Nduati v Nduati & another (Environment and Land Appeal E002 of 2021) [2022] KEELC 15402 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15402 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANGA

ENVIRONMENT AND LAND APPEAL E002 OF 2021

LN GACHERU, J

DECEMBER 8, 2022

BETWEEN

ANTHONY MAINA NDUATI ..... APPELLANT

AND

SAMUEL MWANGI NDUATI ..... 1ST RESPONDENT

ITUDA LIMITED ..... 2ND RESPONDENT

RULING

1. The respondents filed the instant application dated July 5, 2022, seeking for orders that;
    1. That this honourable court be pleased to grant leave to the firm of Mundia Mwangi & Co Advocates to come on record for the respondents.
    2. Spent
    3. Spent
    4. Spent
    5. That there be an order for *status quo ante* and/ or a stay of execution of the judgment issued by this honourable court on the June 30, 2022 pending appeal.
    6. That costs of this application be provided for.
    7. Any other order that this court may deem just and fit in these circumstances.
2. The application is predicated on eight grounds stated on the face of it and the supporting affidavit of David Itume Mukuna. The respondents contend that they intend to appeal against the judgment of this court of June 30, 2022. It is their contention that the director of the 2nd respondent has established his matrimonial home on the suit property and should stay not be granted, he risks losing

his matrimonial home. Further, it was contended that should stay orders not be granted, their intended appeal will be rendered nugatory and the same will be a mere academic exercise.

3. The application is opposed by the appellant/respondent herein *vide* a replying affidavit sworn by Anthony Maina Nduati. He deponed that he has been in occupation of the suit property since 2014, and that he occupies a distinct parcel of land from that of the 2nd respondent. It is his contention that the 2nd respondent has built his matrimonial home elsewhere, and not in the demised suit property. Further, he contends that the respondents have never lodged any appeal and the instant application is an attempt to delay the fruits of his judgments. He further deponed that the respondents do not have an arguable appeal and the instant application is not merited.

4. The application was dispensed with by way of written submissions and parties filed their respective rival submissions as directed by the court.

5. The respondents/applicants filed their submissions on the August 17, 2022, and raised one issue for determination.

6. It is their submissions that the respondents/applicants have met the threshold for the grant of orders of stay. The respondents further submitted on the conditions for grant of orders of stay as provided under order 42 rule 6 of the *Civil Procedure Code*. Reliance was placed on the case of *Elena Doudoladova Korir v Kenyatta University* {2014} eKLR, where the court adopted the conditions for grant of orders of stay as enumerated by the Court of Appeal in *Halal & another v Thornton & Turpin Ltd* to wit sufficient cause,

> "substantial loss would ensue from a refusal to grant stay, the applicant must furnish security & the application must be made without unreasonable delay."

7. The respondents further submitted that the fact that the order for cancellation has far reaching effects including loss of 1st respondent's matrimonial home, is sufficient reason for the grant of the orders sought. He maintains that they will suffer substantial loss for the reason that he lives on the suit property with his family having been a bonafide purchaser. It is their submissions that they are ready to deposit such security as may be directed by this court, but this being a land matter, the costs to be awarded in the event the appeal will be unsuccessful should be enough security. In the end, the respondents submitted that a stay for 60 days pending the appeal would not jeopardise the appellant/respondent but will serve to preserve the suit property.

8. The appellant filed his written submission on the August 25, 2022, wherein he raised one issue for determination, and that is whether the application should be allowed.

9. He reiterated the law on grant of stay and relied on the case of *Masisi Mwita v Damaris Wanjiku Njeri*(2016)eKLR, where the court highlighted the conditions for grant of stay as sufficient cause, substantial loss, furnish security for cost, must be made without unreasonable delay and that the appeal will be rendered nugatory.

10. He submitted on the foregoing conditions and maintained that the respondents have not demonstrated the foregoing. It is his submissions that the respondents will not suffer any loss within the meaning of the judgment of the court of *James Wangalwa & another v Agnes Naliaka Cheseto*(Misc application No 42 of 2011) in Bungoma where the trial court opined that substantial loss is such loss that will create a state of affairs of irreparable effect should execution issue. He contends that contrary to the respondents' assertions that he will be rendered homeless, the 1st respondent has not constructed his home on the ¼ acre but on the ¾ piece. The appellants submits that the 1st respondent has not made

out a case for grant of the orders sought and the instant application should be dismissed and he should be allowed to enjoy the fruits of his judgment.

