



**Kamau & another v Kamau & another (Environment & Land Case  
38 of 2020) [2023] KEELC 21072 (KLR) (27 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21072 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MURANGA  
ENVIRONMENT & LAND CASE 38 OF 2020  
LN GACHERU, J  
OCTOBER 27, 2023**

**BETWEEN**

**SIMON WARUINGU KAMAU ..... 1<sup>ST</sup> PLAINTIFF**

**JANE MUTHONE WARUINGI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**JACKSON MARICHU KAMAU ..... 1<sup>ST</sup> DEFENDANT**

**KARUGA KAMAU ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiffs/Applicants herein brought this Notice of Motion application dated 24<sup>th</sup> March 2023, brought under Section 3A of the [Court Procedure Act](#), and Order 22 Rule 22, of the [Court Procedure Rules](#), and sought the following Orders;
  - i. That leave be granted allowing the Plaintiffs/Applicants herein to act on person.
  - ii. That the court do issue stay of execution pending the hearing and determination of the Appeal.
  - iii. That costs of the application be provided for.
2. The application is anchored upon the four grounds set out on the face of it, and on the Supporting Affidavit of Jane Muthoni Waruingi, the 1<sup>st</sup> Plaintiff/Applicant herein.
3. These grounds are;
  1. That Judgment was delivered by this court on 9<sup>th</sup> June 2022, and the Plaintiffs/Applicants were dissatisfied with the said decision of the court and therefore



filed a Court of Appeal Case No. E093 of 2022; that the Defendants/ Respondents have served the Plaintiffs/Applicants with the Notice to Show Cause why they should not be committed to Civil jail for failure to satisfy the decree of the court; therefore, it is in the interest of justice that the prayers sought herein be granted.

4. In her Supporting Affidavit, Jane Muthoni Waruingi, averred that the 2<sup>nd</sup> Plaintiff/ Applicant who is her father authorized her to take over conduct of this matter on both of their behalf. She further averred that the Appeal filed has a high probability of success. Further that the Defendants/Respondents have served them with the Notice to Show Cause why they should not be committed to Civil jail for failure to satisfy the Decree of the Court. She annexed a copy of the said NTSC as JMW1. She also contended that she was aggrieved by the Judgment of this Court and she lodged an Appeal being Court of Appeal Case No E093 of 2022, as per annexure JWM2, which is a Memorandum of Appeal. Therefore, she requested the court to issue an Order of Stay of Execution of the said judgment. She also contended that it is in the interest of justice that this court should issue the Orders sought.
5. The Notice of Motion Application is contested by the Defendants/Respondents through the Replying Affidavit of J. N Kirubi Advocate, for the Respondents. He averred that the instant application is frivolous, vexatious and an abuse of the process of the Court. It was his further contention that the Plaintiffs/Applicants case was dismissed with costs and the Respondents had no Counter-claim, against the Plaintiff/Applicants. Therefore, the Plaintiffs/Applicants case having been dismissed, there was nothing to be executed and the applicants cannot stay a dismissal order.
6. Further that the Defendants/Respondents through their advocates on record are only executing on the awarded costs as per the NTSC dated 10<sup>th</sup> February 2023, marked JNK1 and as such the Plaintiffs/Applicants cannot stay the execution of costs, and hence the applications as filed is a non-starter, and not known in Law. He urged the court to dismiss the instant application with costs to the Defendants/ Respondents.
7. The Respondents also filed Grounds of Oppositions as follows:
  - a. The applications filed is frivolous, vexatious and an abuse of the process of the court.
  - b. The applicants' suit was dismissed with costs and such, there is nothing to be executed by the Respondents who were Defendants with no Counter-claim.
  - c. That the Respondents advocates are duly executing the costs awarded by the court what cannot be stayed.
8. They urged the Court to dismiss the instant application with costs.
9. The application was canvassed by way of written submissions.
10. The 2<sup>nd</sup> Plaintiff/Applicant Jane Muthoni Waruingi, filed her submissions on 9<sup>th</sup> June 2023, and submitted that the main issue for determination is whether the court has discretion to grant stay of execution as sought by the Plaintiffs/Applicants herein;
11. It was her submissions that the guiding principles for grant of stay of execution pending Appeal are provided for by Order 42 Rule 6 of the *Civil Procedure Rules*, which provides as follows;
  - 1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed for except in so far as the court appealed from may order but, the court appealed



from may for sufficient cause order stay of execution for such decree or order, and whatever the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the Appellate court to have such order set aside.

12. That the conditions to be satisfied by an applicant before stay of execution pending appeal is granted are set out in Order 42 Rule 6 (1) of the [Civil Procedure Rules](#), which provides that;

No Order of stay of execution shall be made under this 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.

13. Reliance was placed in the case of [Nicholas Stephen Okaka & Another v Alfred Waga Wesongo](#) (2022) eKLR, where the Court stated as follows.

