Jamarat Apartments Limited v Mandera County Government (Civil Appeal E013 of 2024) [2024] KEHC 15545 (KLR) (9 December 2024) (Ruling)

Neutral citation: [2024] KEHC 15545 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT GARISSA

CIVIL APPEAL E013 OF 2024

JN ONYIEGO, J

DECEMBER 9, 2024

BETWEEN

JAMARAT APARTMENTS LIMITED ..... APPLICANT

AND

MANDERA COUNTY GOVERNMENT ..... RESPONDENT

(Being an appeal from the ruling of the Magistrate's court Garissa (Hon. Jackson Omwange) dated 26th June 2024 in Civil Case No. E009 of 2024)

RULING

1. Vide a plaint dated 25th October 2024, the appellant filed a suit before Garissa CM's court seeking; judgment to the tune of Kshs 9,567,279,035 being a claim for unpaid rent; Kes 2,205,520 being costs for carrying out repairs; interest and costs.

2. In response, the respondents filed a preliminary objection dated 20-05-2024 challenging territorial jurisdiction of the Garissa CM's court considering that the cause of action arose within Mandera county. In opposing the same, the appellant urged that the monetary value of the suit was a total of kes 11,772,799 which was way above the kes 10,000,000 million which is the monetary jurisdiction of a P.M's court the highest in Mandera law courts.

3. Upon hearing the P.O., the hon. Court upheld the same on 26-06-24 thereby dismissing the suit with costs. Subsequently, the matter was listed for assessment of the party to party bill of costs filed on 08-07-2024 and scheduled for assessment on 14-08-2024. Aggrieved by the court's decision, the appellant moved to the high court through a memorandum of appeal dated 12-07-2024.

4. The trial court proceeded to assess the bill of costs and set the ruling date for 11-09-2024. Meanwhile, the appellant filed before the high court a notice of motion application dated 19-08-2024 seeking stay of taxation proceedings pending interpartes hearing. The high court allowed the exparte application on 20-08-2024 thus staying the lower court proceedings pending interpartes hearing. The application

which is the subject of this ruling is supported by particulars on the face of it and further amplified by the affidavit of the applicant herein in which he deponed that he has an arguable appeal and that the suit was properly filed in Garissa court as the Mandera PM's court had no monetary jurisdiction to hear the matter.

5. He averred that despite the trial court being informed of the pending appeal, it went ahead and heard the matter thus taxing the same. That the application should be allowed to preserve the Substrum of the appeal and avoid the appeal rendered nugatory.

6. In response, the respondent filed a replying affidavit sworn on 25-08-2024 thus opposing the application arguing that; the application was premature as the bill had not been taxed by the time the appeal was filed; the appeal is not arguable; the appellant will not suffer any prejudice should the assessment of costs go ahead and; the applicant is not likely to suffer any substantial loss.

7. The appellant/applicant filed a supplementary affidavit sworn on 12-09-2024 thus stating that despite serving the order of the high court stopping further proceedings before the lower court, the trial magistrate ignored the same and went ahead to assess the bill of costs at 369,100. He deponed that the magistrates' interpretation that the order of the high court did not stop him from hearing the matter was erroneous and disrespectful of the high court.

8. When the matter came up for hearing, parties agreed to canvass the application through submissions.

9. The appellant filed his submissions dated 25-10- 2024 in which the learned counsel reiterated the content of the affidavit in support of the application. Learned counsel urged that the applicant had established the requirements under order 42 rule 6 of the civil procedure rules for grant of stay of execution orders. He contended that should execution of the taxed amount go on; the applicant will suffer substantial loss as it will be difficult to recover the amount paid. To buttress the point on the likelihood to suffer substantial loss, the court was referred to the case of Sewankombo Dickson vs Ziwa Abby HCT 00-CC MA0178 OF 2005 Kampala where the court held that substantial loss is qualitative and it refers to any loss small or great.

10. Further reference was made to the case of *Kenya Shell Limited vs Kibiru and another* (1986) KLR 410 where the court held that in an application for stay, an applicant must show reasonable probability of suffering irreparable injury which cannot adequately be compensated.

11. On the aspect of time, it was contended that the same was filed within reasonable time. Regarding security, the applicant stated that they were ready to deposit any amount of security as the court may direct.

