M'Ithinji v M'Itonga (Environment and Land Appeal E048 of 2023) [2024] KEELC 5194 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5194 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E048 OF 2023

CK YANO, J

JULY 11, 2024

BETWEEN

ZAKARIA M'ITHINJI ..... APPELLANT

AND

JOSEPHINE TEI M'ITONGA ..... RESPONDENT

RULING

1. The subject of this ruling is the notice of motion application dated 29th January, 2024. The appellant/applicant is seeking for orders of stay of execution of the judgment in Nkubu SPMC ELC No E030 of 2021 pending the hearing and determination of this appeal.

2. The application is supported by the affidavit of the applicant and is premised on the grounds that the respondent is moving with speed to execute the judgment, that the suit land be transferred to the appellant in execution of the judgment (sic) and that the appellant stands to suffer irreparably if the orders sought are not granted.

3. The applicant avers that he was the defendant in Nkubu PMCC No 30/2021 whereby his sister the respondent herein had filed a suit against him claiming that he holds 1 acre of land in trust for her. That he totally denied the said allegation since the land is his and he did not hold any land in trust for the respondent or any other person. That the said suit was duly heard and judgment was pronounced on the 15th November, 2023, whereby the court gave a declaration that the applicant holds the suit land in trust for the respondent and that he transfers 1 acre to the respondent within 90 days failure to which the court administrator is empowered to sign all the documents on his behalf.

4. The applicant avers that he is totally dissatisfied with the said decision and had immediately lodged an appeal to this court seeking to overturn the said decision. That he is currently in occupation of the land and had planted tea bushes and other developments and the land is where his homestead is. That upon

judgment being read, the respondent is moving with speed to execute the said judgment and unless the orders sought are granted he stands to suffer irreparable loss.

5. The applicant avers that he has a good appeal with high chances of success.

6. The application is opposed by the respondent through her replying affidavit dated 1st March, 2024. The respondent avers that the applicant's motion lacks merit and is merely meant to prevent her from the enjoyment of the fruits of her judgment in the lower court which ordered that she gets 1 acre of the suit land LR. No Igoji/Kinoro/962 measuring about 4 acres.

7. The respondent avers that the applicant who is the 1st born and the only son to their late father, M'Itonga M'Nceru has never been keen or ever desired to share a single inch of the aforesaid land with the respondent or her other sisters in spite of admitting that the same is ancestral land.

8. Relying on advice by her advocate, the respondent states that the application should fail on the following grounds-;

   a) The application is sketchy and general. It does not meet the threshold stipulated in Order 42 Rule 6 of the *Civil Procedure Rules, 2010* particularly on substantial loss.

   b) That the applicant has not stated and/or demonstrated what substantial loss he will suffer unless the orders sought are issued, rendering his application fatal.

   c) The applicant has merely put forward a general and mere assertion in paragraph 7 of the supporting affidavit by stating that, "unlee(sic) the orders sought are granted, I stand to suffer irreparable loss."

   d). It is trite law that an applicant must prove specific details and particulars of substantial loss otherwise without demonstrable pecuniary or tangible loss to the satisfaction of the court stay should not be granted. The applicant has miserably failed in this respect.

   e) It's also trite law that the fact that execution process was underway or was likely to be put on motion does not by itself amount to substantial loss since execution is a legal process. A party must establish other factors to show that execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as a successful party in the intended appeal.

   f) The application is not only a waste of precious judicial time, the same is frivolous and vexatious.

9. The respondent states that she stands to suffer prejudice if the motion is allowed as among others its incontestable that the suit land is ancestral land and the applicant wants to have it exclusively. That she has been advised by her advocate that justice requires the court to give an order of stay with certain conditions. The respondent states that the applicant has not offered to provide any security for the due performance of the decree as may ultimately be binding on him. The respondent urged the court to impose security of not less than Kshs. 200,000/= as a condition for granting stay which nevertheless she stated is not merited.

10. The respondent urged the court to find that the application is devoid of merit and dismiss the same with costs.

Analysis And Dtermination

11. The court has considered the application. First, it is pertinent to state that at this stage, the court is not concerned with the merits of the appeal, save to consider whether the same is not frivolous. It is trite

that the power of the court to stay the execution of a decree pending appeal is discretionary. However, the discretion should be exercised judicially.

12. The jurisdiction of this court to grant orders to stay execution pending appeal is donated by Order 42 Rule 6 of the *Civil Procedure Rules* which provides that-:

> "(1) 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 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
>
> (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."

13. In *Halai & another v Thornton & Turpin (1963) Ltd* [1990] eKLR the Court of Appeal held that:

> " The application before the superior court was made under Order XLI Rule 4. In sub-rule (1) the order provides that the court appealed from may for sufficient cause (emphasis is ours) order stay of execution of a decree or order made or passed by it. Before the superior court can exercise its discretion in favour of an applicant for a stay of execution the applicant must first establish a sufficient cause. Sub rule (2) of the same rule reads;
>
> (s) No order for 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
>
> (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."
>
> 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."

14. One of the most enduring legal authorities on the issue of substantial loss is the case of *Kenya Shell Ltd v Kibiru & another* [1986] eKLR 410. The principles enunciated in this authority have been applied in countless decisions of superior courts. Holdings 2, 3 and 4 of the shell case are specially pertinent. These are that-;

    1. ...

    2. In considering an application for stay, the court doing so must address its collective mind to the question of whether to refuse it would render the appeal nugatory.

    3. In applications for stay, the court should balance two parallel prepositions, first that a litigant, if successful should not be deprived of the fruits of a judgment in his favour without just cause and secondly that execution would render the proposed appeal nugatory.

    4. In this case, the refusal of a stay of execution would not render the appeal nugatory, as the case involved a money decree capable of being repaid."

15. The court is required to interrogate if the application has been made without unreasonable delay; whether substantial loss will result to the applicant unless the order sought is granted and security for due performance of the decree has been given by the applicant (also see *Kiambu Transporters v Kenya Breweries* (2000) eKLR.

16. In the case of *Butt v Rent Restriction Tribunal* (1982) KLR 417, it was held that the power to grant stay of execution is discretionary and should be exercised in such a way so as not to prevent an appeal especially if successful so as to be rendered nugatory. It is however, important to note that granting such an order is a matter of discretion and should be decided in the interest of justice.

17. From the record, the judgment of the lower court was delivered on 15th November, 2023, while this application was filed on 29th January, 2024. This was after about two months. In my considered view, the application was made timeously and without inordinate delay.

18. Regarding the second pre-requisite in Order 42 Rule 6 that is substantial loss occurring to the applicant, the applicant states that the respondent is moving with speed to execute the decree of the lower court. The decree of the lower court ordered the applicant to transfer one acre of the suit land to the respondent within 90 days, failure to which the Court Administrator was empowered to sign all the necessary documents for and on behalf of the applicant. From the material on record, I am satisfied that unless the orders sought herein are granted, the execution of the decree may be carried out and the decreed land transferred to the respondent which no doubt will result in substantial loss and may render the appeal nugatory.

19. In the case of *Absalom Dora v Turbo Transporters* [2013] eKLR, it was stated that-;

> " The discretionary relief of stay of execution pending appeal is designed on the basis that no one would be worse off by virtue of an order of the court: as such order does not introduce any disadvantage, but administers the justice that the case deserves. This is in recognition that both parties have rights, the appellant to his appeal which includes the prospects that the appeal will not be rendered nugatory, and the decree holder to the decree which includes full benefits under the decree. The court in balancing the two competing rights focuses on their reconciliation which is not a question of discrimination."

20. The Court of Appeal in the case of *Butt v Rent Restriction Tribunal* (supra) stated:

> "The power of the court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent any appeal.
>
> 2. The general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal court reverse the judge's discretion.
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> 3. A judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
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> 4. The court in exercising its discretion whether to grant and refuse an application for stay will consider the special circumstances of the case and unique requirements.
>
> 5. The court in exercising its power under Order XLVI Rule 4(2)(b) of the Civil Procedure Rules, can order security upon application by either party or on its own motion"

21. In this case, it is apparent that the whole suit property is registered in the applicant's name. According to the decree of the lower court the respondent is entitled to one acre. In my view, that portion measuring one acre can still be transferred to the respondent in the event that the appeal is not successful. In this case, I do not think that an order for security for costs is necessary in the circumstances of this case.

22. The upshot is that I find the application dated 29th January, 2024 is merited and the same is allowed.

23. Considering that the parties herein are siblings, I order that each party bears his/her own costs of the application.

24. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 11TH DAY OF JULY 2024

In the Presence Of

Court Assistant – Tupet

Muthomi for respondent

C.K YANO

JUDGE