Njoroge v Hamisi & another (Environment & Land Case 83 of 2017) [2023] KEELC 282 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELC 282 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 83 OF 2017

FO NYAGAKA, J

JANUARY 24, 2023

BETWEEN

DAVID KURIA NJOROGE ..... PLAINTIFF

AND

SHABIR HAMISI ..... 1ST DEFENDANT

EMILY WALENIAORA ..... 2ND DEFENDANT

RULING

1. This Court was called upon to determine a Motion on Notice dated 15/11/2022 and filed on even date. The application was accompanied with a Certificate of Urgency dated the same date. The Application was brought by the 2nd Defendant, under Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Order 22 Rule 25 and Order 42 Rule 6 of the *Civil Procedure Rules* and what was termed as all other enabling provisions of law. She sought the following reliefs:

    1. ...spent

    2. ...spent

    3. That there be a stay of eviction of the 2nd Defendant/Applicant, her agents, servants, or representatives from title number Kwanza/Kwanza Block 7/Tonyot/153 and 168 pending the hearing and determination of Appeal (sic) before the Court of Appeal.

    4. That this Honourable Court make any further orders for the ends of justice.

2. In support of the Application, the 2nd Defendant gave a number of grounds on its face. These were that she had filed an appeal against the judgment of this Court and it was pending hearing in the Court of Appeal; this Court had issued a decree for eviction; she had lived on the land for over 40 years; in the event that she, her family and agents were evicted from the land they would be left in the cold and without a remedy; and she was desirous of preserving the subject of the Appeal.

3. She gave details of the grounds and facts in support of the Application in an Affidavit she swore on 15/11/2022. In it she deponed that judgment herein was delivered on 09/10/2019 and she applied immediately for proceedings which were collected in September, 2021. She annexed a copy of the Certificate of Delay as EW1. Her further deposition was that upon receiving the proceedings, she prepared and filed a Record of Appeal together with the Memorandum of Appeal. She annexed them as EW2. She then swore that on 11/11/2021 she was notified by the OCS Kwanza that she was required to vacate the land following an eviction order issued on 6/09/2021. She annexed a copy of the Order to the Affidavit and marked it as EW3. She then stated that no notice to show cause had been served on her to enable her respond to it. She repeated the other contents of the grounds in support of the Application besides stating that she and her children would suffer mental and phycological torture if she was evicted from the land. Lastly, she deponed that the Appeal raised substantial issues.

4. Naturally, the Application was opposed. The Plaintiff did so through an Affidavit sworn on 24/11/2022 and filed on 28/11/2022. He stated therein that by the judgment in issue, the Applicant was directed to forthwith move from land parcel Nos Kwanza/Kwanza Block 7/Tonyot/153 and 155 in default of which eviction would be carried out. Further, he stated that three years later they had not moved out of the land and they have cultivated the land; he was entitled to the fruits of his judgment and the applicant's failure to vacate the land was prejudicial to him and had led to him making heavy economic loss. He deponed that the three-year delay in bringing the Application was inordinate and unexplained.

5. The Respondent denied that he had not served the Notice to Show Cause as sworn by the Applicant by stating that she was served with the same but failed to attend Court on 09/11/2020 when the eviction order was issued. He deponed further that the Applicant was even committed to civil jail after the costs herein were taxed and he failed to pay them even as at the time of doing the Replying Affidavit. He added that to date no Record of Appeal had ever been served on him. Further, he stated that he was the registered owner of the parcels of land and the Court had found as much while the Applicant had failed to establish her claim by way of adverse possession. He then stated that the issue of ownership of the land was res judicata. He deponed further that the suit land measured 19 acres or thereabout and he had lost substantially by way of loss of user thereof. Lastly, he deponed that the Applicant had not offered any security whatsoever and the Application fell too short of the requisite threshold for stay of execution pending appeal.

Submissions

6. The Application was disposed by way of written submissions of which only the Respondent filed on 6/12/2022. In them he summed it that the father in-law to the Applicant sold 19 acres of land to him in the 1980s. This constituted two parcels measuring 11 acres and 8 acres and were finally registered as land parcel Nos. 153 and 168 respectively, being the suit lands herein. He gave other details which are not necessary to repeat here for purposes of this Application. He then stated that Order 42 Rule 6 gives three (3) conditions which an Applicant must satisfy in order to be granted the orders sought. He enumerated them as proof of substantial loss if stay is not granted, the application is made without undue delay, and the Applicant gives security for due performance of the decree.

