2019) [2022] KEELC 15161 (KLR) (24 November 2022) (Ruling)

Neutral citation: [2022] KEELC 15161 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL 34 OF 2019

OA ANGOTE, J

NOVEMBER 24, 2022

BETWEEN

ROBERT MBATIA .... 1ST APPELLANT

NAIROBI CITY COUNTY .... 2ND APPELLANT

AND

DIRECTOR GENERAL, NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY (NEMA) .... 1ST RESPONDENT

DAVID NDIRANGU & 100 OTHERS .... 2ND RESPONDENT

(National Environment Tribunal, Judgment of March 5, 2019)

RULING

1. Before this court for determination is the appellants'/applicants' notice of motion dated May 16, 2022 seeking the following reliefs;

    a. That the honourable court be pleased to order stay of execution of the judgment and decree issued on the March 5, 2019 in Tribunal Appeal No 177 of 2016 and all consequential orders therein pending the hearing and determination of the relevant Appeal filed in the Environment and Land Court.

    b. That the costs of the Application be borne by the Claimant.

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Robert Mbatia, the 1st Appellant, who deponed that the 2nd Respondent filed a suit against the Appellants and the 1st Respondent at the National Environment Tribunal on May 30, 2016 and

that vide its Judgment of March 5, 2019, the Tribunal upheld the Respondents' claim and entered judgment in favour of the 2nd Respondents by revoking the Environmental Impact Assessment License No NEMA/RB/P2/5/1/9141 issued by the 1st Respondent on April 29, 2016, stopping the development of the social hall at Uhuru Phase IV-Playgrounds-Uhuru Estate Areas and issued an environmental restoration order against the 1st Appellant.

3. It was deponed by the 1st Appellant that he is personally aggrieved and intends to challenge the decision of the Tribunal and to this effect he filed a Memorandum of Appeal; that the Appellants' Appeal has high chances of success and that stay orders should be granted pending the hearing and determination of the Appeal.

4. The 1st Respondent did not participate in the Application. The 2nd Respondent deponed that the rationale leading to the decision of NET was because there was no public participation prior to the issuance of the EIA and that whereas the Appellants were given 60days to comply with the Judgment of NET, they did not pray for a stay before the Tribunal neither did they pray for stay at the time of filing the Appeal.

5. According to the 2nd Respondent, the current application does not meet the threshold for the grant of stay pending appeal as the Appellants' have not demonstrated what substantial loss they stand to suffer; that it is the 2nd Respondents who are the actual occupants of Uhuru Phase IV Estate and that their children were supposed to use the property as a playground.

6. It was deponed by the 2nd Respondent that the Appellants began construction on the suit property in 2011 before getting the requisite approvals and that there exists one playground in Uhuru Estate Phase IV which the residents, with the assistance of their former Member of Parliament and Safaricom Limited, upgraded and put up metal swings slides, seats and rock climbs for children to play all of which were brought down by the Appellants to pave way for the social hall.

7. According to the 2nd Respondent, the suit property was set aside as a playground by the Town Planning Committee of the Nairobi City County in 1995, which decision was upheld by the City Planning Department in November, 2011; that whereas the Appellants assert that public funds have been utilized in the project, there has been no evidence of the same and that in any event, the 2nd Appellant may as well hold on the funds and no prejudice will be occasioned.

8. The 2nd Respondent lastly deponed that the Appellants have not only failed to adhere to the Judgment of March 5, 2019, but have continued developing the property in complete disregard of the Tribunal's orders and having come to court with unclean hands, the Appellants are undeserving of the orders sought.

9. According to the 2nd Respondent, the application having been filed three years after the delivery of the judgment and no explanation having been rendered, the application should be dismissed. The Appellants and the 2nd Respondent filed submissions which I have considered.

Analysis and Determination

10. Having carefully considered the pleadings and rival submissions by the parties, the sole issue that arises for determination is:

    i. Whether the Appellants have satisfactorily discharged the conditions warranting the grant of stay of execution pending Appeal?

11. As correctly cited by the parties, the law governing the grant of stay of execution pending appeal is order 42 rule 6 of the *Civil Procedure Rules*, the relevant part of which states as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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."

12. In the case of *Halai & another v Thornton & Turpin (1963) Ltd* [1990] eKLR the Court of Appeal held *inter-alia*:-

> "The superior court's discretion to order a stay of execution of its 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 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."

13. It is evident from the above provisions and the cited authority that the grant of orders of stay of execution are subject to the court's discretion, the court being guided in this regard by the provisions of order 42 rule 6 of the *Civil Procedure Rules*. The question of how the court should exercise this discretion was extensively discussed by the Court of Appeal in *Butt v Rent Restriction Tribunal* [1982] KLR 417 as follows:

> "1. The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
>
> 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

4. The court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.

5. The court in exercising its powers under Order XLI rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

14. The court is alive to the fact that while exercising its discretion hereunder, it should always opt for the lower rather than the higher risk of injustice. This was persuasively stated by Warsame, J (as he then was) in *Samvir Trustee Limited v Guardian Bank Limited* [2007] eKLR 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 judgment. It is a fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgment; hence the consequence of a judgment is that it has defined the rights of a party with definitive conclusion. The respondent is asserting that matured right against the applicant/defendant….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…"

15. By way of a brief background, the Motion herein relates to the Judgment delivered by the National Environment Tribunal (NET) at Nairobi in Tribunal Appeal Net 177 of 2016 on March 5, 2016. The matter was instituted in the Tribunal by the 2nd Respondent herein challenging the issuance of an environmental impact assessment license No NEMA/RB/P2/5/1/9141 of 29/04/2016 on the ground that the same was issued without proper consultation.

16. In the matter before the Tribunal, the 2nd Respondent sought inter-alia for the revocation of the said license and the demolition and removal of structures constructed on Uhuru Phase4 playground - Uhuru Estate Area, Makadara Sub-County in Nairobi County. Vide its decision, the Tribunal found in favour of the 2nd Respondent herein and made the following determination;

a. The Environmental Impact Assesment License No NEMA RB/P2/5/19141 issued by the 1st Respondent on 29th/04/2016 is hereby revoked.

b. The intended development of a social hall at Uhuru Phase IV Playgrounds-Uhuru Estate, Makadara Sub-County in Nairobi County by the 2nd Respondent is hereby stopped.

c. An environmental restoration order is hereby issued against the 3rd Respondent. The 1st Respondent shall enforce the order at the cost of the 3rd Respondent. This Order requires the demolition of the social hall structure on Uhuru Phase IV Estate Playground, the restoration of all soil, flora and natural features therein, together with the supervisory removal of all buildings material and sources or cause of pollution and/or environmental hazard or damages on the suit premises within 60 days after the lapse of the period set out under Section 130(1) of the Environment Management and Co-ordination Act.

17. The Appellants, the 2nd & 3rd Respondents at the Tribunal, are aggrieved by this decision and have filed an appeal in this court. In the meantime, they are seeking for an order of stay of execution of the Judgment pending appeal.

18. The aspect of showing sufficient cause in an application for stay of execution was discussed in the case of *Antoine Ndiaye v African Virtual University* [2015]eKLR, where Gikonyo, J opined as follows;

> "The relief of stay of execution pending appeal is governed by order 42 rule 6 of the Civil Procedure Rules. The relief is discretionary although, as it has been said often, the discretion must be exercised judicially, that is to say, judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. And in determining whether sufficient cause has been shown, the court should be guided by the three prerequisites provided under order 42 rule 6 of the *Civil Procedure Rules*, that:
>
> a) The application is brought without undue delay;
>
> b) The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered; and
>
> c) 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."

19. Before delving into the merits of the application, the court will determine the issue of whether the Motion has been brought without unreasonable delay.

20. The question of what constitutes unreasonable delay was discussed in the case of *Jaber Mohsen Ali & another v Priscillah Boit & another* [2014] eKLR where Munyao J stated as follows:

> "The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter. In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret E&LC 919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied, the court holding that, the application ought to have come before expiry of the period given to vacate the land."

21. In the instant case, the Judgment sought to be appealed against was delivered on March 5, 2019. The present application was filed on May 16, 2022. This constitutes a period of more than 3 years after the filing of the Appeal. Three years is not a reasonable time within which to file an application for stay of execution. However, this in itself does not warrant a denial of an order of stay.

22. The court must take into account the circumstances of the case. So, are there any circumstances to consider? None has been rendered by the Appellants who did not make any attempts to explain the delay. That being the case, it follows that this application fails the test of unreasonable delay. The above notwithstanding, the Court will for purposes of completion proceed to consider the other elements.

23. It is the Appellants' contention that they stand to suffer substantial loss if the stay is not granted. According to them, one of the orders granted by the Court was the demolition of the social hall which if allowed will result in substantial loss; that the construction was financed by public funds and that further funds have been released for the project which is of great public interest.

24. In response, the 2nd Respondent deponed that no evidence has been adduced with respect to the assertion that that public funds have been released for the project and that in any event, the release of further funds can be suspended. According to the 2nd Respondent, the mere fact that the construction was undertaken by public funds cannot sanitize it.

25. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Rhoda Mukuma v John Abuoga*[1988] eKLR where the court held as follows;

> "Granting a stay in the High Court is governed by Order XLI rule 4(2), the questions to be decided being – (a) whether substantial loss may result unless the stay is granted and the application is made without delay; and (b) the applicant has given security. The discretion under rule 5(2)(b) is at large, but as was pointed out in the Kenya Shell case substantial loss is the cornerstone of both jurisdictions. That is what has to be prevented, because such loss would render the appeal nugatory..."

26. In the case of *Tropical Commodities Suppliers Limited 7 others v International Credit Bank Ltd (in liquidation)*(2004) 2 EA 331 the court persuasively defined the aspect of substantial loss thus;

> "Substantial loss does not represent any particular mathematical formula. Rather, it is a qualitative concept. It refers to any loss, great or small, that is of real worth or value as distinguished from a loss without value is a loss that is merely nominal."

27. In considering whether the Appellants will suffer substantial loss unless an order of stay of execution is granted, the court is guided by the decision of the Court of Appeal in *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR in which the court stated as follows:

> "It is usually a good rule to see if order 41 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 cornerstone of both jurisdictions for granting stay."

28. First, and as correctly stated by the 2nd Respondent, no evidence has been adduced with respect to the use of public funds for the construction of the Hall on the suit property. Second, nothing prevents the Applicants of not utilizing the money as they await the court's decision.

29. The only aspect of substantial loss that the Appellants have demonstrated is in regard to the demolition of the social hall as ordered by the Tribunal. Indeed, if the social hall is demolished before the appeal is heard, the appellants are likely to suffer substantial loss in the event the appeal is allowed.

30. However, having not filed the current application within a reasonable time, the application dated May 16, 2022 is dismissed with costs to the 2nd respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF NOVEMBER, 2022.

O. A. ANGOTE

JUDGE

In the presence of;

Ms Ndugiwe for Applicant

Ms Betty Mbugua for Respondent

Court Assistant - June