



REPUBLIC OF KENYA



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**Conte v Mutua (Environment & Land Case 112 of 2018)
[2024] KEELC 112 (KLR) (25 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 112 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 112 OF 2018
FM NJOROGE, J
JANUARY 25, 2024**

BETWEEN

FELICITA CONTE PLAINTIFF

AND

ALFRED MUTUA DEFENDANT

RULING

1. This ruling is in respect of two applications which have been pending determination in this matter. The first is dated 9th August 2023 and filed by the Defendant seeking orders that this court be pleased to grant stay of execution of judgment delivered in this suit on 8th June 2023 pending hearing and determination of an intended appeal. The application is premised on the grounds on the face of it and supported by the affidavit sworn by the Defendant on the even date. The Defendant averred that he was given 45 days to relocate the water closet subject of the main suit which days lapsed on 24th July 2023. That despite initiating the process not of relocation as ordered but of appeal the Plaintiff threatened to institute contempt proceedings against him, which she has now done vide an application dated 11th September 2023. It is the second application herein.
2. The Plaintiff wants the Defendant to be found in contempt of the impugned judgment and that he be condemned to imprisonment and a fine. The Plaintiff's application is supported by her affidavit dated 25th August 2023. The Plaintiff confirmed that indeed judgment was delivered on 8th June 2023 and the Defendant filed a Notice of Appeal on 21st June 2023. He stated that the Defendant has also failed to abide by the determination in the suit, thus forcing her to move out of her house and lease another property thus incurring undue expenses amounting to Euros 3,561/-.
3. The Plaintiff also filed a Replying Affidavit on 19th October 2023, opposing the Defendant's application. She stated that the delay in filing the first application was not explained and that it is an afterthought prompted by her demand notice to comply with the judgment.



4. In response to the Plaintiff's application, the Defendant filed a further Affidavit on 4th October 2023, wherein he reiterated the contents of his supporting affidavit in the first application. He added that allowing the Plaintiff's application will render his appeal nugatory. He urged the court to dismiss it.
5. Both applications were canvassed by way of written submissions.

Defendant's Submissions.

6. Counsel for the Defendant aptly stated that the law and principles guiding such applications for stay of execution, is found under Order 42 rule 6 (1) and (2) of the *Civil Procedure Rules*. He outlined the purpose of stay of execution as was stated in the case of Consolidated *Marine v Nampijja & another* Civil Appeal No. 93 of 1989 as was quoted in *Charles Kariuki Njuri v Francos Kimaru Rwara (suing as the administrator of the estate of Rwara Kimaru alias Benson Rwara Kimaru (deceased))* [2020] eKLR and *Geoffrey Muriungi & another v John Rukunga M'Imonyo (suing as the legal representative of the estate of Kinoti Simon Rukunga (deceased))* [2016] eKLR.
7. He added that the Defendant had satisfied the requisite conditions for grant of the orders sought as were outlined in the case of *Congress Rental South Africa v Kenyatta International Convention Centre; Co-operative Bank of Kenta Limited & another (garnishee)* [2019] eKLR, and *Global Tours & Travel Limited v Five Continents Travel Limited* [2015] eKLR.
8. Counsel argued the Defendant has demonstrated that substantial loss will be occasioned should his application be denied as the Plaintiff may apply for demolition; further, if the Defendant is committed to civil jail, the substantial loss he would suffer as a state officer will be unquantifiable.

Plaintiff's Submissions

9. It was the plaintiff's counsel's submission that the Defendant neither disputed being aware of the judgment nor filing the application for stay after the lapse of the 45 days granted therein; that he should thus be held responsible for failure to obey court orders. Counsel relied on the cases of *Econet Wireless Kenya Limited v Minister for Information and Communication of Kenya Authority* [2005] eKLR, *T.N Gadavarman Thiru Mulpad -v- Ashok Khot and another* [2005] 5 SCC, and *Mabinderjit Singh Bitta -V- Union of India & Others* 1A No. 100 Of 2010- Supreme Court of India.

Analysis And Determination

10. Order 42 rule 6 of the *Civil Procedure Rules* provides: -
 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.

11. On 8th June 2023, judgment was delivered by my predecessor, Odeny J. in favour of the Plaintiff in the following terms: -

A declaration is therefore issued that the defendant's water closet on Chalet No. 14 adjacent to the Plaintiff's dining room is a nuisance and ought to be relocated within 45 days."

