Ngeno v Mosonik (Environment and Land Appeal E001 of 2022) [2023] KEELC 18699 (KLR) (6 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18699 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

ENVIRONMENT AND LAND APPEAL E001 OF 2022

MC OUNDO, J

JULY 6, 2023

BETWEEN

GEOFFREY NGENO ..... APPELLANT

AND

CHARLES CHERUIYOT MOSONIK ..... RESPONDENT

RULING

1. Pursuant to delivery of judgment dated the 16th December 2021 on the 27th January 2022 in the trial Magistrate's court, the Applicant has now filed an Application by way of Notice of Motion dated 10th January 2023 brought under the provisions of Order 22 Rule 22, Order 42 Rule 6 and Order 51 Rule 1 of the *Civil Procedure Rules*, Section 1A, 1B, 3 and 3A and 63(e) of the *Civil Procedure Act*, and all enabling provisions of the law where he has sought for orders of stay of execution of the said judgment, pending the filing and hearing of his Appeal .

2. The Application was premised on the grounds on the face of it and supported by an Affidavit sworn by the Applicant on the 11th January 2023. The application was disposed of by way of written submissions to which the Applicant had submitted that the Appeal was arguable as per the issues raised in their Memorandum of Appeal.

3. That the discretionary relief of execution pending Appeal was designed on a basis that no one would be worse off by virtue of an order of a court, as such orders do not introduce any disadvantage but administer justice that the case deserves. That the court is expected to ensure that no party is harmed in a way that cannot be compensated by a cost award.

4. That there was sufficient cause that the Appeal would be rendered nugatory because the Respondent was in the process of executing the judgment and had since filed a Party to Party Bill of Costs dated 28th January 2022 which was due for taxation. That further, the Applicant stood to suffer having adduced

evidence in the trial court that he was neither the registered owner of the subject parcel of land nor was he the legal representative of his father's estate and which evidence had been ignored.

5. On the issue of substantial loss, the Applicant submitted that the decretal sum was so large in comparison with his status that the execution itself would threaten his existence and thus occasion him substantial loss. Reliance was placed on the decision in *Meteine OleKileu & 10 Others vs Moses K Nailole* [2018]eKLR.

6. That the thrust that the intended Appeal was arguable was in his Memorandum of Appeal dated 15th February 2022, for which the main grounds raised therein was that the trial Magistrate had erred in not finding that he was not the registered proprietor of the adjacent land which had illegally encroached onto the Respondent's property, nor was he a representative of the late Alfred Maina Goymur, the registered proprietor of the land.

7. That the Respondent was on the verge of execution and the Appeal would be rendered nugatory if the application was not allowed. That he had timeously filed the application as the ruling dismissing the initial application had been delivered on 20th December 2022. That he was willing to offer security and abide by the orders, conditions and/or directions that the court may impose.

8. A Replying Affidavit by the Respondent sworn on 1st February 2023 opposed the application for reasons that the Applicant had sought for similar orders in the trial court and his application had been dismissed by a ruling of 20th December 2020 and therefore he was seeking for a second bite of the cherry by filing the current application. That the judgment was a decretal judgment and it had not been demonstrated by the Applicant that the Respondent would not be able to refund the decretal amount if the Appeal was successful.

9. That the Applicant had not demonstrated the kind of substantial loss he would suffer if the application was not granted since substantial loss in its various forms was the corner stone of both jurisdictions for granting a stay and therefore it was not sufficient to merely state that the decretal sum was a lot of money and the Applicant would suffer loss if the money was paid.

10. That there had been no assurance that the Appeal would succeed and on the other hand granting the stay would be denying a successful litigant the fruits of his judgment. That the Court ought not to deny a successful litigant the fruits of his judgment save in exceptional circumstances where to decline to do so may well amount to stifling the right of the unsuccessful party to challenge the decision in the higher Court.

11. On the issue of providing security, the Respondent had submitted 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 a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, for the security for due performance of the decree under order 42 rule 6(1) of the Civil Procedure Rules, it was trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgment in case the Appeal fails. That since the Applicant had been ordered to pay a sum of Kshs. 1,304,000/= as general and special damages, that he be ordered to deposit this amount in a joint interest earning account of Counsel within 21 days.

