Milele Centre Homes v Wambua (Environment and Land Appeal E034 of 2024) [2024] KEELC 5815 (KLR) (9 August 2024) (Ruling)

Neutral citation: [2024] KEELC 5815 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E034 OF 2024

JO MBOYA, J

AUGUST 9, 2024

BETWEEN

MILELE CENTRE HOMES ..... APPELLANT

AND

BENARD WAMBUA ..... RESPONDENT

(An Appeal against the Ruling and Orders delivered by Honourable James Ndegwa on the 15%March, 2024 in the Business Premises Rent Tribunal, Nairobi in Suit No. E1144 of 2023)

RULING

Introduction and Background

1. The Appellant/Applicant herein has approached the court vide notice of motion application dated the 15th March 2024; brought pursuant to the provisions of Sections 1A, 1B, 3, 3A and 95 of the *Civil Procedure Act* and Order 42 Rule 6; Order 45 and Order 50 Rules 1, 2, 3, 4, 5, 6 and 7 of the *Civil Procedure Rules, 2010*. For coherence, the Applicant seeks for the following reliefs;

    i. .....Spent

    ii. That this Honourable Court be please to issue a Stay of Execution, implementation and/ or operation of the Ruling issued on 15" March, 2024, pending the lodging, bearing and determination of the Application and Appeal against the said Ruling dated 15° March,2024.

    iii. That a Temporary Injunction be issued by this Honourable Court to restrain the Respondent baring, its servants, agents, employees and/or any other persons acting pursuant to its authority, from enforcing the Ruling and Orders issued on 15t March, 2024 pending the lodging, bearing and determination of this Application inter-partes.

iv. In That a Temporary Injunction, be issued by this Honourable Court to restrain the Officer Commanding Station Kitengela Police Station from enforcing the Ruling and Orders issued on the 15" Mard.2024.

v. The costs be provided for

2. The instant application is anchored on a raft of grounds which have been enumerated in the body thereof. Furthermore, the application is supported by the affidavit of Evans Otieno and to which the deponent has annexed three [3] documents inter-alia a copy of the memorandum of appeal.

3. Suffice it to point out that upon being served with the application beforehand, the Respondent herein filed a Replying affidavit sworn on the 2nd April 2024 and wherein same has annexed one document, namely, a letter dated the 22nd March 2024.

4. The application beforehand, came up for hearing on the 22nd May 2024 whereupon the advocates for the respective parties covenanted to canvass and dispose of the application by way of written submission. Consequently and in this regard, the court proceeded to and circumscribed the timeline for the filling of the written submissions.

5. Instructively, the Appellant/Applicant proceeded to and filed written submissions dated the 30th May 2024 whereas the Respondent filed undated submissions and in respect of which same [Respondent] highlighted four [4] pertinent issues for consideration by the court.

6. Notably, the two [2] sets of written submissions [details in terms of the preceding paragraph] form part of the record of the court.

Parties'submissions:

a. Applicant's Submissions:

7. The Appellant filed written submissions dated the 30th May 2024 and wherein same [Applicant] has adopted the grounds contained in the body of the application as well as the averments in the supporting affidavit. Furthermore, the Applicant herein has canvassed and highlighted two [2] issues for due consideration by the court.

8. Firstly, learned counsel for the Applicant has submitted that the Applicant herein has established and demonstrated the requisite basis for the grant of the orders of stay of execution pending the hearing and determination of the appeal beforehand. Additionally, learned counsel has posited that unless the orders of stay of execution are granted, the orders which were issued by the tribunal shall be implemented and/or enforced and which implementation shall culminate into the eviction of the new tenant who now occupies the suit premises.

9. At any rate, learned counsel for the Applicant has submitted that the Respondent herein shall not suffer any prejudice and/or injustice, insofar as same [Respondent] vacated the suit premises and is therefor no longer in occupation thereof.

10. Arising from the foregoing, learned counsel for the Applicant has thus invited the court to find and hold that the Applicant has demonstrated the likelihood of substantial loss arising and/or accruing, if the orders of stay of execution pending appeal are not granted.

