



Gichunge v Mwamba (Suing as the Administrator of the Estate of Lily Kroki Mwamba) & another (Environment and Land Appeal E004 of 2022) [2023] KEELC 17589 (KLR) (31 May 2023) (Ruling)

Neutral citation: [2023] KEELC 17589 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT CHUKA
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

CK YANO, J

MAY 31, 2023

BETWEEN

ALEX KINYUA GICHUNGE APPELLANT

AND

MAUREEN MWENDE MWAMBA (SUING AS THE ADMINISTRATOR OF THE ESTATE OF LILY KROKI MWAMBA) 1ST RESPONDENT

PATRICK NTHIGA NABEA 2ND RESPONDENT

RULING

1. The application before me for determination is the Notice of Motion dated October 31, 2022 brought under order 42 rule 6 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* and all other enabling provisions of the law. The Appellant/Applicant is seeking orders of stay of execution of the decree issued by the Senior Resident Magistrate at Chuka Court on September 23, 2022 in ELC Case No 20 of 2019 pending the hearing and determination of the appeal herein. The application is supported by the affidavit of Alex Kinyua Gichunge, the Applicant sworn on October 31, 2022 and is premised on the grounds that the Applicant will suffer substantial loss if the decree issued by the subordinate court is implemented as his registration as the registered owner of land Parcel No Karingani/Ndagani/6836 the subject of this appeal is revoked by the Land Registrar and that the appeal shall be rendered nugatory. The Applicant further contends that the application herein has been made without unreasonable delay.
2. In the affidavit in support of the application, the Applicant has annexed copies of the pleadings, judgment and decree in ELC Case No 20 of 2019.
3. The application is opposed by the 1st Respondent through a Replying Affidavit sworn on January 6, 2023 in which she summarized the proceedings that were before the subordinate court and has annexed



copies of various documents, judgment and decree. The 1st Respondent has deponed that the suit land is where she calls home and where her mother was laid to rest and where her grandmother resides. She denied that the Applicant will suffer substantial loss and damage if the decree issued is implemented since he does not reside nor undertake anything on the land. The 1st Respondent avers that she has no intention of disposing of the suit land, adding that the appeal is not arguable. The 1st Respondent also pointed out that the Applicant has not deposited or undertaken to deposit any security for the due performance of the decree. The 1st Respondent argued that the application lacks merit and urged the court to dismiss the same with costs.

4. The application was canvassed by way of written submissions. The Applicant submitted inter alia, that he will suffer substantial loss if the decree is executed during the pendency of this appeal as the appeal will be rendered nugatory in that title deed to land parcel No Karingani/NDagani/6836 will be revoked by the Land Registrar as per the court orders. The Applicant submits that the application is for preservation of the status quo pending the hearing and determination of the appeal.
5. The Applicant further submits that the firm of Ojwang Sombe & Co Advocates who drew and filed the replying affidavit is not properly on record as the 1st Respondent was represented by the firm of IC Mugo & Co Advocates until judgment was delivered in the lower court. It is the Applicant's submission that the filing of a notice of appointment by the current firm is incompetent and offends the provisions of order 9 Rule 9 of the Civil Procedure Rules. The Applicant further submits that he is ready to deposit security as may be ordered by the court for a stay to be granted.
6. The 1st Respondent submits inter alia that the Applicant has not proved how he will suffer loss once the decree is executed. The 1st Respondent relied on the case of Joackim Ngugi Kiarie v Ul-Yate & Others, Nairobi Civil Suit No 1029 of 1982; James Wangalwa & Another v Agnes Naliaka Cheseto [2012] eklr; Equity Bank Ltd v Taiga Adams Co Ltd [2006] eklr; Elena D Korir v Kenyatta University [2012] eklr; Arun C Sharma vs Ashana Raikundalia t/a Rairundalia & Co Advocates & 2 Others [2014] eklr and Mohammed Salim t/a Choice Butchery v Nasserpuria Memon.
7. The 1st Respondent further submits that the application has not been filed timeously. On the issue of the 1st Respondent's advocate, the 1st Respondent submitted that the appeal was taken over by Kituo cha Sheria after the grandmother of the 1st Respondent sought assistance since she could not raise legal fees. That the firm on record was appointed by the said organization as a volunteer advocate and submit that the issue is a technicality and that justice should be administered without undue regard to technicalities as provided under article 159(2)(d) of the constitution and section 3A of the Civil Procedure Act. The 1st Respondent also cited sections 1A and 1B of the Civil Procedure Act, section 3(1) and 19(1) of the Environment and Land Court Act, and pointed out that there is a consent filed between the two advocates before filing of submissions.
8. I have considered the application and the submissions filed. Order 9 Rule 9 of the Civil Procedure Rules provides as follows:
 - “9. When 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.
 - 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.”



9. In this matter, there is no dispute that the 1st Respondent was being represented by the firm of I C Mugo & Co Advocates. There is also no dispute that judgment was entered by the lower court on September 23, 2022. The 1st Respondent filed a Replying Affidavit and a Notice of Appointment of advocate by the firm of Ojwang Sombe & Co Advocates on January 9, 2023. Order 9 Rule 9 is clear that no new advocate can take over the conduct of a suit which was finally determined without the leave of the court through a formal application or by consent of the outgoing advocate. In this case, the consent was filed on February 23, 2023. It is clear therefore that as at January 9, 2023, the firm of Ojwang Sombe & Co Advocates was not properly on record, and the documents filed on January 9, 2023 or before February 23, 2023 when consent was filed by the said firm were filed by a firm that was not properly on record and are incompetent. The violation of the mandatory provisions of Order 9 Rule 9 in my view, cannot be regarded as a mere technicality. I will therefore proceed to treat the application as unopposed.
10. The relief of stay of execution pending appeal is governed by Order 42 Rule 6 of the [Civil Procedure Rules](#). The relief is discretionary, but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant.
11. In determining whether sufficient cause has been shown the court should be guided by the three pre-requisites provided under Order 42 Rule 6. Firstly, the application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicant unless stay of execution is granted; and thirdly, 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.
12. From the record, the decree appealed against was made on September 23, 2022 and the application herein was filed on November 1, 2022. This was after a period of about 41 days. The application in my view was filed timeously.
13. Regarding the second pre-requisite in Order 42 Rule 6, that is substantial loss occurring to the Applicant, I wish to refer to the case of [Kenya Shell Limited v Benjamin Karuga Kigibu & Ruth Wairimu](#) [1982-1988] KAR 108 where the Court of Appeal states:

“It is usually a good rule to see if Order 41 Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting stay.”
14. In the present case, the Applicant has stated that he will suffer substantial loss and the appeal rendered nugatory because the registration of the suit land in his name may be revoked. In this case, it is not in dispute that the suit land is registered in the applicant’s name. I am satisfied that unless the orders sought herein are granted, the transfer may be effected and which action no doubt will result in substantial loss and may render the appeal nugatory. The Applicant has however stated that he is ready to give security as the court may order. Therefore, the court finds merit in the application dated October 31, 2022 and allows the same in the following terms:
 - a. Stay of execution of the decree in Chuka CMCC ELC Case No 20 of 2019 is granted pending the hearing and determination of the appeal herein.
 - b. The Applicant shall provide security to the amount of Kshs 160,000/= to the Respondent within a period of thirty days from the date of this ruling.



- c. The said amount to be deposited into a joint interest earning account in the names of the respective advocates in a reputable bank of their choice.
- d. In default of compliance with the provisions of such security, the stay orders granted herein shall lapse automatically.
- e. Costs of the application shall abide the outcome of the appeal.

15. Orders accordingly.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 31ST DAY OF MAY, 2023.

In the presence of:

CA: Martha

Muriithi h/b for Ms. Muthoni Ndeke for Respondents

Ms. Kijaru h/b for Ms. Musyimi for Appellant

C. K. YANO,

JUDGE.

