



Republic v County Secretary Nairobi City County & another; Tom Ojienda & Associates (Exparte) (Miscellaneous Civil Application 121 of 2017) [2024] KEHC 3925 (KLR) (Civ) (18 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3925 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION 121 OF 2017

JM CHIGITI, J

MARCH 18, 2024

BETWEEN

REPUBLIC APPLICANT

AND

**THE COUNTY SECRETARY NAIROBI CITY COUNTY 1ST RESPONDENT
CHIEF OFFICER FINANCE, NAIROBI CITY COUNTY 2ND RESPONDENT**

AND

PROF TOM OJIENDA & ASSOCIATES EXPARTE

RULING

1. The application that is before this court is dated 13th February 2024. The applicant seeks the following orders:
 - a. Spent
 - b. Spent
 - c. That this Honourable Court be pleased to stay orders issued on 20th December, 2023 for the impending mitigation and sentencing scheduled for the 14th day of February, 2024 pending the hearing and determination of COACAPPL/E050/2024- Patrick Analo Akivanga and Asha Abdi v Prof. Tom Ojienda and Associates.
 - d. Any other order that this Honourable Court deems fit to grant in the circumstances.
2. The application is opposed.



3. The only issue for determination, is whether an order of stay of execution of the order of 20th December, 2023 should be granted. The grant of an order of stay of execution pending appeal is provided for under order 42 rule 6 of the Civil Procedure Rules, the relevant part of which states as follows:

- “(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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.
- (2) No order for stay of execution shall be made under subrule (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 may ultimately be binding on him has been given by the applicant.
- (3) ...
- (4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.
- (5) ...
- (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.”

4. An applicant for stay of execution of a decree or order pending appeal is obliged to satisfy the conditions set out in order 42 rule 6(2), aforementioned: namely (a) that substantial loss may result to the applicant unless the order is made, (b) that the application has been made without unreasonable delay, and (c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given. See Antoine Ndiaye v African Virtual University [2015] eKLR.

5. In Butt v Rent Restriction Tribunal [1979], the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that the power of the court to grant or refuse an application for a stay of execution is discretionary, and the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted



so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

6. I am satisfied that the application was made without an extra ordinary or unreasonable delay. On the issue of substantial loss is, it was observed in *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, that:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under order 42 rule 6 of the *CPR*. This is so because execution is a lawful process. 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 ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

7. On 14th February, 2023, pursuant to a consent entered into by the law firms of Mugoye & Associates Advocates and Prof. Tom Ojienda and Associates Advocates, the 2nd Respondent/Applicant and the former County Secretary undertook and paid the sum of KShs. 20,000,000.00 in partial settlement of the Applicant's outstanding debt leaving a balance of Kshs. 133,202,739.00.
8. This matter was scheduled for sentencing on the 18th day of December 2023. This court stayed the sentencing so as to determine this application. On 19th May 2023, the 2nd Applicant, Mrs. Asha Abdi, testified that the - Decretal sum would be settled pursuant to the passing of the Budget.
9. This was followed by the submissions dated 22nd May 2023, the Applicants asked this Honorable Court to give them up to the first week of August 2023 to settle the decretal sums. On 21st July 2023, the Court directed as follows:

“That the Respondents shall cause the payment of the sum of Kshs. 133,202,739.72 on or before 30th August 2023.

That in the event the Kshs. 133,202,739.72 is not paid on or before 30.08.2023, then the court shall proceed to sentence the contemnor.

That the matter will be mentioned on 4.10.2023 to report compliance or for purposes of sentencing.

That when the matter came up on 4th October 2023, the Respondents had not purged the contempt nor paid even a cent towards the settlement of the decretal sums. -

The applicant did not honour the terms of the consent.

through the Orders dated 17th March 2023 directed the Respondents to pay the outstanding sum of Kshs 133,202,739.72 which includes money payable from Misc No. 123 of 2017; Prof Tom Ojienda & Associates v Nairobi County Government and 2 others which they failed to do.



10. On the 21st July 2023, this Honourable court through its Ruling dated 21st July 2024 directed the contemnors to cause the payment.
11. The contemnors further got more time for compliance when the matter was rescheduled from 4th October 2023 to 2nd November 2023. However, despite the wide window of compliance provided to the contemnors there was still no compliance.
12. On the 2nd November 2023, the contemnors had not yet paid the decretal sum and caused further delays in filling numerous applications causing further delay.
13. On the 20th of December 2023 this Honourable Court dismissed the contemnors Application dated 11th December 2023 and set the matter for sentencing on the 14th of February 2024.
14. The Respondent gave the Applicant numerous opportunities to comply with the consent.
15. The last offer to settle was made by the Applicant for the sum of Ksh. 15,000,000.
16. The said consent has not been set aside, nor varied as a result of which the Respondent opted to advance with the contempt proceedings.
17. The consent created duties and obligations on the part of the parties. The applicant has breached the terms of the consent. The respondent has legitimate expectation that the decretal sum would be settled in line with the consent.
18. In support of the application, the applicants have through counsel argued that; the Respondent/Applicants risk losing their liberty, freedom of association and reputation as a result of diligently exercising their duties as public officers. That at all times, the Respondents have acted in good faith; inspite of the contemptuous acts being committed by other previous office holders and in good conscience, the Respondent/Applicants ought to be given an opportunity to secure their liberty.
19. The introduction of an argument that the Respondents herein were not in office when the order citing Mr. Cyrus Musumba and Mr. Hallakhe Waqo was issued and to invoke section 21(4) of the [Government Proceedings Act](#) which shields public officers from being held personally liable for any debts incurred by the Government and any execution proceedings arising therefrom is an afterthought which reeks of mischief.
20. The applicants entered into a consent voluntarily in court in the presence of their advocate. They have partly acted on the consent and proposals to settle the decretal sum. They have made payments albeit small amounts to the respondent. They even made a proposal and a commitment to pay 15 million which happened when the Matter last came up.
21. Parties have even gone to the extent of asking the court to grant them time to negotiate. The Affidavit of Patrick Analo dated 11th December 2023, sets out in detail an accurate account of what the Applicant has done towards settling the claim. The Said Patrick Analo has demonstrated his deep involvement towards settling the decretal sum.
22. He brings out all the efforts that the judgment debtor has put in place towards settling this claim. He has however changed his tune to suit his convenience to the prejudice of the decree holder. This makes a mockery of the court orders. Such is the way of impunity which this court will not countenance.
23. The applicants are not candid and they are blowing hot and cold air so at the same time.
24. The Respondents/Applicants are apprehensive that if the Orders sought are not granted, the Respondent/Applicants shall be condemned for actions perpetrated by others.



25. In advancing the issue of substantive loss the applicants argue that they risk losing their liberty, freedom of association and reputation as a result of diligently exercising their respective duties as public officers and that they shall be condemned for actions perpetrated by others. The court has considered that the applicants entered into a consent to settle the amount herein, made some payments after the consent, made numerous pleas to be given time to settle the claim, offered to continue paying as of the last the matter was before this court.
26. Over and above the foregoing, this court through a ruling of 20th December 2023 dismissed the Application dated 11th December 2023 by the 1st and 2nd Respondents which sought inter alia; this Honourable Court pleased to stay orders issued on the 30th November 2023 for the impending mitigation and sentencing scheduled for the 18 Day of December 2023 pending the hearing and determination of this instant application.
27. The current Application dated 13th February 2024 seeks to stay the impending sentencing of the contemnors as noted in prayer two which states; this Honourable court pleased to stay orders issued on the 20th December 2023 for the pending mitigation and sentencing scheduled for the 14th day of February 2024 pending the hearing and determination of this instant application.
28. The issue of stay of the impending sentencing of the contemnors has been litigated and disposed of by this Honourable Court through the Ruling dated 20th December 2023. It is now res judicata and this Court lacks the jurisdiction to entertain it as it is functus officio.
29. The Respondents/Applicants have also filed a matter at the Court of Appeal being COACAPPL/E050/2024- Patrick Analo Akivanga and Asha Abdi v Prof. Tom Ojienda and Associates which seeks a stay of proceedings herein pending the hearing and determination of the intended appeal.
30. The Applicant is seeking the same orders it sought at the court of appeal. The court finds that the applicants are not acting in good faith. This is an abuse of the court.

Order;

The Application dated 13th February, 2024 is dismissed with costs. The same applies to no. 123 of 2017.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH MARCH 2024.

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J. CHIGITI (SC)

JUDGE

