Emojong v Manyuru & 2 others (Environment & Land Case 7 of 2013) [2023] KEELC 20428 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20428 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND CASE 7 OF 2013

BN OLAO, J

OCTOBER 5, 2023

BETWEEN

FREDRICK IDIAMA EMOJONG .... PLAINTIFF

AND

XEPHERIO MANG'ENI MANYURU .... 1ST DEFENDANT

DINA ACHIENG NYONGESA .... 2ND DEFENDANT

LYDIA BENTA TATA MANG'ENI .... 3RD DEFENDANT

RULING

1. The dispute between Fredrick Idiama Emojong (the Plaintiff) and Xepherio Mang'eni Manyuru, Dina Achieng Nyongesa and Lydia Benta Tata Mang'eni (the 1st, 2nd and 3rd Defendants respectively) over the land parcel NO South Teso /angoromo/7331 and the resultant sub-divisions thereof being parcels No South Teso /angoromo/8424, 8425, 8426 and 8427 was heard by Omollo J. By a judgment delivered on 17th February 2021, the Judge ruled in favour of the Plaintiff.
2. A decree was issued in the following terms:
    1. That the titles No South Teso /angoromo/8424, 8425, 8426 and 8427 be cancelled and to revert to title No South Teso /angoromo/7331 in the names of the Plaintiff.
    2. The District Land Registrar Busia/teso to recall the resultant fraudulent titles and cause their nullification.
    3. The Defendants, their servants or agents be evicted from the above (4) resultant titles.
    4. Costs awarded to the Plaintiff.

3. Being aggrieved by the said judgment, the Defendants filed a Notice of Appeal on 1st March 2021. Meanwhile, the Plaintiff's costs were taxed at Kshs.147,555 on 13th May 2021 by Hon. P. Kulecho the Deputy Registrar.

4. The Defendants have now approached this Court vide their Notice of Motion dated 26th April 2023 premised under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules* and Section 1A, 1B and 3A of the *Civil Procedure Act*. They seek the following remedies:

   1. Spent

   2. Pending the hearing of this application inter-parte, this Honourable Court be pleased to grant an order of stay of execution of the Decree herein.

   3. Pending the hearing and final determination of this application, this Honourable Court do issue an order of stay of execution of the Decree herein.

   4. Costs be in the cause.

5. That application is the subject of this ruling and is founded on the grounds set out therein and supported by the affidavit of Xepherio Mang'eni Manyuru the 1st Defendant herein.

6. The crux of the application is that the Defendants being aggrieved with the judgment delivered herein on 17th February 2021 have filed at the Court Of Appeal In Kisumu, Civil Appeal No 51 of 2021. That the Plaintiff has commenced execution and served the Defendants with a letter to the effect that the County Surveyor will be visiting the suit land on 21st April 2023 with a view to executing the Decree yet the appeal is arguable. That the Plaintiff is a person of no known means and should the stay not be granted, he will be incapable of compensating the Defendants incase their appeal succeeds. The Defendants shall not be prejudiced and it is therefore in the interest of justice that the order of stay of execution pending appeal is granted.

7. Annexed to the application are the following documents:

   1. A document headed "Record Of Appeal" No 51 of 2021 but which is not really a record.

   2. A letter dated 15th April 2023 from the County Surveyor Busia addressed to the Defendants advising them of a site visit on 28th April 2023.

   3. Notice of Appeal dated 1st March 2021.

8. The Plaintiff filed Grounds of Opposition dated 8th May 2023 raising the following:

   1. That the application is without any merit since it seeks to stay a decree issued on 13th May 2021 more than 2 years ago.

   2. That this Court is functus officio and lacks jurisdiction to hear the application.

   3. That the application is frivolous, vexatious and an abuse of the process of this Court.

9. When the application was placed before me on 28th April 2023, I directed that it be canvassed by way of written submissions to be filed on or before 19th May 2023.

10. However, none of the parties filed any submissions.

11. I have considered the application and the grounds of opposition.

12. Before I consider the merits or otherwise of the application, I must decide whether I have the jurisdiction to do so. This is because that issue has been raised in the grounds of opposition. Being a matter of law, I must determine it as a first point of call. That is because, as was held in Owners Of The Motor Vessel 'lillian S' –v- Caltex Oil Kenya Ltd 1989 C.a. Civil Appeal No 50 Of 1989 [1989 eKLR) as per Nyarangi Ja,

> " ... a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step. Where a Court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A Court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

Other than a mere assertion that this Court has no jurisdiction to determine this application, nothing has been placed before this Court to demonstrate this Court's want of jurisdiction. The dispute herein relates to ownership of land and no law has been cited to support that ground of opposition.

13. The other issue raised is that this Court is functus officio. That term is defined in *Black's Law Dictionary 10[Th] Edition* as follows:

> " Latin having performed his or her office ... without further authority or legal competence because the duties and functions at the original commission have been fully accomplished." Emphasis added.

