Amos v Kirika & 2 others (Environment and Land Appeal E017 of 2024) [2025] KEELC 800 (KLR) (24 February 2025) (Ruling)

Neutral citation: [2025] KEELC 800 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MERU

ENVIRONMENT AND LAND APPEAL E017 OF 2024

JO MBOYA, J

FEBRUARY 24, 2025

BETWEEN

CHRISTOPHER GITONGA AMOS ..... APPELLANT

AND

JOTHAM MBAE KIRIKA ..... 1ST RESPONDENT

NK [SUING ON HER ON BEHALF AND AS NEXT FRIEND TO YN, SK & BM (MINORS) ..... 2ND RESPONDENT

JEGLAND MUTHUGUMI MWITHIRWA ..... 3RD RESPONDENT

RULING

1. The Appellant/Applicant has approached the court vide the application dated 6th February 2025 and wherein the applicant seeks for various/diverse orders in particular, the applicant seeks for an order of stay of execution of the judgment and r decree of the court which was issued on the 6th November 2024.

2. Upon being served with the application under reference the Respondent's filed and served a Replying affidavit sworn on the 21st February 2025; and wherein the Respondent has contended inter alia that the application beforehand is misconceived and premature. Furthermore, the Respondents have also contended that the Applicant has neither met nor satisfied the requisite conditions or the statutory threshold to warrant the grant of the orders of stay of execution pending the hearing and determination of the appeal.

3. The instant application came up for hearing on the 24th February 2025 wherein the advocates for the Respondents; and the Applicant herein [who appears in person] agreed/covenanted to canvass the application by way of oral submissions.

4. In this regard, the court allowed the matter to proceed. For coherence, the parties tendered their respective submissions.

5. Moreover, the submissions canvassed by and or behalf the parties form part of the record of the court.

6. Having read and evaluated the submissions tendered by and on behalf of the parties, I come to the conclusion that the determination of the subject application turns on one salutary and/or singular issue namely; whether the court has the requisite jurisdiction to grant an order of stay of execution of the Judgment and consequential decree of the court issued on the 6th day of November 2024.

7. To start with, there is no gainsaying that the Honourable court rendered a Judgment on 6th day of November 2024; and wherein the court dismissed the appeal that had been filed by and on behalf of the appellant /applicant herein. In this regard, it suffices to state that the decree of the court which is the subject of the instant application, was a negative decree and hence the court did not command the applicant to do and or to abstain from doing any act.

8. To the extent that the decree was a negative decree, it is imperative to state that such an order/decree cannot found and or anchor an order of stay of execution pending appeal or the intended appeal or at all.

9. For good measure, the position that a negative decree [or Order for that matter] cannot be stayed has been the subject of various decisions by the Court of Appeal. In this regard, it suffices to cite and reference but a few.

10. In the case of Western College of Arts and Applied Sciences vs Oranga [1976] eKLR, the Court of Appeal stated that where a negative order/decree arises no order of stay of execution can be granted or at all.

11. Furthermore, the legal position [supra] was re-affirmed and reiterated by the Court of Appeal in the case of Oliver Collins Wanyama vs Engineering Registration Board (ERB) [2019] eKLR. Instructively, the court highlighted that a negative order/decree arising from a dismissal of the suit cannot be a basis for an order of stay of execution.

12. Without endeavoring to exhaust the decisions of the Court of Appeal on the point, I also beg to reference the decision of the court in the case of Registered Trustees of Kenya Railways Pension Scheme vs Milimo Muthoni & Co. Advocates [2022] KECA, where the court was categorical and affirmed the position that had been adverted to in the previous decisions.

13. Premised on the clear and explicit position that has been espoused by the Court of Appeal and taking into account the doctrine of stare decisis [precedents]; I am left with no alternative but to find and hold that the application beforehand is not only misconceived but also amounts to an abuse of the due court process.

14. Having come to the said conclusion, there is no need of venturing to ascertain whether the applicant has offered security for the due performance of the decree that may ultimately arise in accordance with the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010 or otherwise. Notably, the question/ issue of security, was raised by Learned Counsel for the Respondents.

15. Nevertheless, it is worthy to posit that the provision of security, in appropriate cases, is a matter for the discretion of the court and hence the court can venture forward and deal with same [provision of security] even where the applicant doesn't make any offer and/ or proposal to that effect.

16. Simply put, a failure by the Applicant to offer to provide security does not fetter the discretion of the court in terms of Order 42 Rules 6 (2) of the Civil Procedure Rules 2010. For coherence, the discretion and jurisdiction of the court to engage with and decree the provisions of security is statutorily circumscribed. Notably, same [discretion] is to be exercised by the court with or without

the prompting by either party, provided the circumstances of the case warrants provision of such security. [See the decision of the court of appeal in the case of Nduhiu Gitahi vs Warugongo [1988] eKLR, where the Court of Appeal highlighted the jurisdiction to give/provide security for the due performance of the decree that may ultimately ensue.

17. Suffice to state that the issue under reference, was also highlighted by the Court in the in the case of James Wangalwa vs Agnes Naliaka Cheseto [2012] eKLR and Arun C. Sharma vs Raikundalia and Company Advocates [2016] eKLR.

18. Despite the interpretation of the provisions of Order 42 Rule 6 (2) of the Civil Procedure Rules 2010; on the question of the provision of security and whether the failure to offer or propose to offer security can affect or fetter the jurisdiction of the courts, it suffices to state that I have come to the conclusion that the application beforehand is devoid of merits and thus courts dismissal.

19. In the premises and for the reasons highlighted and enumerated above; the application dated the April 6, 2025 be and is hereby dismissed.

20. Costs ordinarily follow the events unless the court deems otherwise. Nevertheless, the discretion of the court to order otherwise and depart from the general practice must be based on good grounds/reasons. However, in this case, no good reasons/basis has been canvassed and hence I do proceed to order that the costs of the application be and are hereby awarded to the Respondents.

21. In arriving at and coming to the conclusion [details in terms of preceding paragraphs] I have taken into account and applied the principle of law which was highlighted by the Court of Appeal in the case of Farah Awad Gullet vs CMC Motors Ltd [2018] eKLR. [See also the decision of the supreme court in the case of Jasbir Singh Rai & 3 others vs Tarlochan Singh Rai & 4 others [2013] eKLR].

22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 24TH DAY OF FEBRUARY 2025.

OGUTTU MBOYA,

JUDGE.

In the presence of

Mutuma Court Assistant

Mr. Kaumbi for the Respondents

Mr. Charles Gitonga – the Appellant/Applicant present in person