11. The appellant filed a suit *vide* Kandara SRM ELC No 4 of 2019 against the respondents seeking a cancellation of the 2nd respondent's title over Loc 16/Kigoro/1737, for a claim of ¼ acres which he alleged was fraudulently transferred to the 2nd respondent by the 1st respondent. The trial court entered judgment against the 1st respondent in terms of prayer (b) of the plaint, which prayer sought an order to compel the 1st respondent(defendant) to transfer ¼ acre of land to the plaintiff.

12. Being dissatisfied with the judgment the appellant (plaintiff) moved this Court on Appeal for orders that the judgment of the court be partially set aside and judgment be entered as per prayer (a) and (c) of the amended plaint dated August 20, 2020. The appeal was allowed.

13. The respondents now wishes to appeal against the said judgment and have moved this court for the orders enumerated hereinabove.

14. Having considered the application and the annexures thereto, the replying affidavit and the annexures thereto and the rival written submissions, the issues for determination are;

    i. Whether leave should be granted to the law firm of Mundia Mwangi & Co Advocates to come on record for the respondents

    ii. Whether an order for stay or status quo ante can issue

    iii. Who shall bear the costs for the application

Whether leave should be granted to the Law Firm of Mundia Mwangi & Co. Advocates to come on record for the Respondents

15. None of the parties submitted on this prayer despite the respondent/applicants moving court for the same. The right to legal representation is guaranteed not only in criminal proceedings, but also civil, thus the respondents have a right to choose an advocate of their choice. However, rules of procedure must be adhered to as set out in order 9 of *Civil Procedure Rules*. Presently, order 9 rule 9 of *Civil Procedure Rules* lays out the practice to be followed being

> When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

16. The Act contemplates a twofold process which is either through an application to court for leave or by consent and it carries mandatory tone. The purpose of this is to protect the outgoing advocates from unscrupulous litigant and to notify the court.

17. While an appeal is a fresh proceedings and parties can choose an advocate of their choice without adherence to the foregoing, there is a limitation as was well enunciated by the Court of Appeal in where the court held

> "Once a judgment is entered, save for matters such as applications for review or execution or stay of execution *inter alia*, an appeal to an appellate court is not a continuation of

proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a notice of change of advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate."

18. The respondents/applicants have moved this court for leave and is thus well within the confines of the law. What is not clear is whether the previous counsel was notified or not. Be that as it may, this court lends credence to the respondents/applicants and exercise the unfettered discretion donated by article 159 of the *Constitution* and proceeds to grant the leave to the law firm of Mundia Mwangi & Co Advocates to come on record for the respondents herein.

Whether an order for stay or status quo ante can issue

19. The law on stay pending appeal is well laid out under order 42 rule 6 of the *Civil Procedure Rules* which provides;

(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 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.

(3) ...

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of that court notice of appeal has been given.

20. The Supreme Court in application No 5 of 2014 *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR held that

"the applicant must satisfy the court that

(i) the appeal or intended appeal is arguable and not frivolous; and that

(ii) unless the order of stay sought is granted, the appeal or intended appeal, were it to eventually succeed, would be rendered nugatory."

The principles were also echoed in the Court of Appeal case of *Butt v Rent Restriction Tribunal* [1982] KLR 41.

21. The principles contemplated above include, substantial loss on the part of the applicant, application is made without delay and the applicant to furnish such security as will be directed by court and lastly that the appeal will not be rendered nugatory.

22. Instantly, the application was filed on July 8, 2022, whereas judgment was delivered on June 30, 2022, at least seven days from the date of judgment. What amounts to inordinate delay differs from case to case. Once a court delivers judgment, there is always an existing uncertainty as to what time execution can issue as a result therefore; an aggrieved party is required to take immediate action to avoid execution by staying the orders of court. In civil case No 32 of 2010, *Utalii Transport Company Limited & 3 others v Nic Bank Limited & another* [2014] eKLR; the court while considering what amounted to inordinate delay had this to say

> "Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable".

I associate myself fully with this.

23. The respondents averred that the application was filed timely having been filed at least five days from the date of judgment. Even though no reason was advanced as to why the application could not be filed immediately, this court finds and holds that the delay was not inordinate.

