Waningilo v Baraza & another (Environment & Land Case 2 of 2019) [2023] KEELC 17082 (KLR) (3 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17082 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 2 OF 2019

FO NYAGAKA, J

MAY 3, 2023

BETWEEN

JOSEPH SAWENJA WANINGILO ..... PLAINTIFF

AND

SAMMY BARAZA ..... 1ST DEFENDANT

EDDAH BARAZA ..... 2ND DEFENDANT

RULING

1. The Application before me is the one dated 05/09/2022. It was brought under Sections 3 and 3A of the *Civil Procedure Act*, under the High Court Vacation Rules, Section 10 and Rule 3 of the *Judicature Act*, Order 22 Rule 22, Order 10 Rule 11 of the *Civil Procedure Rules* and "all other enabling provisions of the law." It sought the following orders:-

    a. ....spent

    b. ...spent

    c. ...spent

    d. The Honourable Court be pleased to grant a stay of execution of the judgment issued by this Honourable Court on 11/08/2022 pending hearing and determination of this application pending hearing and determination of this application and the appeal.(sic)

    e. Costs of the application be awarded to the applicant.

2. The application was based on ten grounds which I will summarize the relevant ones since the others related to it being heard during the vacation, at the time it was filed. The rest were that the Plaintiff has filed the suit against the defendants seeking a declaration that he was the owner of the suit land; the court disallowed the plaintiff's suit and awarded the land to the defendants; the plaintiff was

given a maximum of 90 days to vacate the land; the Plaintiff was dissatisfied with the judgment of the Court and had appealed therefrom; the defendants were in haste to evict the applicant and he was apprehensive of that; the suit land was the plaintiff's only source of livelihood as a retired civil servant and he uses it to eke out a living; the intended appeal raised triable issues and therefore it was prudent to grant the orders sought; and no prejudice or irreparable loss will be suffered by the Plaintiff/ Respondent (sic) of the orders sought are granted since they have not been in occupation.

3. The Application was supported by the Plaintiff's affidavit sworn on 05/09/2022. In it, apart from repeating the grounds above but in deposition form, he annexed to the affidavit and marked as JSW1 a copy of the Notice of Appeal he filed in the matter; JSW2 a copy of the letter asking for typed proceedings; and JSW3 a draft of the Memorandum of Appeal. He also deponed that he had been in occupation of the land for 40 years and had developed it and used it for cultivation. He stated further that the Court had powers to stay the execution and that he stood to suffer beyond reparation of the execution ensured. He deponed that the Respondents would suffer no prejudice if the application was granted and that fairness demanded that it be so.

4. At this point, this Court points out that when it scrutinized the application, particularly the annextures thereto it noted that the one marked as JSW3 was the copy of the judgment against which the intended appeal was to be filed. There was no draft of the Memorandum of Appeal.

5. The Application was opposed strongly by the Respondents through the Affidavit sworn on 11/10/2022 by the 2nd Defendant for himself and on behalf of the 1st. He deponed that the application was premature devoid of merit and an abuse of the process of the Court. He supported the judgment of the Court as being sound and that the intended appeal was frivolous and vexatious and a design for the application to buy more time on the land by leasing it. He deponed further that the application did not meet the threshold of one for stay of execution of a decree pending appeal. He stated further that the applicant had not shown sufficient cause why the Court should exercise discretion and that the applicant has not demonstrated that he would suffer loss if the order was not granted. He reiterated that the Court had determined the rights of the parties on the land hence they as Defendants were entitled to enjoy the fruits of the judgment.

6. They deponed further that the applicant had been enjoying the use of the land for 40 years without paying the full price for it to their disadvantage and detriment. They swore that they had already suffered irreparable hard and they would continue to do so because they would be locked out of the enjoyment of the land. They then deponed that the filing of a Notice of Appeal did not itself give an automatic right of stay of execution of the decree of the Court. They stated that the suit land was vacant and if the appeal succeeded the Plaintiff would be given the chance to re-enter it. They deponed that the Plaintiff had not been in physical possession and not build on it hence no prejudice to be suffered by him. They deponed that the balance between the enjoyment of their fruits of judgment and the right of the appeal for the applicant was that they would be prejudiced if the orders sought were granted.

Submissions

7. The Applicant summarized the basis for his application dated 05/09/2022, and I need not repeat them here. He went on to submit that that the move by the decree holder to evict him was grossly prejudicial given that he had appealed the judgment as shown in the draft memorandum of appeal. He argued that he had made extensive developments on the suit land and demonstrated as such by photographs. He argued that the plot premises standing thereon were his basic source of income and livelihood, hence removing him therefrom would result into hardship on his part.

8. He submitted further that he had no intention of disposing off or wasting the same subject matter of this suit is land which kept appreciating value each day. He argued that the application was presented timeously, having filed it within 25 days of delivery of judgment. He relied on the case of *George Kitiyo Kimary v Stephen Lowasi Koumwoi* KTL ELC No. 44 of 2015.

9. He contended that the appeal be rendered nugatory, if the order was not granted, but the Respondent would suffer no prejudice it granted. He relied on the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417. He argued that to remove all that which is standing on the farm, for instance, a farm house, sugarcane plantation and all other farm equipment thereto would cause substantial loss and hardship. He stated how, if the sugarcane is removed there is a likelihood of him breaching a contract he made with West Kenya Sugar Company. He also relied in the case of *Republic v National Land Commission & 2 others* KTL ELC JR No. 1/2017. He submitted that the Respondent had not advanced anything tangible to support ability to compensate the irreparable harm that may result in the event of success.

10. The Applicant submitted further that the court had the discretion to order the applicant to furnish security. He relied on the case of *Cater & Sons Ltd v Deposit Protection Fund Board & 2 others* Civil Appeal No. 291 of 1997 and of *Dhiman v Shah* (2008) eKLR. His submission was that he was willing to abide by any conditions on security and that the court to consider his age, feeble health and financial situation hence proposed to pay a sum of Kshs. 100,000/- reasonable security. He relied on his alleged occupation of the property for over 40 years prayed that status quo would be ideal pending the determination of the appeal while if the appeal failed the Respondent could be adequately compensated by award of damages. He prayed that the application be allowed.

11. The Defendants filed their submissions dated 20/02/2023 on 23/02/2023. They started by summarizing the content of the application and the provisions under which it was brought. He argued that the Application was brought under the wrong provisions of law as cited. He submitted that in the application should have been brought under Order 42 Rule 6(2) of the *Civil Procedure Rules* which they reproduced. They then gave a summary of three requirements to be fulfilled under the Rule in order for it to be successful. There were:

    a. Substantial loss likely to occur unless the order is made;

    b. The application is made without undue delay;

    c. The applicant shall have offered security for the due performance of the decree or order.

12. The Respondents relied on the case of *Tassam Logistics Ltd v David Macharia & Another* [2018] eKLR which held that the three requirements cannot be severed. They then submitted that the applicant had not shown that he would suffer loss. He stated that the condition had to be fulfilled first before the Court could consider the other conditions. They also relied on the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR.

13. The Respondents then submitted that the applicant was dishonest when he, at paragraph 12, he swore that he had developed the suit land yet he had not and had never been in physical possession thereof. They stated that the suit land was vacant and the intended execution would not render the appeal nugatory. They relied still on the case of *Samvir Trustee vs. Guardian Bank Limited*, Nairboi (Milimani) HCCC 795 of 1997 from which they quoted extensively about the issue. They emphasized the holding in the matter that a successful party is prima facie entitled to the fruits of the judgment because the judgment determines with definitive conclusion the rights of the parties. The Court also stated that it was not enough to just state that there was likely to be a substantial loss but he had to present empirical documentary evidence to support the contention.

14. Also, they quoted from the authority the holding that the execution of one's right should not derogate from the right of the other hence the court was obligated to do a balancing act of the rights of the parties to ensure justice and fairness.

