



County Government of Wajir v Abdilah & 2 others (Constitutional Petition E007 & 8 of 2023 (Consolidated)) [2024] KEHC 5401 (KLR) (3 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5401 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT GARISSA
CONSTITUTIONAL PETITION E007 & 8 OF 2023 (CONSOLIDATED)**

JN ONYIEGO, J

MAY 3, 2024

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF
KENYA**

**(SUPERVISORY JURISDICTION AND PROTECTION OF FUNDAMENTAL RIGHTS
AND FREEDOMS) HIGH COURT OF PRACTICE AND PROCEDURE RULES (2013)**

AND

**IN THE MATTER OF ALLEGED CONTRAVENTION OF FUNDAMENTAL
RIGHTS UNDER ARTICLES 2(1), 3, 10, 22(1), 27(1), 39(1), 43,47(1)
AND (2) AND ART 196 OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF COUNTY GOVERNMENTS ACT NO. 17 OF 2012

AND

**IN THE MATTER OF A CONSTITUTIONAL PETITION AGAINST ARBITRARY
INCREASE OF CESS RATES BY THE COUNTY GOVERNMENT OF WAJIR**

BETWEEN

THE COUNTY GOVERNMENT OF WAJIR APPLICANT

AND

ALI ABDILAH 1ST RESPONDENT

KUSO DAHIR 2ND RESPONDENT

ABDULLAHI SHARUBU 3RD RESPONDENT



RULING

1. Before this court is an application dated 08.11.2023 brought by the respondents through the firm of Gedi & Co. Advocates seeking for orders that:
 - i. This Honourable Court be pleased to order stay of execution of the ruling and/or order of the court delivered on 09.10.2023 and all other consequential orders emanating therefrom pending the inter partes hearing of this application.
 - ii. This Honourable Court be pleased to order stay of execution of the ruling and/or order of the court delivered on 09.10.2023 and all other consequential orders emanating therefrom pending the inter partes hearing of the intended appeal.
 - iii. Costs of this application be provided for.
2. The application is premised on the grounds on the face of it and the annexed affidavit sworn on 09.10.2023 by Naema Ibrahim, the County Attorney of Wajir County, the applicant herein. It was deposed that this court delivered a ruling on 09.10.2023 in favour of the petitioners seeking to suspend the new cess rates. That being aggrieved and dissatisfied with the decision, the applicant has since appealed against the entire ruling by lodging a Notice of Appeal to the court of appeal.
3. Counsel swore that the applicant has an arguable appeal with high chances of success and further, that the applicant stood to suffer substantial loss should the orders sought herein be denied and the appeal succeeds. It was further stated that the application was brought in good faith and without inordinate delay hence the same should be allowed.
4. The respondent opposed the application via a replying affidavit sworn by Kenneth Odera on 21.11.2023 in which he deposed that the application was frivolous, mischievous, lacking in merit and therefore fit for dismissal. It was averred that the application clearly aims at frustrating the petitioners'/respondents' legitimate business and occasion unto them further violations of their rights. It was decried that should the prayers herein be allowed, the petitioners/respondents will incur substantial loss. That the respondents will suffer massive commercial constraints arising from the unjustified exorbitant cess rates by the applicant.
5. It was urged that no constructive reason had been offered by the applicant to warrant the grant of stay of execution nor any demonstration that the intended appeal has high chances of success. The petitioners/respondents decried the fact that the applicant was notorious in disobeying court orders and therefore, the court ought not to come to its aid. That the respondent lacked sufficient justification in seeking for stay execution and therefore, the application herein is devoid of merit and thus ought to be dismissed with costs.
6. The court directed that the application be canvassed by way of written submissions which direction parties complied with.
7. The applicant in its submissions dated 23.11.2023 submitted that the main issue for determination is whether the threshold for grant of stay had been met. That the main issues for determination in a case such as this are: substantial loss which may result if the orders are made; whether the application has been made without unreasonable delay and; whether the applicant has given such security for due performance.



8. It was urged that the issue of substantial loss is the cornerstone for exercising discretion in grant of stay pending appeal. Reliance was placed on the case of Michael Wanjihia Onesmus vs Francis Waihiga [2017] eKLR where the court reiterated that substantial loss is the cornerstone of an application for stay of execution.
9. Counsel contended that the applicant stood to suffer substantial loss because the sums of money in issue have already been factored in the applicant's budget and the intended appeal is arguable. That the respondent may not be in a position to refund the decretal sum should the appeal succeed.
10. On the question of unreasonable delay, it was submitted that the impugned ruling was made on 09.10.2023 and thereafter the court granted a thirty-day stay to which the application herein was lodged on 08.11.2023 thus approximately thirty days after the delivery of the ruling. That the notice of appeal was lodged on 23.10.2023 soon after the delivery of the ruling thus signaling the applicant's interest in pursuing the appeal. Counsel therefore opined that the application herein was brought without inordinate delay.
11. On provision of security, the court referred to the case of Focin Motor Cycle Co. Ltd v Ann Wambui Wangui & Another [2018] eKLR in which the court stated that where the applicant has proposed to provide security as the applicant has done, the same was a mark of good faith.
12. In reference to the same, the applicant urged that it was willing to abide by the orders issued by this court to ensure that the ends of justice is met. Additionally, that from the memorandum of appeal annexed herein, it is evident that the appeal is arguable.
13. The respondents in opposing the application filed their submissions dated 28.11.2023 wherein it was submitted that the applicants did not state which amount of revenue would be equated to substantial loss as the 1st respondent would still continue receiving its revenue. To that end, support was placed on the case of James Wangalwa and Another v Agnes Naliaka Cheseto (2012) eKLR where the court held that ...execution is a lawful process; the applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal. It was submitted that the application has been brought late in the day considering that the same was made after thirty days of delivery of the impugned ruling was delivered. That no reason was given to support the unreasonable delay in filing this application.
14. On security, it was contended that the applicant did not show good faith as none was provided. Reliance was placed on the case of Arun C. Sharma v Ashana Raikundalia t/a Raikundalia and Co. Advocates and 2 Others (2014) eKLR where the court stated that the purpose of security is to guarantee due performance of such a decree or order as may ultimately be binding on the applicant. Lastly, the petitioners/respondents urged that the intended appeal did not raise arguable issues. That the grounds upon which the appeal was founded were not only frivolous but also unmerited.
15. The petitioners /respondents urged that the application herein is res judicata as the same had been previously dealt with wherein the court granted the applicant a thirty-day stay. That entertaining the matter herein having heard a similar application was a waste of this court's precious time. Further, that the application before court was not brought in good faith having in mind that previously, the applicant has been in contempt of the orders of the very court that it now seeks reprieve from. This court was thus urged to dismiss the application herein for the same was in want of merit.
16. I have considered the application herein together with the response and the submissions by both parties. In my view, the issue for determination is whether this court can grant the order of stay of execution pending the hearing and determination of the intended appeal.



17. It is trite that Order 42 Rule 6 of the Civil Procedure Rules, 2010 specifies the circumstances under which the court may order stay of execution of a decree or order pending an appeal. It provides that an applicant must demonstrate the following: -
- i. The substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - ii. 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.
 - iii. Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.
18. The Court of Appeal in *Vishram Ravji Halai vs Thornton & Turpin* Civil Application No. Nairobi 15 of 1990 [1990] KLR 365, outlined the requirements for granting stay of execution pending appeal. It held that, whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 (as it then was) of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security.
19. The first requirement is that the intended appeal must be arguable. The essence of considering whether the appeal raises triable issues is to avoid the same being rendered nugatory should the decision of the appellate court overturn that of the trial court.
20. The second aspect to consider is whether the application before court had been filed without undue delay. The applicant submitted that the impugned ruling was made on 09.10.2023 and thereafter the court granted a thirty-day stay thus the application herein was lodged on 08.11.2023 which is approximately thirty days after the delivery of the ruling. Thus the application herein was made without unreasonable delay.
21. On the other hand, the respondent urged that the application herein was res judicata and further, the same was filed late in the day. Without much ado, this court holds the view that article 48 of *the Constitution* guarantees every person access to justice and in addition, Article 50(1) of *the Constitution*, provides that every person has the right to have any dispute that can be resolved by the application of law decided in *affair and public hearing* before a court or, if appropriate, another independent and impartial tribunal or body.
22. In the same breadth, in the case of *Kamlesh Mansukhalal Damki Patni v Director of Public Prosecution & 3 Others* [2015] eKLR, the Court of Appeal articulated that: ...for these reasons, decisions of the courts must be redolent of fairness and reflect the best interests of the people whom the law is intended to serve. In my considered view therefore, the application herein is proper before the court.
23. Thirdly, this Court must determine whether not granting the order will occasion substantial loss to the applicant. Substantial loss was explained in the case of *James Wangalwa & Another vs Agnes Naliaka Cheseto* [supra] eKLR, where the court held that: -

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors



which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

24. The main concern on the applicants’ side is that the cess in question has already been budgeted for hence disruption of the county budget should the order remain in force. Secondly, they are apprehensive that the respondents may not be able to refund the amount due should they lose the case hence the element of substantial loss.
25. The respondents on the other hand contended that the applicant did not demonstrate what amount of revenue would be equated to substantial loss as the applicant would still continue receiving its revenue. It is not lost to this court that in balancing these two interests, the court must satisfy itself that no party would suffer undue prejudice.
26. This principle was enunciated in the decision of the Court of Appeal in *Absalom Dova vs Tarbo Transporters* [2013] eKLR, where it stated: -

“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...”
27. From the above, I am of the view that the scales of justice tilts in favour of the respondents for the reason that the applicant will still continue to receive old rates of revenue from the respondents as the petition is pending hearing and determination.
28. On security, the applicant urged that it was willing to abide by the orders issued by this court to ensure that the ends of justice is met. The respondent on the other hand urged that the applicant did not show good faith as it did not provide any security. The purpose of security was clearly enunciated in *Arun C. Sharma vs. Ashana Raikundalia t/a Rairundalia & Co. Advocates & 2 others* [2014] eKLR, where the court stated: -

“The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor.... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose.”
29. It has been pronounced in several instances that this court is possessed of powers to order a party to provide security in cases where no security has been provided. [See the case of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd* [2019] eKLR]. However, security should not be equated to punishment but rather as a precautionary measure to secure litigants from unnecessary loss occasioned by parties who can not even afford to pay in case they lose. It is some extent a message



to litigants to weigh carefully on the merits of their case before appealing. In this case I do not fund furnishing security necessary as the county government cannot be broke.

30. Regarding loss of revenue, the number of tax payers affected in this case is insignificant hence of little effect in the overall tax collection which is ongoing in other sectors which are not complaining. To that extent, on a balance of convenience, justice will invariably tilt in favour of the respondents. As concerns inability by the applicants to refund the amount lost as tax, the government will recover the lost amount from the parties' in default sanction them from doing business within their jurisdiction hence no substantial loss will arise.
31. In a nutshell, it is my finding that the applicants did not make a case for grant of stay and as a consequence, I dismiss the application with costs to the respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 3RD DAY OF MAY 2024

J. N. ONYIEGO

JUDGE