11. In support of the submissions that the Applicant herein has established and demonstrated a basis for the grant of the orders of stay of execution pending the hearing and determination of the appeal, learned counsel for the Applicant has cited and referenced inter-alia the holding in the case of *Visram*

Ravji Halai v Thornton & Turpin Civil Application No 15 of 1990 [KLR] 365 and *RWW v EKW* [2019] eKLR, respectively.

12. Secondly, learned counsel for the Applicant has also submitted that the Applicant has equally established and demonstrated a basis for the issuance of an order of temporary injunction pending hearing and determination of the appeal beforehand.

13. Pertinently, learned counsel for the Applicant has submitted that the tribunal ordered and/or directed reinstatement of the Respondent into the suit premises, yet the Respondent had voluntarily vacated and moved out of the suit property.

14. Furthermore, it has been contended that subsequent to the Respondent vacating the suit property, same [suit property] was demised to a third party, who was never party or privy to the proceedings before the tribunal. In this regard, learned counsel for the Applicant has contended that the implementation of the impugned orders shall therefore affect the rights and interests of a Third party contrary to and in contravention of Article 50 of the *Constitution* 2010.

15. In support of the submissions that the Applicant herein is entitled to the orders of temporary injunction, learned counsel for the Applicant has cited and referenced the holdings in the case of *Nguruman Ltd v Jan Bonde Nielsen & 2 others* [2014] eKLR, *Robert Mugo Wakaranja v Eco Bank [K] Ltd & another* [2019] eKLR, *Pius Kipchirchir Chogo v Frank Kimeli Tinai* [2018] eKLR and *American Cyanamid Co v Ethicon Ltd* [1975] ALL ER 504, respectively.

16. In a nutshell, learned counsel for the Applicant has invited the court to find and hold that the application beforehand is meritorious and thus same ought to be granted, with a view to protecting and preserving the status quo in respect of the suit property.

b. Respondent's Submissions:

17. The Respondent herein filed undated written submissions and wherein same has reiterated the contents of the Replying affidavit sworn on the 2nd April 2024 and thereafter same [Respondent] has highlighted four [4] pertinent issues for consideration.

18. First and foremost, learned counsel for the Respondent has submitted that though the Respondent vacated and moved out of the suit premises, same [Respondent] moved out therefrom out of desperation. In this regard, learned counsel has therefore contended that the Respondent did not vacate and hand over vacant possession voluntarily, in the manner contended by the Applicant.

19. Secondly, learned counsel for the Respondent has submitted that even though the Applicant herein filed a Notice of preliminary objection to the reference lodged on behalf of the Respondent, the Applicant also filed a Replying affidavit to the reference. In this respect, learned counsel for the Respondent has posited that once the tribunal was convinced that the preliminary objection was devoid of merits same [tribunal] was duty bound to render a ruling/decision as pertains to the reference.

20. At any rate, learned counsel for the Respondent has submitted that whilst considering the reference, the tribunal indeed took into account the contents of the Replying affidavit filed by the Appellant and hence the Applicant cannot now be heard to submit that same [Applicant] was condemned unheard.

21. Thirdly, learned counsel for the Respondent has submitted that the process that was adopted and deployed by the tribunal in disposing of the reference in the manner it did, is acceptable under the law. In any event, learned counsel has added that the procedure adopted by the tribunal complied with known and effective methods of disposal of suits.

22. Finally, learned counsel for the Respondent has submitted that orders sought by and on behalf of the Applicant are merely intended to defeat the implementation of the orders of the tribunal and in particular, to allow the Applicant to continue hiding the tools of trade which same [Applicant] confiscated from the Respondent. In this respect, learned counsel for the Respondent has submitted that the application beforehand has not been made in good faith and thus same [application] reeks of mala fides.

23. Premised on the foregoing, learned counsel for the Respondent has implored the court to find and hold that the application before the court does not meet and/or satisfy the conditions envisaged vide Order 42 Rules 6 of the *Civil Procedure Rules 2010*.