7. On the issue of delay, the Respondent contended that the same was long and the application made belatedly. He argued that the Applicant made two applications post judgment. One was for paying taxed costs in instalments and it was dismissed, and another for enjoinment of parties after the judgment which was never prosecuted. He relied on Eldoret ELC No 495 of 2012 (2014) eKLR - *Thomas Kiplel Sum v Phillip K. Samich and 3 Others* where the Court found that a delay of 40 days from the date the defendants were supposed to vacate the suit land was inordinate.

8. He also submitted that no proof of filing of the Record of Appeal was give: only an invoice for filing and also that if indeed the Record was filed the annexture showed that it was filed on Ms Yano & Co.Advocates who were not on record.

9. On substantial loss, he submitted that none was alluded to. The only claim was that the Applicant was on the land for over 30 years yet it was not true because the Applicants moved onto the land after the Land Disputes Tribunal awarded them. Even so they did that after there was an order staying the award hence their occupation was illegal. He relied on the case of Eldoret ELC No 411B of 2012 (2013) eKLR, *Sammy Some Kosgei v. Grace Jelel Boit*. He prayed for the dismissal of the Application with costs.

10. As noted in paragraph five (6) above, the Applicant did not file his written submissions. But be that as it may, that will not prejudice the determination of the Application on merits since submissions do not constitute facts and pleadings of parties but only a marketing language of parties trying to impress the Court on making a determination in their clients' favour. If a party fails to plead an issue or cause of action before the Court, his or her case will disclose no cause of action. And if he fails to adduce evidence to support what he has pleaded, he will fail to discharge the burden of proof as required by the Rules of evidence. For this proposition reference is made to the Court of Appeal case of *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & Another* [2014] eKLR. Thus, even where submissions have been filed, the Court can as well not consider them depending on their import: it does not have to comment on them either. Indeed, many decisions have been rendered by Courts without submissions being considered and they have been found lawful. For this, the holding of the Court of Appeal in the above case is clear when it stated that, "Indeed there are many cases decided without hearing submissions but based only on evidence presented.". For this reason, I now proceed to determine the instant Application.

Analysis and Disposition

11. I have considered the Application before me. I have also taken into account the law, the facts relied on and the submissions filed herein. I am of the view that two issues are worth determining herein. They are:

    a. Whether the Application is merited;

    b. Whether the Application was brought with undue delay;

    c. What orders to issue and who to bear costs.

12. I begin the determination of the Application with analyzing sequentially the issues identified. But before delving into them, it is important to consider the relevance of the provisions of law cited or relied on by the Applicant.

13. The Applicant relied on Section 1A, 1B, 3A and 63(e) of the *Civil Procedure Act* and Order 22 Rule 25 whose relevance I need to analyze. Once I do, in this Application I strongly propose that both counsel use my finding to educate themselves and other counsel and parties on why it is important not to cite provisions of law as being the basis of an Application they bring, just for the sake of it. I say so because, times without number, I have indicated decisions elsewhere that it is worth doing the right thing even as a party moves the Court. By so doing it makes the judge's life easier and helps to determine one's issue faster than when the opposite is done.

14. Section 1A of the *Civil Procedure Act* is about the objective of the Act which is the facilitation of just, expeditious, proportionate and affordable resolution of disputes governed by it. Section 1B is about the duty of the Court applying the Act, which is essentially on the just determination of disputes by

efficient use of resources in a time and cost-effective way including by use of technology. Section 3A provides for the inherent power of the Court not being limited by way of the provisions in the Act in making orders as it may deem fit for the ends of justice or preventing the abuse of its process.

15. Section 63(e) relates to the situations where it is prescribed by law for the court to make orders in the interlocutory stage if it appears to the judge or judicial officer to be just and convenient. In regard to the last provision, for instance, where the Court directs a party to serve documents within a certain period and the party mischievously avoids serving the same when he realizes that by serving it them he is drawing to the attention of the other party poor and defective papers which may give rise to automatic sanctions and he purports to withdraw them (with no order as to costs), the court will apply Section 63(e) in ordering that the party serves the documents. Order 22 Rule 25 of the *Civil Procedure Rules*, 2010 is in regard to situations where there exist in a court two suits (on different causes of action and by different persons) against one party, and in one of the suits a decree has been passed against that person/defendant. In such a case, the Court may stay on such terms as to security or otherwise the execution of the decree already passed, until the pending suit is determined.

16. Why on earth the Applicant cited this last provision no one knows because nowhere is there information that there are two suits against him. That aside, as it is clear from the summaries of the analysis I have made of the other provisions relied on, it is clear that they are not relevant to an application of this nature. What was termed as all other enabling provisions of law, clearly no provision of this nature exists in law and even if there were provisions which the Applicant intended the Court to base its decision on by importing the meaning of that phrase, the Court is not to assist a party conduct his case by going out for a search of the relevant provisions to apply in the Application. A party is bound to do his preparation well. This legal system, the Common Law, is an adversarial system wherein the Court sits as an impartial arbiter and not one to assist parties in their cases.

17. I am now left with considering Order 42 Rule 6 of the *Civil Procedure Rules* which the 2nd Defendant relied on. The provision gives conditions an Applicant must satisfy in order to succeed in such an Application. They are conjunctive and are:-

    i. The Application has been made without unreasonable delay;

    ii. Substantial loss may result to the Applicant unless the order is made; and

    iii. That the Applicant is willing to furnish such security as the court order for the due performance of such decree.

18. When an Applicant moves the Court for grant of orders for stay of execution, he ought to bear in mind that he invokes the discretionary power of the Court which is granted on a case by case basis, but must be done judiciously. With that in mind, I now consider the merits of the Application.

a.Whether the Application is Merited

19. In terms of Order 42 Rule 6 of the *Civil Procedure Rules*, three requirements, as summarized above, are to be met in an Application for stay of execution in this Court. Starting with the last one, it is noteworthy that the Applicant did not furnish any security for the due performance of the decree herein. Also, she did not plead the likelihood of suffering substantial loss. All that she contended was that she and her family would be in the cold and suffer mental anguish if the decree is executed and they are removed from the land where they have been for over 40 years. How that translates to substantial loss, she did not demonstrate. For that reason, I am of the view that the second requirement has not been met. Thus, in my view, up to this point the Application is without merit. But even assuming that I am wrong in my findings above and hence the Application were merited, there is a third requirement

the Applicant ought to have satisfied. With regard to this requirement, I now handle it together with the second issue I framed above.

b.Whether the Application was brought with Undue Delay

20. As for the need to bring the Application for stay of execution of the decree without unreasonable delay, the chronology of the events leading to the instant Application is important to analyze. It was submitted that the Applicant filed two applications, namely the instant one and another to enjoin the parties. I have looked at the record. What I see is that on 12/05/2021, two prospective Applicants, namely, one Sadat Hamisi and Tufah Hamisi appointed the same lawyers who represent the Applicant herein to come on record for them. At the same time, they filed an Application dated 10/05/2021 in which they sought to be enjoined as interested parties. The Application was neither given a date nor prosecuted. On 22/04/2022 the Respondent's learned counsel sought to fix the said Application for hearing by filing thereon a Certificate of Urgency dated 19/04/2022 requesting for directions on the Application. The record does not show that same was handled by the Court. That was all for the Application. It is therefore incorrect that the Application was filed by the Applicant here. Even then, the events after the judgment ought to be chronicled to the end.

21. The record bears that judgment herein was delivered on 09/10/2019 and the decree issued on 29/10/2019. To the time of bringing the instant Application it was a period of three years and one month. Clearly, the Applicant did not explain why she delayed in bringing the instant application for that long. However, the record bears it out that there has been a beehive of activity leading to the Application herein. An examination of it would show whether the delay justifies the filing of the application this late in the day.

22. First, the Respondent raised the issue that even though he was served with the Notice of Appeal from the judgment whose eviction order is sought to be stayed he has never been served with Record of Appeal which was purported to have been prepared and filed as deponed by the Applicant. The Applicant failed to rebut that deposition on oath. She neither filed in this Court a served copy nor an Affidavit to show that indeed she served the document.

