Nyamboki v Nairobi City County & 251 others (Environment and Land Case 672 of 2015) [2024] KEELC 956 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 956 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND CASE 672 OF 2015

JO MBOYA, J

FEBRUARY 22, 2024

BETWEEN

HARUN OSORO NYAMBOKI ..... PLAINTIFF

AND

THE NAIROBI CITY COUNTY ..... 1ST DEFENDANT

THE ATTORNEY GENERAL ..... 2ND DEFENDANT

ERASTUS KAIRU KONGU & 249 OTHERS & 249 OTHERS & 249 OTHERS & 249 OTHERS ..... 3RD DEFENDANT

RULING

Introduction And Background

1. The Applicants herein [177th & 26 Others Defendants/Applicant] have approached the Honourable Court vide amended Notice of Motion Application dated the 26th January 2024; and in respect of which same have sought for the following reliefs; [verbatim];

   i. .....Spent.

   ii. .....Spent.

   iii. That the Execution of the Decree herein issued on [sic] the 23rd January 2024 and all consequential orders against the Defendants/Applicants be stayed pending the final determination of Civil Appeal No. E001 of 2024 now pending at the Court of appeal.

   iv. Costs of the Application be provided for

2. Suffice it to point out that the instant Application is anchored on various grounds which have been enumerated at the foot thereof. Furthermore, the Application is supported by the affidavit of Annah

Wangui Kabera sworn on even date; and in respect of which, the Deponent has annexed various documents, inter-alia, a copy of the Notice of Appeal and the Record of Appeal.

3. Upon being served with the subject Application, the Plaintiff/Respondent filed a Replying affidavit sworn on the 18th January 2024; and in respect of which, same has highlighted various issues, inter-alia, that the Applicants herein have neither demonstrated nor proved the incidence of substantial loss, which is contended to be the cornerstone to the grant of an order of stay of execution.

4. Be that as it may, the instant Application came up for hearing on the 31st January 2024; whereupon the advocates for the respective Parties covenanted to canvass and ventilate the Application by way of written submissions.

5. For coherence, the Applicant proceeded to and filed written submissions dated the 6th February 2024; whereas the Plaintiff/Respondent filed written submissions dated the 12th February 2024.

6. Both sets of written submissions are on record.

Parties Submissions:

Applicants' Submissions:

7. The Applicant herein has adopted the grounds enumerated in the body of the amended Application as well as reiterating the averments contained in the body of the Supporting affidavit. Furthermore, the Applicants' have thereafter highlighted and canvassed two [2] salient issues for due consideration by the Hoourable court.

8. Firstly, Learned counsel for the Applicants' has submitted that the instant Application has been filed and mounted without undue and inordinate delay or at all.

9. In any event, Learned counsel for the Applicants' has submitted that it was incumbent upon the Applicants' to first and foremost to file an Appeal against the impugned Judgment before same could file the instant Application.

10. Secondly, Learned counsel for the Applicants' has submitted that the Applicants' herein are disposed to suffer substantial loss and hardship, if the orders of stay of execution are not granted in the manner sought.

11. Furthermore, Learned counsel has contended that even though the Applicants' do not reside on the suit property, same are liable to suffer Eviction on account of the Judgment of the court and thus the necessity to issue/grant an order of stay of execution of the said Judgment and the attendant Decree.

12. On the other hand, Learned counsel for the Applicant has also submitted that the Judgment sought to be stayed also gave an award of Kes.10, 000, 000/= only, as against the Applicants' herein and that the execution of the award in question shall therefore subject the Applicants' to great and severe losses; which ought to be averted by way of an order of stay of execution.

13. Premised on the foregoing submissions, Learned counsel for the Applicants' has thus implored the Honourable court to find and hold that the amended Application before the court is meritorious and thus ought to be granted.

Plaintiff's/Respondent's Submissions:

14. The Plaintiff/Respondent herein filed written submissions dated the 12th February 2024; and in respect of which same has similarly raised, highlighted and canvassed two [2] pertinent issues for consideration by the Honourable court.

