Njiru & 2 others v Mbiti (Environment and Land Appeal E006 of 2021) [2024] KEELC 1437 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEELC 1437 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT AND LAND APPEAL E006 OF 2021

A KANIARU, J

JANUARY 24, 2024

BETWEEN

PETER MURIUKI NJIRU ..... 1ST APPELLANT

DOMINIC NJERU ANTHONY ..... 2ND APPELLANT

EMILIO NYAGA NJIRU ..... 3RD APPELLANT

AND

NJIRU MBITI ..... RESPONDENT

RULING

1. The application before me for determination is a Notice of Motion dated 25.03.2022 and filed on 30.03.2022 under Certificate of Urgency. It is expressed to be brought under Order 40 Rule 6, Section 3A of the *Civil Procedure Act*, Section 68(1) of the *Land Registration Act* and Article 159(2)(d) of the *Constitution*. The applicants– Peter Muriuki Njiru, Dominic Njeru Anthony & Emilio Nyaga Njiru – are the 1st, 2nd & 3rd Appellants in the Appeal while Njiru Mbiti is the Respondent. At this stage, prayers (1) and (2) are spent as they were meant for consideration at the exparte stage. It is only prayer (3) that remains for consideration and it is as follows;

> Prayer 3: That this Honourable court be pleased to stay the execution/further execution of the decree appealed against dated 21.07.2011 in LDT ELC Case No. 18 of 2011 at Siakago in terms of the court order dated 29.04.2021 and to that extent stay the further implementation of the subject desk subdivisions of Mbeti/Gachuriri/1261 (giving rise to Mbeti/Gachuriri/5255 and 5256) and Mbeti/Gachuriri/1269 (giving rise to Mbeti/Gachuriri/5253 and 5254) pending the hearing and final determination of this Appeal.

2. The application is premised on the grounds on its face and on the Supporting Affidavit and Supplementary affidavit sworn by the 1st Appellant on behalf of the other Appellants *interalia*; that the

lower court in its ruling delivered on 10.02.2022 refused to stay the execution of the decree appealed against, hence this application; that the said ruling was delivered without notice to the Appellant's advocate; that the intended appeal is highly arguable and will be rendered nugatory if the said decree is executed since the respondent intends to dispose the subject matter of the appeal; that the appellants stand to suffer irreparable loss and damage since the respondent admitted to having secretly caused the suit parcels to be sub divided with the intention of disposing of the same; and that it's in the interest of justice to maintain the *status quo* pending the hearing and determination of the appeal.

3. The application was responded to vide a replying affidavit dated 17.04.2022 and filed on 20.04.2022 drawn by the Respondent. He deposed interalia, that by admission made by the 1st Appellant in their supporting affidavit, this matter is sub-judice; that the issues raised in the said affidavit have already been raised in another matter being ELC Case No. 9 of 2021 whose ruling was to be delivered on 20.09.2022; that this application raises no triable issue, is merely filed to waste this courts time, and also to frustrate the Respondent from enjoying the fruits of his judgment.

4. The application was canvassed through written submissions. The applicant's submissions were filed on 31.10.2023. They cited the case of *Jamii Bora Bank Ltd & Anor v Samuel Wambugu Ndirangu* (Civil Appeal No. E030 of 20219 Nyeri) Eklr which outlined the provisions of Order 42 Rule 6(2) of the Civil Procedure Rules applicable when granting orders of stay of execution. They submitted that they are the sons of the Respondent by his 1st wife who is deceased and with whom he was bitterly estranged; that the intended interference with the suit titles by way of sub division and eviction of the applicants will render the appeal nugatory and cause them substantial loss by having them rendered destitute; that the Respondent will not suffer any prejudice if the intended execution is held in abeyance for a while before this court hears and renders itself on the appeal. They submit that they are willing to furnish any security imposed by this court.

5. The Respondents filed their submissions on 30.10.2023. They submitted that no substantive appeal has been lodged by the Applicants since 2022 when the application was filed; that the Applicants have not demonstrated that they would suffer substantial loss if the appeal succeeded as there is no appeal; that apart from the alleged bad blood and the so called hatred between the Applicants and the Respondents, no substantive loss has been demonstrated by the Applicants; that without evidence of substantial loss, it is difficult to see why the decree holder, that is the Respondent, should not be allowed to execute the judgement; that the Applicants have failed to offer any substantive security as they do not disclose in what form they are willing to deposit the security. The respondent is of the position that there is no appeal filed and that the orders sought cannot be granted in a vacuum; and that also the court is not appraised of the facts of the Appeal and therefore any finding may be of an academic nature in the absence of a substantive appeal. He ultimately urged urge that the Notice of Motion be dismissed.

6. He cited the cases of *R W W v E K W* [2019] Eklr, *Jamii Bora Bank Ltd & Anor v Samuel Wambugu Ndirangu* while quoting the case of *Shell Ltd v Kibiru & Anor* [1986] Klr 410, *Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 Others* [2015] Eklr, *Arun C Sharma v Ashana Raikundalia T/A Raikundalia & Co. Advocates & 2 Others* [2014] Eklr to support his position.

7. I have considered the application, the response made to it and the rival submissions. The issue for determination is whether the Application dated 25.03.2022 has merit.

8. Stay of Execution pending appeal is governed by Order 42, Rule 6 of the *Civil Procedure Rules*, 2010 which provides as follows: -

   (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.

(3) 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.

9. As outlined above, the power to grant stay of execution is a discretionary one and the Court of Appeal in the case of *Butt v Rent Restriction Tribunal* [1982] KLR 417 as cited in *Francis K. Chabari & another v Mwarania Gaichura Kairubi* [2022] eKLR gave guidance on how a court should exercise the said discretion and held that:

> " 1. The power of the Court to grant or refuse an application for a stay of execution is a discretionary power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle in granting or refusing a stay is; if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion.
>
> 3. A Judge should not refuse a stay if there are good grounds for granting it merely because in his opinion, a better remedy may become available to the applicant at the end of the proceedings.
>
> 4. The Court in exercising its discretion whether to grant [or] refuse an application for stay will consider the special circumstances of the case and unique requirements. The special circumstances in this case were that there was a large amount of rent in dispute and the appellant had an undoubted right of appeal.
>
> 5. The Court in exercising its powers under *Order XLI rule 4 (2) (b) of the Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security for costs as ordered will cause the order for stay of execution to lapse."

10. From the foregoing, it is clear that in order for an applicant to succeed in an application for stay of execution, they must satisfy the court that substantial loss may result to them 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.

11. My considered view is that the application before the court is not well thought through. It is brought under some wrong provisions of law. Order 40 rule 6 of *civil procedure Rules* and section 68(1) of *land registration Act* are wrongly invoked. Order 40(*supra*) is about injunctive orders. No order of injunction is sought and the application is not in any way about injunctions. Section 68 of *Land Registration Act* is about orders of inhibition. Again no order of inhibition is sought. I hasten to add that citing the wrong provisions of law does not make the application incurably defective but one can not help wondering why the applicants could not simply invoke order 42 rule 6 of *Civil Procedure Rules*, which is clearly the applicable law in the matter. It is important to note here that the applicants are represented by counsel.

12. The application also suffers from another fundamental flaw Viz; failure to make available to the court the ruling and order forming the basis of the appeal. The applicants only made available the decree dated 21.7.2011. The memorandum of appeal filed shows they are appealing the ruling delivered on 29.4.2021 and the order made pursuant to the ruling. Neither the ruling nor the order has been made available. These two should have been made available to enable the court to establish whether or not the appeal being filed is a frivolous one. The court is required to establish whether the appeal is arguable and this can only properly be done by looking at the grounds of appeal and the ruling and/ or order forming the basis of the appeal. This omission by the applicants is fatal to the application. It is fatal because the court is not sufficiently enabled to consider whether the requisite legal threshold for granting an order of stay has been met. It appears to the court that the application was made in a hurry and/ or formulated without careful preparation. If proper care had been exercised, blunders of the type mentioned here would not have occurred.

13. The upshot, in light of the foregoing, is that the merits of the application have not been demonstrated before, this court. The application is hereby dismissed. I realise that this matter is between a father and his sons. I therefore make no order as to costs.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 24TH day of JANUARY, 2024.

A.K. KANIARU

JUDGE

In the presence of;

Applicant / Appellant – present

Court Assistant - Leadys