



**Barasa v Barasa (Environment & Land Case E010 of 2022)
[2023] KEELC 16444 (KLR) (21 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16444 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E010 OF 2022**

**BN OLAO, J
MARCH 21, 2023**

BETWEEN

MICHAEL ALUKU BARASA APPLICANT

AND

BARNABAS OTWANI BARASA RESPONDENT

(Being an application for stay of execution pending an appeal from the ruling by Hon. L. Ambasi Chief Magistrate delivered on 26th April 2022 in Busia CMC MISC Application No. 33 of 2018)

RULING

1. Michael Aluku Barasa (the Applicant herein) has approached this Court vide his Notice of Motion dated December 13, 2022 seeking against Barnabas Otwani Barasa (the Respondent herein), the following orders:
 - 1) Spent
 - 2) That pending the hearing of this application inter-parte, there be a stay of execution of the ruling dated 26th April 2022.
 - 3) That upon grant of order (2) above, conservatory orders be issued to present status quo ante pending the determination of the appeal filed.
 - 4) That in any event, the Court be pleased to grant any and all such orders as are necessary to meet the circumstances of this case.
 - 5) That costs of this application be borne by the Respondent.
2. The application is predicated upon the provisions of Sections 1, 1B, 3, 3A and 79G of the Civil Procedure Act, Order 42 of the Civil Procedure Rules and Articles 47, 48 and 159(2) of the Constitution.



3. The gist of the application is that the Applicant being dissatisfied with the ruling of the Hon L Ambasi Chief Magistrate delivered on April 26, 2022 in Busia CMC Misc. Application No 33 of 2018 has preferred an appeal. Meanwhile, the Respondent has commenced the process of executing the orders of the trial Magistrate as contained in the said ruling.
4. That the appeal has high chances of success and the Respondent is apprehensive that if those orders are executed, his appeal will be rendered nugatory. That the Applicant's application for stay in the trial Court was dismissed on a technicality on December 6, 2022 (it was actually December 2, 2022). Further, that the Applicant is willing to abide by any conditions which this Court will impose and he will also move with speed to ensure that the appeal is heard and determined in good time. Annexed to the application is a copy of the ruling sought to be appealed.
5. The application is opposed and the Respondent filed grounds of opposition dated January 13, 2023 in which it is stated, *inter alia*, that this application is *res judicata* having been dismissed in the trial Court on December 2, 2022. That the application is also fatally defective for having been filed by a firm of Advocates who are not properly on record given the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) and should therefore be struck out for being an abuse of the process of the court.
6. The Respondent also filed a replying affidavit dated January 13, 2023 in which he deposed that following the ruling of the trial Magistrate dated April 26, 2022 which directed the Land Registrar Busia to revoke the titles to the land parcels No South Teso/Apokor/4325 and 4326 and for the same to revert to the present title No South Teso/Apokor/1005, that order was served upon the said Land Registrar and was implemented by combining the title No South Teso/Apokor/4325 and 4326 to create title No South Teso/Apokor 4916. That the Respondent has no intention of transferring the title to third parties as it has reverted to the original owner who is now deceased. That there is therefore no pending action which can be stayed. That a similar application was dismissed by the trial Court on December 2, 2022 and in any event, counsel for the Applicant is not properly on record. This application is therefore scandalous, frivolous and devoid of merit. It should be dismissed with costs.
7. Annexed to the replying affidavit are the following documents:
 - 1) Copy of the trial Court's ruling delivered in Busia Chief Magistrate's Misc Application No 33 of 2018 on December 2, 2022.
 - 2) Copy of Grant of Letters of Administration issued in Busia Cmc Succession Cause No 37 of 2020 to the Respondent in respect to the Estate of Yohana Obarasa Imotele.
 - 3) Decree issued in Busia ELC Appeal No 3 of 2018.
 - 4) Order issued in Busia CMC Misc Application No 33 of 2018.
 - 5) Register for the land parcel No South Teso/Apokor/4916 in the name of Yohana Obarasa Imojele as a result of the combination of Plots No 4325 and 4328.
 - 6) Certificate of official Search for the land parcel No South Teso/Apokor/4916.
 - 7) Death Certificate for Yohana Obarasa Imojele.
8. When the application was placed before me on December 14, 2022, I noted that the ruling sought to be appealed had not been annexed and I directed that it be availed. On December 22, 2022, I gave further directions that the application be canvassed by way of written submissions. Meanwhile, I certified the application as urgent and granted prayer NO 2.



9 Submissions were subsequently filed both by Mr Okutta instructed by the firm of Ouma Okutta & Associates Advocates for the Applicant and by Mr Okeyo instructed by the firm of Okeyo Ochiel & Company Advocates for the Respondent.

10 I have considered the application, the rival affidavits and grounds of opposition as well as the respective submissions by counsel.

11 Before I delve into the merits of the application, the Respondent has raised two jurisdictional issues which I must first determine. This is because if I up-hold them, then I must down my tools and move no further. Those two issues are:

- 1) That the application is res judicata.
- 2) That the application is fatally defective having been filed by an Advocate who is not properly on record contrary to Order 9 of the *Civil Procedure Rules*.

I shall therefore consider those issues in that sequence.

Res Judicata

12. In ground No 3 of the grounds of opposition, the Respondent states:

3: “That the application herein is therefore res judicata having been made and dismissed before the trial court”

A plea of re judicata which is provided for under Section 7 of the *Civil Procedure Act* has the effect, if it is up-held, of bringing proceedings to an end. It also applies to both suits as well as to applications – *Kanorero River Farm Ltd & Others v National Bank of Kenya Ltd* 2002 KLR 207.

13. It is not in dispute that a similar application was canvassed before the trial Magistrate and dismissed vide a ruling delivered on December 2, 2022. That ruling was pursuant to a Notice of Motion dated July 4, 2022 and also premised under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. It also sought a stay of the ruling dated April 26, 2022. However, Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules* allows a party to seek orders of stay both in the trial Court and in appellate Court. It reads:

6 (1) “No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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.” Emphasis added.

It is therefore clear from Rule 6(1) above that the Applicant being dissatisfied by the ruling of the trial Court declining his application for stay of execution pending appeal had the option of filing a similar application in



this Court or also appealing the same to this Court. Secondly, the trial Court and this Court exercise different jurisdictions while considering such an application. In the circumstances, the plea of *res judicata* is not well taken and must be declined.

2. The Application is Fatally Defective and Contravenes Order 9 Rule 9 of The Civil Procedure Rules.

14. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides that:

“Where there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court -

- a. upon an application with notice to all the parties; or
- b. upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

Other than the ruling delivered on December 2, 2022 by the trial Magistrate and several orders made, the Respondent has not informed this Court which counsel was appearing for the Respondent in the subordinate Court. All that the counsel for the Respondent has submitted on that issue is that:

“We urge your Lordship to find that the application is filed by a firm of Advocates that is not properly on record and proceed to strike out the application.”

It would have helped if counsel would have specified which counsel previously appeared for the Applicant or if he was acting in person. A perusal of some of the documents suggest that the Applicant was previously represented by the firm of J. P. Makokha Advocates. It is true, however, that where there has been a change of Advocates, the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) must be complied with. However, failure to do so is not fatal. This was considered in the case of [Tom M. Wafubwa -v- Bishop Ben Butali](#) 2017 eKLR where the Court of Appeal said:

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the [Court of Appeal Rules, 2010](#) or the [Supreme Court Rules, 2010](#). Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate. As this dispute concerned an appeal from the Principal Magistrate’s Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondent’s counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the court to be placed on record.

That Court went on to add that:

“We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of the [Constitution](#) and the overriding principles could be called upon to aid the court



to dispense substantive justice through just, efficient and timely disposal of proceedings.” Emphasis added.

The Court went on to cite its own decision in the case of *Bonface Kiragu Waweru -v- James K. Mulinge* 2015 eKLR where, while addressing the issue of non-compliance with the then Order 111 Rule 9A of the *Civil Procedure Rules* which was a replica of the current Order 9 Rule 9, said:

“First, non-compliance with Order 111 Rule 9A of the *Civil Procedure Rules* did not go to the root of the proceedings. By that we do not mean to say that that provision was put on the statute book simply to decorate it. It has a purpose to serve in that the Court should sanction the change of representation in person or by advocate particularly after judgment has been entered. The lawyer to be “replaced” should be notified of the changes because, after judgment has been entered, proceedings are at a crucial stage.

Accordingly, we hold the view that counsel who all along, was on record having expended money and time in the process, ought to know when a change in representation occurs in order to take course to secure his costs.

And for the Court, it is necessary to give an order for the change so that it is known as to the cause further conduct of the case shall take and who to serve with Court process. So either way, the change of representation after judgement has been entered, to us, meant ensuring the orderly conduct of further proceedings and not to expose the lawyer being replaced to the risk of loss of fees or other.

All in all, we are not persuaded that non-compliance with order 111 Rule 9A of the *Civil Procedure Rules* was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all ...” Emphasis added.

15. Therefore, although there was non-compliance with this provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, I did not hear the Respondents complain of any prejudice caused to him and neither has the jurisdiction of this Court been undermined. I am therefore not satisfied that this application is a nullity or defective.
16. Having disposed off the issues of res-judicata and competency of the application, I will now consider its merits or otherwise.
17. The Applicant basically seeks a stay of execution of the ruling dated April 26, 2022 pending the hearing and determination of the appeal. I have already cited the relevant provisions of Order 42 Rule 6(1) and (2) of the *Civil Procedure Rules*. The jurisdiction of this Court in determining such an application was circumscribed by the Court of Appeal as follows in *Visbham Ravji Halai & Another v Thornton & Turpin [1963] Ltd* KLR 365:

“The Superior Court’s discretion to order a stay of execution of its order or decree is fettered by three conditions. Firstly, the applicant must establish a sufficient cause, secondly the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly the applicant must furnish security. The application must of course be made without unreasonable delay.”



Substantial loss is the “cornerstone” of this jurisdiction as was held by Platt Ag J A (as he then was) in *Kenya Shell Ltd v Benjamin Kibiru* 1982 – 88 1 KAR 1018 [1986 KLR 410].

18. The ruling sought to be stayed is fairly short. I find it prudent therefore to set it out in extenso in order to appreciate what the trial Magistrate decreed. It reads:

1. “The Notice of Motion of June 14, 2022 be and is hereby allowed in terms of prayer 3.
2. Court takes note that the Respondent failed to comply with mandatory procedure requirements of Order 50 of Raila II that Article 159 is not a panacea cure for all non-compliance of requisite procedural law and sneak in grounds is clearly grounds of procedure. The grounds are basically one that substantive orders in Mis application. But the Respondent obtained the initial orders in a Misc Exparte orders of Notice of Motion of June 2022.
3. We appealed and set aside those orders in High Court Appeal 3 of 2018.
4. The sub-division emanated from an order that was set aside. Prayer 3 be allowed for land to revert back to South Teso. The Notice of Motion that commence this cause of action is also so intentionally defective not being a suit.
5. Petitioner on Originating Summons – costs to applicant. Right of appeal.

Hon Mrs Lucy Ambasi

Chief Magistrate, Busia.”

I must say I have had considerable difficulties comprehending the said ruling. Counsel for the Applicant shares the same view and has submitted thus in paragraph 5 of his submissions:

“The said ruling cannot be correctly deciphered to provide any meaning to the litigants and or any person interested in it.”

I would not agree more. It is not clear what can possibly be stayed in that ruling.

19. The above notwithstanding, substantial loss, as I have said, is the cornerstone of such an application. The Applicant has not indicated either in the Notice of Motion itself or the supporting affidavit the nature of loss he is likely to suffer if the order of stay is denied and that such loss, if any, will be substantial.

On that basis alone, this application is for dismissal.

20. The Applicant has however deposed in paragraph 11 of his supporting affidavit that he is willing to abide by any conditions which this Court will order as a condition for stay. That is sufficient offer of security. And since he has already filed an appeal, he has established sufficient case.

21. The Applicant was also required to file this application “without reasonable delay.” The ruling sought to be stayed was delivered on April 26, 2022. This application was filed on December 13, 2022 some 8 months later. That delay is not only unreasonable but no attempt has been made to explain why the Applicant did not approach this Court earlier. Again on the basis of “unreasonable delay,” this application is clearly for dismissal.

22. The Applicant has only met two out of the four requirements to be entitled to the orders of stay of execution pending appeal.

23. Most fundamentally, the Respondent has deposed in paragraphs 4 and 5 of his replying affidavit that following the ruling delivered on April 26, 2022, the Land Registrar Busia proceeded to cancel the



title to the land parcels No South Teso/Apokor/4326 and 4325 which reverted back to the parent title No South Teso/Apokor/1005 and subsequently to the land parcel No South Teso/Apokor/4916 now registered in the names of Yohana Obarasa Imojele (deceased). A copy of the register was annexed to the replying affidavit. The Respondent has added therefore that there is nothing pending and capable of being stayed since the orders emanating from the ruling delivered on April 26, 2022 have been implemented. That assertion has not been rebutted. In the circumstances, that would mean that there is no pending action to necessitate an order of stay of execution. The term stay is defined in *Black's Law Dictionary* 10th Edition as:

“The postponement or halting of a proceeding judgment, or the like. An order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding – Also termed stay of execution; suspension of judgment.”

In the case of *Kileleshwa Service Station Ltd v Kenya Shell Ltd* 2008 eKLR, the Court of Appeal affirmed the definition of stay in *Black's Law Dictionary* 6th Edition page 1413 that:

“A stay does not reverse, annul, undo or suspend what already has been done or what is not specifically stayed nor pass on the merits of orders of the trial Court, but merely suspends the time required for performance of the particular mandates stayed, to preserve a status quo pending appeal.”

Therefore if, as has been deposed by the Respondent, and without rebuttal by any supplementary affidavit, that the orders emanating from the ruling dated April 26, 2022 have been fully implemented, there is nothing remaining to be stayed. To grant the orders sought will be acting in vain. Courts do not act in vain.

24. The up-shot of all the above is that the Notice of Motion dated December 13, 2022 is devoid of any merit. It is accordingly dismissed with costs.

BOAZ N. OLAO

JUDGE

21ST MARCH 2023

RULING DATED, SIGNED AND DELIVERED AT BUSIA ELC ON THIS 21ST DAY OF MARCH 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 6TH FEBRUARY 2023.

BOAZ N. OLAO

JUDGE

21ST MARCH 2023

