



REPUBLIC OF KENYA



KENYA LAW
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**Bosire v Waweru (Environment and Land Appeal 7 of 2023)
[2024] KEELC 1573 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 1573 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 7 OF 2023
LC KOMINGOI, J
MARCH 14, 2024**

BETWEEN

ERICK BOSIRE APPELLANT

AND

MAGINS NJERI WAWERU RESPONDENT

RULING

1. Coming up for determination is the Appellant’s Notice of Motion dated 29th August 2022 and the Respondent’s Preliminary Objection dated 20th September 2023.
2. The Notice of Motion seeks:
 - i. Spent.
 - ii. Spent.
 - iii. Spent.
 - iv. The Honourable Court do grant stay of execution of the judgement and decree pending the hearing and determination of this appeal.
 - v. The costs of the application be provided for.
3. The grounds are on the face of the application. It is supported by the sworn Affidavit of Erick Bosire who depones that the Respondent had taken out warrants of attachment against the Appellant’s moveable property following the Lower Court’s judgement and decree delivered on 16th March 2022 in Civil case No. E041 of 2021. The Appellant/ Applicant avers that the application had been made without inordinate delay and if not allowed the appeal would be rendered nugatory.
4. The Respondent in his Preliminary Objection dated 20th September 2023 sought for dismissal of the application and Memorandum of Appeal on grounds that the High Court having held that it did not



have jurisdiction to determine the Appeal meant that it similarly did not have jurisdiction to transfer it to this court and as such, the instant suit was irregularly before this court.

5. The court with the consent of the parties directed that parties do file written submissions.

The Appellant's Submissions

6. Counsel submitted that the court had jurisdiction to order stay of execution of the lower court's judgement as provided for under Order 42 rule 6(1) and (2) of the *Civil Procedure Rules* and held in: *Stanley Karanja Wainaina & another vs Ridon Anyangu Mutubwa* [2016] eKLR, *Patrick Kalava Kulamba & another vs Philip Kamosu and Roda Ndanu Philip (suing as the Legal Representative of the Estate of Jacklin eNdinda Philip (Deceased))* [2016] eKLR and *James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR.
7. On the Preliminary Objection, counsel submitted that the Appeal was filed on 12th April 2022 within 30 days of delivery of judgement by the Lower Court. On the issue of transfer of the suit to this court from the High Court, counsel submitted that the Respondent had recourse to appeal against the decision which he had not done and as such, the suit was rightly before this court.

The Respondent's Submissions

8. Counsel submitted that the lower court in Civil Case No.E041 of 2022 entered judgement against the Appellant and the Respondent began the execution proceedings. Thereafter, five months later, the appellant filed the application dated 29th August 2022 at the High Court. In a ruling delivered on 19th September 2023, the court ruled that it did not have jurisdiction and transferred the suit to this court. Counsel submitted that since the High Court lacked jurisdiction, it hence had no jurisdiction to transfer it to this court citing *Boniface Waweru Mbiyu vs Mary Njeri & another* [2005] eKLR and *Wamatbu Gachoya vs Mary Wainoi Magu* [2015] eKLR.
9. This notwithstanding, Counsel submitted that the Application had not satisfied the threshold for grant of stay of execution since he had not shown how he would suffer substantial loss by paying the decretal amount citing the cases of *Winfred Nyawira Maina vs Peterson Onyiego Gichana, James Wangalwa & another vs Agnes Naliaka Cheseto* [2012] eKLR and *Kenya Shell Limited vs Kibiru* (1986) KLR 410. The Applicant had also not made an indication of payment of Security as was held in *G.N. Muema P/A (sic) Mt. View Maternity & Nursing Home vs Miriam Maalim Bisbar & another* (2018) eKLR and *Gianfranco Manenthi & another vs Africa Mercabnt Assurance Co. Ltd* [2019] eKLR.

Analysis and determination

10. I have considered the Preliminary Objection and the Notice of Motion, the written submissions and the authorities cited. The issues for determination are:
 - i. Whether the Appeal is properly before this court?
 - ii. Is the Applicant entitled to grant of stay of execution pending Appeal as sought in the Notice of Motion dated 29th August 2022?
 - iii. Who should bear costs of the Application?
11. It is trite law that a Preliminary Objection should be raised on a pure point of law that can be discerned on the face of the pleadings as was held in the locus classicus case of *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd* [1969]EA 696.



