Kosgei & 2 others v Musoi & another (Environment & Land Case E004 of 2024) [2024] KEELC 5192 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5192 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE E004 OF 2024

FO NYAGAKA, J

JULY 11, 2024

BETWEEN

JANE KOSGEI ..... 1ST APPELLANT

MESHACK K KURGAT ..... 2ND APPELLANT

JOEL KIPKEMOI ..... 3RD APPELLANT

AND

MICHAEL KIPRUTO MUSOI ..... 1ST RESPONDENT

JONA SANGA ..... 2ND RESPONDENT

RULING

1. By a Notice of Motion dated 19/03/2024 the Appellant moved this Court under Order 42 Rule 6 of the *Civil Procedure Rules*. He prayed for the following orders:-

    1. ...spent.

    2. ...spent.

    3. That upon the inter partes hearing of the application, this honorable Court be pleased to confirm the stay order in Prayer 2, herein, or grant a stay sought in Prayer 2 while pending the hearing and determination of the pending appeal.

    4. That the Defendants/Applicants be granted leave to testify and called witnesses.

    5. That the costs of do abide in the appeal.

2. Prayer 2 of the Application was to the effect that pending the inter partes hearing and determination of this application this Honourable Court be pleased to stay the enforcement of the execution of the judgment delivered on 27/03/2023 and the orders made on 19/02/2023. While the prayer did not

specify which Court delivered the judgment and in which patter it did, this Court used deductive reasoning to determine that the Applicant referred to the judgment delivered by the subordinate Court, Hon. S. K. Mutai SPM in Kitale CMC Land Case No. 73 of 2019.

3. The application was based on seven grounds. The first one was that the Appellant was aggrieved by the ruling of 19/02/2024 delivered in Kitale CMCC Land Case No. 73 of 2019, and preferred an appeal to this honorable court. The Applicant had, in the application dated 18/09/2023, sought an order staying the enforcement of exparte judgment delivered on 27/03/2023 and all consequential orders and the review and setting aside exparte judgment to pave way for them to testify and call witnesses. The matter herein was a land matter which involves family members. The Appellants did not testify in the matter. The right to be heard is a constitutional one and in the interest of justice the application should be allowed since it was brought in good faith.

4. The application was supported by an affidavit sworn by the 3rd Applicant, one Joel Kipkemboi who stated that he was duly authorized to swear the Affidavit on behalf of the other Applicant. But the Court did not see any such authority, and therefore doubts the truthfulness of that deposition: the 3rd Applicant must be out here on a frolic of his own hence the Affidavit is defective and a candidate for striking out.

5. Largely, the 3rd Applicant's deposition repeated the contents of the grounds supporting the application hence this Court does not need to repeat them but will take their contents as the Applicant's factual depositions. However, in addition to the grounds the 3rd Applicant deponed that he had annexed a copy of the Memorandum of Appeal as JK-1. He deponed that the judgment of 27/03/2023 be reviewed and or set aside to enable the Applicants testify, and the orders of 19/02/2024 be stayed pending the hearing and determination of the application.

6. It is instructive that the instant application was on 19/03/2024 exactly a month after the delivery of the Ruling appealed against, as per the narration in the Memorandum of Appeal. The Application is filed in the Appeal itself.

7. The Respondents opposed the Application through Grounds of Opposition which were three. They were dated 27/03/2024. The first one was that the application was misconceived and bad in law. The second one was that the Applicants had invoked the jurisdiction of this Court wrongly hence it lacked jurisdiction. Thirdly, that the application sought to stay execution of a ruling which had dismissed an application for review and setting aside of a judgment hence it was seeking a stay of a negative order.

8. The Application was disposed of by way or oral submissions. The Applicant stated that he moved this Court to stay the orders of the lower court following the Ruling delivered on 19/02/2024. He admitted that he had not sought first a stay of execution of the order of 19/02/2024 in the Court which issued the order for stay of execution.

9. The Respondents argued that the Applicant ought to have moved the lower court first for similar orders before he could move this Court. Therefore, the application was incompetent and improper before court. He prayed for the Court to strike out the application.

ISSUE, ANALYSIS AND DETERMINATION

10. I have considered the application the law and the submissions by both the Applicant and the Respondents. Only two issues lie before me for determination. The first one is whether the application is properly before this Court. The second one is who to bear the costs of the application.

11. In an application of this nature, the conditions to be met before granting it are basically three. They are provided for under Order Rule 6 (2) of the *Civil Procedure Rules* which stipulates as follows:

> " No order of 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 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."

12. In order to consider the merits of the application in terms of the provision above, this Court has to satisfy itself that it has been moved in accordance with the law. First, it needs to clarify that on 19/02/2024 the subordinate court delivered a Ruling in an application by which the Applicants had moved the court for an order of review and setting aside of its judgment. It was not an order of stay of execution of the judgment of the Court. It is not the application under Order 62 Rule 6(1) of the *Civil Procedure Rules*, 2010 contemplates. The provision is to the effect that,

> " 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" [emphasis mine].

13. In the case of *Anyenda v Simidi & 12 others* (Environment and Land Appeal 1 of 2023) [2023] KEELC 21845 (KLR) (24 November 2023) (Ruling) this Court had the following to say:

> " The above Rule is to the effect that before an Appellant aggrieved by an order or decree of a subordinate Court moves the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one to a Court subordinate to the Superior Court) moves the Superior Court for stay of proceedings or execution he/she/it should have moved the court appealed from for similar orders. This is not optional but a compulsory step. Only upon fulfilment of that step shall the Superior Court be seized of jurisdiction to handle an application for stay of proceedings or execution. This is clearly provided for in the sub-Rule that "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."
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> 19. From the above provision, an Appellant can only apply to the Appellate Court to set aside the order (of stay of execution or proceedings) of the Court appealed from if he/she/it is aggrieved by such an order. It means further that he/she/it or the adverse party must have moved the subordinate Court, the Court shall have rendered itself on the application, and the party is aggrieved by the decision of that Court and moves the Appellate Court. An appellant ought not and should never side-step the subordinate court and attempt successfully to move the appellant for orders he/she should have sought formally in that

court. This is akin to forum shopping and a direct call for a breakdown of the rule of law."

14. Thus, my humble view is, before the Applicants would move this Court for an application of such a nature as the instant one they ought to have moved the trial Court for similar orders, and waited to hear what he would say. But upon filing an appeal against the decision of 19/02/2024 they moved to this court immediately and directly for the orders sought therein. Unlike is situations where there is an appeal preferred to the Court of Appeal where a party may choose to ignore the superior courts and seek a stay of execution of the order or decree of this Court, it is different. In this level of practice, one has to first move the lower court. Herein the Applicant admitted that he did not do so.

15. The upshot is that the application is incompetent and improperly before this Court. It is thus struck out with costs to the Respondents.

16. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 11TH DAY OF JULY, 2024.

HON. DR. IUR NYAGAKA

JUDGE, ELC KITALE