Bakary v Sawa (Environment and Land Appeal 13 of 2021)
[2023] KEELC 17257 (KLR) (10 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17257 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT AND LAND APPEAL 13 OF 2021

SM KIBUNJA, J

MAY 10, 2023

BETWEEN

RIZIQ FUNDI BAKARY ..... APPELLANT

AND

KASSIM ALI SAWA ..... RESPONDENT

([FORMELY HCCA NO.140 OF 2016])

RULING

1. Kassim Ali Sawa, the applicant, filed the notice of motion dated the May 18, 2022 through Ms Moses Mwakisha Advocates seeking for the following prayers;

    a. "That owing to the urgency, the nature of case and reasons to be offered. Service of this application upon the Respondent thereto be dispensed with in the first instance.

    b. That pending the hearing of this application inter parties, there be an order staying execution of judgment delivered on October 11, 2022 and decree resultant therefrom.

    c. That this Honorable Court be pleased to order a stay of execution of its judgment delivered on October 11, 2022 and the decree resultant therefrom pending the hearing and determination of the appeal intended from the said judgment.

    d. That there be an order for the costs of this application."

2. The application is premised on the four (4) grounds on its face and supported by the affidavits of Kassim Ali Sawa sworn on the November 10, 2022 and December 19, 2022 inter alia deposing that the Respondent alerted him of his intention to execute the decree vide a notice of intention to execute; that he therefore seeks for stay of execution pending appeal; failure to grant him orders sought would subject him to hardship; that he is ready to present title documents of lands valued over Kshs 4,000,000 as security and concedes to a restriction being registered against the titles.

3. The application is opposed by Riziq Fundi Bakary, the respondent, through the six grounds of opposition dated January 11, 2023 and replying affidavit sworn on the January 25, 2023 that were filed through Ms Sherman Nyongesa & Mutubia Advocates. In nutshell the respondent averred that the application was filed mala fides and the Applicant had not demonstrated how he would suffer substantial loss if the money decree was paid or executed. Moreover, the Applicant had failed to offer sufficient and appropriate security for the performance of the decree; that the properties offered are in a very remote and hilly part of Kwale County, cannot fetch the values given and would be impossible to liquidate incase the intended appeal is not successful; that the applicant is capable of depositing the decretal sum as he is a sitting MP, prominent businessman with interest in Ukunda, Mombasa and Nairobi; that the Respondent had been kept away from the decretal sum since 2009 and stood to suffer substantial loss if prevented from executing the decree to recover the amount.

4. Directions on filing and exchanging submissions were given on the January 26, 2023. Thereafter, the learned counsel for the applicant and respondent filed their submissions dated the February 8, 2023 and March 3, 2023 respectively.

5. Counsel for the applicant submitted that there was no objection to their prayer for stay being granted. That what was in contest was the nature of the security to be tendered by the applicant. The learned counsel submitted that there are no hard and fast rules in providing security in case of a money decree and such decisions are up to Courts discretion. Reliance was placed on *Africa Safari Club Limited v Safe Rentals* [2010] eKLR. It was further submitted that there was no law that distinguished Member of parliament from any other person to the extent of not having financial hardships, and urged the court to accept the proposed land titles as security.

6. Counsel for Respondent submitted that the application for stay did not meet the conditions for stay as provided under Order 46 Rule 6(2) of the *Civil Procedure Rules*. Counsel referred to the decision in the case of *Mwaura Karuga t/a Limit Enterprises vs Kenya Bs Services Ltd & 4 others* [2015] eKLR, pointed out that the security offered by the Applicant is insufficient for due performance of the decree in this matter. That security for money decree should be in the form of money to be deposited in Court or a joint interest earning account as was held in the case of *Onesmus Mburu Njungua vs Samson Kitire Kuna* [2007] eKLR, and *Arun C Sharma vs Ashana Raikundalia t/a Raikundalia & Co Advocates & 2 others* [2014] eKLR. It was further submitted that the Applicant was a man of means and the should be ordered to deposit decretal sum and therefore, the application should be dismissed with costs.

7. The following are the issues for the court's determinations;

    a. Whether the Applicant has provided sufficient security for due performance of the decree as may ultimately be binding on him.

    b. Who bears costs of the application.

