



**Mwangi (Suing as the Personal Representative of the Estate of the
Late Onesmus Mwangi Kamau) v Numi (Environment & Land Case
2754 of 1995) [2023] KEELC 20287 (KLR) (28 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 20287 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 2754 OF 1995
OA ANGOTE, J
SEPTEMBER 28, 2023**

BETWEEN

**ANTHONY KAMAU MWANGI (SUING AS THE PERSONAL
REPRESENTATIVE OF THE ESTATE OF THE LATE ONESMUS MWANGI
KAMAU) PLAINTIFF**

AND

MWAURA NUMI DEFENDANT

RULING

1. There are two Applications before me, both brought by the Defendant. The first is the application dated November 9, 2022 and the second is dated April 17, 2023. In the application dated November 9, 2022, the Defendant/Applicant prays for orders:
 - a. That this Honourable Court be pleased to order a complete stay of execution of the Kshs 811,309 costs against the Defendant in this matter in view of the orders dated March 23, 2021 issued by the Deputy Registrar after granting/allowing the Defendant's Application dated August 26, 2020, which orders granted the Defendant orders to pay Kshs 50,000/- initial deposit and Kshs 5,000/- on monthly instalments.
 - b. That the costs of this Application be provided for
2. The grounds on the face of the application dated November 9, 2022 and the Supporting Affidavit thereto sworn by Esther Wangui Mwaura of even date are that being aware of the costs awarded to the Plaintiff in this matter, the Defendant filed a Notice of Motion dated August 26, 2020 which was allowed by the Deputy Registrar on March 23, 2021.
3. The Defendant deponed that Pursuant to the orders arising therefrom, she paid the Kshs 50,000 initial deposit and proceeded to pay monthly instalments as per the orders of the court; that contrary to the



- said orders of the court, Mbeki Auctioneers did a proclamation on the basis of warrants of attachment and sale issued by this court on October 31, 2022 and that the proclamation is dated September 29, 2022 despite the fact that the warrant of attachment and sale was issued on December 31, 2022.
4. In the Replying Affidavit, the Plaintiff deponed that the application is frivolous, vexatious, totally misplaced, gravely misconceived and an abuse of the court process and ought to be dismissed with costs; that the same is fatally defective for want of compliance with the orders of the court of March 23, 2021 when the matter was listed for a Notice to Show Cause why execution should not issue against the Defendant and that the court did not on that date allow the Defendant's Application dated August 26, 2020 as alleged.
 5. It was deposed by the Plaintiff that there were no orders issued allowing her to pay the initial deposit by instalments as stated; that the Defendant has provided no evidence to show that the orders sought in her said application were indeed granted on March 23, 2020 as alleged in the current application and that the Notice to Show Cause was heard on August 11, 2021 and was allowed whereas the application dated August 26, 2020 was dismissed on the same date, and the court ordered the case be closed.
 6. Consequently, it was deposed, the Deputy Registrar ordered that an order for warrants of execution, attachment and sale be issued against the Defendant; that these orders have not been varied or set aside, and thus are still valid, hence the move to execute with a view to recover the costs and that the Defendant sat as a judge in her own application and acted unilaterally by making payments without orders of the court.
 7. According to the Plaintiff, the payments were adverse to the orders of the court of March 23, 2021 and that if the application dated June 9, 2022 is allowed, he will be denied the right to enjoy the fruits of his judgment as the sum of Kshs 5,000/- is a meagre amount compared to the full amount of costs awarded which is Kshs 808,309.
 8. The Defendant sought and obtained leave to file a Further Affidavit sworn by his advocate, who deponed that he attended court virtually on March 23, 2020 and heard the court allowing the application and that it is only after February 27, 2023 when this matter was mentioned before Justice Mwangi and the Judge read to him the proceedings of March 23, 2023, that he realised that the Plaintiff's claims were true as concerns the said proceedings and orders arising therefrom.
 9. According to counsel, he can only describe the actions his client undertook as an inadvertent and excusable mistake which was acquiesced by the Plaintiff accepting the initial deposit of Kshs 50,000/- and the instalments of Kshs 5,000/- since May, 2021 to the date of the Affidavit without default.
 10. He stated that the reason he was not in court on the date his application was dismissed was because he was not served with a hearing notice, noting that the day the date was fixed for hearing of the application, the court was not sitting and that it is the Plaintiff who attended court *ex parte* and took the date. It was deponed that the Plaintiff proceeded to have his application dismissed despite knowing that the Defendant was unaware of the date.
 11. It was deponed that the court should consider the fact that the Defendant is elderly and terminally ill and trying to pay off her husband's debts and that the court should consider the evidence placed before it as well as the circumstances of the case and exercise its unfettered discretion by allowing the application dated November 9, 2022.
 12. The second application is dated April 17, 2023 and seeks the following orders from this court:



- i. That this Honourable Court be pleased to set aside the exparte orders by the Deputy Registrar dated August 11, 2021 that dismissed the application dated August 26, 2020 and reinstate the same to hearing and determination.
 - ii. That the costs of the Application be provided for.
13. The application is supported by the Affidavit of the Plaintiff's advocate who deponed that the earlier application for payment of costs in instalments was dismissed without notice to the Applicant by either the Respondent or the Court and that while Counsel for the Respondent knew that the application was to be heard on May 27, 2021 and again on August 11, 2021 and attended the hearing, he was not aware of the said dates.
14. The Defendant's Counsel deponed that he had inadvertently heard that his application dated August 26, 2020 had been allowed which was the basis for the payment of the initial deposit and monthly instalments thereafter; that unless the application is reinstated, heard and determined, even the firm of Wambugu Kariuki & Associates Advocates is properly on record becomes an issue for consideration.
15. To this, the Plaintiff filed Grounds of Opposition dated May 17, 2023 in which he averred that both parties were in attendance when the application dated August 26, 2020 was fixed for hearing on August 11, 2021, and therefore neither the Court nor the Respondent were under any obligation to notify him of the hearing of his own application.
16. It was averred by the Plaintiff that it is misleading to claim that the Advocate was not aware of the date of the application; that the matter ought to be put to an end by an order that the Defendant do pay the costs as ordered and subsequently assessed and that the application is incompetent and an abuse of court process and should be dismissed and the Defendant ordered to pay the balance of the costs which stands at Kshs 673,309.
17. The parties did not file written submissions.

Analysis and Determination

18. The following key issues arise for consideration and determination by this court:
 - i. Whether the firm of Wambugu Kariuki & Associates Advocates is properly on record having taken over the matter after entry of judgment
 - ii. Whether the Defendant's Application dated November 9, 2022 has satisfied the test for grant of a stay of execution?
 - iii. Whether the Application dated May 17, 2023 ought to be reinstated?
19. Before considering the issue at hand, it is prudent to give a very brief outline of the background of this matter. This case was commenced by the Plaintiff by way of Originating Summons seeking for orders that the Defendant do transfer a piece of land LR Number Kiambaa/ Kanunga/585 to him, failing which the Deputy Registrar of the court be authorised to sign all necessary documents and acts towards transferring the land to him.
20. On October 9, 2018, the court entered judgment in favour of the Plaintiff and awarded him costs of the suit. The Plaintiff went ahead and filed his Party and Party Bill of Costs dated December 13, 2018 which was taxed by the Deputy Registrar on December 5, 2019 at Kshs 808,309. All this time, the Defendant was represented by the firm of Kamau Mwangi & Company Advocates.



21. The Plaintiff then applied for issuance of Warrant of Attachment and Sale in a move to recover the costs awarded and taxed. It is at this point that the Defendant moved the court by filing the application for stay of execution dated August 26, 2020 through the firm of Wambugu Kariuki & Associates Advocates.
22. In addition to the application for stay of execution, the Defendant filed a Notice of Motion application also dated August 26, 2020 seeking to have the firm of Wambugu Kariuki & Associates Advocates come on record replacing the firm of Kamau Mwangi & Company Advocates. However, when the matter came up on March 23, 2021, no mention was made of this application.
23. Indeed, the Defendant's Advocate himself did not inform the court of the existence of the application. From the record, it appears the same was never heard or determined. That being the case, The Plaintiff's Advocate is right in his assertion that the question of whether the firm of Wambugu Kariuki & Associates Advocates is properly on record is an issue for consideration.
24. His apprehension stems from the provisions of Order 9 Rule 9 & 10 of the [Civil Procedure Rules](#) which provides as follows:
 - “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; 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.”
25. Order 9 Rule 10 on the other hand provides as follows:
 - “An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”
26. The purpose of the above provision was explained in [Violet Wanjiru Kanyiri v Kuku Foods Limited \[2022\] eKLR](#) where the court held that:-
 41. The provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) make it mandatory that change of Advocates after judgment has been entered must be through an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi v Veronica Muehlemann* (supra) where the judge observed as follows:
 - “...In my view, the essence of the Order 9 Rule 9 of the [CPR](#) was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”
27. From the above, it follows that as per the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#), it is mandatory for an Advocate or a party coming on record post judgment to either first seek the leave of court by way of a formal application or obtain a consent from the outgoing counsel and file it in court.
28. Order 9 Rule 9 does not impede the constitutional right of a party to be represented by an Advocate of their choice, but sets out the procedure to be complied with when a party wants to change counsel. Thus, a party wishing to change counsel after judgment can only do so with the approval of the Court or upon filing a consent signed between the outgoing advocate and the proposed incoming advocate.



29. The court in the case of *James Ndonyu Njogu v Muriuki Macharia* (2020) eKLR while striking out an application filed by counsel post judgment in contravention of the provisions of Order 9 rule 9 of the *Civil Procedure Rules* held as follows;

“Although the Applicant has a Constitutional right to be represented, yet where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality. Having found that this procedure was not followed by M/S Nyiha, Mukoma & Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Applicant and therefore all pleadings filed by it ought to be struck out. Consequently, and in the absence of such leave of court as provided by the law, the application by Notice of motion under certificate of urgency dated the December 13, 2019 filed by the firm of M/S Nyiha, Mukoma & Company Advocates is hereby struck out with costs to the Respondent.”

30. In the instant case, there is no consent obtained from the firm of Kamau Mwangi & Company Advocates who, to the court’s knowledge, is still on record for the Defendant. Indeed, when the matter came up on March 23, 2020, the court noted that the application for stay of execution had not been served on the Respondents.

31. While it is clear that the application for stay of execution was eventually served on the Plaintiff, there’s no evidence on record to show that the application for leave to come on record, was ever served on the Plaintiff or the firm of Kamau Mwangi & Company Advocates.

32. A perusal of the application for leave that is in the court file indicates that the main reason for change of Advocates is that the erstwhile advocates misrepresented the Defendant’s proposal to the Plaintiff. However, since the said Advocate was not served with the application and given an opportunity to respond to the same, the court finds that the Defendant’s current advocate is improperly on record.

33. Indeed, the Defendant’s incoming advocate clearly knew the procedure to be followed and that is why he filed the application for leave. Counsel for the Defendant is well aware that the same was not determined. He cannot claim that he was not aware that the orders were never issued in respect to the application for leave when he himself took no steps towards prosecuting the said application.

34. Despite not been properly on record, the Defendant’s counsel is seeking to have the application for stay of execution reinstated. That being the case, it is the finding of this court that the firm of Wambugu Kariuki & Associates Advocates has no standing and/or capacity to move the court on behalf of the Defendant in the manner it has done.

35. Having found that counsel herein is not properly on record before this court, the two applications are as a consequence incompetent as they are filed by a stranger to the suit. As a result, it would not be necessary to determine the second and third issues herein as they arise from incompetent applications, which should be struck out.

36. For those reasons, the applications dated November 9, 2022 and April 17, 2023 are struck out with costs.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 28TH DAY OF SEPTEMBER, 2023.

O. A. ANGOTE

JUDGE



In the presence of

Mr. Kimemia for Nyachoti for Decree holder

Mr. Kariuki for Defendant/Applicant

Court Assistant - Tracy