24. On the second limb of substantial loss, this court considers the meaning of substantial loss as was defined Plat GA J as he then was in *Kenya Shell Limited v Benjamin Karuga Kibiru & anorther* [1986] eKLR, where the court held

> "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"

25. Further in *James Wangalwa & another v Agnes Naliaka Cheseto*{2012}, the court found that substantial loss is what has to be prevented by preserving the status quo because such loss would render an appeal nugatory. It is therefore not enough to suggest that the applicant will suffer loss as this court has to be furnished with evidence as to the loss that will be suffered and the injury that will occasion the applicants. The respondents averred that the 2nd respondent has put up a matrimonial home on the suit property and should execution issue, his family will be rendered vagabonds. The appellant on the other had maintained that the 2nd respondent only occupies ¾ acre of the land and that is where he has constructed his matrimonial home.

26. This court is not well aware of the foregoing. It was the judgment of this court that the appellant is entitled to ¼ acre of the land. The effect of the judgment of the court is that the 2nd respondent's title will be cancelled and such cancellation will interfere with the substratum of the appeal, which is the suit land and will also have ripple effect of interfering with the 2nd respondent's use and occupation of the suit property.

27. The essence of stay is to preserve the subject matter pending the hearing and determination of the appeal. The appellant does not dispute that the 2nd respondent is in occupation of the suit land.

Cancellation of title will have such far reaching effects in the end. It is thus the finding of this court that the 1st respondent has demonstrated that he is likely to suffer substantial loss.

28. Whether the appeal will be rendered nugatory is an issue to be determined on case by case basis. This court has already found hereinabove that cancellation of title will have such far reaching effect including interfering with the 2nd respondent's title deed. Undoubtedly, cancellation will render the appeal nugatory should the same become successful.

29. On security, the purpose of security was enunciated by the in *Arun C Sharma v Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 others* [2014] eKLR, where the court stated that:

> "The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor ... civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

30. Similarly, the court in *Focin Motorcycle Co Limited v Ann Wambui Wangui & another* [2018] eKLR, held,

> "Where the applicant proposes to provide security as the applicant has done, it is a mark of good faith that the application for stay is not just meant to deny the respondent the fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security or to propose the kind of security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay."

31. The respondents/applicants have submitted that they are ready and willing to submit such security as may be directed by this court. However, the applicant suggest that the costs to be awarded in case the appeal will be unsuccessful will be enough. While this court appreciates his proposition, it finds that not to be adequate.

32. This being an appeal to the Court of Appeal, this court must also ensure there has been filed an appeal within the provisions of order 42 rule 6(3) above. As per the attached notice of appeal, it is evident that the notice of appeal has not been lodged as required by rule 77(1) of the *Court of Appeal Rules* which provides;-

> (1) A person who desires to appeal to the court shall give notice in writing, which notice shall be lodged in two copies, with the registrar of the superior court."

33. Such notice must be lodged within 14 days of the judgment of this court as contemplated by rule 77(2). The attached notice of appeal was prepared on the July 5, 2022, five days after delivery of judgment of this court. It is not clear whether the notice of appeal was lodged or the cause of attaching it to the instant notice of motion application herein amounts to filing the same. This court notes from the appellant's response in paragraph 6 that no appeal has since been lodged and as at the time of the instant ruling, this court has not been appraised. However, appeal under the *Court of Appeal Rules* includes an intended appeal. To this end, this court finds and holds that the 1st respondent has satisfied the conditions for grant of stay. However, on account of the unclear status of appeal, the stay shall be conditional to the filing of appeal.

iii. Who Should Pay Costs Of The Application?

34. While it is trite law that costs shall follow the events, this court has the discretion to make such orders as to cost. Thus this court directs that each party to bear its own costs.

35. Having now carefully considered the instant application, the court finds it merited and it is allowed in terms of prayers No 1 and 2 on conditions that the respondents/applicants do furnish a security by depositing in court Kshs 50,000/= as security within the next 14 days from the date hereof.

36. Further the respondents/applicants are directed to file their intended appeal within the next 60 days from the date hereof, failure to do so, the stay order will lapse automatically. Failure to deposit the security of Kshs 50,000/= in court means that the stay order shall not be issued.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 8TH DAY OF DECEMBER, 2022.

L. GACHERU

JUDGE

Delivered virtually;

In the presence of

Mr Kirimi for the Appellant/Respondent

Ms Misiko for the 1st & 2nd Respondents/Applicants

Joel Njonjo - Court Assistant

L. GACHERU

JUDGE

8/12/2022