**Kiptum v Njau & another (Environment & Land Case 292 of 2013)**
**[2023] KEELC 16869 (KLR) (20 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16869 (KLR)

**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT ELDORET**

**ENVIRONMENT & LAND CASE 292 OF 2013**

**JM ONYANGO, J**

**APRIL 20, 2023**

**BETWEEN**

**CYNTHIA CHEPKEMBOI KIPTUM ..... PLAINTIFF**

**AND**

**MICHAEL KAMAU NJAU ..... 1ST DEFENDANT**

**SILA CHERUIYOT KEMBOI ..... 2ND DEFENDANT**

**RULING**

1. By a Notice of Motion dated November 29, 2022 the Plaintiff/Applicant filed an application seeking the following orders:

    a. Spent

    b. That the firm of Kesse and Kesse Advocates be granted leave to come on record for the Plaintiff/ applicant in place of the firm of Arap Mitei& Co Advocates.

    c. That there be a stay of execution of the judgment and orders of this Honourable court dated November 15, 2022 pending the hearing of the application inter partes.

    d. That there be a stay of execution of the judgment and orders of this Honourable court dated November 15, 2022 pending the hearing of the appeal lodged at the Court of Appeal.

    e. The costs of this application be in the cause.

2. The application is based on the grounds set out on the face of the Notice of Motion and the Applicant's supporting affidavit sworn on the November 29, 2022. The gist of the application is that the Applicant being dissatisfied with the judgment of this honourable court delivered on the November 15, 2022 intends to lodge an appeal in the Court of Appeal and has duly filed a Notice of Appeal. The Applicant

is apprehensive that the Respondent will execute the judgment and the detriment of the applicant thus rendering her appeal nugatory.

3. The Defendant/Respondent has filed a Replying affidavit opposing the application. He contends that the Applicant's suit having been dismissed, the court issued a negative decree which is incapable of being executed and therefore there is nothing to stay. The Applicant has also taken issue with the fact that the firm of Kesse & Kesse has not followed the right procedure in seeking to come of record after judgment in place of the firm of Arap Mitei & Co Advocates.

4. The application was disposed of by way of written submissions and both parties filed their submissions and authorities.

Having considered the application, affidavits, and rival submissions and authorities relied on by the parties the issues for determination are twofold:

i. Whether the firm of Kesse and Kesse advocates should be allowed to come on record after judgment in place of the firm of Arap Mitei & Co Advocates.

ii. Whether the Applicant should be granted a stay of execution pending appeal.

Order 9 rule 9 of the *Civil Procedure Rules* provides as follows:

5. When there is a change of advocates, 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.

6. Although the right to be represented by advocate of a person's choice is enshrined in Article 50 (2) g of the *Constitution*, it is clear that the procedure set out in Order 9 rule 9 must be followed for any change of advocates to be effected after delivery of judgment. The rationale for the said provision was explained in the case of *K Tawardi v Veronica Muchiman* (2019) eKLR where the court observed that:-

> " In my view the essence of Order 9 rule 9 of the *Civil Procedure Rules* was to protect advocates from mischievous clients who will wait until a judgment is delivered and then sack the advocate or replace him"

7. The procedure in Order 9 rule 9 clearly indicates that the application for change of advocates must be served upon all the parties. In the instant case, the application was not served upon the firm of Mitei & Company Advocates who previously acted for the Plaintiff. No explanation has been given why the said firm was not served as required by the provisions of Order 9 of the *Civil Procedure Rules*. In the case of *Stephen Mwandware Ndighila v Steel Makers Limited* (2022) eKLR the court faced with a similar situation found that the firm of Advocates that sought to come on record for the Applicant was not properly on record. The court relied on the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* (2012) eKLR where it was held that:

> " A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of

procedure, the court may well be entitled to conclude that failure to comply therewith was deliberate"

8. In view of the foregoing, it is my finding that the firm of Kesse & Kesse Advocates are not properly on record for the Applicant and they had no legal standing to file this application and the same is therefore incompetent.

9. Be that as it may, I will proceed to consider whether the order for stay of execution should be granted. Order 42 Rule 6 of the *Civil Procedure Rules* sets out the principles that should guide the court in considering an application for stay pending appeal. In particular Order 42 Rule 6(2) provides as follows:

(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 may ultimately be binding on him has been given by the applicant.

10. In order to grant the order for stay of execution the court must be satisfied that the above three conditions have been met. With regard to substantial loss, the applicant has averred that the Respondents are in the process of executing the judgment and she risks being evicted. There is no evidence in support of her averment that she is threatened with eviction as the court in its judgment merely dismissed the Applicant's suit but did not issue any eviction order. The dismissal being a negative order is not capable of being stayed. In arriving at this finding I am guided by the case of *Jennipher Akinyi Osodo v Boniface Okumu Osodo & 3 Others* ( 2021) eKLR where the court held as follows:

> " With regard to the first prayer, a cursory perusal of the record herein shows that the High Court vide its judgment dated July 30, 2020 merely dismissed the Applicant's case with costs to the Respondents. The parties were not ordered to do anything or refrain from doing anything. What was therefore issued by the High Court is in the nature of a negative order incapable of execution and as such there is nothing to stay.

See *Western College of Arts and Applied Sciences v EP Oranga & 3 others* [1976] eKLR where the learned judges of Appeal stated thus:

> " what is there to be executed under the judgment, the subject of the intended appeal" The High Court has merely dismissed the suit, with costs. Any execution can only be in respect of costs. In *Wilson v Church* the High Court had ordered the trustees of a fund to make a payment out of that fund. In the instant case, the High Court has not ordered any of the parties to do anything, or to refrain from doing anything, or to pay any sum. There is nothing arising out of the High Court judgment for this Court, in an application for a stay, it is so ordered."

11. On the question of delay, the judgment was delivered on November 15, 2022 while the application was filed on November 29, 2022. I do not consider a delay of 14 days to be inordinate.

12. The third and last condition that the applicant was required to satisfy is to furnish security for costs. Although counsel for the Applicant has submitted that the Applicant is willing to deposit security for costs for the due performance of the decree, this is not mentioned in her Supporting Affidavit.

In the case of *Kiplangat Kotut v Rose Jebor Kipngok* (2015) eKLR the Court observed as follows:

> " Evidently, the three (3) prerequisite conditions set out in the said Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 cannot be severed. The key word is "and". It connotes that all three (3) conditions must be met simultaneously. "

13. From the above analysis it is clear that the Applicant has not met all the three conditions for stay pending appeal. In the premises, I have come to the inescapable conclusion that the application lacks merit and the same is hereby dismissed with costs to the Respondents.

**DATED SIGNED AND DELIVERED VIRTUALLY THIS 20TH DAY OF APRIL, 2023**

**.....**

**J.M ONYANGO**

**JUDGE**

In the presence of:

1. Mr. Kesse for the Plaintiff/Applicant

`2. Miss Kemboi for Miss Odwa for the Defendant/Respondent

Court Assistant: Antony Oniala