



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT MIGORI

ELC CASE NO. 733 OF 2017

(Formerly Kisii ELC case No. 636 of 2016)

SAMSON MARIGO MAKUBO.....PLAINTIFF/APPLICANT

VERSUS

JOSEPH MWITA RAGITA.....1ST DEFENDANT/RESPONDENT

ROBI MWITA.....2ND DEFENDANT/RESPONDENT

RAGITA MWITA.....3RD DEFENDANT/RESPONDENT

BUCHORO MWITA.....4TH DEFENDANT/RESPONDENT

RAGITA MWITA.....5TH DEFENDANT/RESPONDENT

RULING

1. The instant ruling is in respect of an application by way of Notice of Motion dated 24th August 2020 duly filed in court on the even date under Order 51 of the Civil Procedure Rules, 2010 (the Rules herein) as read with section 1A and 1B Civil Procedure Act Chapter 21 Laws of Kenya and Order 12 Rule 7 of the Rules. The plaintiff, Samson Maringo Makubo (the applicant herein) who appears in person, is seeking orders infra :-

a) Spent

b) **THAT** this Honourable court be pleased to stay execution of the orders issued on 15th January 2020, and the Bill of cost dated 22nd July 2020 pending hearing and determination of this application.

c) **THAT** this Honourable court be pleased to stay execution of the orders issued on 15th January 2020 and the Bill of Cost dated 22nd July 2020 pending and determination of the applicant's intended appeal at the Court of Appeal.

d) **THAT** cost of this application be in the cause.

2. The application is premised on the applicant's affidavit sworn on the even date and the annexed notice of appeal marked as "SMM1" alongside taxation notice and Bill of costs marked as "SMM2" (a) and (b) "SMM1" as well as grounds (a) to (i) set out on its face. Briefly, the applicants laments inter alia, that further to the delivery of this court's ruling on 18th January 2020 in regard to the defendant's preliminary objection at paragraph 11 of their statement of defence amended and dated 24th June 2019, he filed the notice (SMM1) and served the same on the defendants' counsel. That he was not able to file and serve the notice within the set timelines due to Corona Virus Pandemic Challenges which paralysed court operations from 16th March 2020.

3. The applicant also laments that the respondents have since filed the notice and the bill (SMM 2 (a) and 2 (b)) due for taxation. That the intended appeal has raised many serious and significant issues for hearing and determination by the Court of Appeal. That therefore, the application be allowed as he is likely to suffer loss and damages if the orders sought herein are not granted.

4.m In a further affidavit sworn on 16th November, 2020 to supplement his supporting affidavit, the applicant stated in part that he filed and served the intended appeal to and is waiting upon the Court of Appeal to fix it for hearing. Annexed to the further affidavit are a memorandum and the record of appeal marked as "SMM1(a)" and "SMM1 (b)" respectively and a letter of the Deputy Registrar, Court of Appeal at Kisumu marked as "SMM2".

5. The respondents through their learned counsel **Messrs, Oguttu Ochwangi, Ochwal and Co Advocates** opposed the application and sought its dismissal with costs.

6. On 22nd October, 2020, this court directed that the application be argued by way of written submissions; see **Order 51 Rule 16 of the Civil Procedure Rules, 2010** and Practice direction number 33 of the Environment and Land court Practice Directions, 2014.

7. Accordingly, in his four (4) paged submissions dated 16th November, 2020 and filed in court on 17th November 2020, the applicant made reference to the orders sought in the application, the conditions set out under **Order 42 Rule 6 of the Rules**, and urged this court to allow the application with costs. In his analysis of the facts and the law, he cited **James Wangalwa and another =vs= Agnes Naliaka Cheseto (2012) eKLR, Commissioner of Customs =vs= Anil Doshi (2007) eKLR, section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya)** and the case of **Butt =vs= Rent Restriction Tribunal (1979)**, to reinforce his submissions.

8. On the other hand, the defendants, through the firm of Oguttu Mboya, Ochwal and partner, Advocates filed submissions dated 15th February 2011 whereby they sought dismissal of the application with costs to the respondents. Counsel gave a brief background of the case, framed four (4) issues for determination and relied on several pronouncements namely **Electro Watts Limited =vs= Alios Finance Kenya limited (2018) eKLR, DR. G.N. Muema P/A MT. View Maternity and Nursing Home =vs= Miriam Maalim Bishar and another, Voi High Court Civil Application No. 20 of 2016, Ndegwa Gichine =vs= Sicily Warware Njira (2018) eKLR. Tom Ojienda and Associates =vs= Mumias Sugar Company Limited and another (2018) eKLR and NSSF =vs= Central Bank of Kenya & 2 others (2015) eKLR**, to buttress the said submissions.

9. I have carefully considered the application in its entirety, the replying affidavit and rival submissions including case law cited therein. Therefore, before I embark on the issues for determination, I note that the application is mounted **under Order 51 (supra), sections 1A as well as 1B and Order 12 Rule (7) (supra)** governing applications, overriding objective and setting aside judgment or dismissal respectively; see also section 3 of the Environment and Land court Act, 2015 (2012) regarding the overriding objective.

10. Besides, the application is intently initiated under Order 42 Rule 6 (2) (supra) which reads;-

“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”(conditions emphasized)

11. In the Black’s Law Dictionary 10th Edition by Bryan A. Garner at page 1639, the term “**Stay**” means;-

“The postponement or halting of a proceeding, Judgment, or the like. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding. Also termed stay of execution; suspension of judgment”

12. The conditions emphasized in paragraph 10 herein above and as framed in the parties’ respective submissions, boil down to whether;-

a) The conditions for stay of execution have been met.

b) The decree herein is in the nature of a negative order not capable of stay.

c) The orders sought in the application are merited.

13. On the first condition, the applicant stated that he got aggrieved by the ruling of this court rendered on 15th January 2020 and that he filed a memorandum of appeal and record of Appeal as disclosed in the documents marked as **“SMM 1(a) and SMM 1(b)” and SMM 2**. That if stay of execution of the decree is not granted, the respondents are likely to proceed with taxation as shown in the notice and the bill marked as **“SMM 2 (a) and (b)”**.

14. The applicant cited the decision in **Wangalwa case (supra)** on substantial loss. That he is bound to be denied his constitutional right of appeal.

15. The respondent’s counsel asserted that the applicant has not proved the substantial loss he is bound to suffer in the event the orders sought in the application are not granted. Reference was made to **Muema and Gichine cases (supra)** to fortify the assertion.

16. By the Notice marked as **“SMM1”**, the appeal to the Court of Appeal is deemed to have been duly filed as envisaged under Order 42 Rule 44 of the Rules. Furthermore, by the Memorandum of Appeal and record of Appeal marked as **“SMM1 (a)” and “SMM1 (b)”** respectively, the appeal is duly filed and pending hearing and determination as discerned in the letter marked as **“SMM2”**. So, if the respondents are allowed to proceed as observed in paragraph 13 hereinabove, the applicant is likely to suffer great financial detriment as envisaged in **Blue Shield Company Ltd =vs= Mahinda (2009) KLR 551 at 560 and David Morton Silverstein =vs= Atsango Chesoni (2002) 1KLR 867**.

17. As regards the second condition, this court is pretty aware of Section 79G of the Civil Procedure Act Chapter 21 Laws of Kenya as

pertains the timelines for filing of appeals. Order 50 Rules 4 and 8 of the Rules govern when time does not run and to computation of days respectively.

18. In the case of **Philip Chemwolo and Another =vs= Augustine Kubende (1982-88) KAR 103, Apaloo JA** held that delay is judged against the facts of the case and the surrounding circumstances. Thus, four weeks delay would be an extreme penalty and would be wrong and unjust in the circumstances.

19. It is common baseline that the court delivered the ruling on 15th June 2020. The appeal was deemed filed as per notice marked as "SMM1" whole the application was filed seven (7) Months thereafter. To that extent, the delay herein is not inordinate.

20. The term "Security" as captured in the third condition, is defined in the Concise Oxford English Dictionary 12th Edition at page 1302 as hereunder:-

"a thing deposited or pledged as a guarantee for the fulfilment of an undertaking or the repayment of a loan."

21. It is trite law that no person or body is exempt from providing security for the due performance of a decree as required by the statute; see **Doshi Iron Mongers Ltd =vs= Kenya Revenue Authority and another (2020) EKLR.**

22. I approve the reasoning in **Gichine case (supra)** that it is within the discretion of the court as to what kind of security a party would provide based on the circumstances of the case. That security will be provided where a court grants stay of execution. That should be the position in the present application.

23. On the nature of the order or decree, this court considers the circumstances under which the suit was dismissed with costs as contained in the ruling rendered on 15th January, 2020. I also take note of **Dr. G. N. Muema case (supra)** and others on the negative order as cited in the respondents' submissions. However, those authorities were decided on their own facts and are distinguishable. Clearly, the appeal duly filed at the Court of Appeal, would be rendered nugatory, if successful, in the event the application for stay is refused as held in **Silverstein case (supra).**

24. More fundamentally, it is settled law that the court has authority to issue orders for the preservation, in the interim, of a subject matter of appeal, see **Board of Governors Moi High School Kabarak and another =vs= Malcolm Bell (2013) eKLR.**

25. It is therefore, the finding of this court that the applicant has satisfied the cumulative conditions set out under Order 42 Rule 6 (supra). He is entitled to the orders sought in the application as the same are merited in the circumstances.

26. Accordingly, the application dated 24th August 2020 duly filed in Court on the even date, is hereby allowed thus:

(a) Order 3 sought therein is granted

(b) costs of the application to abide the outcome of Civil Appeal No. 116 of 2020 pending before the Court of Appeal at Kisumu.

(c) For the due performances of the decree herein, the applicant shall deposit security in the form of Kenya Shillings Eighty Thousand (Kshs. 80,000/=) in this court within the next thirty days from this date in default the stay of execution of orders as granted herein shall lapse automatically.

Orders accordingly.

DELIVERED, DATED and SIGNED at MIGORI this 24th day of February, 2021

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. B. S. Mulisa learned counsel for respondents

Tom Maurice - Court assistant