14. This Court [Omollo J] has of course already heard the dispute over the suit land and rendered a judgment. The Defendants have intimated their intention to appeal that decision and meanwhile, they have approached this Court to stay the execution of that judgment even as they pursue their right of appeal. The law, which I shall be referring to shortly, donates to this Court the power to consider the application for stay of execution pending appeal. In the circumstances therefore, this Court in considering this application which it is empowered to do by virtue of Order 42 Rule 6 of the *Civil Procedure Rules* cannot be said to be acting "without further authority or legal competence."

15. The Supreme Court Of Kenya in *Election Petitions No. 3, 4 and 5 Raila Odinga & Others -v- Iebc & Other 2013* eKLR relied on the holding in the case of Jersey Evening Post Limited -v- Al Thani [2002] LR 542 at page 550 to the effect that:

> " A Court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the Court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully conducted, and the Court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally conducted, the Court cannot review or alter it's decision; any challenge to it's ruling on adjudication must be taken to a higher Court if that right is available."

Clearly therefore, the Court is not functus officio as the law allows it to entertain this application and its judgment has not "been perfected."

16. Having dispensed with those procedural issues, I shall now consider the application.

17. Order 42 Rule 6 (1) and (2) of the *Civil Procedure Rules* provides that:

> 6 (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 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." Emphasis mine.

The jurisdiction of this Court while considering such an application was circumscribed by the Court of Appeal in Vishram Ravji Halai & Another -v- Thornton & Turpin (1963) LTD 1990 KLR 365 where it said:

> " Thus the Superior Court's discretion to order a stay of execution of it's order or decree 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."

Substantial loss, as was held by Platt Ag JA (as he then was) in Kenya Shell Ltd -v- Benjamin Kibiru 1982 – 88 I KAR 1018 [1986 KLR 410], is the "cornerstone" of the jurisdiction to grant stay of execution pending appeal.

18. Although the Defendants have not specifically referred to "substantial loss" in their application, they have in ground NO (III) pleaded that:

> (III) "There is a real likelihood of the Respondent in the absence of an order of stay alienating the suit property and or disposing off the same which will occasion the applicants irreparable damage and loss and the Respondent will be incapable of compensating the applicants as he has no known ability to compensate the applicants."

Other than pleading "irreparable damage and loss" which I will equate to "substantial loss" for purposes of this ruling, the Defendants have not stated what type of damage it will be that they will suffer. As Gachuhi Ag JA (as he then was) stated in Kenya Shell -v- Kibiru (supra):

> " In an application of this nature, the applicant should show what damages it would suffer if the orders for stay is not granted."

Similarly, in Machira T/a Machira & Co Advocates –v- East African Standard (no 2) 2002 2 KLR 63 KULOBA J stated as follows at page 67:

> " If the applicant cites, as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given, and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial loss by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order before disposal of the applicant's business (eg appeal or intended appeal)."

The Defendants should have gone further to state what substantial or irreparable loss they will suffer if the order of stay is not granted. It is not sufficient to speculate and no evidence has been placed before me to suggest that the Plaintiff intends to dispose off the property subject of this suit.

19. The Defendants were also required to file the application "without un-reasonable delay." The judgment sought to be stayed was delivered on 17th February 2021 in the presence of Mr Onsongo holding brief for Mr Ashioya for the Plaintiff and Mr Ipapu for the Defendants. Mr Ipapu sought and was granted a stay for 30 days. However, it was not until 26th April 2023 (2 years and 2 months later) that this application was filed. That is clearly "unreasonable delay" and which has not even been explained. Meanwhile, the Plaintiff's bill of costs has been taxed and the record shows that on 3rd November 2021, MR IPAPU informed the Court that he was under instructions to negotiate the matter with the Plaintiff. The Court is yet to be informed about the results of any negotiations. Clearly, this application has not been brought in good faith as we have not even been told the status if any, of the Appeal NO 51 of 2021.

20. Finally, the Defendants have not offered any security for the due performance of any such decree that may be ultimately be binding on them after their appeal is prosecuted. All that they have pleaded in paragraph (ii) of their application is that they "have an arguable appeal with overwhelming chances of success." That has also been repeated in paragraph 5 of the 1st Defendant's supporting affidavit. The arguability or success of a pending appeal cannot be a consideration when a Court is considering an application for stay of execution pending an appeal from it's own decision.

21. The up-shot of all the above is that the Notice of Motion dated 26th April 2023 is devoid of merit. It is dismissed with costs to the Plaintiff.

BOAZ N. OLAO

JUDGE

5TH OCTOBER 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ON THIS 5TH DAY OF OCTOBER 2023 BY WAY OF ELECTRONIC MAIL.

BOAZ N. OLAO

JUDGE

5TH OCTOBER 2023