8. The court has carefully considered the grounds on the application and opposition, affidavit evidence, the submissions by the learned counsel, superior courts decisions cited thereon, and come to the following conclusions;

    a. From material on record, the respondent is more or less agreed that the stay order sought by the applicant should be allowed upon a suitable security being provided. The only contestation between the parties is the suitability of title to land as a security as opposed to a money deposit. The Respondent takes the ostensible view that the Applicant is a man of means quite capable of depositing the decretal sum, whereas the Applicant is of the view that the titles to lands whose valuations he has provided are sufficient security. The Applicant has provided copies of four title deeds for Kwale/ Matuga/636, 667, 1097 and 1146 and their valuation reports, giving

their current market value as Kes 4,600,000 and forced sale value of Kes 3,450,000. Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* provides as follows:

> "(1) No appeal or second appeal shall operate as a stay of execution or proceeding 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."

b. The superior courts have in various previous cases addressed the conditions of payment of security for due performance and the standards that must be met. In *Gianfranco Manenthi & another vs Africa Merchant Assurance Company Ltd* [2019] eKLR, the court observed that:

> "... the applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition a party who seeks the right of appeal from money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under order 42 rule 6(1) of the *Civil Procedure Rules*, it is trite that the winner of litigation should not be denied the opportunity to execute the degree in order to enjoy the fruits of his judgment in case the appeal fails. Further, order 42 should be seen from the point of view that a debt is already owed and due for payment to the successful litigant in a litigation before a court which has delivered the matter in his favour. This is therefore to provide a situation for the court that if the appellant fails to succeed on appeal there could be no return to status quo on the part of the plaintiff to initiate execution proceedings where the judgement involves a money decree. The court would order for the release of the deposited decretal amount to the respondent in the appeal ... This the objective of the legal provisions on security was never intended to fetter the right of appeal. It was also put in place to ensure that courts do not assist litigants to delay execution of decrees through filing vexatious and frivolous appeals. In any event, the issue of deposit of security for due performance of decree is not a matter of willingness by the applicant but for the court to determine."

The Court of Appeal in *Nduhiu Gitahi vs Warugongo* [1988] KLR 621; 1 KAR 100; [1988-92] 2 KAR 100 expressed itself as follows:

> " The process of giving security is one, which arises constantly. So long as the opposite party can be adequately protected, it is right and proper that security should be given in a way, which is least disadvantageous to the party giving the security. It may take many forms. Bank guarantee and payment into court are but two of them. So long as it is adequate, then the form of it is a matter, which is immaterial. In an application for stay pending appeal the court is faced with a situation where judgement has been given. It is subject to appeal. It may be affirmed or it may be set aside. The court is concerned with preserving the rights of both parties pending that appeal. It is not the function of the court to disadvantage the defendant while giving no legitimate advantage to the plaintiffs. It is the duty of the court to hold the ring even-handedly without prejudicing the issue pending the appeal. For that purpose, it matters not whether the plaintiffs are secured in one way rather than another. It would be easier for the defendants or if for any reason they would prefer to provide security by a bank guarantee rather than cash. There is absolutely no reason in principle why they should not do so...The aim of the court in this case was to make sure, in an even-handed manner, that the appeal would not be prejudiced and that the decretal sum would be available if required. The respondent is not entitled, for instance, to make life difficult for the applicant, so as to tempt him into settling the appeal. Nor will either party lose if the sum is actually paid with interest at court rates. Indeed, in this case there is less need to protect the defendant because nearly half the sum will have been paid and the balance was at one stage open to negotiation to reduce it".
>
> From the above two decisions, the Court is called to consider adequacy of the security provided or offered, and terms that would prove to be fair to both parties, after whichever outcome in the intended appeal.

c. From the materials on record, specifically the valuation reports on the immovable properties offered by the applicant, the forced sale value of the parcels is Kes 3,450,000, which figure is definitely below the decretal sum in the decree. The Respondent has expressed his reservations to the suitability of the said parcels of land as security by reason of their remote location, value and possible difficulties in liquidating them should need arise. He has however neither tendered an alternative valuation report to counter that relied upon by the applicant nor provided any evidence to prove that the valuation was false or overvalued as claimed. The court does not therefore find any reasonable cause or ground upon which not to consider the titles tendered as part of the security for the due performance of the decree, especially considering a restriction against the said titles will be registered in addition.

d. Having considered the facts, the law and the submissions presented by the parties' learned counsel, and finding merit in the application, what remains is for the court to exercise its discretion in setting the terms of the security to be met by the applicant. On the issue of costs of the application, it is only fair and just that the costs do abide the outcome of the appeal, the provisions of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya notwithstanding.

9. From the foregoing I find that the application for stay of execution pending appeal is merited and is hereby allowed on condition the applicant meets the following terms;

a. The Applicant shall within fourteen (14) days from today deposit Kes 1,000,000 [one million], and the original titles of land Kwale/ Matuga/636, 667, 1097 and 1146 with this court as security for the due performance of the decree herein. That in case the applicant fails or declines to comply with this condition within the set timeline, the stay of execution order to be taken to have automatically lapsed or vacated.

b. That further to (a) above, inhibition orders against the land parcels Kwale/ Matuga/ 636, 667, 1097 and 1146 are hereby issued to be registered against the four titles and to remain in force unless otherwise ordered by this court or other competent court of law.

c. The costs to abide the outcome of the appeal.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 10th DAY OF MAY 2023.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

APPLICANT : Absent

RESPONDENT : Absent

COUNSEL : Mr Mwakisha for Applicant, Ms Takah for Mutubia for Respondent.

WISON – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.