12. The applicant urged the court to consider it as an act of judicial misconduct by the trial court ignoring a high court order thereby proceeding with the hearing in total disregard of that order. Counsel referred to the case of *Bellavue Development company limited vs Francis Gikonyo & 3 others* (2018) eKLR where it was held that where a court disregards an order of a superior court, it amounts to contempt of court.

13. On their part, the respondents filed their submissions dated 28-10-2024 reiterating the content contained in the replying affidavit. Basically, it was submitted that the applicant filed the appeal prematurely before taxation was concluded and that in any event, costs are quantifiable hence not necessary to appeal before taxation. The court was referred to the case of *Muri Mwaniki &Wamiti Advocates v Wings Engineering Services Limited* (2020) e KLR.

14. On the question of possibility or likelihood to suffer substantial loss, counsel urged that, there was no proof of such loss and the likelihood that the respondent was incapable of refunding should the appeal succeed.

15. On whether the appeal is likely to be rendered nugatory, counsel opined that mere taxation of the bill of costs can not render the appeal nugatory.

16. I have considered the application herein, response thereof and parties' respective submissions. The only issue for determination is whether the applicant has met the threshold for grant of stay of execution orders. Order 42 rule 6 (2) provides that before an order for stay of execution can issue, the applicant must prove that; the applicant is likely to suffer substantial loss; that the application has been filed within reasonable time and that; the applicant has offered to deposit or furnish security for the due execution of the decree. See *Jason Ngumba Kagu & 2 others vs Intra Africa Assurance Co. Limited*(2014)e KLR where the court held that;

> " The possibility that substantial loss will occur if an order of stay of execution is not granted is the cornerstone of the jurisdiction of court in granting stay of execution pending appeal under order of 42 rule 6 of the civil procedure rules...)

17. However, to grant or not to grant an order of stay is an issue of discretion by the presiding court bearing in mind that denial of such order will not defeat the purpose of appeal. See Butt v Rent Restriction Tribunal (1982) KLR 417 where the court held that the power to grant or not to grant an order for stay is discretionary power. However, what amounts to substantial loss is relative. In the instant case, parties are arguing over a sum of money already taxed. From the pleadings, this amount was taxed while there was an order of the high court in place stopping any proceedings before the trial court pending the hearing of the pending application interpartes.

18. Had the trial court complied with the court order, the figures being referred to could not be there. In my view, the assessed amount was irregularly arrived at by the trial court when it had no capacity to so assess. To that extent, the applicant is likely to suffer substantial loss by paying what was irregularly ordered in the circumstances.

19. AS regards time, the appeal was filed in less than a month's period from the date the impugned orders were made. Therefore, there was no inordinate delay.

20. Regarding security, the applicant is duty bound to deposit security for due performance of the decree or payment of costs where necessary. This is meant to cushion the respondent should the appeal fail. It is also a tool for gauging serious litigants and discourage frivolous applications. See *Gianfranco Manenthi & another v Africa Merchant Assurance Co. limited* (2019) eKLR where the court held that the applicant in an application for stay should deposit security in due performance of a decree. In this case, I do not find any justifiable reason to so order.

21. The other aspect the applicant ought to prove besides the traditional grounds is whether the appeal is arguable. In the case of *Kenya revenue authority vs Sidney Keitany Changole &3 others* (2015) eKLR the court held that where a party establishes an arguable appeal, he should be given an opportunity to argue his appeal. Having assessed the crux of the matter which is the alleged lack of monetary jurisdiction by the Garissa court which the trial court up held, the question then would be, between Mandera and Garissa which court has jurisdiction to hear a claim of a value of over 11million. The trial court did not address this question. It simply considered territorial jurisdiction. Had the learned magistrate considered that fact, may be, he would have arrived at a different finding. That issue will be for the substantive appeal to determine. In my view, this ground can not be ignored hence an arguable appeal.

22. In a nut shell, I am satisfied that the application is merited and the same is allowed as prayed pending the hearing and determination of the appeal herein. The Deputy Registrar to call for the original court record for purposes of expediting the appeal. For avoidance of doubt, no further proceedings should

be entertained in respect of this file before the lower court until further orders from this court. Costs shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 9TH DAY OF DECEMBER 2024.

J. N. ONYIEGO

JUDGE