



REPUBLIC OF KENYA



**KENYA LAW**  
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**Ngitech v Kabogo (Environment and Land Appeal E012 of 2025)  
[2025] KEELC 1281 (KLR) (17 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1281 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND APPEAL E012 OF 2025  
MN MWANYALE, J  
MARCH 17, 2025**

**BETWEEN**

**SINKALO OLE NGITECH ..... APPLICANT**

**AND**

**NDEGWA KABOGO ..... RESPONDENT**

**RULING**

1. The Notice of Motion Application dated 10.03.2025 seeking stay of execution of the decree resulting from the certificate of taxation in Kilgoris CMELC E055/2025 by suspending the orders of Hon. Cyprian Waswa of committing the Appellant/Applicant to civil jail, among other prayers is the subject of this Ruling.
2. When the matter came up for interparty hearing and during the call over thereof, the court did inquire from Mr. Njoroge learned counsel for the Applicant as to whether his client was able to deposit security for grant of the stay of execution orders.
3. To which Mr. Njoroge responded that his client would be in a position to deposit Kshs.300,000/= upon inquiry by the court to Ms. Mireri learned counsel for the Responded whether the deposit would be adequate, Ms. Mireri learned counsel for the Respondent stated that whereas she would not be opposed to such a proposal, Mr. Njoroge for the Applicant was not property on record and the Application before court had been filed by a stranger after judgment in contravention of order 9 rule 9 of the civil procedures Rules and that she had replied to the application and this formed part of her response.
4. On probing Mr. Njoroge further, he acknowledged that the prayer for him to come on record after judgment was still pending before the lower court his application having not been certified as urgent, thus this appeal and the application before court.



5. He stated that the prayer to come on record after judgement was made in the main Appeal at that he was ready to proceed with the interparty hearing nonetheless.
6. The court allowed parties to argue the application.
7. The grounds in support of the application are interalia, that the Applicants previous counsels had unprocedurally ceased acting leading to the dismissal of the suit in the lower court with costs, which costs were tased at Kshs.539,087 leading to the committal of the Applicant to civil jai; hence the present application for stay of execution and release of the Applicant.
8. The application is supported by the Affidavit of the Binkalo Ole Ngetich the Applicant who reiterates the grounds in support of the application and has annexed summons to enter appearance, the certificate of taxation the notice to show cause and warrants of arrest.
9. In response to the applicant, the Respondent filed a Replying Affidavit and narrated the history of the litigation before the trial court leading to dismissal of the Plaintiff's case and the taxation of the Bill of Costs, and eventual committal of the Applicant to Civil ail. That the Applicant has not exhibited substantial loss and that the Application has not been heard and determined before the trial court hence the appeal has been lodged prematurely and is incompetent.
10. In his submissions, Mr. Njoroge submitted that an appeal is a new case and that the same did not require a Notice of change under order 9 Rule 9 of the civil procedure Rules, and that he had met the requirements of order 42 Rule 6 of the civil procedure Rules, the application having been made timeously and having demonstrated substantial loss by the committal to civil jail of the Applicant, as committal was the last resort under Section 38 of the Civil Procedure.
11. In response Ms. Mireri submitted placing reliance on the decision in Sarah Wanjiku vs Peter Munyula Kimani submitted that an application to come on record after judgment ought to have been filed in the matter. She further submitted that the dismissal was a negative order and she placed reliance on the decision in the case of Catherine Njeri and Another vs Sarah Chege.
12. She submitted that the judgment have been delivered on 08.10.2024 and the appeal filed on 10.03.2025, the Applicant is guilty of latches and has times no satisfied the requirements of order 42 Rule 6. She submitted further if the application is allowed there will be no appeal to be argued, and thus argued the court to dismiss the appeal.
13. Mr. Njoroge did not have any legal points to make a rejoinder.
14. Upon analysis of the application and the affidavits and submissions the court notes the following undisputed facts;
  - i. That once this application is allowed, they will be no appeal to be considered.
  - ii. That the application which has provoked this appeal is live before the trial court and shall be heard on 2<sup>nd</sup> of April, 2024.

### **Issues of Determination**

15. The issue for determination arising from the application are
  - i. Whether or not in an appeal there is a requirement for compliance by a new Advocate with order 9 Rule 9 of the *Civil Procedure Rules*?
  - ii. Whether the application is merited?



- iii. What orders ought to issue?

### **Analysis and Determination**

16. There has been confusion on the applicability of order 9 Rule 9 of the *Civil Procedure Rules* especially as regards an appeal. Mr. Njoroge argued without citing any authority that the provisions of order 9 Rule 9 are not applicable to an appeal as it is a new matter while Ms. Mireri was the view that the provisions of the law is indeed applicable and she cited a decision to buttress her point.
17. Different superior courts have interpreted the said provisions differently with some taking the position that the provision is applicable while others taking a different position, undoubtedly though the provisions apply to the trial court in applications made post judgment. The court of Appeal in its decision in the case of Tobias M. Wafubwa vs Ben Butali (2017) eKLR considered this issue and held as follows; “We are of the same view and would adopt the same approach in its entirety in matters concerning appeal. 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 to engage tother counsel on appeal without being required to file a Notice of Chang of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous Advocates.”
18. That being the position of the law with regard to change of Advocates in an Appeal, the objection and arguments by Ms. Mireri would be merited before the trial court and not this court and the same fail, and the court agrees with Mr. Njoroge that his position reflects the legal position although he seemed not to have been confident when he made the said submission.
19. Having passed the first hurdle, the court shall now examine whether to application is merited.
20. As indicated the application is for a stay of execution brought under order 42 Rule 6
21. The orders appealed from were made on 6<sup>th</sup> of March 2025 and the application was made on 11<sup>th</sup> March 2025. Ms. Mireri submitted rather wrongly that the appeal is from the judgment delivered in October 2024, which judgment was a dismissal and that no stay of execution could issue on a dismissal.
22. Whereas it is the general legal position that they can be no stay of execution on negative orders as a dismissal, the orders appealed from made on 6<sup>th</sup> March 2025 arose from the certificate of Costs and they were committal orders that committed the Applicant to civil jail. Certainly, those were not negative orders and a stay of execution can rightly issue against them.
23. Under Order 42 Rule 6, an applicant ought to make the application timeously, and also indicate the substantial loss that they are likely to suffer.
24. On the application being timeously, the orders appealed from were made on 6<sup>th</sup> March 2025 and the Appeal and application filed on 11<sup>th</sup> March 2025. It was thus filed timeously.
25. The court considers that a person committed to civil jail to suffer substantial loss contrary to the depositions by the Respondent.
26. As earlier stated, the Applicants counsel had proposed to deposit Kshs.300,000 as security for the decretal aspect on costs.



27. The court thus views the application as meritorious and allows the same in terms as follows noting that allowing the application will effectively dispense with the Appeal.

### **Disposition**

28. The court allows the application dated 10.03.2025 in terms that

- i. There be a stay of execution of the decree resulting from the certificate of costs in Kilgoris CMELC No. E055/2025 pending hearing and determination of the application dated 5<sup>th</sup> March 2025 coming up for hearing the trial court.
- ii. That the Applicant, Sinkalo Ole Ngetich be released from Kilgoris Prison forthwith.
- iii. That the Applicant to deposit in court security for performance of the decretal aspect on costs of Kshs. 250,000/= by close of business on 19.03.2025 and to secure the balance of the decretal sum by a Bank guarantee from a Reputable Bank before the hearing of his Application at the lower court.
- iv. Costs of this application shall abide by the outcome of the application pending before the lower court.

**DATED AND DELIVERED AT KILGORIS THIS 17<sup>TH</sup> DAY OF MARCH 2025.**

**HON. M.N. MWANYALE**

**JUDGE**

In the presence of

C/A Emmanuel/Slyvia

Mr. Njoroge for the Applicant

Ms. Mireri for the Respondent