12. The Respondent seeks the striking out of the appeal on grounds that the High Court bereft of jurisdiction to determine the matter erred in transferring it to this Court. I find that the question of jurisdiction is a point of law and I will thus start with making a determination on whether this court has jurisdiction to entertain the appeal or not.
13. The history of this appeal is that it was first filed at the High Court as High Court Civil Appeal case No. E026 of 2022 vide a Memorandum of Appeal filed on 12th April 2022. The Respondent objected the High Court's jurisdiction to determine the matter for being filed out of time. The High Court in its ruling dated 19th September 2023 determined as follows:
 - “ 14. I have read the documents in the court record. I have noted that there is a stamped memorandum of appeal dated 11th April 2022. It bears the court stamp of 12th April 2022. It is the same memorandum of appeal in the Record of Appeal...
 15. ... My reading of the record, especially the pleadings, the proceedings and the judgement of the lower court, reveals that the matter before the lower court was about a tenancy agreement between the parties...
 16. To my mind, this was clearly a landlord / tenant relationship...
 20. It is for the above reason that I make a finding that this court lacks jurisdiction to try this matter, not because of the reasons advanced in the PO but on grounds that this matter in the lower court concerned rent issues which issues are best handled by the ELC as provided under Section 13 of the ELC Act. I will and do hereby exercise my discretion and transfer this matter to the ELC Kajiado for directions as to how the matter shall proceed.”
14. The High Court having found that it did not have jurisdiction to determine the question of landlord/ Tenant relationship exercised its discretion and transferred the suit to this court. Is this transfer made by a court without jurisdiction therefore valid? Transfer of suits from one court to another are a procedural issue which aid in the expeditious dispensation of justice. The tenets of Section 1A and 1B of the *Civil Procedure Act* are meant to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes; I am of the view that the High Court which is a court of equal status did not err in transferring the matter to this court. This court is now clothed with jurisdiction and can proceed to hear and dispose of the matter. I agree with the Appellant's submissions that if the Respondent was aggrieved by the said transfer, she ought to have preferred an appeal against the ruling. She did not do so.
15. I will now proceed to consider the Notice of Motion dated 29th August 2022.
16. I have considered the rival submissions. The issue for determination is whether the Appellant has satisfied the conditions for grant of stay of execution set out under Order 42 Rule 6 of the *Civil Procedure Rules*.
17. The Principles guiding the grant of stay of execution pending appeal are well settled. Order 42 rule 6 (2) of the *Civil Procedure Rule* provides that;
 - “ (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 due performance of such decree or order as may ultimately be binding on him has been given by the applicant.”
18. It is clear from the above provisions that for an order of stay of execution to be granted, specific conditions must be met by the Applicant.
19. I have considered the Notice of Motion herein and find that it has been brought without unreasonable delay. Judgement was delivered on 16th March 2022 and this application was filed on 12th April 2022.
20. It is the Appellant’s case that the Appeal raises cogent points of law and has high chances of success. It is his case that this being a money decree the Respondent can always be compensated by an award of costs.
21. The Respondent on the other hand submits that the Appellant has failed to demonstrate that he will suffer substantial loss.
22. I have considered the oral submissions and I find that the Appellant has failed to demonstrate that he will suffer substantial loss if the orders are not granted. He has failed to demonstrate that the Respondent will not be able to refund the decretal sum if the Appeal succeeds. In the case of *James Wangalwa & Another Vs. Agnes Naliaka Cheseto* (2012) eKLR the court stated that;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal..... The issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”
23. I also find that the Appellant has not stated that he is willing to provide security for the due performance of the decree.

In the case of *Gianfranco Manenthi & Another Vs. Africa Merchant Assurance Co. Ltd* (2019) eKLR the court observed;

“The applicant must show and meet the condition of payment of security for due performance of the decree. Under this condition, a party who seeks the right of appeal from a money decree of the lower court for an order of stay must satisfy this condition on security. In this regard, the security for due performance of the decree under Order 42 Rule 6(1) of the Civil Procedure Rules, it is trite that the winner of litigation should not be denied the opportunity to execute the decree in order to enjoy the fruits of his judgement in case the appeal falls.”



24. I find that the Appellant's application has not met the conditions set out in Order 42 rule 6(2) of the *Civil Procedure Rule*.
25. I find no merit in this application and the same is dismissed. The costs do abide the outcome of the Appeal.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 14TH DAY OF MARCH 2024.

L. KOMINGOI

JUDGE.

In The Presence Of:

N/A for the Appellant.

N/A for the Respondent.

Court Assistant – Mutisya.