15. Furthermore, they cited the case of *AAL v HAS* [2020] eKLR which emphasized that the fear of substantial loss was the cornerstone of an application for stay of execution but the applicant has to satisfactorily demonstrate the same. Regarding the offer of security, they submitted that the applicant was not serious in his proposition. They relied on the case of *G. Sundaram Chettiar v P. A. Valli Ammar* AIR [1935] Mad. 43 on the point that an order of stay of execution cannot be granted unless security for due performance of the decree is given. They also relied on the case of *Gianfranco Manenthi & another v Africa Merchant Assurance Company Ltd* [2019] eKLR. Theirs was the view that the power of the court at this stage was discretionary but the court should balance the interests of the parties.

Issues, Analysis And Determination

16. The Court considered the application before it, in terms of the facts that were in contention. It also considered the law on an application of such nature, the submissions of both rival parties and the authorities relied on by each. This Court is of the view that there are only two issues for determination herein, namely, whether the application is merited and who to bear the costs of the application.

17. As I set forth to determine the two issues before me, I need to summarize some undisputed facts in relation to the instant application. First, Barasa Khaoya, the person who is said to have sold the suit land to the Plaintiff the applicant died. Second, judgment in this matter was delivered on 11/08/2022. Third, the judgment was in favour of the defendants. Fourth, on 38/03/2019 an order of injunction was issued against the Defendants barring them from interfering with the quiet possession of the suit land until the determination of the suit. Fifth, the Applicant filed a Notice of Appeal from the judgment and applied for proceedings herein. Sixth, the applicant brought this application seeking to stay the execution of the judgment.

18. The above being the circumstances of the application before me, the preliminary issue I need to determine is the relevance of the provisions cited by the applicant. Other than the provisions relating to the application having been brought under the Vacation Rules and Sections 10 and Rule 3 of the *Judicature Act* which would be applicable thereto, the applicant relied on Sections 3 and 3A of the *Civil Procedure Act*, Order 22 Rule 22, Order 10 Rule 11 of the *Civil Procedure Rules* and "all other enabling provisions of the law. It is my view that where the Rules of procedure provide for the taking of an act or step in any proceedings, then it is important that the right provision is cited. Citing others would be irrelevant.

19. In the present case, the applicant seeks stay of execution of a decree of this Court for reason that he had preferred an appeal from its judgment delivered on 11/08/2022. He stated that he had already filed a Notice of Appeal and applied for proceedings as required by the Rules. That being the case, it means that he had already taken steps pursuant to Order 42 Rule 6(4) of the *Civil Procedure Rules* and Rule 82 (1) and (2) of the *Court of Appeal Rules*. He did these on 18/08/2022. As to whether he served them or not as required by the Rules this Court is not privy to it, but it has not been raised by the Respondents. Therefore, this Court will not delve into the issue.

20. Since the Applicant filed a Notice of Appeal as observed above, it means that in terms of Order 42 Rule 6(4) of the *Civil Procedure Rules* an appeal has already been filed against the judgment herein. Thus, the applicable law is Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*. It is not Order 10 Rule 11 which provides for setting aside of a judgment, or Order 22 Rule 22 which relates to a stay of

execution in circumstances where a decree of one court is being executed by another, Sections 3 and 3A which deal with specific instances as provided therein.

21. I now examine the law applicable and compare it with the facts of the instant case. The relevant provision herein is Order 42 Rule 6 of the *Civil Procedure Rules*. It provides:

> " 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.

22. Sub-rule 1 of Rule 6 is to the effect that the filing of an appeal or second of appeal does not operate as a stay of execution or proceedings. The Applicant must show sufficient cause for that to be. Sub-rule 2 which is cited above gives requirements to be met. In my understanding the Rule sets out three main conditions a successful applicant should fulfil, and I agree with the Respondents' submissions about them. They are:

i. That substantial loss may result in case the order is not granted

ii. The application is brought without undue delay

iii. Security for due performance of the decree has been offered by the Applicant.