Determination

12. The law applicable on the issue of stay of execution pending the hearing and determination of the Appeal is Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:

''No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appeal ed from except in so far as the court Appeal ed from may order but, the court Appeal ed 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 Appeal ed 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. There are three conditions for granting of stay order pending an intended Appeal under Order 42 Rule 6 (2) of the Civil Procedure Rules to which :

a. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;

b. The application is brought without undue delay and

c. 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 .

14. The purpose of stay of execution is to preserve the substratum of the case. In the case of Consolidated Marine vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), the Court held that:-

> " The purpose of the application for stay of execution pending Appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of Appeal are safeguarded and the Appeal if successful is not rendered nugatory".

15. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the Act or in the interpretation of any of its provisions. According to Section 1A (2) and 1B of the *Civil Procedure Act*.

16. It therefore follows that all the pre-overriding objective decisions must now be looked at in the light of the said provisions. What the Court ought to do when confronted with such circumstances is to consider the twin overriding principles of proportionality and equality of arms which are aimed at placing the parties before the Court on equal footing. The Court, in exercising its discretion, should therefore always opt for the lower rather than the higher risk of injustice.

17. On the first condition of proving that substantial loss may result unless stay order is made, it was incumbent upon the Applicant to demonstrate what kind of substantial loss he would suffer were the stay order not made in his favour.

18. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs. Abuoga* (1988) KLR 645 where their Lordships stated that;

> " Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory."

19. The Applicant herein contends that he would suffer irreparable loss if stay was not granted as he was required to pay the decretal amount of Kshs. 1,104,000/= which sum was so large in comparison with his status that the execution itself would threaten his existence and thus occasion him substantial loss.

20. Platt, Ag.JA (as he then was) in *Kenya Shell Limited vs. Kibiru* [1986] KLR 410, at page 416 expressed himself as follows:

> " It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the Applicant, it would be a rare case when an Appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a 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".

On the part of Gachuhi, Ag.JA (as he then was) at 417 held:

> " It is not sufficient by merely stating that the sum of Shs 20,380.00 is a lot of money and the Applicant would suffer loss if the money is paid. What sort of loss would this be" In an application of this nature, the Applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before judgement. What assurance can there be of Appeal succeeding" On the other hand, granting the stay would be denying a successful litigant of the fruits of his judgement."

21. It is trite law that monetary loss cannot amount to substantial loss since it is capable of being quantified and can be recovered by the Applicant in the event that the Appeal succeeds. I find that even if orders sought herein are not granted, there is no evidence that the Applicant will suffer substantial loss. I make this finding taking into account that it is not the duty of the Court to deny successful litigants the fruits of their Judgment.

22. On the second condition, there is no dispute that the impugned judgment dated the 16th December 2021 was delivered on 27th January 2022 wherein the Applicant had sought for stay of execution in the trial court and a ruling dismissing the same had been delivered on the 20th December 2022. He then filed the present application on the 23rd January 2023 and a Memorandum of Appeal was subsequently filed on the 22nd February 2023. I find that the said application is brought without undue delay.

23. On the last condition as to provision of security, the Applicant in the present application has offered his willingness to furnish security for the due performance of such decree as is mandatory as per the wording of Order 42 Rule 6 (2) (b) of the Civil Procedure Rules.

24. In the foregoing the Court orders as follows:

    i. The Applicant shall within 30 days from the date of this ruling, deposit Kshs.500,000/=(Five Hundred Thousand) in Court. In default, the stay shall automatically lapse.

ii. If the Applicant has not been supplied with the documents required to prepare the record of Appeal, his Counsel shall liaise with the Deputy Registrar of this court and ensure that the same are supplied within fifteen (15) days of this order.

iii. The Applicant shall within forty-five (45) days from the date of this ruling compile, file and serve upon the Respondent a complete record of Appeal.

iv. If the Applicant does not file the Appeal within the time stipulated in (iii) above, the window granted to file the Appeal shall automatically lapse.

There shall be no Costs.

DATED AND DELIVERED AT KERICHO VIA TEAMS MICROSOFT THIS 6TH DAY OF JULY 2023

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE