Barasa v Kwoba (Enviromental and Land Originating Summons E023 of 2021) [2024] KEELC 5108 (KLR) (9 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5108 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIROMENTAL AND LAND ORIGINATING SUMMONS E023 OF 2021

BN OLAO, J

JULY 9, 2024

BETWEEN

CRESENT WANDERA BARASA ..... APPLICANT

AND

PAUL ODHIAMBO KWOBA ..... RESPONDENT

RULING

1. The dispute between CRESENT WANDERA BARASA (the Applicant herein) and PAUL ODHIAMBO KWOBA (the Respondent herein) over the ownership of the land parcel NO BUKHAYO/EBUSIBWABO/149 (herein the suit land) was determined by this Court vide a judgment delivered on 27th September 2023. In that judgment, the Court awarded the Applicant 6.1625 acres out of the suit land and dismissed the Respondent's counter-claim.

2. The Respondent was aggrieved by the judgment and promptly filed a Notice of Appeal on 4th October 2023. It is not clear if any appeal was subsequently filed.

3. The Applicant has now approached this Court by his Notice of Motion dated 24th January 2024 and premised under the provisions of Section 72 of the *Civil Procedure Act* and Order 42 Rule 6 and Order 51 Rule 1 of the Civil Procedure Rules. He seeks the following orders:

    1. Spent

    2. Spent

    3. That this Honourable Court be pleased to issue an order of stay of execution and/or implementation of the order and/or decree issued by this Honourable Court pending the hearing and determination of the Respondent's appeal before the Court of Appeal.

    4. That this Honourable Court be pleased to issue an order of stay of execution and/or implementation of the order and/or decree issued herein pending the hearing and

determination of the Applicant's intended cross appeal to the Respondent's appeal before the Court of Appeal.

5. That costs be provided for.

The application is premised on the grounds set out therein and is also supported by the Applicant's supporting affidavit of even date.

4. The gravamen of the application is that following this Court's judgment delivered on 27th September 2023, the Respondent was aggrieved and filed a Notice of Appeal. The Applicant is equally aggrieved by the said judgment and intends to file a notice of cross-appeal against the Respondent's appeal in the Court of Appeal. That meanwhile, the Respondent has extracted the decree herein and served it upon the County Surveyor for implementation on 25th January 2024. If the said decree is implemented, the Applicant will suffer irreparable loss since this Court did not specify which part of the suit land should the 6.1625 acres be excised from since the Applicant has fully developed the whole 11.16 acres which he was claiming from the Respondent in this suit. That he did not find it necessary to file his own appeal since he knew that he would have a chance during the Respondent's appeal to raise his cross-appeal and if this application is not allowed, his intended cross-appeal will be rendered nugatory. That the application has been brought in good faith, without delay and the Respondent will suffer no prejudice.

5. The following documents have been annexed to the application:

1. Notice of Appeal lodged by the Respondent on 4th October 2023.

2. Notice of Address for service dated 12th October 2023 and lodged by the Applicant on 1st November 2023.

3. Notice of Cross-Appeal by the Applicant dated 10th January 2024.

4. Letter dated 8th January 2024 by the County Surveyor Busia and addressed to the parties advising them that the Court Order will be implemented on 25th January 2024.

6. The application was opposed and the Respondent filed a replying affidavit dated 14th February 2024 in which he has deposed, inter alia, that his advocate is still on record and ought to have been served with this application. That he filed the Notice of Appeal in person and it was not meant for this case. That he has been advised by counsel that the application is incurably incompetent since it was filed long before he had filed his Notice of Appeal on 4th October 2023. That his Notice of Appeal lapsed automatically upon the expiry of 60 days and therefore there is no appeal against which a cross-appeal can be filed. Further, that this application is hanging in the air as it has been brought pending a non-existent appeal and cross-appeal. That the Applicant has not met the condition for granting an order of stay pending appeal. In any case, the Applicant won the case and the purpose of the survey is to curve out his six (6) acres and transfer the same to him and therefore the Respondent does not understand why the Applicant wants any order of stay.

7. The application has been canvassed by way of written submission. These have been filed by MR BOGONKO instructed by the firm of BOGONKO, OTANGA & COMPANY ADVOCATES for the Applicant and by MR ONSONGO instructed by the firm of OBWOGE ONSONGO & COMPANY ADVOCATES for the Respondent.

8. I have considered the application, the rival affidavits and the submissions by counsel.

9. Before I delve into the application, I must address an issue raised by the Respondent in paragraph 3 of his replying affidavit in which he has taken issue with the fact that the application was served upon him personally yet he has counsel acting for him. It is of course true that during the trial, MR ONSONGO

acted for the respondent upto the time the judgment was delivered on 27th September 2023. The record shows, however, that the Respondent filed the Notice of Appeal in person which he lodged herein on 4th October 2023. By doing so, he was intimating that for purposes of the appeal, he would be acting in person. That notwithstanding, his replying affidavit was drawn and filed by his counsel MR ONSONGO who also filed his submissions. Nothing really turns on that complaint.

10. Having said so, and inspite it's wording this is essentially an application of stay of execution pending an appeal. Such an application is governed by the provisions of Order 42 Rule 6 (1) and (2) which provides that:

(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 -

(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 mine.

It is clear from the above that a party seeking an order of stay of execution pending appeal must prove the following:

1. Show sufficient cause.
2. Demonstrate that he will suffer substantial loss unless the order is granted.
3. Approach the Court without unreasonable delay.
4. Offer security.

The jurisdiction of this court while considering an application for stay of execution pending appeal was circumscribed by the Court of Appeal in the case of VISHRAM RAVJI HALAI & ANOTHER -V- THORNTON & TURPIN (1963) LTD 1990 KLR 365 as follows:

> " Thus the Superior Court's discretion 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."

The marginal notes to Order 42 Rule 6 of the Civil Procedure Rules read:

"Stay in case of appeal."

And Order 42 Rule 6 (1) commences thus:

QUOTE{startQuote "}

No appeal or second appeal shall operate as a stay of execution ..."

That means that in seeking an order of stay of execution of a judgment herein pending an appeal, the Applicant was first required to show sufficient cause by demonstrating that he has already filed or commenced the filing of an appeal against the judgment herein to the Court of Appeal. It is the filing of a Notice of Appeal which confers upon this Court the jurisdiction to grant an order of stay of execution pending appeal. And under Rule 75 (2) of the *Appellate Jurisdiction Act*:

> " Every such notice shall, subject to rules 84 and 97, be so lodged within fourteen days of the date of the decision against which it is desired to appeal."

Order 42 Rule 6 (4) of the Civil Procedure Rules provides that:

> " 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."

And Rule 84 (1) of the Court of Appeal reads:

> " Subject to rule 118, an appeal shall be instituted by lodging in the appropriate registry, within sixty days after the date when the notice of appeal was lodged-
>
> (a) a memorandum of appeal, in four copies;
>
> (b) the record of appeal, in four copies;
>
> (c) the prescribed fee; and
>
> (d) security for the costs of the appeal:
>
> Provided that where an application for a copy of the proceedings in the superior court has been made in accordance with subrule (2) within thirty days after the date of the decision against which it is desired to appeal, there shall, in computing the time within which the appeal is to be instituted, be excluded such time as may be certified by the registrar of the superior court as having been required for the preparation and delivery to the appellant of such copy."

The Respondent having filed a Notice of Appeal did not file a record of appeal within 60 days. Indeed he abandoned the appeal as is clear from paragraph 6 of his replying affidavit where he has deponed thus:

> " That I filed my Notice of Appeal on 4/10/2023 and it lapsed automatically upon expiry of 60 days when I abandoned the quest to file record of appeal and as such there was no appeal to cross-appeal against."

In view of the above, counsel for the Respondent has made the following submissions:

> " My lord, it is upon the foregoing humble submissions that we submit that there is no pending appeal on the part of the Respondent. If there is no pending appeal, can the Applicant file a cross-appeal? Our humble submissions are that he cannot. This is because a cross-appeal is pegged upon an appeal already filed."

Counsel is correct in that submission. A notice of appeal dies a natural death after the expiry of 60 days if no record of appeal is filed unless it is resuscitated by an order extending time – MAE PROPERTIES LIMITED -V- JOSEPH KIBE & ANOTHER 2017 eKLR. Therefore, there

can be no cross-appeal by the Applicant as alleged in paragraph 4 of his supporting affidavit. A cross-appeal, as defined in BLACK'S LAW DICTIONARY 10TH EDITION is:

> " An appeal by the appellee, usu. heard at the same time as the appellant's appeal."

Clearly therefore there can be no cross-appeal by the Applicant as known in law to warrant an order of stay of execution pending appeal.

11. Most importantly, the Applicant has deposed in the said paragraph 4 of his supporting affidavit thus:

> " That I was equally aggrieved by the judgment of this Honourable Court and I intend to file a cross appeal to the respondents appeal before the Court of Appeal which can only be filed within 30 days after service of the memorandum of appeal and the record of appeal upon me by the respondent under Rule 90 and 91 of appeal rules which is yet to be done for me to realize my intention." Emphasis mine.

Under Order 42 Rule 6 (1) of the Civil Procedure Rules an "appeal" or "second appeal" can justify the grant of an order of stay of execution pending appeal. There is no room for an intended cross-appeal as a ground upon which an order for stay of execution pending appeal can be premised. On that ground alone, this application must collapse.

12. The Applicant was also required to demonstrate that if the order for stay of execution pending appeal is not granted, he is likely to suffer substantial loss. In paragraph 8 of his supporting affidavit, the Applicant has deposed thus:

> " That I am in actual occupation of a portion measuring approximately 11.16 acres out of L.R. NO BUKHAYO/EBUSIBWABO/149 which I have expensively developed and I shall therefore suffer irreparable loss and damage if the decree is implement as sought."

Substantial loss, as was stated by PLATT Ag. JA (as he then was) in the case of KENYA SHELL LTD -V- KIBIRU & ANOTHER 1986 KLR 410, "is the cornerstone of both jurisdictions for granting 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." Other than alleging that he will "suffer irreparable loss and damage if the decree is implement (sic) as sought," the Applicant has not stated what substantial loss or irreparable loss he will suffer if the order for stay of execution is not granted. It is not enough to simply allege substantial or irreparable loss and leave it at that. The Applicant ought to have gone further and show what loss he will suffer and that it will be substantial. In the case of MACHIRA t/a MACHIRA & CO. ADVOCATES -V- EAST AFRICAN STANDARD (NO 2) 2002 2 KLR 63, it was held that:

> " In this kind of application for stay, it is not enough for the Applicant to merely state that substantial loss will result. He must prove specific details and particulars ... where no pecuniary or tangible loss is shown to the satisfaction of the Court, the Court will not grant a stay."

It is only the Applicant's counsel who has submitted on this issue as follows:

> " The applicant having been in occupation of BUKHAYO/EBUSIBWABO/149 measuring 11.6 acres and having developed the same extensively, allowing the implementation of the order that the respondent has extracted means that the applicant will lose close to half a portion of the land that he has invested on."

Whether the Applicant will lose close to a half portion of the suit land is really an issue which ought to have been raised in his supporting affidavit. It is not an issue to be raised in submissions. Submissions, as was held in DANIEL TOROITICH Arap MOI -V- MWANGI STEPHEN MURIITHI & ANOTHER 2014 eKLR, are not evidence upon which a Court can rely to determine a dispute. The Applicant has failed to demonstrate that he will suffer substantial loss if the order for stay of execution pending appeal is not granted.

13. With regard to approaching the Court without "un-reasonable delay", the judgment sought to be stayed was delivered to the parties by way of electronic mail on 27th September 2023 at 2.26pm. I have not heard the Applicant deny that. This application was filed on 24th January 2024 some four (4) months later. While the law does not define what amounts to unreasonable delay, this depends on the peculiar circumstances of each case. What is important however is that any delay must be explained to the satisfaction of the court to enable it exercise it's discretion one way or the other. The Applicant must have been informed about the judgment on the same day it was delivered because it was dispatched to his counsel by email as I have already stated above. He has not given any explanation, satisfactory or otherwise, as to why it took him four (4) months to file this application. In paragraph 12 of his supporting affidavit, he has deposed thus:

> " That this application has been brought in good faith and without undue delay."

I do not consider a delay of four (4) months, in the circumstances of this case, not to be anything but unreasonable. The Applicant has also failed to surmount this hurdle.

14. Finally, the Applicant was required to offer security for the due performance of such decree or order as may ultimately be binding on him. No such offer has been made by the Applicant. As was held in MACHIRA -V- MOHAMED 2022 KEELC 2376 KLR;

> " The offer for security must come from the Defendant himself and is a demonstration of the fact that the application for stay of execution is being pursued in order to advance the cause of justice and is not simply a knee-jerk reaction only intended to delay and scuttle a lawful execution process".

Again, it is counsel for the Applicant who has submitted in the penultimate paragraph of his submissions that:

> " Your Lordship, the applicant is willing to comply with any condition by Court for grant of such stay of execution, and to that extent, the application herein ought to be allowed".

That offer ought to have been embodied in the Applicant's supporting affidavit because, as I have already stated above citing the case of DANIEL TOROITICH Arap MOI -V- MWANGI STEPHEN MURIITHI & ANOTHER (supra), submissions are not evidence.

15. The up-shot of all the above is that the Applicant has been unable to meet the threshold of the grant of an order of stay of execution pending appeal. Costs follow the event and there is no reason why this Court should not award the Applicant the costs of this application.

16. The Notice of Motion dated 24th January 2024 is devoid of merit. It is dismissed with costs to the Respondent.

BOAZ N. OLAO

JUDGE

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 9TH DAY OF JULY 2024 WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE