National Land Commission v Tom Ojienda & Associates; National Bank of Kenya & another (Garnishee) (Civil Application E106 of 2022) [2022] KECA 1112 (KLR) (7 October 2022) (Ruling)

Neutral citation: [2022] KECA 1112 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT KISUMU

CIVIL APPLICATION E106 OF 2022

PO KIAGE, M NGUGI & F TUIYOTT, JJA

OCTOBER 7, 2022

BETWEEN

NATIONAL LAND COMMISSION ..... APPLICANT

AND

TOM OJIENDA & ASSOCIATES ..... RESPONDENT

AND

NATIONAL BANK OF KENYA ..... GARNISHEE

CENTRAL BANK OF KENYA ..... GARNISHEE

(An application from the judgment and order High Court of Kenya at Kisumu (Ochieng, J.) dated 11th November, 2021 in HC Com Case No. 73 of 2018)

RULING

1. The motion before us dated August 17, 2022 as framed, and the supporting affidavit, together with the replying affidavit and authorities in opposition thereto running as they do into 1400 pages is a prime example of why this Court must deliberately and decidedly limit the time and effort expended in the hearing and determination of interlocutory applications for stay of execution or proceedings, and for injunction pending appeal under Rule 5(2)(b) of the *Court of Appeal Rules*.

2. The instant motion seeks stay of execution of orders made on August 15, 2022 by the High Court at Eldoret (Ogola. J.) It is no more than a Rule 5(2)(b) application but on its face it invokes a multiplicity of other legal provisions that are of no real relevance as follows;

> " under Article 159, 164, 165 (5)b And 162 (2)(b), 165(1)(5) of the *Constitution*, Section 3a, 3b of The *Appellate Jurisdiction Act*, Order 42 Rule 6 of The Civil Procedure Rules,

Environment And Land Court Act, Rules 5(2)(b), 41,43,45,46,47 And 49 of The Court of Appeal Rules 2022 And All Enabling Provisions of The Law)."

3. Notwithstanding that our rules do not permit for ex-parte order the motion has prayers seeking orders "pending the hearing and determination of the application inter partes." Again, wholly unnecessary.

4. To compound this stance of prolixity, and notwithstanding that a Rule 5(2)(b) application just needs to demonstrate only a couple of points, namely that the appeal or intended appeal is arguable and that it would be rendered nugatory unless interim relief is granted, the motion contains on its face some thirty-three grounds in support. Moreover, in the 28th ground, "Applicant/Judgment Debtor," as the National Land Commission calls itself herein, lists ten reasons why if stay is not granted, it would suffer "substantial loss," a standard wholly inapplicable before us.

5. On its part, the respondent/Decree holder as Prof. Ojienda & Associates is named, filed a 76-paragraph, 21-page replying affidavit with no less than 33 annexures running into nearly 1200 pages!

6. With great respect to learned counsel, and much as we appreciate industry, we very much doubt that a 5(2)(b) application is the occasion for such voluminous strivings. We doubt that the record of appeal itself, when filed, will be as long as what we have been saddled with in this application, which is really no more than a procedural, ancillary skirmish. It should never detract from or distract us from the real reason for our existence, which is the hearing and meritdetermination of substantive appeals.

7. Aware that these interim/interlocutory applications if left unchecked could become the bane of the Court we have endeavoured, by gently yet firm persuasion to encourage parties through their counsel who appear before us to be mindful of the extremely limited judicial time available to us. An enlightened populace is getting more and more litigious and with the rapid expansion of the numbers of Judges of the High Court and of Courts of equal status under Article 162(2) of the *Constitution*, this Court is literally and increasingly in undated with many more appeals that it is duty bound to hear.

8. Hearing appeals is its primary jurisdiction by constitutional command in Article 164(3). It will be no reasonable excuse that a mounting backlog of appeals should build up because the Court is busy hearing interlocutory 5(2)(b) applications for interim relief pending appeal, while keeping appeals proper perpetually pending. To do so would be to major in minors and inverting our priorities, thus fomenting an intolerable state of affairs.

10. It has been, and continues to be our view that parties and their advocates must have a pragmatic approach to 5(2)(b) applications so as to assist the Court to attain the just, expeditious, proportionate and affordable resolution of appeals. This necessarily calls for an embracing of practical forms of resolution of 5(2)(b) applications by way of negotiation and arriving at settlements including agreeing to interim protective measures of status quo pending the hearing of the appeals proper. We encourage parties to craft solutions they can live with in the interim unless there should be genuine belief that the appeals are hopeless non-starters or there are bona fide principled objections.

11. We did try to nudge the parties herein in that direction, to no avail. We do, not however, consider that in an area of law where the applicable principles are old hat, the path a well-trodden one, we need to go into a detailed analysis of the impassioned submissions that were made before us.

12. There is little doubt that the applicant's substantive grievance is with the order made on August 2, 2022 by the High Court in the following terms;

> "(a) Garnishee order absolute against National Bank of Kenya Hill Plaza Branch, Account Number 2021000103 and 01001032980000, the 1st Garnishee herein

and against the Central Bank of Kenya account numbers 100020221 and 1000221828, the 2nd Garnishee herein, as is enough to satisfy the decretal amount of Kenya Shillings 397,3000,323.32 as per the certificate of order dated 15th June 2022.

(b) The sum of money being Kshs.397,300,323.32 be remitted into the judgment Holder's account particulars whereof were given: Prof Tom Ojienda & Associates, ABSA Bank of Kenya, Account Number 2024984489, Hurligham Branch (Swift code BARCENX) within 24 hours from the date of the issuance of the Garnishee order absolute." (Emphasis in the original)

13. Immediately that order was made, the applicant sought and obtained a 7-day stay of execution to enable it to file a formal application for stay pending appeal, which it did on 8th August 2022. It had in the meantime filed a notice of appeal on August 5, 2022.

14. The formal application for stay of execution was subsequently heard and a ruling was delivered on 15th August 2022, the effect of which was to grant the stay sought but on condition that half of the decretal of Kshs.397,3000,323.32 be paid to the respondent within 3 days of that ruling, and the balance be paid into a joint interest bearing account in the joint names of the advocate from the parties. In default of either order the entire decretal sum was to be paid to the respondent within 14 days from the date of the order but not later than August 29, 2022.

15. It is clear from the application and the supporting affidavits of Brian Ikol, the applicant's Director of Legal Affairs and Dispute Resolution, and of Benard Cherutich, its Director Finance & Corporate Planning, both sworn on August 17, 2022, that the applicant considered the conditions for stay given to be onerous. The applicant thus filed the current application seeking stay of execution. It seems quite obvious that what the applicant was seeking to stay was not the order of stay of execution, which was in its favour. Rather, it is the conditions it found onerous. It ought to have made before us a fresh application for stay of execution in the form of the one it had made before the High Court. A party who has made an application for stay of execution before the High Court is at liberty to make the same application before this Court, whether or not the High Court granted the prior application before it. That is the plain meaning of Order 42 Rule 6(1) of the *Civil Procedure Rules*;

> " 6(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 applicationand 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." (Our Emphasis)

16. We thus think that our jurisdiction to deal with an application to stay the substantive orders of 2nd August 2022 is extant, and Rule 5(2)(b) is fully and properly engaged.

17. The guiding principles on such an application are well-settled. They are that the applicant must demonstrate that he has an arguable appeal, and that it would be rendered nugatory absent interim stay. We stated the full meaning of and relevant consideration in *Stanley Kangethe Kinyanjui v Tony Ketter & 5 Others* [2013[eKLR and we need not rehash them.

18. Having considered the motion in totality and the objection and opposition thereto, we are satisfied that the applicant does have an arguable appeal considering that the threshold for arguability is quite low in that the applicant needs to show but a single point requiring an answer and worthy of judicial interrogation. It is not one that must necessarily succeed on appeal.

19. On the nugatory aspect, we are mindful that the sums involved are colossal approaching Kshs.400 million, and that the respondent is a public body. These are public funds. We note the respondents' firm depositions and assertions that he is well-able to repay any sums paid up to him in the event the application succeeds on its appeal.

20. Having borne in mind all of those competing arguments, and alive that our jurisdiction herein permits us to grant an order of stay of execution on such term as are just, we hereby grant a conditional stay of execution of the orders of the High Court set out above on the following terms;

21.

(a) That the applicant shall pay the sum of Kshs. 100,000,000 (One Hundred Million Shillings) being a quarter or thereabouts of the decretal sum into the respondent's bank account provided in the High Court's orders above within Fourteeen (14) days of the date hereof.

(b) That the applicant shall institute the intended appeal and serve the record of appeal, written submissions and authorities within Thirty (30) days of this date.

(c) That should there be default of payment or filing as set out in (a) and (b) above, this stay order shall lapse and the entire decretal sum be immediately due and payable.

(d) That the costs shall be in the intended appeal.

DATED AND DELIVERED AT KISUMU THIS 7TH DAY OF OCTOBER, 2022.

P. O. KIAGE

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JUDGE OF APPEAL

MUMBI NGUGI

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JUDGE OF APPEAL

F. TUIYOTT

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR