Dagam and Investments Limited & another v Waruiru & 3 others; Waruiru & 4 others (Defendant) (Environment and Land Appeal E154 & E180 of 2024 (Consolidated)) [2024] KEELC 14092 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14092 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT AND LAND APPEAL E154 & E180 OF 2024 (CONSOLIDATED)

JO MBOYA, J

DECEMBER 19, 2024

BETWEEN

DAGAM AND INVESTMENTS LIMITED ..... 1ST APPELLANT

CHRISTOPHER MATHEA NDIRANGU ..... 2ND APPELLANT

AND

ALFETA WARUIRU ..... 1ST RESPONDENT

CHRISTINE WAMBUI MUNGAI ..... 2ND RESPONDENT

BECKY WAMORO MUNGAI ..... 3RD RESPONDENT

VINENCT KINGORI NGUGI & JOHN NGURI KINGOR(IBEING THE ADMINISTRATORS OF THE ESTATE OF WANJIRU NGUGI ALIAS MARGARET WANJIRU NGUGI, DECEASED) ..... 4TH RESPONDENT

AND

ALFETA WARUIRU ..... DEFENDANT

CHRISTINE WAMBUI MUNGAI ..... DEFENDANT

BECKY WAMORO MUNGAI ..... DEFENDANT

DAGAM AND INVESTMENTS LIMITED ..... DEFENDANT

CHRISTOPHER MATHEA NDIRANGU ..... DEFENDANT

RULING

Introduction And Background:

1. The Appellants/Applicants have approached the court vide Notice of motion application dated the 15th of October 2024 brought pursuant to the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*; Order 42, Rule 6; and Order 51 Rules 1 and 3 of the *Civil Procedure Rules* 2010, and in respect of which the Applicants have sought for the following reliefs;-

    a. That the Application herein be certified urgent and the same be heard ex-parte.

    b. That this honourable court be pleased to stay execution of the part of the Ruling finding the Appellants/Applicants in contempt of court pending inter-partes hearing of this application and further pending hearing and determination of this appeal.

2. The instant application is anchored on various grounds which have been highlighted in the body thereof. Furthermore, the application is supported by the affidavit sworn by Christopher Mathea Ndirangu [Deponent], sworn on even date, namely, the 15th of October 2024. In addition, the deponent has also filed a further affidavit sworn on the 31st of October 2024.

3. Upon being served with the instant application, the Respondents filed a Replying affidavit sworn by one Becky Wamoro Mungai on the 29th of October 2024, and a further affidavit sworn by the same deponent and which has been sworn on the 7th of November 2024.

4. The application beforehand came up for hearing on the 11th of November 2024 whereupon the advocates for the parties covenanted to canvass and dispose of the application by way of written submissions. In this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

5. The Appellants/Applicants filed written submissions dated the 25th of November 2024, whereas the Respondents filed written submissions dated the 29th of November 2024.

6. Both sets of written submissions form part of the record of the court.

Parties Submissions

(a) Appellants'/applicants' Submissions:

7. The Appellants/Applicants filed written submissions dated the 25th of November 2024 and wherein the Applicants have adopted the grounds contained at the foot of the application. Furthermore, the Applicants have also reiterated the averments contained at the foot of the supporting affidavit and the further affidavit sworn by Christopher Mathea Ndirangu.

8. Additionally, learned counsel for the Applicants has ventured forward and highlighted three (3) salient issues for determination by the court. Firstly, learned counsel for the Applicants has submitted that the Applicants herein were found guilty of contempt by the learned Senior Principal Magistrate vide Ruling rendered on the 1st of July 2024. Besides, it has been contended that arising from the said Ruling, the learned Principal Magistrate ordered and directed that the Applicants do attend court with a view to showing cause why same [Applicants] should not be committed to civil jail.

9. It was contended by learned counsel for the Applicants that the Applicants herein felt aggrieved and dissatisfied and thus proceeded to and filed the instant appeal. Furthermore it has been contended that the Applicants also filed the subject application.

10. Owing to the foregoing, learned counsel for the Applicants has submitted that the application beforehand has been filed timeously and with due promptitude. To this end, it has been submitted that the application for stay for execution of the limb of the impugned Ruling of the Senior Principal Magistrate has been made without unreasonable or inordinate delay.

11. Secondly, learned counsel for the Applicants has submitted that the Applicants herein shall be disposed to suffer substantial loss unless the orders being appealed against are stayed. In this regard, it has been contended that unless an order of stay of execution is granted, there is a likelihood that the learned Principal Magistrate shall proceed to mete out punishment against the Applicants and hence the Applicants are likely/disposed to be committed to jail.

12. In addition, it was contended that the committal to jail on account of contempt, shall deprive the Applicants of their liberty. In this regard, it has been posited that if the committal to jail is undertaken prior to and before the hearing and determination of the appeal, then the Applicants shall suffer substantial loss.

13. Thirdly, learned counsel for the Applicants has submitted that the Applicants are ready and willing to provide security on such terms and conditions as the court may deem just, expedient and appropriate in the circumstances.

14. Arising from the foregoing, learned counsel for the Applicants has implored the court to find and hold that the application beforehand is meritorious. In this regard, the court has been invited to proceed and grant the orders sought at the foot of the application beforehand.

(b) Respondents' Submissions:

15. The Respondents herein filed written submissions dated the 29th of November 2024 and wherein the Respondents have adopted and reiterated the averments at the foot of the Replying affidavit sworn on the 29th of October 2024 and the other Further Replying affidavit sworn on the 7th of November 2024.

16. On the other hand, the Respondents have raised, highlighted and canvassed three (3) salient issues for consideration and determination. First and foremost, learned counsel for the Respondents has submitted that the Applicants herein were found guilty of contempt and willful disobedience of lawful court orders and same [applicants] have not purged the contempt.

17. On the contrary, it has been contended that the Applicants herein have remained in contempt of the orders of the court that were issued on the 28th of February 2022. Consequently, learned counsel for the Respondents has submitted that the Applicants herein have approached the court with unclean hands and thus same [Applicants] are not deserving of equitable discretion of the court.

18. Secondly, it has been submitted that the Applicants herein shall not be disposed to suffer any substantial loss or at all if the orders of the Senior Principal Magistrate are not stayed. In any event, it has been contended that the Applicants shall have the opportunity to show cause before the learned senior principal magistrate and hence the fears by the Applicants are premature and misconceived.

19. Finally, learned counsel for the Respondents has submitted that the Applicants herein have neither offered nor provided any security for the due performance of the decree that may ultimately arise. In this regard, it has been posited that the Applicants herein have not met and/or satisfied the requisite condition[s] for the grant of an order of stay of the execution.

20. Other than the foregoing, it has also been contended that the failure to grant the orders of stay of execution being sought by the Applicants herein, shall not render the appeal nugatory. To the contrary, it has been contended that the appeal would still proceed for hearing and the court shall be at liberty to make such orders as may be deemed expedient.

21. Flowing from the foregoing submissions, learned counsel for the Respondents has invited the court to find and hold that the application beforehand is misconceived and hence legally untenable. In any event, it has been contended that the Applicants are merely seeking the orders beforehand to enable same to continue with the offensive activities on the suit property.

Issues for Determination:

22. Having considered the application beforehand and the responses thereto, and upon takin into consideration the written submissions filed on behalf of the respective parties, the following issues do crystallize[emerge] and are thus worthy of determination:-

    i. Whether the applicants have established and demonstrated the existence of sufficient cause to warrant the grant of the orders.

    ii. Whether the Applicants have demonstrated that same shall be disposed to suffer substantial loss unless the orders sought are granted.

    iii. What security if any ought to be provided by the Applicants.

Analysis And Determination

Issue Number 1 Whether the applicants have established and demonstrated the existence of sufficient cause to warrant the grant of the orders

23. The application beforehand seeks for orders of stay of execution pending the hearing and determination of the appeal which has since been filed by the Applicants. To the extent that the application beforehand seeks for an order of stay of execution, it is incumbent upon the Applicants to first and foremost demonstrate that same have established a sufficient cause.

24. As pertains to what would constitute[s] a sufficient cause, it suffices to cite and reference the decision of the court in the case of *Wachira Karani v Bildad Wachira* [2016] eKLR where the court elaborated on the meaning and import of sufficient cause.

25. For coherence the court stated and held as hereunder;-

    It's important for me to mention that in the above case, the court defined what constitutes sufficient cause and in this respect the following paragraph is highly relevant to the issues before me:-

    > " Once the defendant satisfies the court on either, the court is under duty to grant the application and make the order setting aside the ex parte decree, subject to any conditions the court may deem fit. However, what constitutes 'sufficient cause' to prevent a defendant from appearing in Court, and what would be 'fit conditions' for the court to impose when granting such an order, necessarily depend on the circumstances of each case.
    >
    > Although it is an elementary principle of our legal system, that a litigant who is represented by an advocate, is bound by the acts and omissions of the advocate in the course of the representation, in applying that principle, courts must exercise care to avoid abuse of the system and or unjust or ridiculous results. A litigant ought not to bear the consequences of

> the advocates default, unless the litigant is privy to the default, or the default results from failure, on the part of the litigant, to give the advocate due instructions"

The applicant is required to satisfy to the court that he had a good and sufficient cause. What does the term "sufficient cause" mean.? The Court of Appeal of Tanzania in the case of *The Registered Trustees of the Archdiocese of Dar es Salaam v The Chairman Bunju Village Government & Others*[9] discussing what constitutes sufficient cause had this to say:-

> "It is difficult to attempt to define the meaning of the words 'sufficient cause'. It is generally accepted however, that the words should receive a liberal construction in order to advance substantial justice, when no negligence, or inaction or want of bona fides, is imputed to the appellant" (Emphasis added)

26. Having appraised myself of the meaning and import of what constitutes sufficient cause, it is now appropriate to revert to the instant matter and discern whether the Applicants have established a sufficient cause.

27. To start with, there is no gainsaying that Applicants have filed a memorandum of appeal dated the 14th of October 2024 and wherein the Applicants have raised a plethora of issues, which same [Applicants] shall seek to canvass before the court. Instructively, the Applicants herein have contended that the learned Senior Principal Magistrate proceeded to and found same [Applicants] guilty of contempt/ willful disobedience of lawful court orders, yet the Applicants herein were not parties to the suit at the time when the impugned orders were issued.

28. Furthermore, the Applicants have also contended that the Learned Senior Principal Magistrate has also proceeded to and cited the Applicants for contempt yet there is a contradiction in the Ruling by the learned senior principal magistrate.

29. Arising from the foregoing, the Applicants herein have contended that same have an arguable appeal before this court and which appeal ought to be heard and disposed of before the issue of committal/ sentencing can be undertaken.

30. I have perused the ruling of learned Senior Principal Magistrate rendered on the 1st of July 2024 and taken into account the fact that the Applicants herein were not parties to the suit as at the 28th of February 2022, when the impugned orders were issued. Furthermore, there is also the question as to which orders are said to be have been disobeyed. To this end, the contents of paragraph 24 of the Ruling of the learned Senior Principal Magistrate is relevant.

31. To my mind, the memorandum of appeal that has been filed by and on behalf of the Applicants herein raises pertinent legal issues, including whether or not the findings of contempt as against the Appellants constitute a violation of the right to fair hearing in terms of Article 50 of the *Constitution* 2010; and whether the orders which are contended to have been disobeyed were clear and devoid of ambiguity.

32. Simply put, the memorandum of appeal raises bona fide and arguable issues, which can only be interrogated during the hearing of the appeal. In this regard, it suffices to state and underscore that the Applicants have established sufficient cause to warrant being allowed to partake of the equitable discretion of the court.

33. Notwithstanding the foregoing, it is imperative to state and underscore that the establishment of sufficient cause alone, does not warrant the grant of an order of stay of execution. To the contrary, sufficient cause constitutes a precursor and/or prelude to the issuance of an order of stay of execution pending the hearing and determination of an appeal.

34. Notably, sufficient cause is the key that is deployed to open the door of justice in pursuit of an order of stay of execution pending appeal. Pertinently, sufficient cause is indeed the launch pad to accessing an order of stay of execution pending appeal.

35. Arising from the foregoing, my answer to issue number (i) is to the effect that the Applicants herein have indeed established and demonstrated the existence of a sufficient cause in the manner envisaged by the provisions of Order 42, Rule 6 of the *Civil Procedure Rules*, 2010.

Issue Number 2 Whether the Applicants have demonstrated that same shall be disposed to suffer substantial loss unless the orders sought are granted.

36. Having established and demonstrated sufficient cause vide the arguable grounds contained at the foot of the memorandum of appeal, the next hurdle that must be surmounted by the Applicants herein touches and concerns proof of substantial loss. For good measure, it has been held and settled that substantial loss is the cornerstone[key pillar] upon which an order of stay of execution pending appeal is premised/anchored.

37. To underscore the foregoing exposition of the law, it suffices to take cognizance of the decision in the case of *Kenya Shell Limited v Benjamin Karuga Kibiru & another* [1986] eKLR where the Court of Appeal [Per Platt JA] 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.

38. What constitutes substantial loss and which may render an appeal nugatory was also considered in the case of *Reliance Bank Limited v Norlake Investments Ltd* [2002] 1 EA 227, where the Court of Appeal rendered itself as hereunder;

> "..... what may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling."

39. Likewise, the question of substantial loss was also highlighted in the case of *James Wangalwa & Another v. Agnes Naliaka Cheseto* [2012] eKLR, where the court stated as hereunder;-

> " The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail."

40. Premised on the foregoing positon, it is now imperative to consider whether the execution or implementation of the orders of the Learned Principal Magistrate [which found the instant appeal], would occasion substantial loss to the Applicant.

41. To my mind, the Applicants having been found guilty of contempt, same are now exposed to sentencing and committal to jail in the execution of the court order. Suffice to state that once a court of law has found a subject, the Applicants herein not excepted, guilty of contempt, then the court is seized of the authority to sentence the subject[s] to a term of imprisonment or to such fine not exceeding

Twenty million[Kshs.20,000,000]. [See the provisions of Section 5 of the *Judicature Act*, Chapter 8 Laws of Kenya. See also Section 29 of the *Environment & Land Corut Act* 2011]

42. In my humble view, the execution and/or implementation of the orders of the Learned Senior Principal Magistrate, will no doubt occasion substantial loss to the Applicants herein. For good measure, the Applicants herein may be committed/sentenced to serve a term in prison. Such a sentence would deny and/or deprive the Applicants of their liberty.

43. Whereas committal/sentencing to jail is a legal process, it must be recalled that such sentencing ought to be deployed as a last resort and only when a party has exhausted his/her right of appeal. To this end, it suffices to underscore that the right to liberty and human dignity in terms of Articles 28 & 39 of the *Constitution* 2010, are paramount.

44. Arising from the foregoing, it is my finding and holding that the execution of the impugned orders of the learned principal magistrate shall subject the Applicants to loss of liberty. Consequently, substantial loss is likely to accrue and/or arise.

Issue Number 3 What security if any ought to be provided by the Applicants.

45. The grant of an order of stay of execution is provided for and anchored on the provisions of Order 42, Rule 6 (2) of the *Civil Procedure Rules*. Pertinently, where a court of law is inclined to grant the orders of stay of execution, the court is called upon to calibrate on the question of security [if any] for the due performance of the decree that may ultimately arise and/or ensue.

46. Having come to the conclusion that the Applicants herein have established and demonstrated substantial loss, it now behooves the court to consider the nature of security that the Applicants are obligated to provide. [See Order 42c Rule 6[2] of the *Civil Procedure Rules*, 2010]

47. While considering the nature and type of security to be provided, it suffices to take cognizance of the decision in the case of *Arun C Sharma v Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others* [2014 eKLR where the court stated as hereunder;-

> " 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*. The Court should always remember that both the Applicants and the Respondent have rights. The Applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren result if they pay out the decretal sum to a person who may not make a refund. The Respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the Applicant. There is no legally binding assignment of the proprietary rights in the proposed security which the court may consider adequate to secure the due performance of such decree or order as may ultimately be binding on the Applicant."

48. Flowing from the foregoing, it is my finding and holding that even though there is no question of money involved in the dispute beforehand, nevertheless the Applicants herein are obligated to provide

security. In any event, the security to be provided may very well include security to cover the costs incurred in the proceedings being appealed against as well as the costs, if any, to be incurred in respect of the appeal.

49. In the circumstances, I find it appropriate and expedient to order and direct that the Applicants herein shall deposit the sum of Kshs.1,000,000/= only in an escrow account in the names of the advocates for the Applicants and the Respondents herein. For good measure, the deposit of the sum of Kshs.1,000,000/= shall be undertaken within sixty (60) days from the date of Ruling.

Final Disposition:

50. Arising from the foregoing analysis, [details highlighted in the body of the Ruling], it must have become apparent that the Applicants herein have established and demonstrated that same shall be disposed to suffer substantial loss unless the orders of stay of execution pending appeal are granted.

51. In the premises, the final orders that commend themselves to the court are as hereunder;-

    a. The application dated the 15th October 2024 be and is hereby allowed.

    b. There be and is hereby granted an order of stay of execution of the limb of the Ruling/orders of the Learned Principal Magistrate dated the 1st of July 2024 and in particular the portion finding the Applicants guilty of contempt/willful disobedience of lawful court orders.

    c. For coherence, the intended mitigation by and sentencing of the applicants herein be and is hereby stayed pending the hearing and determination of the appeal.

    d. The applicants herein shall provide security by depositing the sum of Kshs.1,000,000/= only in an Escrow account in the names of the advocates for the Applicants and the Respondents.

    e. The deposit of clause (d) above, shall be undertaken within sixty (60) days from the date hereof [subject to the provisions of Order 50 of the Civil Procedure Rules, 2010].

    f. In default by the Applicants to comply with clause (d) and (e) above within the set timelines, the order of stay of execution shall lapse automatically.

    g. The Orders herein shall apply mutatis mutandis to ELC Land Appeal No. E180 of 2024.

    h. Costs of the Application shall abide the outcome of the appeal.

52. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2024

OGUTTU MBOYA

JUDGE

In the presence of:

Hilda –Ccourt assistant

Mr. Gachau Mwangi for the Appellants/Applicants

Mr. Kairaria for the 1st, 2nd and 3rd Respondents

Mr. Gachau Kariuki for the Appellants in ELCLA E180 of 2024