Rading v Onyango & another (Environment & Land Case E015 of 2022)
[2022] KEELC 14876 (KLR) (15 November 2022) (Ruling)

Neutral citation: [2022] KEELC 14876 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT & LAND CASE E015 OF 2022

SO OKONG'O, J

NOVEMBER 15, 2022

BETWEEN

JULIUS OTIENO RADING ..... APPELLANT

AND

ERICK OCHIENG ONYANGO ..... 1ST RESPONDENT

SHADRACK OGINDO ..... 2ND RESPONDENT

RULING

1. On 12th November 2021, the lower court, Hon EA Obina, PM entered judgment for the respondents against the appellant on admission for a sum of Kshs 8,500,000 together with interest at court rate with effect from 13th July 2020 until payment in full in Kisumu Chief Magistrate's Court ELC No E166 of 2020, *Erick Ochieng Onyango & Shadrack Ogindo v Julius Otieno Rading*. The appellant was aggrieved by the said judgment and filed the present appeal against the same on 18th March 2022 through a memorandum of appeal dated 14th March 2022. The appellant had written to the Executive Officer, Kisumu Law Courts on 19th January 2021 seeking typed proceedings and a certified copy of the ruling of 12th November 2021 for the purposes of appeal.

2. On 4th August 2022; several months after the date of the ruling the subject of this appeal, the appellant filed a Notice of Motion application of the same date seeking a stay of execution of the decree of the lower court pending the hearing and determination of this appeal and an order lifting the proclamation and attachment that had been levied against the appellant. This is the application that is before me.

3. The application has been brought on the grounds set out on the face thereof and on the affidavit of the appellant sworn on 4th August 2022. The appellant has averred that the lower court entered interlocutory judgment against him in a ruling that was delivered on 12th November 2021 in favour of the respondents. The appellant has averred that on 10th March 2022, the court adopted the said ruling as a judgment of the court. The appellant has averred that unless the stay sought is granted, the

respondents are likely to execute the said decree a step that will erode the substratum of his appeal and render it nugatory. The appellant has averred that his application has been brought without unreasonable delay and that he will suffer irreparable loss unless the stay sought is granted.

4. The application is opposed by the respondents through a replying affidavit sworn by the 1st respondent on 12th September 2022. The respondents have averred that the appellant's application has not met the conditions for stay set out in order 42 rule 6 of the *Civil Procedure Rules.* The respondents have averred that the application has been brought after unreasonable delay and that the appellant has not demonstrated that he stands to suffer substantial loss if the stay is not granted. The respondents have contended further that the appellant has not furnished security for the due performance of the decree. The respondents have averred further that the appellant's appeal has no chances of success in that the appellant had admitted owing the respondents the sum of Kshs 8,500,000 that was awarded to the respondents in the judgment the subject of the appeal. The respondents have averred that monetary decrees are stayed only in exceptional circumstances and on condition that the entire decretal sum is deposited in court. The respondents have averred that in the event that the court exercises its discretion in favour of granting the stay sought, it should be conditional.

5. The application was argued by way of written submissions. The appellant filed his submissions on 12th August 2022 while the respondents filed their submissions on 20th September 2022. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the respondents in opposition to the application. Finally, I have considered the submissions by the advocates for the parties and the various authorities cited in support thereof. The appellant's application was brought under order 42 rule 6 of the *Civil Procedure Rules*. Order 42 rule 6(2) of the *Civil Procedure Rules* provides that:

> (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 ultimately be binding on him has been given by the applicant."

6. In *Kenya Shell Limited Karuga* (1982 – 1988) I KAR 1018 the court stated that:

> "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."

7. I am not persuaded that the appellant would suffer substantial loss if the stay sought is not granted. In the judgment that was delivered on 12th November 2021 and confirmed on 10th March 2022, the appellant was ordered to pay to the respondents a sum of Kshs 8,500,000 being a refund of the purchase price paid by the respondents to the appellant for Title No Kisumu/Kanyakwar "B"/1678 pursuant to the agreement of sale dated 19th July 2019 that was rescinded through a rescission agreement dated 14th February 2020. Apart from stating that the said amount is substantial, the appellant has not indicated that in case it is paid, the appellant will not be able to recover the same from the respondents. I am of the view that the mere fact that the decretal amount is substantial is not a ground for granting a stay. The appellant has therefore not discharged the burden of proving that he will suffer substantial loss unless the stay sought is granted.

8. I am also in agreement with the respondents that the appellant's application was brought after unreasonable delay that has not been explained. Judgment on admission in the sum of Kshs 8,500,000 was entered against the appellant on 12th November 2021. That judgment was confirmed on 10th March 2022. The application before the court was filed on 4th August 2022; that is more than 8 months after the initial judgment and 4 months after the judgment was confirmed. The appellant has not given any reasonable explanation for the long delay. I am of the view that the appellant who had slept of his rights was only woken up from slumber when the respondents levied attachment against him on 3rd August 2022. The orders sought by the appellant are discretionary. This court cannot exercise its discretion in favour of an indolent party. I have also noted that the appellant is not prepared to furnish security for the performance of the decree against him. The appellant has argued that the respondents are in possession of the suit property and as such do not require any other security and that he has a constitutional right to be heard on appeal. As mentioned earlier, security is a statutory condition for granting a stay. The appellant's right to be heard on appeal must be balanced against the respondents' equally weighty right to enjoy the fruits of their judgment and to have the decretal sum secured.

   The upshot of the foregoing is that the appellant's application dated 4th August 2022 has no merit. The same is dismissed with costs to the respondents.

DELIVERED AND DATED AT KISUMU THIS 15TH DAY OF NOVEMBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

N/A for the Appellant

N/A for the Respondents

Ms. J.Omondi-Court Assistant

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