Masinde & another v Onyango (Civil Case 14 of 2020)
[2022] KEELC 15283 (KLR) (7 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15283 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

CIVIL CASE 14 OF 2020

BN OLAO, J

DECEMBER 7, 2022

BETWEEN

DOMIANO BARASA MASINDE ..... 1ST APPLICANT

FELIX WASIKE MASINDE ..... 2ND APPLICANT

AND

CHARLES NAMWIMA ONYANGO ..... RESPONDENT

RULING

1. By a judgment delivered on September 29, 2022, this court decreed that Charles Namwima Onyango (the respondent for purposes of this ruling), was entitled to half a portion of the land parcel No Bukhayo/Buyofu/615 (the suit land) by way of adverse possession. Domiano Barasa Masinde and Felix Wasike Masinde (the applicants for purposes of this ruling) were directed to execute all the documents necessary to have that portion registered in the names of the respondent within 30 days and in default, the deputy registrar would be at liberty to do so.

2. Aggrieved by that judgment, the applicants lodged a notice of appeal on September 30, 2022.

3. The applicants have now approached this court *vide* their notice of motion dated September 30, 2022 and predicated under the provisions of article 38 and 154 (2) of the *Constitution*, sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* and order 42 rules 5 and 6 of the *Civil Procedure Rules* seeking the following orders:

    1. Spent.

    2. Spent.

    3. That this honourable court be pleased to issue stay of execution of the orders issued on September 29, 2022 and all consequential decrees/orders issued pursuant thereto pending a formal application for appeal and it's necessary annextures (sic) over the said judgment.

4. That the costs of this application be provided for.

4. This application is premised on the grounds set out therein and is supported by the affidavit of the 1st applicant dated September 30, 2022.

5. The gravamen of the application is that the applicants are aggrieved by the judgment delivered on September 29, 2022 and intend to appeal. That if the orders sought are not granted, the respondent may proceed with execution of the decree herein to his detriment. That the application should be allowed to enable the applicants prosecute their appeal.

6. Annexed to the application is the notice of appeal dated September 30, 2022.

7. The application is opposed and the respondent has filed a replying affidavit whose date is not very legible and in which he has deponed, *inter alia*, that the applicants' have not satisfied the threshold to qualify for the grant of the orders sought. Further, that the applicants have not demonstrated that they stand to suffer substantial loss which cannot be compensated by an award of damages in the event that their appeal succeeds nor shown that their appeal has high chances of success. The applicants have also not shown their willingness to deposit any security in court or to abide with any conditions which the court may deem fit. Further, that he and the applicants occupy their respective half portions of the suit land which are defined and therefore the applicants do not risk being evicted. That the applicants have been very violent to him and it is only fair that he be allowed to execute the judgement and this application should therefore be dismissed with costs.

8. When the application was placed before me on October 3, 2022, I declined to certify it as urgent but directed that it be canvassed by way of written submissions.

9. The submissions were subsequently filed by Mr Nyegenye instructed by the firm of Calistus Nyegenye & Company Advcoates for the respondent and by the applicants who are acting in person.

10. I have considered the application, the rival affidavits and the submissions.

11. The applicants seek a stay of execution of the judgement delivered on September 29, 2022 pending the hearing of an appeal. Order 42 rule 6 (1) and 2) of the *Civil Procedure Rules* provides as follows:

> 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 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 –
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> (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" Emphasis added.

12. It is clear from the above that a party must meet the following requirements 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 of the due performance of any decree that may be binding upon him.

13. 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 nuggatory by some other event. Substantial loss in it's various forms is the cornerstone of both jurisdiction 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 the same case, Gachuhi Ag JA (as he then was) added the following:

> "It is not sufficient by merely stating that the sum of Kshs.20,380 is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it was before judgement. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgment." Emphasis added.

In *Machira & Company Advocates v East African Standard (No 2) 2002 2KLR 63*, Kuloba J addressed the same issue in the following terms:-

> "If the applicant cities, 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)."

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 by 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 circumstances" Emphasis added.

14. The applicants filed this application on the day following the judgment sought to be appealed. There has been no unreasonable delay. Secondly, the applicants have already filed a notice of appeal. They have therefore shown sufficient cause.