Issues For Determination:

24. Having reviewed the application beforehand as well as the response thereto and upon consideration of the written submissions filed on behalf of respective parties, the following issues do emerge [emerge] and are thus worthy of determination;

    i. Whether the Applicant has been able to demonstrate the existence of sufficient cause.

    ii. Whether substantial loss is likely to accrue and/or arise, if the orders sought are not granted.

    iii. Whether there is need to provide security for the due performance of the decree that may arise and if so the quantum thereof.

Analys And Determination:

Issue Number 1 Whether the Applicant has been able to demonstrate the existence of sufficient cause.

25. By dint of Order 42 Rule 6[2] of the *Civil Procedure Rules, 2010*, this honourable court is vested and bestowed with the requisite jurisdiction to grant inter-alia orders of stay of execution pending the hearing and determination of an appeal or intended appeal.

26. Nevertheless, it is worthy to state and underscore that the jurisdiction of the court to grant and/or issue an order of stay of execution pending appeal or intended appeal [whichever is the case], is fettered by three conditions, namely, the existence of sufficient cause, demonstration of likelihood of substantial loss occurring; and provisions of security.

27. To this end, it suffices to recall and reiterate the holding of the Court of Appeal in the case of *Vishram Ravji Halai v Thornton & Turpin* Civil Application No Nai. 15 of 1990 [1990] KLR 365, where the court stated thus;

> The Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay. To the foregoing I would add that the stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in sections 1A and 1B of the *Civil Procedure Act*, the Court is no longer limited to the foregoing provisions.

28. Taking into account that an Applicant like the one beforehand is obligated to demonstrate inter-alia sufficient cause, which is a precursor to partaking of an order of stay of execution, it is therefore

imperative to discern and decipher whether the Applicant beforehand has indeed established sufficient cause.

29. Nevertheless, before endeavouring to ascertain whether sufficient cause has been espoused and established, it is imperative to ascertain what exactly sufficient cause denote. In this respect, it is instructive to take cognizance of the holding in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR, where the court held as hereunder;

> The fact that setting aside is a discretion of the court is not disputed. What is contested is whether the applicant has demonstrated "sufficient cause" to warrant the exercise of the courts discretion in its favour. I again repeat the question what does the phrase "Sufficient cause" mean. The Supreme Court of India in the case of *Parimal v Veena* observed that:-
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> > "sufficient cause" is an expression which has been used in large number of statutes. The meaning of the word "sufficient" is "adequate" or "enough", in as much as may be necessary to answer the purpose intended. Therefore the word "sufficient" embraces no more than that which provides a platitude which when the act done suffices to accomplish the purpose intended in the facts and circumstances existing in a case and duly examined from the view point of a reasonable standard of a curious man
> >
> > . In this context, "sufficient cause" means that party had not acted in a negligent manner or there was want of bona fide on its part in view of the facts and circumstances of a case or the party cannot be alleged to have been "not acting diligently" or "remaining inactive." However, the facts and circumstances of each case must afford sufficient ground to enable the court concerned to exercise discretion for the reason that whenever the court exercises discretion, it has to be exercised judiciously"

30. Back to the instant matter. The Appellant/Applicant contends that upon being served with the reference filed by and on behalf of the Respondent, same [Applicant] proceeded to file a notice of preliminary objection challenging the jurisdiction of tribunal to entertain and adjudicate upon the reference.

31. Furthermore, the Applicant has posited that upon filing the notice of preliminary objection, the tribunal issued directions pertaining to and concerning the disposal of the preliminary objection vide the written submissions to be filed and exchanged by the parties.

32. Moreover, the Applicant has averred that pursuant to and in compliance with the directions of the tribunal, the parties [Appellant and Respondent] proceeded and indeed filed written submissions as pertains to the notice of preliminary objection.

33. Be that as it may, the Appellant has contended that even though the tribunal issued directions pertaining to and concerning the ventilation of the notice of preliminary objection, the tribunal ventured forward and not only disposed of the preliminary objection, but also the reference, the latter which had not been canvassed.

34. Arising from the foregoing, learned counsel for the Applicant has therefore submitted that the manner in which the tribunal heard and disposed of the reference, which had not been canvassed, is contrary to the Rules of Natural justice and in contravention of the right to fair hearing and trial.

35. Further and in any event, learned counsel for the Applicant has contended that the infringement and/or violation of inter-alia the right to fair hearing espouses a bona fide ground of appeal worthy of being canvassed during the substantive hearing of the appeal.

36. Having taken note of the submission by and on behalf of the Applicant and coupled with the fact that the Respondent herein does not deny that the tribunal proceeded to disposed of the reference; which had not been canvassed, I come to the conclusion that the appeal on behalf of the Applicant indeed raises bona fide triable issue worthy of interrogation during the conventional hearing of the appeal.

37. Simply put, the memorandum of appeal beforehand raises and demonstrates sufficient cause and/or basis, which is a critical ingredient to be considered by the court whilst engaging with an application for stay of execution pending appeal.

38. Arising from the foregoing, my answer to issue number one [1] is to the effect that the Applicant has demonstrated the existence of sufficient cause and/or basis.

Issue Number 2 Whether substantial loss is likely to accrue and/or arise, if the orders sought are not granted.

39. Whereas demonstration of the existence of a sufficient cause is critical and paramount in an endeavour to procure an order of stay of execution pending appeal, it is worth pointing out that an Applicant who has demonstrated sufficient cause, is obligated to venture forward and satisfy the aspect pertaining to substantial loss.

40. For good measure, it has been pointed out times without number that substantial loss is indeed the cornerstone upon which an order of stay of execution pending appeal is anchored and/or predicated. Pertinently, substantial loss is the fulcrum and/or anchorage of an order of stay of execution pending appeal.

41. Consequently and in the premises, where an Applicant is unable to demonstrate the likelihood of substantial loss accruing and/or arising, then no orders of stay of execution pending appeal can be issued and/or granted.

42. To this end, it suffices to take cognizance of the holding in the case of *Kenya Shell Ltd v Benjamin Karuga Kibiru & another* [1986] eKLR, where the court stated and held thus;

> It is usually a good rule to see if order XLI rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms, is the corner stone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore without this evidence it is difficult to see why the respondents should be kept out of their money.

43. Duly guided by the decision [*supra*], it is appropriate to revert to the matter and to consider whether the Applicant herein has demonstrated that substantial loss is likely to arise and/or accrue, unless the orders sought are granted.

44. To start with, the Applicant posited that the Respondent herein had vacated and moved out of the suit property. Furthermore, the Applicant added that upon the Respondent moving out of the suit property same [suit property] was demised to and in favour of a third party/tenant.

45. On the other hand, it was also contended that the third party/tenant entered upon and took possession of the suit property and hence the reinstatement of the Respondent onto the suit property, would have the effect of evicting the third party/tenant.

46. Notwithstanding the foregoing, it was also stated that the Respondent herein has since conceded that same [Respondent] is not desirous to revert back to the suit property. In this regard, the attention of the court was drawn to paragraph 7 of the Replying affidavit sworn on the 2nd April 2024.

47. Without belabouring the point, it is my finding and holding that the enforcement and implementation of the orders of the tribunal, which are the subject of this appeal, shall no doubt cause and/or occasion substantial loss to the Appellant.

48. At any rate, there is also evidence that the Respondent himself is not desirous to revert back and take possession of the suit property. Consequently, it is apparent that there exists a disconnect between the desires/intendment of the Respondent and the orders that were issued by the tribunal.

49. Consequently and in a nutshell, I come to the conclusion that the Applicant herein has similarly established and proved the likelihood of substantial loss accruing unless the orders sought are granted.

Issue Number 3 Whether there is need to provide security for the due performance of the decree that may arise and if so the quantum thereof.

50. Having come to the conclusion that the Appellant herein has demonstrated the likelihood of substantial loss arising and/or accruing and having come to the conclusion that the application beforehand is meritorious, the only outstanding question, relates to provision of security.

51. In my humble view, there is already a judgment of some sort in favour of the Respondent and it is the said judgment/ruling, which the Applicant is seeking to stay and/or suspend.

52. Confronted with the application for stay, like the one beforehand where an Applicant is seeking to exercise his/her undoubted rights of appeal on one hand and where the Respondent is seeking to partake of the fruit of the judgment on the other hand, it is incumbent upon the court to strike a balance and to protect the competing interest of both parties.

53. Simply put, both the Appellant and the Respondent are entitled to partake of a fair share of justice and in this regard, the court is called upon to decree provision of security for the due performance of the decree that may ultimately arise and/or ensue.

54. Pertinently, the significance of provision of security was adverted to and elaborated upon by the court in the case of *James Wangalwa & another v Agnes Naliaka Cheseto*[2012] eKLR, where the court held as hereunder;

> 18. I agree with the respondent that the Applicants have not offered or proposed any security for the due performance of the decree of the lower court. This should be done as a sign of good faith that the Applicant is ready and willing to commit to giving security. But my reading of order 42 rule 6(2) (b) of the *CPR* reveals that, it is the court that orders the kind of s[ecurity the applicant should give as may ultimately be binding on the applicant. This modeling of the law is to ensure the discretion of the court is not fettered.

55. Similarly, the question of provision of security was also highlighted and underscored by the court in the case of *Arun .C. Sharma v Ashana Raikundalia & 5 others* [2015] eKLR, where the court stated and observed as hereunder;

> The purpose of the security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the Applicant. It is not to punish the judgment-debtor. The alternative security being offered presents several problems. The first one-the security is owned by another person. This is a civil suit where the Applicants are judgment-debtors. But, the Applicants seem to have borrowed from the criminal procedures where a person stands surety for the attendance of another in court. Civil process is quite different because, in a civil process, the judgment is like a debt hence the Applicants become and are judgment-debtors in relation to the Respondent. That is why any security given under Order 42 rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree or order as may ultimately be binding on the Applicants. I presume, the security must be one which can serve that purpose. When one imagines, if it becomes necessary, the steps required to be taken for such security being offered to be realized by the decree-holder, it becomes absolutely clear that mere affidavit by the owner does not convert the said property into any legally binding security for the due performance of such decree or order as may ultimately be binding on the Applicant.
>
> I, therefore, hold that the security offered is not suitable for purposes of Order 42 rule 6 of the *CPR*.

56. Taking into account the import and tenor of Order 42 Rule 6[2] and coupled with the purpose to be served by provision of security, this court is minded to decree that the Appellant/Applicant herein shall deposit the sum of Kshs 250, 000/= only in an Escrow account in the names of the advocates for the Appellant and the Respondent, respectively.

57. For good measure, the deposit shall be undertaken within a duration of 30 days from the date hereof.

Final Disposition:

58. From the discussion, [whose details have been elaborated in the preceding paragraphs], it is crystal clear that the application by and on behalf of the Appellant/Applicant is meritorious and thus worthy of being granted.

59. Consequently and in the premises, the application dated the 15th March 2024 be and is hereby allowed on the following terms;

    i. There be and granted an order of Stay of Execution, implementation and/or operation of the Ruling issued on 15" March, 2024, pending the hearing and determination of the Application and Appeal against the said Ruling dated 15th March,2024.

    ii. There be and is hereby granted an order of Temporary Injunction restraining the Respondent baring, its servants, agents, employees and/or any other persons acting pursuant to its authority, from enforcing the Ruling and Orders issued on 15th March, 2024 pending the hearing and determination of this Application inter-partes.

    iii. There be and is hereby granted an order of Temporary Injunction, restraining the Officer Commanding Station Kitengela Police Station from enforcing the Ruling and Orders issued on the 15" March.2024.

iv. Nevertheless, the Appellant herein shall provide security in the sum of Kshs 250, 000/= only which shall deposited in an Escrow account in the names of the respective advocate for the Appellant and the Respondent herein in a bank or financial institution of repute.

v. For good measure, the Escrow account shall be opened and operationalized within 30 days from the date hereof.

vi. In default to comply with clause [iv] and [v] herein above witinh the set timelines, the orders of stay/injunction shall automatically lapse.

vii. Nevertheless, Costs of the Application shall abide the outcome of the appeal

60. It is so ordered

DATED, SIGNED AND DELIVERED ON THE 9TH DAY OF AUGUST 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Omondi h/b for Mr. Gashie Mwanza for the Appellant/Applicant.

Mr. Biwott for the Respondent.