12. The Defendant then lodged a notice of appeal on 21st June 2023, well within the statutory time, but did not file any application for stay of execution pending appeal until on 14th August 2023, approximately 21 days after the lapse of the 45 days stay given in the impugned judgment. Before that application could be heard and determined, the Plaintiff instituted contempt proceedings against the Defendant.
13. Stay of execution pending appeal is a discretionary power bestowed upon this court by the law. The principles upon which stay of execution pending appeal can be allowed are now well settled from the authorities from this court and from the superior courts as aptly cited to me by the Defendant herein. Generally, the authority to grant stay of execution as provided for under Order 42 rule 6 above, is a discretionary power exercised only when an applicant satisfies the court that substantial loss may result to him unless the stay is granted, that the application has been made without undue delay and that the applicant has given security or is ready to give security for due performance of the decree.
14. It is also trite that the undisputed purpose of stay pending appeal is to prevent a successful appellant from becoming a holder of a barren result for reason that he cannot realize the fruits of his success in the appeal. (See Geoffrey Muriungi & another v John Rukunga M'Imonyo (suing as the legal representative of the estate of *Kinoti Simon Rukunga (deceased)*) [supra]).
15. The defendant has evidently made intention to appeal the impugned judgment. It is within his rights to do so. In the meantime, he is asking for a stay of execution of that judgment pending appeal. It is apparent that the defendant wishes to challenge the very orders that may have held him to be in contempt. Given those circumstances, it would not be fair to hold him in contempt especially because the contempt proceedings were initiated long after he had filed the application for stay of execution. On that ground alone the application for committal should fail.
16. The effect of the orders granted by my predecessor in this case, involve demolition of a part of the Defendant's property. Does this meet the definition of substantial loss? Would this be defeating the whole purpose of the intended appeal? Should the prevailing status quo be maintained?
17. While the court is dealing with a stay of execution application it is necessary to remember that much as the unsuccessful litigant is entitled to the determination of the issues in the intended appeal, the successful litigant is also entitled to the fruits of his judgment.
18. In matters stay of execution also, the court ought to deal with each case on its own merits. I am aware that this is a matter concerning everyday hygiene and psychological and physical wellbeing of the plaintiff. In the present case the issue of the water closet/pit latrine on the defendant's plot was still an issue at the commencement of the suit. In the notice of motion dated 21/5/2018 which was later withdrawn vide a notice dated 27/7/2018, the plaintiff sought inter alia an order restraining the construction of that facility. No interim orders were issued. The defendant was thus granted a chance to defend his decision to construct that facility at the disputed point next to the plaintiff's dining area; at the hearing on the merits he failed to convince the court on the merits of his action. The defendant ought to have proceeded with caution and awaited the decision of the court regarding the disputed issue. He did not, with the result that the facility was reported by his counsel to be complete later on



during the pendency of the present suit. Parties then decided to explore a settlement which apparently failed and so the matter proceeded to hearing. The defendant can not in such circumstances state that he was ambushed by the issue. He has known all along that there was possibility that he would be compelled to demolish the facility. On the other hand the plaintiff avers that she is exposed to foul odours in her dining area. I consider the harm to be occasioned to the plaintiff, who has endured the nuisance for the past 5 years, to be greater than the loss that the defendant would suffer upon execution. I consider that the utility of the plaintiff's property is considerably diminished by the location of the toilet. She may suffer greater harm than the defendant if she is not allowed to execute her judgment. On the other hand only a small portion of the defendant's property would be affected by the execution of the judgment and I hardly consider that as substantial loss. Lastly, no record of appeal appears to have been filed and such glacial pace in the execution of the defendant's affairs may result in protracted wait for the suffering plaintiff and it ought not be countenanced by a court of justice.

19. The result is that the defendant's application dated 9th August 2023 is hereby entirely disallowed and the defendant shall meet its costs. The defendant should put himself in the shoes of the plaintiff whose cries for justice have been confirmed to be genuine by this court and empathize and comply with the judgment of this court in this matter for amity to exist between neighbours. I also dismiss the plaintiff's application dated 11th September 2023 but with no orders as to costs.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 25TH DAY OF JANUARY 2024.

MWANGI NJOROGE

JUDGE, ELC MALINDI.

