Njuguna v Macharia (Environment and Land Appeal E022 of 2024)
[2024] KEELC 6796 (KLR) (17 October 2024) (Ruling)

Neutral citation: [2024] KEELC 6796 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND APPEAL E022 OF 2024

FO NYAGAKA, J

OCTOBER 17, 2024

BETWEEN

ISHMAEL NGANGA NJUGUNA ..... APPELLANT

AND

JAMES MAINA MACHARIA ..... RESPONDENT

RULING

1. This is a Notice of Motion dated 21/09/2024 brought under certificate of urgency. The Appellant moved this Court under Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act*, Chapter 21 Laws of Kenya and Order 40 and 42 of the *Civil Procedure Rules*, the *Land Act* 2012 and Article 40 of the *Constitution* of Kenya and all other enabling provisions of the law. He sought the following orders:-

    1. ...spent
    2. ...spent
    3. ...spent
    4. That pending the hearing and determination of the appeal, there be a stay of execution of decree in trial court (sic) in Kitale MELC Number 141 of 2022 of 16th September, 2024.
    5. That pending the inter partes hearing and determination of the appeal herein the Respondents, their agents, servants, employees be restrained in any manner howsoever from entering into, trespassing, developing, transferring, selling, conveying, charging, leasing, or in any way dealing with plots originally numbered 335, 336, 985, 855, 365, and 364 in Nyakinyua Mugumo Tree Company Limited farm or as currently described or numbered.
    6. That the costs of this application being the cause.

2. The Application was based on a number of grounds which are summarized as follows. That on 16/09/2024, the trial court in Kitale Magistrates Court render Judgment against the Appellant to the effect that the respondent had proved his claim. The Appellant was aggrieved by it and decided to appeal against it. Further, even though the judgement is contradictory and vague in terms of the existence of the suit property, being No. 1652, the Appellant is apprehensive that the Respondent may proceed to execute the decree and evict him from his home on plots originally numbered 335, 336, 985, 855, 365, and 364 in Nyakinyua Mugumo Tree Company Limited Farm. The Appellant would suffer damage or loss if the orders sought herein are not granted since he has built a home on the properties which are the subject of the impending execution. As evident from the Memorandum of Appeal, the appeal is a good one with high chances of success. The Application is brought without undue delay. The Respondent is likely to annihilate the Applicant's interests over his suit properties in the guise of executing the impugned judgment.

3. The application was supported by the affidavit of one Ishmael Nganga Njuguna who repeated the contents of the grounds in support of the application but in deposition form. In addition, he annexed to it a copy of the judgment of the lower court and a copy of the Memorandum of Appeal although he appears not to have commissioned and even serialized them in accordance with the law.

4. When the application was brought before me for determination as to whether it was urgent for directions at the *ex parte* stage, the Court invited the parties address it for purposes of determining whether or the Applicant complied with the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules*.

5. Following that the Respondent filed a Preliminary Objection dated 04/10/2024. The grounds in it though three were basically one: that the Application offends the provisions of Order 42 Rule 6(1) of the *Civil procedure Rules*, is incompetent and should be struck out.

6. On his part, the Appellant submitted in writing vide a document dated 04/10/2024. He began by summarizing the application and reproducing verbatim the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules*, as the Appellant did in his submissions too. He interpreted the provision to the effect that it was not mandatory for any Appellant to first approach the court from which an appeal is preferred first in order for him or he to thereafter approach the court to which an appeal is preferred, for an order of stay of execution of its decree or order. Further, he submitted that besides the prayer for grant of an order of stay of execution of the decree, he had sought an order of injunction against the Respondent as provided under Order 42 Rule 6(6) of the *Civil Procedure Rules*. Therefore, this Court had jurisdiction to hear the application and, accordingly, it was not incompetent.

7. In his submissions dated 07/10/2024 the Respondent started by summarizing the contents of the application. He cited the provisions of Order 42 Rule 6(1) of the *Civil Procedure Rules* and reproduced it verbatim. He relied on the decision of Family Bank Limited versus Isaack Mathenge Guandarau, Kitale ELC Appeal No. E003 of 2022 in which the learned Judge stated that the relevant and guiding phrase of the provision in issue is "... and whether the application for such a stay shall have been granted or refused by the court appealed from...". He submitted further that the court, in that decision, was of the view that the Applicant had jumped the gun by moving straight to the court appealed to and while leaving the trial court up to its own devices. Instead, he should have asked the trial court to consider whether to stay the execution or not before moving the appellate court. The Respondent then submitted that it was a requirement that the Appellant should have taken the first step in the trial court, in Kitale MCELC No. 141 of 2022 before moving this court. He submitted that the Preliminary Objection be upheld and the application be struck out.

Issue, Analysis and Determination

8. I begin the determination of this Application by pointing out two important points which should be clear to learned counsel and parties herein, and everyone who will read this Ruling as a source of guidance or research material. One, courts should be extremely vigilant and deal firmly and decisively against forum shopping. The reason for that is to avoid the breakdown of the rule of law which is one of the constitutional values Kenya holds onto dearly as it makes her people noble and holds her society together. Forum shopping is akin to establishing alternative obedience to the rule of law, which is a strange creature in the legal system: it implies that the party who engages in it decides about court the party runs away or shuns that "I am not obeying this court, but I am willing to obey the other". It not only creates selectivity and suspicion but brings out disharmony.

9. For this reason, parties should not purport to confer jurisdiction to a court if the law does not, even where the law confers the same but gives guidelines on which of the many courts one has to approach the party ignores (deliberately or otherwise) and moves one other than the first in line.

10. The reason why this court has laid this background for the instant application is now clear from the above facts that the Appellant did not at first move the trial court for similar orders as sought herein. The question is whether or not he followed the procedure and if he did not, whether he his application is properly before this court

11. The other point is that the law ought to be complied with. Herein it is clear that the two purported annextures were not commissioned before the Commissioner for Oaths who commissioned the Affidavit in support of the Application. The documents annexed to the Supporting Affidavit to the Application and purported to be relied on were mere photocopies. Under Rule 9 of the Oaths and Statutory Declarations Rules as made pursuant to Section 6 of the *Oaths and Statutory Declarations Act*, Chapter 15 of Laws of Kenya the person taking the oath should do so, while in possession of or with the exhibits to be annexed to the Affidavit and the Commissioner signs and or marks and serializes them. It reads,

> " All exhibits to affidavits shall be securely sealed thereto under the seal of the commissioner, and shall be marked with serial letters of identification."
>
> It follows that if the documents are not marked and serialized and signed and stamped by the commissioner, they do not constitute part of the oath taken by the deponent. They cannot and do not form part of the evidence or facts deponed and cannot be relied on as part of the Affidavit. The Court has nothing much but to disregard them. To accept them as part of the oath will not bind the deponent to the contents or even the commissioner in case an issue arises as to the oath or manner in which it was taken. An oath is a very solemn step which should be taken with the utmost seriousness it carries. Thus, no lie or any other non-factual matter should pass into it or constitute such. One immediate consequence of falsely swearing is that the deponent is supposed to be jailed for the lie."

12. In the instant matter the two annextures do not constitute part of the oath the Applicant took before the Commissioner for Oaths. They must be disregarded or at best struck out of the record.

13. I have considered the issue raised by the court and the Preliminary Objection filed by the Respondent. This Court needs not reinvent the wheel by giving another definition of a Preliminary Objection than

the one which was given in *Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd* (1969) EA 696 case as follows:

> " A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion."

14. Thus, since the Preliminary Objection by the Respondent as is before this Court is purely on a point of law fits in the definition above. Hence the issue before this court is whether the application before the court is competent or not. Based on the provisions of Order 42, Rule 6 (1) of the *Civil Procedure Rules* and Order 42 Rules 6(6) of the same *Rules*. It therefore hinges on a determination by this Court on the import of the two provisions.

15. It will start by analyzing the provisions of Order 42 Rule 6(6) which deals with the grant of an injunction pending appeal. It stipulates;

> "(6) Notwithstanding anything contained in subrule (1) of this rule, the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

16. One important point this Court is alive to, by virtue of the provision above, is the fact that it has the power to grant an injunction on appeal where it is called upon by a party who can demonstrate on merit that such a prayer ought to be granted. This power is discretionary and has to be exercised judiciously. In considering whether the court is acting judiciously it has to have regard to the circumstances of the case. One of the clear circumstances the court should consider is first or as a preliminary issue is whether the Party now seeking an injunction pending appeal had sought a similar relief in the trial court, and the court has finally made a determination on the same one way or other. Even then, the Applicant needs to clearly demonstrate that there are special circumstances that have arisen after the trial court became functus officio which are a threat to or are likely to cause damage to the subject matter or property, and which an order of stay of execution of the judgment, ruling, order or decree appealed from cannot serve. If there is none then the party should confine himself to seeking an order of stay of execution.

17. The mere fact that the trial court has delivered a judgment or order unfavourable to the Appellant or applicant does not give rise to circumstances, out of the blue, that form the basis of a prayer for injunction when none was sought before. To do so is nothing but a matter of both ambush and forum shopping. My humble view is that a prayer for an injunction on appeal is intricately and completely tied with the reliefs sought in the trial court: they cannot be severed. If they must be severed, then the party moving the court must demonstrate clearly the second limb upon which he can successfully move the appellate court for grant of such a prayer: he must show that from the time the decree or order appealed from was made by the trial court to the time of Application, the Respondent has done or threatened to carry out acts or something that would endanger or cause damage to the subject matter during the pendency of the appeal. Even so, he ought to show that an order of stay of execution of

the decree or order appealed from if granted would be insufficient and no more. These must be clearly demonstrated by way of Affidavit (s).

18. This Court is alive to the principles for grant of temporary injunction pending appeal. These were discussed in the case of *Patricia Njeri & 3 Others vs. National Museum of Kenya* [2004] eKLR, wherein the court stated as follows:

> "(a) an order of injunction pending appeal is a discretionary which will be exercised against an applicant whose appeal is frivolous.
>
> (b) the discretion should be refused where it would inflict greater hardship that it would avoid.
>
> (c) the applicant must show that to refuse the injunction would render the appeal nugatory.
>
> (d) the court should also be guided by the principles in *Giella vs. Cassman Brown* [1973] EA 358."

19. The principles were also reiterated in the case of *Madhupaper International Limited vs. Kerr* [1985] eKLR, where the court held that it would be wrong to grant a temporary injunction pending appeal where the appeal is frivolous or where the injunction would inflict greater injustice than it would avoid.

20. In the present application/case I have carefully read through the supporting affidavit and the grounds of the application. I have found no facts that support any of the two limbs for considerations I have laid down above, which an Appellate court ought to consider as a preliminary check-list before embarking on the merits of such a prayer. In the application, rather than the Appellant focusing on seeking the prayer for stay of execution he trudged onto the one of temporary injunction without giving a basis: no threat of damage is shown. The court is of the view that he did so as a way of going around the provisions of Order 42 Rule 6(1). I would therefore find that without any possible explanation why the prayer of injunction is sought at this stage, the only proper prayer is the one for stay of execution. It is on those premises that this Court points out at the outset that this Court point out that this step was at best forum shopping: he should have complied with Order 42 Rule 6(1) of the *Civil Procedure Rules*.

21. In this matter the Appellant filed the instant application on 30/09/2024 the same date it filed a Memorandum of Appeal. It is beyond question that the instant Application is in relation to an Appeal preferred against a decision of a subordinate Court as established under Article 169 of the *Constitution* of Kenya. In such circumstances the rules on stay of execution or proceedings are those under the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, 2010, as the *Rules* are amended in 2020.

22. The relevant provisions in the Rules in regard to appeals are Order 42 of the *Rules*. In particular, Order 42 Rule 6(1) provides that

> "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 application and 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."

23. This Court has, for reason of emphasis, underlined the relevant phrases in the provision in relation to the instant Application. From the Rule, an Appellant aggrieved by an order or decree of a subordinate Court from which he/she has appealed has to apply in that court first before moving the Appellate Court either on a first appeal (where the appeal is first) or on a second appeal (where the appeal is preferred as a second one in case there was an earlier one to a Court subordinate to the Superior Court). This would entitle him/her to move the Superior Court for stay of proceedings or execution which can either set new terms or set aside the order of the lower court. The step is not optional but compulsory.

24. Only upon fulfilment of that step shall the Superior Court be seized of jurisdiction to handle an application for stay of proceedings or execution. This is clearly provided for in the sub-Rule that

> " 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."

25. This Court agrees with the submissions of the Respondents about the fact and importance of first moving the trial Court for an order of stay of execution before moving the appellate court.

26. An Appellant should never side-step the subordinate court or a superior court from which he appeals when taking this important step and attempting to move the appellate court for orders he/she should have sought formally in the trial court and succeed. This Court is aware of the provisions of the Court of Appeal Rules as formulated under Section 5 of the *Appellate Jurisdiction Act*, Chapter 9 of the Laws of Kenya regarding the issue. Rule 41 of the *Rules* provides that:

> " The Court may in its discretion entertain an application for stay of execution, injunction, stay of further proceedings or extension of time for the doing of any act authorized or required by these Rules, notwithstanding the fact that no application has been made in the first instance to the superior court."

27. The determining phrase in the provision is

> " ...notwithstanding the fact that no application has been made in the first instance to the superior court."

Thus, as for the Court of Appeal, the law is express that one needs not apply to the superior court first for an order of stay of execution, among other prayers. But as for appeals to this Court, Order 42 Rule 6(1) is clear: one must first approach the trial court. To avoid the trial court and move to this court straight away for orders of stay of execution or proceedings would be akin to forum shopping and a direct call for a breakdown of the rule of law as explained above. This is because laws are enacted for the proper ordering It would be a dark day for judges and judicial officers to encourage infractions of the law that they themselves took oath to uphold.

28. Thus, in *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral And Boundaries Commission & 6 Others* [2013] eKLR Kiage JA of the Court of Appeal held:

> " I am not in the least persuaded that Article 159 of the *Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and

even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."

29. Also, in *Vipingo Ridge Limited v Swalehe Ngonge Mpitta* [2021] eKLR the learned judge held:-

> "11. A plain reading of the provision requires that before an Applicant seeking stay pending appeal moves the appellate court for stay orders, he/she must first have applied for the orders before the trial court. And there must be evidence that the trial court pronounced itself on the application whether it granted or declined to grant it.
>
> 12. It appears to me therefore that it would be irregular for such applicant to move the appellate court without first approaching the trial court on the matter and the trial court pronouncing itself on it one way or the other."

30. Additionally, in *Pius Mbithi & Another v Daniel Mutiria & Another* [2017] eKLR, it was held:

> "I read and understand the rule to dictate that the first port of call by an application for stay pending appeal is the trial court and that once it considers and determines the application then an aggrieved party has the liberty to approach this court and have the orders so issued set aside. 17. Put in the context of the matter before me it is clear that the trial court has not been afforded the opportunity to hear and determine any application for stay. That being the position, and being a court of law applying the law as enacted, this court must tell the applicant that the law is for all to be observed and not be side-stepped. I am in no doubt that the application seeking stay before this court as the appellate court is prematurely made and does not lie."

31. Furthermore, the Court has been clear about the importance of procedural steps. Thus, in *Mwangi v Mokaya* (Environment and Land Appeal 17 of 2022) [2022] KEELC 14835 (KLR) (17 November 2022) (Ruling) this Court held that:

> "A plain grammatical or textual reading of this terminology reading of the text above, particularly, the underlined phrase is to the effect that a party is not permitted to skip the most important point as the first point of call: the respective trial magistrate or judge against whose order or judgment an appeal is preferred. After he or she has moved the Court and his Application is granted or not, depending on how he views the decision, then he/she will file another application in the Court appealed to. It is upon this step having been taken that the application for stay of proceedings in the trial can be considered by the appellate Court. Absent of this step, the application filed for stay of execution or proceedings directly to the appealed to is improper."

32. In the instant Application, it has not been denied or even submitted on to the contrary that the Appellant did not move the trial court first for its determination on whether or not it was to grant an order of stay of enforcement of the orders of the trial court as made on 26/08/2024. On the contrary learned counsel admitted to the infraction and submitted that he needed not to first file the Application before trial court. Missing such a step means that the instant Application was filed contrary

to the requirements of Order 42 Rule 6(1) of the *Civil Procedure Rules*. It means further that as the Respondent argued, the Application is cannot stand: the Applicant did not exhaustion the necessary steps in the subordinate court. Thus, the application is premature, incompetent and bad in law.

33. The upshot is that the application is incurably defectively incompetent. The Court can only strike it out. It does so with costs to the Respondent.

34. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA TEAMS PLATFORM ON THE 17TH DAY OF OCTOBER, 2024.

HON. DR. IUR FRED NYAGAKA

JUDGE, ELC KITALE

At 08:37 am, in the presence of:

Chege Kamau Advocate for the Appellant

Ms. Mwemeke Advocate for the Respondent