Kembe v Sule (Environment and Land Appeal 18 of 2020) [2023] KEELC 15724 (KLR) (23 February 2023) (Ruling)

Neutral citation: [2023] KEELC 15724 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

ENVIRONMENT AND LAND APPEAL 18 OF 2020

SO OKONG'O, J

FEBRUARY 23, 2023

BETWEEN

MOSES AGEYA KEMBE .... APPELLANT

AND

WASHINGTON OKELLO SULE .... RESPONDENT

RULING

1. On March 11, 2018, a judgment was entered for the respondent against the appellant in Kisumu Chief Magistrate's Court, ELC No 36 of 2018 (hereinafter referred to only as "the lower court"). The lower court declared that the respondent was the registered owner of all that parcel of land known as Kisumu/Kasule/5649 (hereinafter referred to only as "the suit property") and issued a permanent injunction restraining the appellant from interfering with the suit property. The court gave the appellant 30 days from the date of the judgment to vacate the suit property in default of which the respondent was given the liberty to apply for his forceful eviction from the property. The appellant was aggrieved by the said judgment and filed the present appeal to challenge the same. On January 31, 2022, this court dismissed the appellant's appeal with costs and upheld the lower court's decision. The respondent filed a party/party bill of costs that was taxed at Kshs 266,975/- on July 6, 2022.

2. What is now before the court is the appellant's application brought by way of a notice of motion dated August 1, 2022 seeking a temporary injunction restraining the respondent from trespassing, constructing on, ploughing, selling, alienating or otherwise interfering in any way with the suit property pending the hearing and determination of the appellant's intended appeal to the Court of Appeal. The appellant has also sought a stay of execution of this court's judgment of January 31, 2022 pending the hearing and determination of the said intended appeal. The application is brought on the grounds set out on the face thereof and on the supporting affidavit and further affidavit of the appellant sworn on August 1, 2022 and September 21, 2022 respectively. The appellant has averred that unless the orders sought are granted, his intended appeal to the Court of Appeal will be rendered nugatory and he will suffer irreparable loss. The appellant has contended that he has a good appeal against this

court's judgment and that his application has been brought without inordinate delay. In his further affidavit, the appellant has stated that he has already filed the appeal in the Court of Appeal and that the respondent is in the process of executing the lower court decree.

3. The application is opposed by the respondent through a replying affidavit sworn on September 27, 2022. The respondent has averred that the application is meant to defeat the cause of justice by delaying him from enjoying the fruits of his judgment. The respondent has averred that he has been unable to use the suit property since 2018 when the lower court suit was filed. The respondent has stated that he has fenced the suit property with the intention of cultivating the same. The respondent has averred that the appellant does not have an arguable appeal to warrant the grant of the orders sought and that the appellant has been indolent. The respondent has averred further that the appellant has not demonstrated that he stands to suffer substantial loss if the orders sought are not granted nor has he offered to furnish security for the performance of the decree.

4. The application was heard on January 24, 2023. The appellant argued that he is in possession of the suit property and that unless the orders sought are granted, he stands the risk of being evicted from the suit property in execution of the decree of the lower court following the dismissal of his appeal by this court. On his part, the respondent submitted that the appellant has vacated the suit property and the respondent has already fenced the same. The respondent submitted that he has been kept out of the suit property for several years.

5. The appellant's application has two limbs that I will deal with one after the other. The first limb seeks stay of execution of the judgment of this court delivered on January 31, 2022 pending appeal. The second limb seeks a temporary injunction restraining the respondent from trespassing, constructing on, ploughing, selling, alienating or otherwise interfering in any way with the suit property pending the hearing and determination of the appellant's appeal to the Court of Appeal.

6. The judgment of this court made on January 31, 2022 merely dismissed the appellant's appeal to this court against the decision of the lower court. Apart from the order on costs, this court did not make any positive order against the appellant capable of execution. In *Kanwal Sarjit Singh Dhiman v Keshavji Jivraj Shah [20008] eKLR*, the Court of Appeal stated as follows:

> "The 2nd prayer in the application is for stay (of execution) of the order of the superior court made on December 18, 2006. The order of December 18, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus a negative order which is incapable of execution save in respect of costs only."

7. The same reasoning was applied by Makhandia J (as he then was) in *Raymond M Omboga v Austine Pyan Maranga* Kisii HCCA No 15 of 2010, where he stated as follows:

> "The order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the respondent which is capable of execution, there can be no stay of execution of such an order."

8. There is therefore nothing in the judgment of the court made on January 31, 2022 capable of being executed save for the costs. With regard to costs, I am of the view that the appellant has not demonstrated that he will suffer substantial loss unless the recovery of the same is stayed. The respondent's party/party bill of costs was taxed at Kshs 266,975/- on July 6, 2022. The limb of the

appellant's application seeking an order of stay of execution was brought under order 42 rule 6 of the *Civil Procedure Rules*. Order 42 rule 6(2) of the *Civil Procedure Rules* provides that:

> (2) No order for stay of execution shall be made under sub-rule (1) unless –

(a) The court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) Such security as the court orders for the due performance of such decree or order as ultimately be binding on him has been given by the applicant.

9. In *Kenya Shell Limited v Karuga (1982 – 1988) I KAR 1018* the court stated that:

> "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 cornerstone of both jurisdictions for granting stay."

10. I am not convinced that the appellant is likely to suffer substantial loss if the stay sought is not granted. The appellant has not explained what kind of loss he is likely to incur if the recovery of the respondent's costs is not stayed. The appellant has not indicated that he has difficulty in raising the costs awarded to the appellant or that in case he is successful in the appeal, the respondent will be unable to refund the costs paid to him. In the absence of evidence of substantial loss, the appellant is not entitled to an order of stay pending appeal.

11. On the second limb of the application for injunction pending appeal, the following is my view: Order 42 rule 6(6) of the *Civil Procedure Rules* on which this limb of the application is grounded provides as follows:

> (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."

12. What was before this court was an appeal. The court was not dealing with an ordinary civil suit. The court having dismissed the appellant's appeal as having no merit, I can see no basis upon which the court can grant to the appellant an injunction pending appeal to the Court of Appeal. Order 42 rule 6(6) of the *Civil Procedure Rules* that has been invoked by the appellant does not give this court jurisdiction to grant an injunction pending appeal to the Court of Appeal. The rule empowers the court to grant an injunction pending the hearing of an appeal pending before it. That is not the case here. For the court to grant an injunction pending appeal to the Court of Appeal, the court will have to undertake an inquiry into whether the appellant has an arguable appeal. Such inquiry can only be undertaken by the Court of Appeal in which the appeal has been preferred. This court having dismissed the appellant's appeal cannot say whether an appeal that has been preferred against its decision is arguable or not. It follows therefore that the appellant's application for injunction pending appeal should have been filed in the Court of Appeal but not before this court.

Conclusion:

13. In conclusion, it is my finding that the appellant's notice of motion application dated August 1, 2022 has no merit. The application is dismissed with costs to the respondent.

DELIVERED AND DATED AT KISUMU THIS 23RD DAY OF FEBRUARY 2023

S OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of

Mr Omondi T for the appellant

Mr Kouko for the respondent

Ms J Omondi-Court Assistant