Makokha v County Government of Bungoma & 4 others (Civil Application E198 of 2023) [2024] KECA 211 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KECA 211 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E198 OF 2023

HM OKWENGU, HA OMONDI & JM NGUGI, JJA

FEBRUARY 29, 2024

BETWEEN

SIMON MASIKA MAKOKHA ..... APPLICANT

AND

THE COUNTY GOVERNMENT OF BUNGOMA ..... 1ST RESPONDENT

MINISTRY OF LANDS ..... 2ND RESPONDENT

THE COUNTY LAND REGISTRAR BUNGOMA ..... 3RD RESPONDENT

THE NATIONAL LAND COMMISSION ..... 4TH RESPONDENT

HON ATTORNEY GENERAL ..... 5TH RESPONDENT

(Being an application for stay of further proceedings in the Environment and Land Court of Kenya at Bungoma (Cherono, J) Dated 12th May, 2023 in ELC Petition No. E 002 of 2021)

RULING

1. The Application before us is the Notice of Motion Application dated 14th August 2023 brought pursuant to Rules 5 (2) (b) of the Court of Appeal Rules 2010, seeking orders that pending the hearing and determination of the appeal, an order of stay of any further proceedings in Bungoma ELC Petition E002 of 2021 be issued. The Application is supported by the affidavit of even date sworn by Simon Masika Makokha.

2. The application stems from the ruling delivered on the 12th of May, 2023 in Bungoma ELC Petition E002 of 2021, where Cherono, J, set aside the ex-parte Judgment of Olao, J. which had been delivered on the 21st of February, 2022; and granted the 1st Respondent more time to file responses to the Petition. The Applicants were dissatisfied with the aforesaid ruling on grounds inter alia that the setting aside

orders amounted to the court sitting on its own appeal as on 12th January 2022 the court had declined to grant the 1st respondent more time to file its response to the petition.

3. The applicant points out that he has since filed the appeal; and is apprehensive that if the proceedings in the trial court continue, his appeal will be rendered nugatory as the core of the appeal challenges the legality of the proceedings in the superior court.

4. To place this matter in perspective, it is necessary to give a brief background of the applicant's claim, and how the orders issued by Olao, J. were eventually set aside by Cherono, J. The applicant herein, as the personal representative of the Estate of Moses Makokha Sabuni alias Musa Makokha Wekola, had filed a suit by way of petition against the respondents, following what he described as the compulsory acquisition of a portion of the late Moses Makokha Sabuni's land by the Municipal Council of Kimilili; and thereafter its allocation to various private individuals without compensation. The applicant, thus, sought a declaration that: the proprietary interest in the portion of land out of the land parcel No Kimilili/Kimilili/447 on which Lutaso Market and Kimilili Ward Administration Office stand, absolutely vests in the Estate of Moses Makokha Sabuni alias Musa Makoka Wekola; and that the compulsory acquisition of the said portion of land without consent or compensation violated Section 75 of the old Constitution and Article 40 of the new Constitution of Kenya 2010; an order of mandamus to compel the 1st to 2nd Respondents to jointly and/or severally pay the named estate mesne profits for the loss of user for the claimed portion of land; a mandatory injunction directing the 1st Respondent to immediately vacate and hand over vacant possession of the said portion of land; or pay the said estate the equivalent market price thereof.

5. The learned judge (Olao, J) directed that the matter be disposed of by way of written submissions and was listed for 12th January when the applicant's counsel and counsel who was holding brief for the 1st Respondent's counsel, informed the court that no responses or submissions to the petition had yet been filed; the other respondents, although notified, had also not responded to the petition. The 1st respondent sought more time to file a response and submissions but the request was declined.

6. The petition was treated as uncontested, and ultimately judgment was entered in favour of the applicants by Olao, J. on 21st February, 2022. Subsequently, the 1st respondent filed an application dated 27th February 2023 seeking inter alia orders to set aside and or vary or review the judgment delivered on 21st February 2022 and all consequential orders obtained thereto; and that the 1st Respondent be granted leave to oppose the Petition. These prayers were granted in an order dated 12th May, 2021 (Cherono, J).

7. If this application leaves one with a sense of de javu/meja vu, it is because save for the name of the applicants, what is sought is on all fours with KSM. CA No E196 of 2023 Abdallah Wereh v the self-same respondents.

8. There is no response filed in reaction to the instant application.

9. The issue to be determined in this matter is whether the Applicants have satisfied the requirements necessary for granting an order for stay of proceedings. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application in 5 (2) (b) the Applicant has to establish that: -

10. This Court has stated that whether it be an application for injunction, stay of execution or stay of proceedings the applicable principles are the same. To succeed in an application in 5 (2) (b) the Applicant has to establish that: -

    " i. The Appeal is arguable.

ii. The Appeal is likely to be rendered nugatory if the stay is not granted and Appeal succeeds."

11. Is the appeal arguable? In the case of Wasike vs Swala [1984] KLR 591 this Court held that an arguable appeal is not one that would necessarily succeed but one that merits consideration by the court. See David Morton Silverstein v Atsango Chesoni [2002] e KLR, Nation Newspapers Limited v Peter Baraza Rabando CA No. 1 [2007] e KLR

12. Also, an arguable Appeal is one that is not idle and/or frivolous. This Court in Transouth Conveyors Limited v KRA & Another [2007] e KLR, CA NO. 37 OF 2007observed that a single issue will suffice and that an applicant need not establish a multiplicity of arguable issues, nor that the point would succeed. The arguable issue only needs to be an issue that raises a serious issue of law worthy of consideration. See Retreat Villas Limited v Equatorial Commercial Bank limited & 2 Others CA NO. 40 OF 2006

13. The applicant's grievance as set out in the grounds in support of this application is that the orders of Cherono, J. amounted to the court sitting on appeal over its own decision as Olao J (a judge of equal status) had already on the 12th of January, 2022 declined to grant the 1st respondent more time to file its responses. They have annexed a memorandum of appeal raising only one issue, that the trial court erred in failing to find that there was inordinate delay by the 1st respondent in bringing the application for setting aside the exparte judgment of the superior court.

14. This Court has held in KCB Limited v Nicholas Ombija [2009] eKLR that an arguable appeal is not one which must necessarily succeed, but one which ought to be argued fully before the court. Whether or not the intended appeal will succeed, that is to be determined at the hearing thereof. It is our view that the question as to whether it was proper to set aside a judgment entered following failure by the opposing party to file written submissions, is an arguable point.

15. As regards the second principle, whether the appeal, if successful, would be rendered nugatory in the event we decline to grant the orders sought. In determining whether or not an appeal will be rendered nugatory, a lot depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved. We recognize that in Stanley Kang'ethe Kinyanjui v Tony Ketter & 5 Others (2013) eKLR, this Court stated that:

" ix). The term "nugatory" has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling.

x). Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved."

16. In the case of African Safari Club Limited vs Safe Rentals Limited, Nai Civ App 53 of 2010 this Court held:

" ...with the above scenario of almost equal hardship by the parties, it is incumbent upon the court to pursue the overriding objective to act fairly and justly...to put the hardships of both parties on scale... we think that the balancing act is in keeping with one of the principles aims of the oxygen principle of treating both parties with equality or placing them on equal footing in so far as is practicable."

17. Ordinarily, this Court does not stay proceedings of the High Court or equal status courts pending interlocutory appeals. As general principle, the fact that an interlocutory appeal is pending before this Court does not, ipso facto, without more, entitle a party to a stay of proceedings. The prevailing jurisprudential position is well captured in David Morton Silverstein v Atsango Chesoni [2002] eKLR. In that case, faced with an application to stay proceedings at the High Court so that the applicant could persuade this Court that the High Court was bereft with jurisdiction to entertain the matter, this Court rendered itself thus:

> What will happen if we do not grant the stay sought is that the appeal in the High Court will be heard and may well be determined. But when the appeal already lodged is heard, determined and, if it succeeded, what would automatically follow is that the proceedings in the High Court would have been rendered unnecessary, but an appropriate order for costs can be made to remedy that. However, the appeal in this Court would not have been rendered nugatory.

18. However, as this Court pointed out in the David Morton Silverstein Case, the decision whether to grant a stay is made on a case by case basis. In the present case, the applicant's complain is that the suit in the ELC had already been concluded in their favour; and that the effect of the impugned decision is to functionally upset the decision of a court of equal jurisdiction and re-open for new hearing a matter that had already been concluded. We believe that the narrow circumstances of this case warrant a stay. This is because, but for the impugned decision, the matter before the ELC had been concluded in favour of the applicant. What will be rendered nugatory, therefore, is the very question before us on appeal: whether the proceedings should be re-opened

    and the respondents allowed to resist the petition filed by the applicant when the applicant had already obtained a judgment in his favour in the same court. It is in this regard that a stay of further proceedings is necessary pending hearing and determination of the appeal.

19. Consequently, the applicants have satisfied the twin principles for grant of an order for stay of proceedings under rule 5(2)(b). Accordingly, the application is allowed. The costs shall abide by the appeal.

DATED AND DELIVERED AT KISUMU THIS 29TH DAY OF FEBRUARY, 2024.

HANNAH OKWENGU

.....

JUDGE OF APPEAL

H.A. OMONDI

.....

JUDGE OF APPEAL

JOEL NGUGI

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR