



Abdullahi Ahmed Gele t/a Buxton Filling Station v Chief Officer, Land Housing & Physical Planning, County Government of Mombasa & 5 others (Civil Appeal (Application) E051 & E052 of 2023 (Consolidated)) [2023] KECA 1394 (KLR) (24 November 2023) (Ruling)

Neutral citation: [2023] KECA 1394 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT MOMBASA
CIVIL APPEAL (APPLICATION) E051 & E052 OF 2023 (CONSOLIDATED)
P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA
NOVEMBER 24, 2023**

BETWEEN

ABDULLAHI AHMED GELE T/A BUXTON FILLING STATION ... APPLICANT

AND

CHIEF OFFICER, LAND HOUSING & PHYSICAL PLANNING, COUNTY GOVERNMENT OF MOMBASA 1ST RESPONDENT

COUNTY GOVERNMENT OF MOMBASA.....2ND RESPONDENT

BUXTON POINT APARTMENTS LTD.....3RD RESPONDENT

HON 2ND RESPONDENT

BUXTON POINT APARTMENTS LTD 3RD RESPONDENT

HON. SULEIMAN SHAHBAL 4TH RESPONDENT

ROTON CONSTRUCTION CO. LTD 5TH RESPONDENT

THE CHIEF LAND REGISTRAR 6TH RESPONDENT

(An application for Review of the Ruling and Order of Stay of Execution pending the Appeal against the Ruling in the Environment and Land Court at Mombasa (L. L. Naikuni J.) delivered on 27th March 2023 in Mombasa Environment and Land Cause No. 44 of 2021.)

RULING

1. This ruling arises from two substantively similar applications both filed by Abdullahi Ahmed Gele T/A Buxton Filling Station, being Civil Appeal (Application) No. 51 of 2023 – Chief Officer, Lands and Housing & Another vs. Abdullahi Ahmed Gele T/A Buxton Filing Station & 4 Others and Civil Appeal (Application) No. 52 of 2023 – Buxton Point Apartments Ltd & 2 Others v. Abdullahi Ahmed Gele T/A Buxton Filing Station & 3 Others dated 10th July, 2023 and 7th July 2023 respectively.



2. On 3rd July, 2023, two other applications had come up for hearing before us, and the Applicants at the time were the 1st to 5th Respondents in the current application. The said 1st to 5th Respondents were seeking to stay the ruling and order of Naikuni J. issued on 27th March 2023, and we made the following orders in both Civil Appeal (Application) 51 and 52 of 2023:

“We have considered the application and the Notice of Motion dated 7th June 2023 is not opposed. The Applicant has demonstrated the arguability of the Appeal through the draft memorandum of appeal annexed to the application and the Appeal would be rendered nugatory. The Applicant is at the risk of committal as demonstrated by Counsel. In the circumstances, the Application is allowed in terms of prayer 3 and for the avoidance of doubt, the prayer that:

‘That the Respondents, their servants, agents and or any other person(s) claiming under their name, be stopped from execution of the order and ruling of the Superior Court dated 27th March 2023 together with all consequential orders against the Applicant pending the hearing and determination of the Appeal.’”

The prayers seeking stay of any further proceedings is hereby declined.”

3. Before issuing the above order, we were satisfied that Abdullahi Ahmed Gele T/A Buxton Filling Station was duly served with the hearing notice but had neither responded to the application nor appeared at the hearing of the application dated 7th June, 2023. The current applications are brought on behalf of Abdullahi Ahmed Gele T/A Buxton Filling Station who was the 1st Respondent in the applications dated 7th June, 2023. In the instant applications, the said Applicant is seeking similar orders in the following terms:

1. Spent
2. That pending the hearing and determination of this Application, the Honourable Court be pleased to review, set aside and vacate the exparte orders of stay granted to the Applicants in terms of prayer 3 of the Application dated 7th June 2023.
3. That this Honourable Court be pleased to grant any other orders it deems mete and just.
4. That the costs of the application be provided for.

4. The applications were supported by the grounds on the face of the motion and the affidavit in support of the motion sworn on even date by Abdullahi Ahmed Gele. The grounds upon which the applications are based are replicated while the averments in the affidavits in the respective supporting affidavits are substantially the same. The same applies to the replying affidavits and the submissions filed on behalf of the parties.

5. According to the Applicant, the substantive application for stay dated 7th June 2023, was filed on 14th June 2023 and served upon them on 21st June 2023; that the Court gave directions and fixed the matter for hearing on 3rd July, 2023; that the said directions were never received by the Applicant; that despite lack of receiving a hearing notice from the Court, the Applicant, was in the process of responding to the application in Civil Appeal (Application) No. 51 of 2023, when on 5th July, 2023 upon making a casual phone call to Ms. Judy Thuku, Learned Counsel for the 2nd 3rd & 4th Respondents who was



the Applicant's advocate in the Application dated 7th June, 2023 that his advocates were informed that both applications dated 7th June, 2023 in Civil Application Nos. 51 and 52 of 2023, were heard on 3rd July 2023 on which date the Applicant's advocates were adjudged absent and the orders sought in the application dated 7th June, 2023 staying the orders of Naikuni J. granted ex parte in both applications.

6. The Applicant denied that he deliberately absented himself from the hearing of the application. Further, it was deposed that the registry was given the wrong email for his advocates as mombasa@abdiazizadvocates.com instead of info@abdiazizadvocates.com and abdioazizadvocates@gmail.com as evidenced by other matters in which the said advocates represented parties before the court. The Applicant asserts that the mishap and the mix up was caused by the Respondents and he is aggrieved by the stay pending appeal granted without his participation and if left as is there is a likelihood that the same will occasion prejudice and unfairness. Thus, according to him, there was good and sufficient cause for review of the orders and direction issued by the Court.
7. In their opposition to the application, the 1st and 2nd Respondents herein, relied on the replying affidavit sworn on 20th July 2023, by Rose Mbaika Munupe, the Director, Department of Lands, Housing and Physical Planning of the 2nd Respondent. According to the deponent, they filed an application dated 7th June 2023 seeking stay of execution pending appeal against the ruling and order of Naikuni J. issued on 27th March 2023 which was heard and determined on 3rd July 2023; that the Court issued directions via email dated 19th June 2023 and directed that the Applicant to file and serve their replying affidavit within three (3) days; that the Applicant ought to have filed the replying affidavit by 26th June 2023, which he failed to do; that the Court served a hearing notice on all parties via email address on 29th June 2023 that the application would be heard on 3rd July 2023 and directed them to file submissions; and that on 1st July 2023, the Respondents filed their submissions after waiting for the Applicant to file his replying affidavit in vain; that the Applicant deliberately chose not to attend the Court on 3rd July 2023 when the application was heard.
8. The deponent further denied that they provided the wrong email address and asserted the email address provided by the Applicant's advocates was mombasa@abdiazizadvocates.com and this was what was usually used for communication. Additionally, it was the address for the Mombasa office while abdiazizadvocates@gmail.com and info@abdiazizadvocates.com were for the offices located in Nairobi. She reiterated that the Court confirmed that the email dated 13th July 2023 notifying the Applicant of the hearing date was duly served on the Applicant and they chose to deliberately not file a response and not attend Court.
9. We heard the application on the Court's virtual platform on 16th August, 2023 when learned counsel Ms Anjiko held brief for Mr Abdiaziz for the Applicant while Ms Thuita held brief for Mr Kilonzo for the 1st and 2nd Respondents as well as for Ms Sultan for the 3rd Respondent. Learned counsel relied on their respective written submissions which they briefly highlighted.
10. On behalf of the applicant, it was submitted that sections 3, 3A & 3B of the *Appellate Jurisdiction Act* vests jurisdiction upon this Court to hear and determine Applications. Further rule 59 (2) of the *Court of Appeal Rules*, 2022 provides that an order can be reviewed, set aside and varied if the same stems from an application that was heard ex parte and that the said rule equips this Court with the requisite Jurisdiction. Additionally, rule 58 (3) vests inherent powers upon this Court to review, set aside and vacate orders and rehear an application heard in the absence of a party if that party can show that he or she was prevented by any sufficient cause from appearing when the application was called for hearing. Therefore, it was submitted, this Court is properly clothed with jurisdiction and the same had been properly invoked.