15. However, they have not surmounted the hurdle of demonstrating that if the order of stay is not granted, they will suffer "substantial loss." Yet, as I have already illustrated above, that loss is the "cornerstone" of such an application. No where in their application have the applicants made reference to the "substantial loss" that they may suffer if this application is denied. In paragraph 4 of his supporting affidavit, the 1st applicant states:

> 4: "That unless stay of execution orders are granted, the respondent may proceed with execution against me to my detriment."
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> Other than that vague assertion that execution will be to their "detriment," the applicants have not gone further to demonstrate what this likely "detriment" will be and whether it will be "substantial"
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> As was held in Machira & Company Advocates v East African Standard (*supra*) "mere vague speculation" will not suffice. There is no evidence placed before this court to suggest, for instance, that the respondent intends to dispose off his portion of the suit land as awarded by the court thus putting it beyond the reach of the applicants should their appeal succeed. In paragraph 3 of their submissions, the applicants state that:
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> > "If the execution to the decree herien is effected, it would amount to denying a registered owner the right to use his own property at the instance of a person who has no title at all. The Court of Appeal in *Michael Githinji Kimothi v Nicholas Muratha Mugo 1977 eKLR* held that a party in occupation of land as a squatter without title to the land in his favour is in no position to resist the registered proprietor's claim."
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> The respondent may have been a squatter with no title when he filed this suit on May 26, 2022 seeking orders that he had acquired a portion of the suit land by way of adverse possession. However, on September 29, 2022 when Omollo J delivered the judgement herein up-holding the respondent's claim, the applicants' title to half a portion of that land was extinguished. They became mere trustees holding that portion on behalf of the respondent pending execution of the relevant documents as directed in the said judgement. Further, and has rightly been deponed in paragraph 8 of the replying affidavit, the applicants occupy half of the suit land while the respondent occupy the other half with both portions properly defined and therefore there is no risk of the applicants being evicted. Indeed they have not made any such allegations of imminent eviction. Clearly, there is no proof of any "substantial loss" which would warrant the grant of the orders sought and on that basis alone, this application is for dismissal.

16. The applicants were also required to offer security for the due performance of any such decree or order as may ultimately be binding on them. Nowhere in his 8 paragraph supporting affidavit has the 1st applicant made any such offer. In *Vishram Ravji Halai & Another v Thornton & Turpin (1963) Ltd CA Civil appeal No 15 of 1990 [1990 KLR 365]*, the Court of Appeal held:

> "The 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 case, 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" Emphasis added.

The applicants have not offered any security nor averred that they are ready and willing to abide by any conditions which this court may deem fit to impose for the due performance of such decree or order as may ultimately be binding upon them. As I held in *Wycliff Sikuku Walusaka v Philip Kaita Wekesa 2020 eKLR*;

"The offer for security must of course come from 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 merely as a decoy to obstruct and delay the respondent's right to enjoy the fruits of his judgment"

In the absence of that offer, this application must collapse.

17. Finally, and although not pleaded in their supporting affidavit nor grounds upon which the application is premised, the applicants, citing the case of *Ismael Kagunyi Thande v HFCK CA Civil Application No 156 of 2006* have submitted that:

> " We humbly submit that the applicant's intended appeal has chances of success as the court erred in law and in fact by totally failing to appreciate the evidence on record thus arriving at an erroneous finding that the applicant has to transfer his land to the defendants"

The case of Ishmail Kagungi Thande v HFCK (*supra*) was concerned with an application under rule 5 (2) (b) of the *Court of Appeal Rules*. In that case, the court addressed itself as follows:

> " The jurisdiction of the court under rule 5 (2) (b) is not only original but also discretionary. Two principles guide the court in the exercise of that jurisdiction. The principles are well settled. For an applicant to succeed, he must not only show his appeal is arguable, but also that unless the court grants him an injunction or stay as the case may be, the success of the appeal will be rendered nugatory."

That case cannot aid the applicants because the Court of Appeal was dealing with a rule 5 (2) 1 (b) application under it's rules. The jurisdiction of this court to grant a stay of execution order is circumscribed by order 42 rule 6 of the *Civil Procedure Rules* as is clearly captured in the case of Vishram Ravji Halai & Another v Thornton & Turpin (*supra*) and the arguability of the intended appeal is not among the conditions which the applicants were required to satisfy. In any event, this court cannot purport to determine the success or otherwise of an appeal arising from the judgement of another judge. It can only do so when considering an application for stay of execution arising from the judgement of a subordinate court. That submission is therefore misplaced and does not aid the applicants.

18. It is clear from all the above that the applicants only met two out of the four conditions required by law for the grant of the orders sought. Having failed to satisfy the two other conditions stipulated in the law, the applicants are not deserving of the orders sought.

19. Ultimately, therefore, the notice of motion dated September 30, 2022 is dismissed with costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT ON THIS 7TH DAY OF DECEMBER 2022.

Mr Ouma for Mr Nyegenye for applicant present

applicant also present

1st respondent present

2nd respondent absent

BOAZ N OLAO

JUDGE

7THDECEMBER 2022