



Kamwere (Suing as administrator of the Estate of John Kamwere Gichuhi – Deceased) & another v Nderitu (Environment & Land Case 19 of 2018) [2023] KEELC 19170 (KLR) (20 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19170 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU
ENVIRONMENT & LAND CASE 19 OF 2018**

YM ANGIMA, J

JULY 20, 2023

BETWEEN

RUTH WANJERI KAMWERE (SUING AS ADMINISTRATOR OF THE ESTATE OF JOHN KAMWERE GICHUHI – DECEASED) 1ST PLAINTIFF

GEORGE KIMANI & DAVID KANOGA KAGOMA (SUING AS ADMINISTRATOR OF THE ESTATE OF ELIUD KIARII KAGOMA - DECEASED) 2ND PLAINTIFF

AND

VINCENT NYINGI NDERITU DEFENDANT

RULING

A. Introduction and Background

1. By a judgment dated March 2, 2023 the court delivered judgment on the Plaintiffs' suit and the Defendant's counterclaim as follows:
 - a. The Plaintiffs' suit be and is hereby dismissed in its entirety.
 - b. The Defendant's counterclaim be and is hereby allowed in the following terms:
 - i. The Plaintiffs shall deliver vacant possession of the respective portions of Parcel No Nyandarua/Njabini/615 in their occupation or utilization.
 - ii. A permanent injunction be and is hereby issued restraining the Plaintiffs by themselves, their agents or servants from trespassing upon or in any manner whatsoever interfering with Parcel No Nyandarua/Njabini/615.
 - iii. The claim for mesne profits is hereby declined.



- c. Each party shall bear his own costs of the suit and the counterclaim.
 - d. For the avoidance of doubt, this judgment does not apply to Simon Waweru Gichuri since the counterclaim against him had abated.
2. Being aggrieved by the said judgment the Plaintiffs filed a notice of appeal intimating their desire to appeal the said decision before the Court of Appeal. Pending the lodging of the intended appeal the Plaintiffs filed the instant application for stay of execution pending appeal.

B. The Plaintiffs' Instant Application

3. Vide a notice of motion dated March 10, 2023 based upon Sections 1A, 1B & 3A of the *Civil Procedure Act* (Cap 21), Order 42 rule 6 and Order 51 rule 1 of the *Civil Procedure Rules, 2010* (the Rules) the 1st and 2nd Plaintiffs sought the following orders:
- a. Spent;
 - b. That this honourable court be pleased to order for stay of execution of the judgment and or decree made on March 2, 2023 by Hon Justice YM Angima pending hearing and determination of the intended appeal.
 - c. Spent;
 - d. Spent;
 - e. That costs of this application be provided for.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn on March 10, 2023 by the 1st Plaintiff, Ruth Wanjeri Kamwere on her own behalf and on behalf of the 2nd Plaintiff. The Plaintiffs' application was based on essentially three main grounds. First, it was contended that they shall suffer substantial loss unless the stay sought was granted. Second, that the outcome of their intended appeal shall be rendered nugatory in the absence of a stay. Third, that the application was filed expeditiously and without unreasonable delay. The Plaintiffs contended that they had been in occupation of the suit property for a long time and they stood to lose their land and to suffer a social crisis and ridicule if they lost their land.

C. The Defendant's Response

5. The Defendant filed a replying affidavit sworn on March 23, 2023 in opposition to the application upon, inter alia, the following grounds:
- a. That the application was misconceived, lacking in merit and otherwise an abuse of the court process.
 - b. That the Plaintiffs' advocates, M/S Wachakana & Company Advocates, were not properly on record.
 - c. That the Plaintiffs had failed to satisfy the legal requirements for the grant of a stay under Order 42 rule 6 of the Rules. In particular, it was contended that there was no evidence of substantial loss in the absence of a stay.
 - d. That there was no evidence that the intended appeal shall be rendered nugatory in the absence of a stay.



- e. That the Plaintiffs had not offered any security for due performance of the decree should the intended appeal ultimately fail.

D. Directions on Submissions

6. When the application was listed for inter partes hearing, it was directed that it shall be canvassed through written submissions. Consequently, the parties were given timelines within which to file and exchange their respective submissions. The record shows that the Plaintiffs' submissions were filed on March 31, 2023 whereas the Defendant's submissions were filed on May 3, 2023.

E. Issues for Determination

7. The court has considered the Plaintiffs' notice of motion dated March 10, 2023, the Defendant's replying affidavit as well as the material on record. The court is of the opinion that the following are the key issues for determination herein:
 - a. Whether the firm of Wachakana & Co Advocates is properly on record for the Plaintiffs.
 - b. Whether the Plaintiffs have satisfied the conditions for the grant of a stay pending appeal.
 - c. Who shall bear costs of the application.

F. Analysis and Determination

a. Whether the firm of Wachakana & Co Advocates is properly on record for the Plaintiffs

8. The court has considered the material and submissions on record on this issue. The Defendant submitted that whereas the Plaintiffs were represented by the firm of M/S Irungu Mwangi Nganga TT & Co Advocates at the trial the firm of M/S Wachakana & Co Advocates had purported to file a notice of appeal and the instant application for stay without leave of court and without obtaining the consent of the firm of Irungu Mwangi Nganga TT & Co Advocates. It was submitted that there was a violation of the provisions of Order 9 rule 9 of the Rules in that regard and consequently the instant application was incompetent and ought to be struck out. The Defendant relied upon the case of [James Tongi Miruka v James Mauti Ombacho \[2022\]](#) eKLR in that regard.
9. The Plaintiffs, on the other hand, submitted that their advocates had simply filed a notice of appointment of advocates after judgment and not a notice of change of advocates. It was submitted that Order 9 rule 9 of the Rules did not cover the current situation. In the alternative, it was submitted that the issue of obtaining leave of court or the consent of the earlier advocates on record was a procedural technicality which was curable under Article 159(2) (d) of the Constitution of Kenya, 2010.
10. The court has noted from the record that there is no indication on record to show that the firm of Wachakana & Co Advocates was appointed by the Plaintiffs to act alongside the firm of M/S Irungu Mwangi Nganga TT & Co Advocates. The notice of appointment dated March 8, 2023 does not state so. Similarly, when the current advocates introduced themselves to court at the hearing of the application, they did not inform the court that they were acting together with the earlier law firm. It is apparent that the instant application was solely filed and prosecuted by the firm of Wachakana & Co Advocates. The court is thus satisfied that there has been a change of advocates in this suit after judgment and that the notice of change of advocates was mischievously camouflaged as a notice of appointment in order to evade the application of Order 9 rule 9 of the Rules. In the premises, the court finds and holds that the firm of M/S Wachakana & Co Advocates is not properly on record for the Plaintiffs.



11. Notwithstanding the above finding, the court is of the opinion that the said irregularity is a procedural violation of the rules of representation of litigants in civil proceedings. The court is further of the opinion that the said violation is curable under the provisions of Section 19(1) of the *Environment and Land Court Act* and Article 159(2)(d) of the *Constitution* of Kenya, 2010. Consequently, the court shall proceed to consider the Plaintiffs' application for stay of execution of merit.

b. Whether the Plaintiffs have satisfied the conditions for the grant of a stay pending appeal

12. The court has considered the material and submissions on record on this issue. The Plaintiffs submitted that they had satisfied the requirements for the grant of a stay of execution of the decree. It was submitted that the Plaintiffs had been in possession of the disputed property for a long period of time and that they stood not only the risk of losing it but also of being exposed to what they called a 'social crisis' and 'ridicule'. They also contended that their intended appeal stood the risk of being rendered nugatory in the event of the appeal being successful.

13. The principles to be considered in granting or refusing an application for stay of execution are set out in Order 42 rule 6(2) of the *Rules* as follows:

(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.'

14. In the case of *Butt v Rent Restriction Tribunal [1979]* eKLR the court made the following observations with respect to an application for stay pending appeal:

' 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 discretion in a way so as not to prevent the appeal, if successful from being nugatory, per Brett IJ in *Wilson v Church* (No 2) 12 Ch.D [1879] 454 at page 459. In the same case, Cotton IJ said at page 458: 'I will state my opinion that when a party is appealing, exercising his undoubted right of appeal, this court ought to see that the appeal, if successful, is not nugatory.'

15. So, what is the meaning of the term 'nugatory?' In the case of *Shah & Partners Ltd v National Social Security Fund Board of Trustees & 3 Others [2018]* eKLR the Court of Appeal quoted the meaning of the term 'nugatory' as rendered in the case of *Stanley Kangethe Kinyanjui & Tony Ketter & 5 Others [2013]* eKLR as follows:

- ix) The term 'nugatory' has to be given its full meaning. It does not only mean worthless, futile or invalid. It also means trifling. *Reliance Bank Ltd v Norlake Investments Ltd* [2002] 1 EA 227 at page 232.
- x) Whether or not an appeal will be rendered nugatory depends on whether or not what is sought to be stayed if allowed to happen is irreversible, or if it is not reversible whether damages will reasonably compensate the party aggrieved.'

16. It is evident from the Plaintiffs' supporting affidavit that they have not explained the nature and extent of the substantial loss they stood to suffer in the absence of a stay order. Apart from stating that they



stood to lose their land and that there was risk of suffering a social crisis and ridicule, there was no evidence of substantial loss tendered by the Plaintiffs. The nature and effect of the alleged social crisis was not disclosed. The nature effect of the alleged ‘ridicule’ was also not disclosed.

17. There was no allegation in the supporting affidavit that the Plaintiffs’ dwelling houses or other permanent structures stood on the portion of land they were required to restitute to the Defendant. There was no evidence to demonstrate that those portions of land had any special religious, social, cultural or environmental significance to the Plaintiffs. In the premises, the court is far from satisfied that the Plaintiffs have demonstrated the element of substantial loss within the meaning of Order 42 rule 6(2) of the Rules.
18. On the Plaintiffs’ apprehension of their intended appeal being rendered nugatory, the court finds no evidence of such a risk on record. The nature of the Defendant’s counterclaim was that the Plaintiffs had wrongfully encroached upon and occupied portions of his parcel No 615. In its judgment dated March 2, 2023 the court found that the Plaintiffs were liable for the encroachment and ordered them to vacate and return the said portions to the Defendant. There is no evidence on record to demonstrate that the Plaintiffs shall be unable to recover the said portions of land from the Defendant should their intended appeal ultimately succeed. There is no evidence or even allegation by the Plaintiffs that the Defendant intended to alienate, charge, lease or dispose of the said portions of land before the hearing and determination of the intended appeal. The court is unable to see anything in the decree on the counterclaim which is not reversible or which cannot be adequately compensated by an award of damages.
19. There is no doubt from the material on record that the application for stay was indeed filed expeditiously and without unreasonable delay. The record shows that judgment was delivered on March 2, 2023 whereas the instant application was filed on March 10, 2023. However, it must be remembered that filing an application expeditiously without demonstration of substantial loss would not justify the granting of a stay. Consequently, the court finds and holds that the Plaintiffs have failed to satisfy the requirements for the grant of a stay as stipulated under Orders 42 rule (6)(2) of the Rules.

c. Who shall bear costs of the application

20. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the Civil Procedure Act (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons v Twentsche Overseas Trading Co Ltd* [1967] EA 287. The court finds no good reason why the successful litigant should not be awarded costs of the application. Accordingly, the Defendant shall be costs of the application.

G. Conclusion and Disposal Order

21. The upshot of the foregoing is that the court finds no merit in the Plaintiffs’ application for stay of execution of the decree pending appeal. Accordingly. The Plaintiffs’ notice motion dated March 10, 2023 is hereby dismissed with costs to the Defendant.

It is so ordered.

RULING DATED AND SIGNED AT NYAHURURU THIS 20TH DAY OF JULY, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Wachakana for the Plaintiffs



Mr. Musungu for the Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

