Dancun & 11 others v Amoth & 2 others (Environment and Land Appeal E005 of 2025) [2025] KEELC 4595 (KLR) (19 June 2025) (Ruling)

Neutral citation: [2025] KEELC 4595 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT SIAYA

ENVIRONMENT AND LAND APPEAL E005 OF 2025

AE DENA, J

JUNE 19, 2025

BETWEEN

ANGAYO AMOTH DANCUN & 11 OTHERS ..... APPLICANT

AND

CORNEL RASANGA AMOTH ..... 1ST RESPONDENT

COUNTY GOVERNMENT OF SIAYA ..... 2ND RESPONDENT

LIVINGSTINE RAGEN AMOTH ..... 3RD RESPONDENT

RULING

1. Before court is the Notice of Motion Application dated 20/02/2025 seeking the following orders

    a. Spent

    b. That the Honourable court be pleased to grant interim order staying the execution of the ruling issued on the 17th February 2025 by the Honourable Benjamin Limo pending the hearing and determination of this application.

    c. That the Honourable court do issue an order restraining the Respondents, their servants, from proceeding with the Bill of Costs as ruled on 17/02/2025 by the Honourable court, pending the hearing and determination of the appeal.

    d. That the costs of the application be in the course.

2. The application is premised on the grounds on its face and what is stated to be a replying affidavit which should be a supporting affidavit sworn by Erick Wango Amoth the 2nd applicant on 12/3/2025. The affidavit is stated to be sworn with authority of the co applicants.

3. It is deponed that the applicants filed Suit No. 21 of 2019 in February 2019. The respondents during the pendency of the suit entered into a commercial contract on 2/3/2020 for a period of 7 and half

years. This escalated the value of the suit property to over Kshs. 20 million which was above the Magistrates jurisdiction necessitating the amendment of the Plaint. That the respondents raised a preliminary objection on the jurisdiction of the court and which was allowed. That the court declined to allow costs for lack of jurisdiction. It is deponed that jurisdiction is everything.

4. It is deponed that after the ruling on the preliminary objection the respondents advocate prayed for costs and the Hon Magistrate declined on the basis he had downed his tools. That the applicant and his two brothers was present in court and confirm that this is what they heard. That this can be confirmed by the verbal recording. That the right to appeal is a constitutional right and mistakes made in the lower courts cannot go unchallenged. That the signing of the lease agreement was a fraud and the court cannot allow fraudsters to benefit from their criminal activity. That there cannot be any taxation without a court order.

5. It is deponed that the filing of the Bill of Costs was a fishing expedition and that the ruling was a negotiated ruling.

6. The application is opposed by the 1st and 3rd respondents through the replying affidavit sworn by Livingstone Ragen Amoth the 3rd respondent. It is deponed that the court rendered its judgement on the preliminary objection herein allowing the same. A copy of the ruling is annexed as LRA-1. That the PO prayed for the suit to be dismissed/struck out with costs. A copy of the PO is attached as LRA-2.

7. That upon granting the PO as prayed costs were awarded and based on information from their counsel on record a Bill of costs dated 11/12/2024 was prepared and served for taxation. That prior to the taxation the applicant sought for review of the ruling for the PO awarding the respondents costs in the guise of 'Notice of Taxation. A copy of the same is annexed as LRA-4. That on the day of the hearing of the respondents' bill of costs the applicant insisted that the trial court reviews its judgement as costs were never awarded.

8. It is deponed the trial court then directed the respondents to respond to the said application for review together with submissions and thereafter the respondents to file his. The court also gave a date for ruling. It is averred counsel for the respondents complied. Copies of the Replying affidavit and submissions were annexed. Subsequently the ruling was delivered on 14/2/2025. That directions were given on the hearing of the Bill of Costs and the applicant was to file submissions on the same. Ruling on the bill was delivered on 6/3/2025. It is deponed that the application is a non starter based on grounds of opposition which were attached as LRA-7.

9. The court is urged to dismiss the application with costs including travelling expenses.

Submissions

10. The application was disposed of by way of written submissions pursuant to directions of this court issued on 7/4/2025. The applicants submissions are dated 12/3/2025 noted to have been filed alongside the application. The respondents' submissions are dated 3/3/2025.

Applicants Submissions

11. Referring to the case of Motor Vessel Lilian v Caltex Oil Kenya Limited it is submitted that where a court finds it has no jurisdiction it downs its tools and the applicants were set free. A ruling was made and can only be vacated on appeal.

12. That the filing of the Bill of costs was sheer arrogance on the part of counsel who heard the ruling and twice asked for costs. That the bill raised was excessive compared to other bills the same counsel had raised in other matters involving the applicants. The court is invited to confirm if a DR can preside

over a matter which is marked closed in the CTS and if the DR has power to alter judgement. That the confirmation of the taxation is against the law and which was without a court order. The court is further requested to revisit the audio proceeding and confirm the truth. That the court cannot deny the applicants the audio recording.

13. The respondent identified two issues for determination namely Whether a party can first stay a process of the court-taxation of a bill and whether a party can appeal a decision they have already reviewed.

14. Citing the case of Butt v Rent Restriction Tribunal [1982] KLR 417 where the Court of Appeal guided on the issues to be considered in exercising discretion to grant orders of stay of execution, it is submitted the present application is for stay of taxation and not execution. That taxation is a court process and does not pose any prejudice to the applicant capable of being stayed. The court is referred to the dictum of Christine Ochieng J in Pius Musimba Muasya &15; others v Onesmus Ndolo Ngeta & 3 others [2022] eKLR:

15. It is submitted that in there is no arguable appeal with any prospects of success. There is also no undoubted right of appeal. Citing the provisions of section 80 of the *Civil Procedure Act* and Order 45 Rule 1(b) of the Civil Procedure Rules it is further urged that the import of these provisions is that a party cannot review a decision then again exercise his right to appeal on the very same grounds he sought review on. It is urged that this provision was designed to safeguard the judicial processes and prevent abuse of the court processes where a party would review and when the decision does not favour him or her, then purport to appeal. Reliance is placed in the case of HA v LB [2022] eKLR where Justice Odunga termed this as an abuse of court process

16. It is contended in addition to the above that in the instant case , the main issue of contention by the appellants is whether the court awarded costs. The trial court in its review ruling, reiterated that it indeed awarded costs. The issue therefore of whether the same was awarded or not, falls squarely on Rule 1(b) of Order 45 as an 'error apparent on the face of the record'. The appellants therefore rightly exercised their right of review. That even if they had not opted for review, an appeal cannot lie to this court on an issue of 'an error apparent on the face of the record'.

17. The applicants did not respond further to the issues of law raised in the respondents submissions and opted for a date for ruling.

Analysis And Determination

18. I have considered the application, the response thereto and the rival submissions of the parties. The main issue for determination is whether the application is merited.

19. Before I get into the analysis of the above I will address the request to revisit the audio recording. This matter was the subject of an oral application made before court on 5/3/2025 where I delivered a ruling dismissing the application for want of merit. This ruling has not been appealed against. The application before me is not for review of that ruling.

20. The application is brought under the provisions of Section 1a,1b, 3a of the *Civil Procedure Act*, Order 42 Rule b and 7, Order 51 Rule 1 and Order 22(1) of the Civil Procedure Rules.

21. Based on the above I must observe that Order 42 is on appeals. The provisions above are not specific on the relevant subrule under which the application is brought. I say so because rule 7 is on security in case of order for execution of decree appealed from. However, the court is unable to make sense of what 42 Rule b entails in relation to the present application.

22. Be that as it may it is clear the application is for stay of execution and I will proceed as such.

23. The provisions of Order 42 rule 6(2) of the Civil Procedure Rules are on stay of execution and stipulate; -

> " 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."

24. Arising from the law the main criteria is that an applicant must demonstrate to the court that they will suffer substantial loss in the absence of an order for stay of execution - see the Court of Appeal pronouncement in Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu Karuga [1982-1988] KAR 1018 where the court stated that ''Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.'

25. From the above provisions of the law the burden is on the applicant to prove they will suffer substantial loss should the orders not be granted. The basis or grounds for the application were that the applicants have an arguable appeal against the ruling with prospects of success. That it is only fair and just that the said taxation is stopped pending the hearing and determination of the application.

26. I have perused the replying affidavit which in my view should be the supporting affidavit. I will treat it as a supporting affidavit in tandem with article 159(2)(d) to determine this application without undue consideration to technicalities.

27. Applying the above dictum substantial loss is the main consideration that a court must consider in exercising its discretion in favor of a stay. The burden is to be discharged by the party professing they will suffer substantial loss should the stay order be declined. I'm afraid I have not seen any depositions in this regard by the applicants. Instead, they have put more effort into reviewing the merits of the appeal which should not happen at this stage.

28. The above is tied to the order itself and which if executed would be prejudicial. Was there an order for execution? My answer is in the negative. I say so because at the point of filing the application before this court there was no decree or order arising out of the taxation because the bill had not been taxed yet. There was therefore nothing to be stayed and I agree with the respondents submission in this regard. Indeed this court on 5/3/2025 declined on the application of the applicant before court to stop the sitting in the lower court noting that what was in the lower court was also a process and there was no immediate threat. In any event what is before court is not an application for stay of proceedings.

29. This therefore means the application was prematurely filed before this court there being no order to be executed and which would have been said to pose the potential of causing substantial loss to the applicant.

30. I have noted the respondents' submissions on the provisions of Order 45 and section 80 herein which relate to review of an order or judgment of the court. It is stated that the applicant already moved the trial court towards review of its order and which the trial court pronounced itself on the same. That there is no arguable appeal since the applicant cannot have a second bite at the cherry.

31. I will be very brief on the above submission. It is trite that in deciding whether an appeal is arguable or not, the court is bound to consider whether the said intended appeal raises a bona fide issue for

determination by the Court. For the intended appeal to be termed as arguable, all that is needed in Law is that there be even one arguable point and that will suffice see Commissioner of Customs v Anil Doshi,[2017] eKLR ; Joseph Gitahi Gachau & Another v Pioneer Holdings (A) Ltd. & 2 others, Civil Application No. 124 of 2008]. My review of the memorandum of appeal seems to indicate whether the discretion was exercised correctly. I will therefore not dwell on this point it will await the determination on merit.

32. The upshot of the foregoing is that the application in my view is a non-starter and must be dismissed. Costs shall abide the outcome of the appeal.

DELIVERED AND DATED AT SIAYA THIS 19TH DAY OF JUNE 2025.

HON. LADY JUSTICE A.E. DENA

JUDGE

19/062025

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Mr. Wango Amoth Erick 2nd Applicant

Mr. Que for the Respondents

No Appearance for the Rest of the Parties

Court Assistant: Ishmael Orwa