23. A close examination of the annexture EW2 which the Applicant described as a copy of email and payment made to Court shows that on 17/09/2021 a copy of 20/09/2021 response thereto was received indicating that a payment of Kshs. 4,000/= was made. But the document annexed to the Supporting Affidavit purporting to be the Record of Appeal does not show that it was ever presented to Court for receiving or was actually received. It bears no stamp thereof. Also, there is no email to show that the document was ever received in Court after the said payment was made. Moreover, the same was indicated at page one as being for service on M. Yano & Co Advocates although other pages below it indicates that it was to be served on Ms Kiarie & Co Advocates who represent the Respondent herein.

24. The said Respondent's law firm have deponed that the record has never been served on them. The Applicant did not provide evidence of service on them. This leaves the Court with serious doubt as to whether or not the steps that the law requires regarding the preparation of a Record of Appeal and service was ever followed by the applicant. While I am not determining the competency of the Appeal and I will not do so since that is a matter for the Court of Appeal to do, the obtaining facts lead to this Court to wonder aloud whether by issuing an order of stay of eviction as prayed it will not be doing so in futility hence its process be abused by the Applicant. But l gives the benefit of doubt to the Applicant and move onto the second issue on delay.

25. Second and of greater importance in determining the merits of the instant Application, after judgment was delivered herein, the parties have participated in a number of post-judgment steps. From the

record, the decree herein was extracted on 29/10/2019. On 25/11/2019 both counsel appeared before the Deputy Registrar for taxation of costs but a date of 09/12/2019 was taken for submissions. On the subsequent date the Defence counsel did not appear, and the ruling thereon was reserved for 7/01/2020. It was delivered in the presence of counsel for the Defence who was in Court this time round. She prayed for a stay of execution for 30 days. It was granted. What is clear from the above is that by the time counsel prayed for stay of execution, the Applicant was aware that a decree had been drawn and extracted, in readiness for execution.

26. It appears nothing took place until 28/02/2020 when the suit was fixed for Notice to Show Cause why execution should not issue, on 07/04/2020 but nothing took place on that date. A new date of 09/11/2020 was given. On the latter date, counsel demonstrated to Court by way of an Affidavit of Service that the Notice to Show Cause had been served. Warrants of Arrest were issued then and on 07/04/2021 the Judgment Debtor was committed to civil jail. Later, he made an application dated 12/05/2021 to liquidate the sum taxed at Kshs. 235,710/= in instalments of Kshs. 10,000/= per month.

27. On 25/05/2021, the judge ordered, in presence of both counsel, that the Application be referred to the Deputy Registrar for determination as may deem appropriate. After a number of mentions and hearing dates, the Application was finally determined on 07/09/2021 when it was dismissed in entirety. The record bears that nothing took place from then to 15/11/2022 when the instant Application was filed and placed before me under certificate of urgency.

28. The question that the above facts beg for is, what was the Applicant doing between when the decree herein was issued up to the time she made the instant Application? One, by the decree being extracted there was clear intent by the Respondent to execute it. The Applicant should have moved the Court for stay at that point: she did not. Two, when the costs herein were taxed with the participation of the Applicant, she did not move the Court for stay of execution pending Appeal. Instead she moved the Court to pay the same by instalments. In essence when the Applicant prayed to be permitted to pay in instalments the costs found due rather than asking for stay of execution pending Appeal, she signified that she was in agreement with the decree.

29. The Applicant cannot be heard to say that she voluntarily agreed in part with one aspect of the decree, namely, payment of costs and yet disagreed with the other part, eviction. The decree could not be severed and there has not been an application by the Applicant in that manner. If the Court were to agree with the Applicant that her application be granted, it would be joining her in her action of abusing the process of the Court. That would be so because, the Applicant could not rightly engage the Court from 17/05/2021 when she filed the Application dated 12/05/2021 to pay the costs herein in instalments and in the end, upon receiving a final decision on it, now turn to this Court for stay of the process she acceded to. By the Applicant neglecting to take the step of applying for stay of execution for such a long time as two years it may be and has to be implied that she abandoned her privilege of equity leaning towards her favour.

c. What Orders to issue and who to Bear Costs

30. The conclusion of the matter is this: The Application dated 15/11/2021 is wholly unmeritorious and it is hereby dismissed. Since costs follow the event and that event is that the Respondents have won the Application, he is entitled to be paid the same.

31. It is so ordered.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 24TH DAY OF JANUARY 2023

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE