County Government of Homa Bay v Liech (Environment and Land Appeal 45 of 2021) [2022] KEELC 2589 (KLR) (18 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2589 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY

ENVIRONMENT AND LAND APPEAL 45 OF 2021

GMA ONGONDO, J

MAY 18, 2022

FORMERLY MIGORI ELC APPEAL NO. E037 OF 2021

BETWEEN

COUNTY GOVERNMENT OF HOMA BAY ..... APPLICANT

AND

OKELLO ROBERT LIECH ..... RESPONDENT

RULING

1. On November 16, 2021, the applicant through M/S Nyauke & Company Advocates mounted an application by way of a Notice of Motion dated November 9, 2021pursuant to, inter alia, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 as read with Order 42 Rule 6 and Section 3A, 1A of the *Civil Procedure Act*. Chapter 21 Laws of Kenya. The applicant is seeking the orders infra;

   a) Spent

   b) Spent

   c) Upon hearing inter-partes the honorable court be pleased to stay the subordinate court's judgment pending determination of the appeal.

   d) Costs of this Application be provided for.

2. The application is founded upon grounds (i) to (v) set out on its face which include that the applicant has preferred an Appeal against the subordinate court's judgment issued on July 15, 2021to this honourable court. It is further based on the supporting affidavit of Noah Otieno, the applicant's Chief Finance Officer, sworn on even date and annexed documents including copy of judgment in Homa Bay SPM Court Environment and Land Case No. 18 of 2018, copy of the notice to show cause dated October 19, 2021. There is also a memorandum of appeal dated 10th August 2021 and filed on 16th November 2021.

3. The applicant's case is that on July 15, 2021, judgment was entered in Homa Bay SPM Court Environment and Land Case No. 18 of 2018 against the applicant. Aggrieved with the judgment, the applicant has preferred the instant appeal.

4. The applicant contends that the respondent is in the process of executing the decree and filed a notice to show cause why execution should not issue, which was scheduled for hearing on November 24, 2021against the applicant herein. That if execution issues then the applicant's agent and the deponent herein being the Chief Finance Officer, will be arrested and committed to civil jail, an event that would occasion him irreparable harm.

5. The applicant further contends that the appeal has high chances of success but will be rendered nugatory if execution does issue on the basis of the trial Court's judgment.

6. By a Replying Affidavit sworn on March 7, 2022and filed on March 17, 2022, counsel for the respondent M/S G.S. Okoth & Company Advocates, opposed the application.

7. Counsel deposed, inter alia, that in Homa Bay SPM Court Environment and Land Case No. 18 of 2018, the then 1st defendant and now the appellant/applicant herein filed an application dated November 19, 2019 which raised the same issue as to whether the 1st defendant had *locus standi* to be sued in the instant suit.

8. That the said issue was canvassed by the trial court which ruled in favour of the plaintiff/respondent. The Court dismissed the application as having no merit and ordered the suit to proceed.

9. Counsel contends that the applicant's counsel failed to appeal the said ruling. That the Memorandum of Appeal dated August 10, 2021raises the same issue that the trial court canvassed.

10. It was the respondent's case that such appeal is barred by the doctrine of estoppel and is therefore, incompetent. Thus, the court lacks ground on which to grant an order of stay of execution.

11. To his affidavit, the respondent attached a copy of notice of motion application dated November 19, 2019and affidavit, respondent's grounds of opposition dated 31st January 2020, parties' written submissions and a copy of the applicant's Memorandum of Appeal dated August 10, 2021.

12. On January 26, 2022, the court ordered and directed that the application be argued by way of written submissions pursuant to Order 51 Rule 16 of the Civil Procedure Rules, 2010.

13. Consequently, learned counsel for the applicant filed submissions dated March 2, 2022reiterating the contents of the supporting affidavit. Counsel relied on Order 46 Rule 6(1) and Order 42 Rule 7(2) of the *Civil Procedure Rules*, 2010. Counsel also sought to be guided by the position in Civil Application No. 42 of 2015 *John Gachanja Mundia –vs- Francis Muriira Alias Francis Muthika* (2016) eKLR.

14. Learned counsel for the respondent filed submissions on May 9, 2022and identified four issues for determination namely; whether the appellant has satisfied the court that it would suffer substantial loss unless the order is made and that the application has been made without unreasonable delay; whether the appellant has given or is willing to give security for the due performance of such decree as the court may order and whether the appeal stands any chance of success. In discussing the same, counsel urged this court to dismiss the application and relied on Order 42 Rule 6 (supra), Section 79B of the *Civil Procedure Act* (*supra*), *Antoine Ndiaye –vs- African Virtual University* (2015) eKLR , *Equity Bank Ltd. –vs- Taiga Adams Company Ltd*. (2006) eKLR, among others.

15. From the foregoing, the following issues fall for determination:

    a. Whether the instant appeal is res judicata hence barred by the doctrine of estoppel

b. If the answer to issue no. (a) hereinabove is in the affirmative, whether the applicant has proved the conditions set for grant of orders of stay of execution; and

c. Who should bear the costs of the instant application?

16. The doctrine of *res judicata* is set out in Section 7 of the *Civil Procedure Act* which stipulates thus:

No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.