23. I bear in mind that it is not worthy trying to reinvent the wheel on the import and interpretation of the above provision. Thus, I would follow a number of decisions on the issue which expound on the conditions Civil Appeal No.107 of 2015, *Masisi Mwita v Damaris Wanjiku Njeri* [2016] eKLR, will suffice. In it the Court held that:-

> " The application must meet a criteria set out in precedents and the criteria is best captured in the case of *Halal & Another v Thornton & Turpin Ltd*, where the Court of Appeal (Gicheru JA, Chesoni and Cockar Ag. JA) held that:-
>
> > "The High Court's discretion to order stay of execution of its Order or Decree is fettered by three conditions, namely; - Sufficient Cause, substantial loss would ensue from a refusal to grant stay, the Applicant must furnish security, the application must be made without unreasonable delay.
>
> In addition, the Applicant must demonstrate that the intended Appeal will be rendered nugatory if stay is not granted as was held in *Hassan Guyo Wakalo v Straman EA Ltd* [2013] as follows:-
>
> > "In addition the Applicant must prove that if the orders sought are not granted and his Appeal eventually succeeds, then the same shall have been rendered nugatory."
>
> These twin principles go hand in hand and failure to prove one dislodges the other"

24. I am of the view that whereas the three conditions must be considered jointly, and whereas the one on substantial loss is the paramount one for that matter, the instant case I start with determining whether the application was brought without undue delay: it is easy. Judgment was delivered herein

on 11/08/2022, a Notice of Appeal against it filed on 18/08/2022 and the application brought on 17 days later. While the delay of about two weeks from the date of lodging the appeal is unexplained, I am prepared to find it not undue or inordinate.

25. The next issue is whether or not the applicant has shown that he will suffer substantial loss. The applicant herein argued that he was a retired civil servant who relied on the suit land to eke out a living. He deponed that he had developed the land by building on and cultivating it. He said that to evict him from the land would occasion irreparable loss. This fact was vehemently refuted by the Respondent who argued that the land was vacant, and that the applicant only leased the land to other people and was intent on continuing to do so by asking the Court to grant the orders sought.

26. Since there was a serious contention as to the actual occupation and use of the land at the time of judgment, the Court had to look at independent evidence on the same. Needless to say, that when the Respondents deponed that the land was vacant and the applicant was misleading the Court by deponing otherwise, the Applicant never rebutted that on oath or demonstrated that he indeed had built on the land. Be that as it may, the Court considered the evidence adduced by the Plaintiff himself in-chief and in cross-examination. He stated that he was leasing the land to people, two of whom he named, to farm. This Court therefore agrees that the Applicant indeed was not in actual occupation and use of the land himself and or his immediate family or servants. Thus, this Court finds further that the applicant was untruthful on oath that he had built on the land and that he farmed it.

27. The applicant deponed to the untruth so that he convinces the Court there was real risk of substantial loss. What does the Court do to parties who lie to it or mislead it purposely to achieve their selfish goals? It disbelieves them and reminds them that he who comes to equity must do so with clean hands and that where equity is approached with soiled hands the equitable remedy of discretion is never available to them. As such, besides the finding that the applicant has not demonstrated the substantial loss he is likely to suffer if the orders sought are not granted, equity cannot suffer the Court to exercise its discretion in his favour.

28. In any event, the Court finds the proposition of the applicant to deposit security of Kshs. 100,000/= as submitted by him, unsupported factually since it only came out in his submissions. Since submissions are not evidence or pleadings of parties, as was stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR but a marketing language of parties, I find it that the Applicant was only marketing his unsupported and unsubstantiated proposition, and he was not serious as submitted by the Respondents. In any event, this Court wonders why an Applicant who wishes to convince this Court that he is serious with filing an appeal, whose content he never bothered to disclose to this Court by way of a draft memorandum or demonstration in any way that it is arguable and is likely to be rendered nugatory in the event of failure to grant the orders sought, has never bothered to collect the typed proceedings he applied for herein from the time they were completed and proof-read on 08/11/2022. Such are the parties who sleep on their rights and blame the Court for backlogs when there is none. They cannot be countenanced.

29. The upshot is that the application is wholly unmeritorious. I can only do the right thing that such applications are accorded: dismissing it with costs to the Respondents.

30. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 3RD DAY OF MAY, 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.