15. First and foremost, Learned counsel for the Plaintiff/Respondent has submitted that the Judgment of the court which is the subject of the current Application was delivered on the 17th July 2023; and yet the Application beforehand, was not filed until the 26th January 2024.

16. Taking into account the time lapse, Learned counsel for the Plaintiff/Respondent has submitted that the Application beforehand was filed with unreasonable and inordinate delay, which the Applicants' have neither accounted for nor explained.

17. Secondly, Learned counsel for the Plaintiff/Respondent has also submitted that the Applicants herein have neither demonstrated nor established the existence of substantial loss, which is contended to be the cornerstone for the grant of an order of stay of execution pending the hearing and determination of an Appeal.

18. Additionally, Learned counsel for the Plaintiff/Respondent has submitted that even though the Applicants herein have contended in the body of the written submissions that the execution of the Judgment and decree shall cause severe loss and disturbance, it has been pointed out that no such averments have been alluded to in the body of the Supporting affidavit.

19. On the other hand, Learned counsel for the Plaintiff/Respondent has also submitted that the Applicants' herein shall not suffer any substantial loss, if the orders sought are not granted, insofar as the Applicants' themselves have contended that same do not reside within the suit property.

20. To the extent that the Applicants herein have acknowledged and admitted that same do not reside within the suit property, Learned counsel for the Plaintiff/Respondent has submitted that same shall thus not be affected by the Eviction order, which only touches on and concerns the suit property and not otherwise.

21. As concerns the payment of the award at the foot of General damages, Learned counsel for the Plaintiff/Respondent has submitted that the Plaintiff/Respondent is seized of the requisite means and capability to refund the decretal sum, in the event that the appeal before the Court of Appeal is successful.

22. In a nutshell, Learned counsel for the Respondent has submitted that the Applicants herein have neither established nor demonstrated the existence of substantial loss, which is paramount and in any event critical, as pertains to an Application for stay of execution.

23. In support of the submissions pertaining on substantial loss, Learned counsel for the Plaintiff/Respondent has cited and relied on, *inter-alia* , *Kenya Shell Ltd vs Benjamin Karuga Kibiru & Another* (1986)eKLR; *Jesikey Enterprises Ltd vs George Kahoto Muiruri* (2022)eKLR; *Adah Nyabok vs Uganda Holdings Properties Ltd* (2021)eKLR, *Machira T/a Machira & Co Advocates vs East African Standards* (2002)eKLR; *Abok James Odera T/a A.J Odera & Associates vs John Patrick Machira T/a Machira & Co Advocates* (2001)eKLR and *Rose Mbithe Ndetei vs Mathew Kialo Mbogo* (2008)eKLR, respectively.

24. Premised on the foregoing submissions, Learned counsel for the Plaintiff/Respondent has therefore invited the Honourable court to find and hold that the Application beforehand does not meet the threshold for the grant of the orders of stay of execution or at all.

25. Notwithstanding the foregoing, Learned counsel for the Plaintiff/Respondent has submitted that in the unlikely event that the court pleases to grant an order of stay of execution, in the manner sough, then the court should decree deposit of Kes.12, 000, 000/= only, in a Joint Interest Earning Accounts in the names of the advocates for the respective Parties.

Issues For Determination:

26. Having reviewed the Application beforehand and the Response thereto; and upon taking into consideration the written submissions filed on behalf of the respective Parties, the following issues do emerge and are therefore worthy of determination;

    i. Whether the instant Application has been mounted with unreasonable and inordinate delay; and if so, whether the delay has been accounted for.

    ii. Whether the Applicants herein have established and demonstrated the likelihood of Substantial loss arising and/or accruing, if the orders sought are not granted.

Analysis And Determination

Issue Number 1 Whether the instant Application has been mounted with unreasonable and inordinate delay; and if so, whether the delay has been accounted for.

27. It is common ground that the Application beforehand seeks to procure and/ or obtain an order of stay of execution of the Judgment and decree of this Honourable court rendered on the 17th July 2023.

28. To the extent that the Application seeks an order of stay of execution, it was incumbent upon the Applicants' herein to, inter-alia, approach the court timeously, promptly and without undue [inordinate] delay or at all.