17. The doctrine of *res judicata* thus, ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.

18. A close reading of Section 7 of *the Act* reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:

i. The suit or issue raised was directly and substantially in issue in the former suit.

ii. The former suit was between the same party or parties under whom they or any of them claim.

iii. That those parties were litigating under the same title.

iv. That the issue in question was heard and finally determined in the former suit.

v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

19. In the memorandum of appeal on record, the applicant/appellant contends that the Honourable Magistrate misdirected himself in law and in fact by holding the appellant liable to the respondent in any way.

20. It is my considered view that the grounds raised in the notice of motion application dated November 19, 2019are not similar to the issue raised in the memorandum of appeal dated 10th August 2021 on the face of it.

21. Further, the memorandum of appeal hereinabove referenced raises triable issues. The same call for hearing of the appeal on its merit.

22. To that extent, it is my finding that the doctrine of res judicata is not applicable to this case.

23. I now proceed to consider the Notice of Motion application dated November 9, 2021on its merits.

24. This court is pretty aware of the conditions as regards an order for stay of execution under Order 42 Rule 6 (*supra*) alongside the Constitutional and statutory provisions under which the application is mounted. Order 42 Rule 6 (*supra*) provides in part that:

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.

25. In the instant case, the applicant's agent, the Chief Finance Officer risks being arrested and committed to civil jail, an event that would occasion the applicant irreparable harm. Those are special circumstances in this application.

26. As regards delay, the period of time between the delivery of the trial court's judgment and the commencement of the application, is borne in mind. So, I am of the considered view that the delay in originating that application is not inordinate.

27. On security for costs, I rely on the provisions of Order 26 rule 1 of the *Civil Procedure Rules*, *supra* which confers discretion on the court. It recognizes that there may be many cases where a call for security for costs may be refused.

28. The court had this to say in the case of *Guff Engineering (East Africa) Ltd –vs- Amrik Singh Kalgi*, at page 281 quoting the dictum of Lord Denning MR in *Sir Lindsay Parkinson & Co. Ltd* (1973) 2WLR 632 and at page 284 quoting Maughan L J in *Gill All Weather Bodies Ltd Vs All Weather Motor bodies Ltd*.

> ''...if there is reason to believe that the company cannot pay the costs, then, security may be ordered, but not must be ordered... Some of the matter which the court might take into account, such as whether the company's claim is bona fide and not a sham and whether the company has reasonably good prospects of success. Again it will consider whether there is an admission by the Defendant on the pleadings or elsewhere that money is due.
>
> ...the court might also consider whether the application for security was being used oppressively – so as to stifle a genuine claim. It would also consider whether the company's wand of means has been brought about by any conduct by the Defendants, such as delay in payment or delay in doing their part of the work.

29. In *Hall -vs- Snowdon Hubbard & Co.* (I), (1899) 1 Q.B 593, the learned Judge at page 594 stated:-

> " The ordinary rule of this court is that, except in applications for new trials, when the respondent can show that the appellant, if unsuccessful, would be unable through poverty to pay the costs of the appeal, an order for security for costs is made."

30. It is my considered view that the conditions stipulated in the authorities cited above have not been met therefore I make no order for security for costs.

31. Moreover, the applicant has an undoubted right of this appeal. I subscribe to the Court of Appeal decision in *Butt –vs- Rent Restriction Tribunal* (1979) eKLR, where it was observed that;

> " It is in the discretion of the court to grant or refuse a stay but what has to be judged in every case is whether there are or not particular circumstances in the case to make an order staying execution. It has been said that the court as a general rule ought to exercise it's best discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett, LJ in Wilson –vs –Church (No. 2) 12 Ch D (1879) 454 at p 459.....
>
> ....and the appellant has an undoubted right of appeal." (Emphasis added)

32. Article 48 of *the Constitution* of Kenya, 2010 anchors the right of access to justice. Furthermore, the applicant is entitled to fair hearing of this appeal as stipulated in Article 50 (1) of the same Constitution.

33. No doubt, the right to be heard before an adverse decision is taken against a person is fundamental and permeates the entire justice system: see *James Kanyiita Nderitu and another-vs- Marios Philotas Ghikas and another* (2016) eKLR and *Onyango Oloo-vs- Attorney General* (1986-89) EA 456.

34. It is trite law that the court has inherent jurisdiction to safeguard the character and integrity of the subject-matter of the appeal, pending the resolution of the contested issues; see the Supreme Court of the Republic of Kenya decision in the case of *Board of Governors, Moi High School, Kabarak and another –vs- Malcolm Bell* (2013) eKLR.

35. Section 13 (7) (a) of the *Environment and Land Court Act*, 2015 (2011) empowers the court to grant interim orders. The Section provides thus:

> In exercise of its jurisdiction under this Act, the Court shall have power to make any order and grant any relief as the Court deems fit and just, including——
>
> (a) interim or permanent preservation orders including injunctions

36. To that end, I find that the application has met the requirements for grant of stay of execution sought therein. The application is merited.

37. A fortiori, the stay order sought in the application dated 9th November 2021 and filed in court on November 16, 2021, be and is hereby granted pending the hearing and determination of the instant appeal.

38. Costs of this application be the costs in the appeal.

39. Orders accordingly.

DELIVERED, SIGNED AND DATED AT HOMA BAY THIS 18TH DAY OF MAY 2022.

G .M .A ONG'ONDO

JUDGE

Ms. Odera, learned counsel for the appellant/applicant

Mr. O.M Otieno holding brief for G.S Okoth, learned counsel for the respondent.

Okello, Court Assistant