11. On whether this Court should grant the orders sought, it was submitted that the Applicant was condemned unheard in violation of his rights to a fair hearing as stipulated under article 50 (1) of the Constitution of Kenya, 2010. Reliance was placed on the case of Nguruman Ltd v Shompole Group Ranch & Another [2014] eKLR where the Court placed fair hearing as an anchor of its discharge of judicial functions and therefore ruled that it had the right to revisit its past decision. According to the Applicant, he had demonstrated that he was only served on 21st July 2023 with the Application dated 7th June 2023 and it was devoid of any direction. Further, the Respondents only served them on 1st July 2023 with their submissions without stating that the hearing was coming up in two days.
12. It was further submitted that the Respondents would have properly served the Applicant with the Court's directions and hearing notice upon himself or even his advocate on record. He relied on Sangram Singh v Election Tribunal Kotch 1955 AIR 425, where the Court found that a fair hearing had two justiciable elements namely: an opportunity of hearing must be given; the opportunity must be reasonable. Further reliance was placed on the case of Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others Petition No. 18 of 2014 as consolidated with Petition no 20 of 2014 [2014] eKLR which elaborated on the right to fair hearing. He concluded that the non-service of the Court's directions and/or hearing notice upon him was deliberate to obstruct justice and fair hearing hence the application should be granted as prayed.
13. On their part, the 1st and 2nd Respondents submitted that the Applicant had not shown any reason why they did not file a Replying affidavit, submissions or attended the hearing on 3rd July 2023 when the application dated 7th June 2023 was heard and determined. Further, the Applicant had admitted that the application dated 7th June 2023 was served upon them on 21st June 2023 while he had alleged that he was not served with the application. They further submitted that at the time of serving the application, the Court had not issued a hearing date. However, the hearing date was finally issued and emailed to the parties and the Court confirmed that it had served the parties.
14. While reiterating the contents of the replying affidavit, the Respondents placed reliance was placed on the case of Habo Agencies Limited v Wilfred Odhiambo Musingo [2016] eKLR and submitted that the Applicant should not benefit from the discretionary orders of this Court as sought in the application dated 10th July 2023 as the exercise of such discretion by the Court should be judicious and not arbitrary and upon the Applicant giving convincing and satisfactory reasons to explain non-attendance. Reliance is placed on the case of MA v MA [2014] eKLR where the Court dismissed an application for restoration of an application on the ground that the Applicant had been served with a hearing notice but failed to show that she was prevented by any sufficient cause from appearing in Court when the dismissed application was called out for hearing.
15. In conclusion, the said Respondents submitted that the Applicant failed to give good and reasonable grounds as to why he failed to file a replying affidavit and submission as well as attend Court for hearing and was underserving of the discretionary order sought in the application dated 10th July 2021.
16. We have considered the issues raised in this application. At the hearing of the application, we drew the attention of Ms Anjiko, learned counsel for the Applicant whether, considering the fact that no substantive order was sought, any use would be served by granting the prayers sought. While learned counsel appreciated that there was a problem with the manner in which the reliefs were drawn, she nevertheless insisted that she was ready to argue the application. As we stated at the beginning of this



ruling, apart from the order for provision for costs and the request for certification of the application as urgent, which prayer was spent, the only other prayer was seeking that:

“pending the hearing and determination of this Application, the Honourable Court be pleased to review, set aside and vacate the exparte orders of stay granted to the Applicants in terms of prayer 3 of the Application dated 7th June 2023.”

17. Clearly that kind of a prayer cannot be termed as a substantive prayer since that prayer lapsed on 16th August, 2018 when we heard this application leaving the application a shell. It follows that nothing remains for this Court’s determination. We thought that Ms Anjiko would have taken cue from this Court’s sentiments and taken a remedial step. That having not been done, the application before us is incompetent.
18. Accordingly, there is no need to deal with the other issues raised before us since we have no application on the basis of which we can address ourselves on the issues raised. In the premises, we strike out this application with costs to the Respondents.
19. Since the issues in both applications, we direct that the orders issued herein shall apply mutatis mutandis to Civil (Appeal) Application No 51 of 2023 as well as Civil (Appeal) Application No. 52 of 2023.
20. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 24TH DAY OF NOVEMBER, 2023.

P. NYAMWEYA

.....

JUDGE OF APPEAL

J. LESIIT

.....

JUDGE OF APPEAL

G. V. ODUNGA

.....

JUDGE OF APPEAL

I certify that this is the true copy of the original

DEPUTY REGISTRAR