29. Furthermore, where there was an iota of delay, it was obligatory upon the Applicants' to account for the delay and/or to avail plausible reasons to explain the circumstances leading to the delay in the filing of the designated Application.

30. Having highlighted the foregoing perspectives, it is now appropriate to revert to the subject matter and to discern/decipher whether the Application by the Applicants' herein has been filed timeously and with due promptitude.

31. To start with, the Judgment and decree of the court which are sought to be stayed were rendered on the 17th July 2023, whilst the current Application was not filed up to and including the 15th January 2024, before same was amended on the 26th January 2024.

32. Taking into account the duration between the named dates, [details in terms of the preceding paragraph], there is no gainsaying that the instant Application was made and/or mounted after a duration of more than six [6] months, from the date of the delivery of the impugned Judgment and decree.

33. To my mind, the duration of six [6] months, which was taken by the Applicants' herein before eventually filing the instant Application, constitutes and represents an unreasonable timeline, which cannot by any stretch of imagination be deemed to be a short duration.

34. Instructively, it is my finding and holding that the instant Application, which was filed after a duration of six [6] months, from the date of delivery of the Judgment was indeed filed with unreasonable and inordinate delay.

35. Secondly, having found and held that the instant Application was filed with unreasonable and inordinate delay, it was therefore incumbent upon the Applicants' to endeavor to and place some material before the court to account for the delay or better still, to explain the circumstances why the Application was not made and/or mounted timeously and with due promptitude.

36. Notwithstanding the foregoing, it is not lost on this court that the Applicants' herein have neither tendered nor placed before the court any scintilla of explanation, to explain the circumstances why the Application was not made in good time, taking into account that the Notice of Appeal was timeously filed and served.

37. To my mind, without any explanation being tendered and availed to the court, it becomes difficult and indeed impossible, for this Honorable court to exercise Equitable discretion in favor of an Applicant, who has neither been proactive nor diligent, in pursuit of his/their Legal rights or at all.

38. Furthermore, I beg to underline that it is the reasons and/or explanations, [if any], given by an Applicant that would enable a court of law to consider whether to exercise discretion in favor of the Applicant or otherwise.

39. However, where no reason is advanced and/or placed before the court, then the court is deprived of the requisite capabilities in discerning whether sufficient cause has been espoused to warrant exercise of Equitable discretion.

40. Simply put, it is the reasons, [if any], advanced by the Applicants' that would unlock the door of Equitable discretion.

41. Before departing from this issue, it suffices to cite and take cognizance of the decision of the Court of Appeal *Njoroge v Kimani* (Civil Application Nai E049 of 2022) [2022] KECA 1188 (KLR) (28 October 2022) (Ruling), where the court stated and observed as hereunder;

> 12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking. An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.
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> 13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

42. In view of the foregoing, my answer to issue number one [1] is therefore to the effect that the subject Application has been mounted and/or made with unreasonable and inordinate delay, which has neither been accounted for; nor explained by the Applicants'.

Issue Number 2 Whether the Applicants herein have established and demonstrated the likelihood of Substantial loss arising and/or accruing, if the orders sought are not granted.

43. Other than the statutory requirement that an Application for stay of execution pending appeal be filed and mounted timeously and with due promptitude, there is the other critical ingredient which must also be established, satisfied and/or proved.

44. For coherence, the other critical ingredient that ought to be established and demonstrated concerns the likelihood of substantial loss arising and accruing, in the event that the orders sought are not granted.

45. Suffice it to state, that it has been held times without number that substantial loss is the cornerstone to the granting of an order of stay of execution pending appeal. Consequently, where there is no evidence of substantial loss, then the court is deprived of the requisite foundation upon which to decree stay of execution or at all.

46. To this end, it suffices to reiterate the holding of the Court of Appeal in the case of *Kenya Shell Ltd versus Benjamin Karuga Kibiru and Another* (1986) eKLR, where the court held as hereunder;

> " It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money."

47. Moreover, an Applicant who desires to establish and demonstrate that substantial loss is likely to arise and/or accrue, the Instant Applicant not excepted, is called upon to articulate the evidence underpinning the likelihood of substantial loss in the Supporting affidavit and not otherwise.

48. Additionally, it behooves such an Applicant to also demonstrate the manner in which the execution, if allowed to proceed, will prejudice and/or occasion grave injustice unto [sic] the Applicant.

49. Besides, it must also be noted that in an endeavor to establish and demonstrate substantial loss, it is not enough for an Applicant to recite and regurgitate the words alluded to in the statutory provisions and thereafter to imagine that the recital of such words, suffices to establish substantial loss.

50. To buttress the foregoing exposition, I endorse and adopt the holding of the Court in the case of *Adah Nyabok versus Uganda Holdings Properties Ltd* (2021)eKLR, where the court stated and held thus;

> " Demonstrating what substantial loss is likely to be suffered, is the core to granting a stay order pending Appeal. therefore the Applicant cannot merely allege substantial loss without demonstrating the nature of such loss"

51. Other than the foregoing decision, it is also instructive to take cognizance of the holding in the case of *Machira T/a Machira & Company Advocates vs The East African Standard Ltd* (2002)eKLR, where the court held thus;

> " The application is failing because the applicant merely repeats the words of rule that substantial loss will be suffered, but does not set out factual particulars of the kind of loss that might be suffered. The application comes late, without a good reason. This is a fit case for the ordinary principle to apply. There is nothing to bring it within the exception. "

52. Back to the instant matter, even though the Applicants' have repeated the words extracted from the statute, inter-alia, that same shall be disposed to suffer substantial loss, there is no scintilla of Evidence that has been placed before the Honourable court to underpin the contention that substantial loss is likely to arise and/or accrue.

53. Worse still, the Applicants' herein have by themselves stated on oath that same do not and have never resided on the suit property. In this respect, the question that does arise is if the Applicants' do not reside within the suit property, then on what basis should same harbor on fear of execution, insofar as the orders of Eviction only relates to the suit property and not otherwise.

54. Finally, it is also worthy pointing out that as concerns the payment of General damages, the Applicants' herein have neither contended nor stated that the Plaintiff/Respondent shall not be in a position to refund same, in the event the appeal succeeds.

55. To the contrary, the Respondent herein has averred at the foot of the Replying affidavit and which averment[s] has not been controverted that same is seized of the requisite means and capability of refunding the decretal sum in the event the appeal succeeds.

56. Notably, if the Applicants herein were desirous to controvert and/or challenge the positive averments espoused in the body of the Replying affidavit, then same were under an obligation to file and serve a Further/ Supplementary affidavit.

57. Suffice to point out that where the contents of a Replying affidavit are not responded to and/or challenged under oath, then it is deemed that the said averments, are admitted by the adverse Party, in this case, the Applicants'.

58. To buttress the foregoing position, it suffices to cite and take cognizance of the holding in the case of *Mohammed & Another vs. Haidara* [1972] E.A 166 [at page 167 paragraph F-H], where Spry V.P expressed himself as follows;

> " The respondent made no attempt to reply to these allegations and they therefore remain unrebutted...Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied..."

59. In a nutshell, my answer to issue number two [2] is to the effect that the Applicants' herein have failed to established and/or demonstrate that substantial loss [which is the cornerstone to the granting of an order of stay], is likely to arise and/or accrue, if the orders sought are not granted.

Final Disposition:

60. Arising from the foregoing exposition, I come to the conclusion that the Applicants' herein have neither met nor satisfied the requisite ingredients underpinned by the provisions of Order 42 Rule 6 (2) f the *Civil Procedure Rules, 2010*, to warrant the grant of the orders sought.

61. Consequently and in the premises, the Amended Notice of Motion Application dated the 26th January 2024; is devoid of merits and thus same be and is hereby Dismissed with costs to the Plaintiff/ Respondent only.

62. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2024.

OGUTTU MBOYA

JUDGE .

In the presence of:

Benson – Court Assistant.

Mr. Nelko Misati for the Applicants'.

Mr. Manyara for the Plaintiff/Respondent.

Ms. Naazi h/b for Mr. George Kithi for the 1st Defendant/Respondent.

Mr. C. N Menge [Deputy Chief Litigation Counsel] for the 2nd Defendant/Respondent.