“Further to the above, stay may only be granted for sufficient cause and that the Court in deciding whether or not to grant the stay and that in light of the overriding objective stipulated in Sections 1A and 1B of the [Civil Procedure Act](#), the Court is no longer limited to the foregoing provisions. The Courts are now enjoined to give effect to the overriding objective in the exercise of its powers under the [Civil Procedure Act](#) of in the interpretation of any of its provisions...

14. As to what amounts to substantial loss, reliance was placed in the case of; [James Wangalwa & Another v Agnes Naliaka Cheseto](#) (2012) Eklr; where the Court held as follows;

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the Civil Procedure Rules. This is so because execution is a lawful process. The application must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal.... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.”

15. It was the Plaintiffs/Applicants further submissions that the Defendants/Respondents launched the NTSC dated 10<sup>th</sup> February 2023, against the Plaintiffs/Applicants for a claim of Kshs. 168,985/= as costs. That the Plaintiffs/Applicants have filed an Appeal at Nyeri Court of Appeal being Court of Appeal Case No. E093 of 2022, and that the applicants stand to suffer substantial loss in the claimed amount and/ or may be committed to Civil jail if the stay of execution sought is not granted. She further submitted that in the said Appeal, the costs awarded by the Court formed the subject of the Appeal.



That the Defendants/Respondents have not demonstrated that they are able to refund the sum, should the appeal succeed. Further, that the failure to grant the stay of execution orders could occasion great loss to the applicants. It was also submitted that Defendants/Respondents have not given any material to show their ability to repay the claimed costs in case the Appeal succeeds, and therefore substantial loss will be occasioned if the stay is not granted. She relied on the case of *RWW v EKW* (2019) Ekl; where the Court held as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The court when granting the stay however, must balance the interests of the appellant with those of the Respondent”

16. On the issue of security, reliance was placed on the case of *Arun C. Sharma v Ashana Raikundalia T/ A Rairundalia & Co. Advocates and 2 others* (2014) eKLR, where the Court stated;

“The purpose of security needed under Order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgement debtor”

17. Further in the Case of *Focin Motorcycle Co. Ltd v Ann Wambui Wangui & another* (2018) eKLR, the Court stated as follows:

“Where the applicant proposes to provide security as the Applicant had done, it is a mark of good faith that the application for stay is not just meant to deny the Respondent three fruits of judgment. My view is that it is sufficient for the applicant to state that he is ready to provide security but it is the discretion of the court to determine the security. The applicant has offered to provide security and has therefore satisfied this ground for stay.”

18. The Plaintiffs/Applicants submitted that they were willing to deposit any sum or the equivalent, as the Court may direct in exercise of its discretionary powers. They urged the court to grant the stay of execution orders in order not to render the Appeal nugatory as well as to give effect to the Overriding Objective of the *Civil Procedure Act*.

19. On the Overriding Objective, reliance was placed on the case of *Football Kenya Federation v Kenya Premier League & Another* (2015) eKLR; wherein the Court held as follow;

“this Court hesitates to place unnecessary hurdles on access to justice and by extension access to the Courts, except when such litigation is apparently and overly hypothetical, abstract or is an abuse of judicial process,”

20. Finally, the Plaintiffs/Applicants submitted that if the orders sought are not granted, they will suffer irreparable loss and damages, and it is in the interest of justice that the application sought is granted. They urged the court to exercise its unfettered discretion and allow the application as sought.



21. The Defendants/Respondents through Kirubi, Mwangi Ben & Co. Advocates, filed their written submissions on 27<sup>th</sup> June 2023, and submitted that the application is frivolous, vexatious and abuse of the due process of law. That it offends the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules which provides:
- “where there is a change of advocate or where a party decides to act in person having previously engaged an advocate, after judgement has been passed, such a 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 out-going advocate and the proposed advocate or party intending to act in person as the case may be.”
22. It was their submissions that the present proceedings were commenced by the plaintiffs/applicants through the Law Firm of Njuguna Nganga & Associates Advocates, who were on record upto the time the court delivered judgment on 9<sup>th</sup> June 2022. Further, that the Applicants filed the notice to act in person on 27<sup>th</sup> March 2023, without first complying with the strict and mandatory provisions of Order 9 Rule 9, of the Civil Procedure Rules.
23. Therefore, the instant application purportedly filed by the applicants in persons is thus fatally defective for being non-compliance with the mandatory provisions of Order 9 Rule 9 of the Civil Procedure Rules, and they urged the Court to dismiss the said Application with costs.
24. It was also their further submissions that the instant application is fatally defective and is a candidate for dismissal with costs. They submitted that the Plaintiffs’ suit was dismissed with costs on 9<sup>th</sup> June 2022, and since the Defendant/Respondents did not have Counter-claim, then the court is thus *functus officio*, in as far as the suit herein is concerned. That the applicants’ suits having been dismissed, there would be no resulted decree to be executed by the Respondents and there is nothing to be executed to warrant stay orders. That the Defendants/Respondents are only proceeding with the taxation of the bill of costs which is payable by the Plaintiffs/Applicants, and therefore the Applicants cannot seek to stay costs as the same does not amount to execution of a Decree. It was their further submissions that applicants have not met the threshold required for grant of stay of execution Orders, pending Appeal. They urged the court to dismiss the instant application with costs.
25. The Court has carefully considered the instant application, the Affidavits in support of it and against it, and the annexures thereto. The Court too has considered the rival written submissions, the cited authorities and the relevant provisions of law and finds the issue for determination is whether the instant application is merited.

### **1. Whether the instant Notice of Motion Application dated 24/3/2023, is merited?**

26. The application herein is expressed to be brought under Section 3A of the Civil Procedure Act, which donates the inherent power to the Court to make such Orders that may be necessary for the end of justice to be met, or to prevent abuse of the Court process.
27. Further the application is brought under Order 22 Rule 22, of the Civil Procedure Rules, which provides for situations when stay of execution may be granted by the court which issued the decree; upon sufficient cause being shown, and upon the application being filed within a reasonable time.
28. The Plaintiffs/ Applicants herein have sought for two prayers:



29. One of the prayers is to be allowed to act in person, and second is for stay of execution, of the Judgement of the Court issued on 9<sup>th</sup> June 2022, by this Court.
30. It is apparent that during the hearing of this case from inception, up and until the Judgement was delivered, the Plaintiffs/Applicants were represented by Law Firm of Njuguna Nganga & Associates Advocates. The Memorandum of Appeal was filed in Nyeri Court of Appeal on 19<sup>th</sup> August 2022, by the said Law Firm of Njuguna Nganga & Associates Advocates. The instant application with prayer to act in person was filed on 24<sup>th</sup> March 2023. That was long after the Judgment had been delivered. Therefore, the application herein was supposed to be anchored under Order 9 Rule 9 of the Civil Procedure Rules. The Plaintiffs/Applicants did not indicate that their Application is anchored or is expressed to be brought under the said Order 9 Rule 9 of the Civil Procedure Rules.
31. However, that omission does not make the Application herein defective, as the said application is expressed to be brought under Section 3A of the *Civil Procedure Act*, which provision of law gives the Court inherent power to make such orders that are necessary for the end of justice to be met. Further Order 51 Rule 10 (2), of the Civil Procedure Rules provides that
- “no applicant shall be defeated on technicality or for want of form that does not affect the substance of the application”.
32. Being guided by the above provisions of law, this Court finds and holds that the applicants’ application herein cannot be defeated for failure to quote the relevant provisions of law on its heading. The intention or gist of this Application can be discerned from the prayers sought and the Affidavit in support of the same.
33. Again Article 159 (2) (d) of *the Constitution*, behoves this Court to deliver justice without paying too much regard to procedural technicalities. Therefore, the Plaintiffs/Applicants Application is properly before this Court, even though the Applicants have failed to state that the said Application is expressed to be brought under Order 9 Rule 9 of the Civil Procedure Rules.
34. Having found that the Plaintiffs/Applicants’ Application is not defective, and can be considered for the sake of substantive justice, the next question is whether the said Application is merited?
35. It is evident that this Application was filed on 24/3/2023, and the Judgment herein had been delivered on 9<sup>th</sup> June 2022. It is also not in doubt that during the hearing of the matter and even at the time of the Judgment, the Plaintiffs/Applicants herein were represented by an advocate. It is now apparent that the Plaintiffs/ Applicants wish or seek to act in person. Consequently, the provisions of Order 9 Rule 9 of the Civil Procedure Rules come into play. The Applicants cannot just start acting for themselves without following the mandatory provisions of the Law. They needed to notify their outgoing Advocate that they now wish to represent themselves as from the date of the Application and onwards.
36. The said provisions of law states;
- “where there is change of advocate or where a party decides to act in person, having previously engaged an advocate, after Judgement has been passed, such change or intention to act in person SHALL not be effected without an Order of the Court;”
37. The Plaintiffs/Applicants upon filing this Application, they needed to serve all the parties herein, including the outgoing Advocates. Alternatively, the applicants were also supposed to file a consent between their outgoing advocates and themselves. They have not filed any consent and neither have



they served the outgoing Advocates with the instant Application. Having failed to do the above, the Applicants failed to adhere to the rules. Rule 9 (a) of the quoted Order 9 is applicable herein, as the applicants were supposed to give a notice of such application to all the parties, the outgoing advocate included. This provision of law does not impede the right of party to be represented by an advocate of their choice or for a party to act in person, but it provides rule to impose orderliness in civil proceedings, and any change of advocate should comply with the said rules and indeed this order is couched in a mandatory term.

38. It is apparent from the provisions of Order 9 Rule 9, of the Civil Procedure Rules, that for a valid change of advocate to take place after judgment, a court order must issue either upon an application, or upon a consent filed in court. And such an application need not be filed separately from the substantive application as the prayer for change of advocate can be canvassed first, but within the same application, which contains other prayers as sought by the applicants.
39. The intention of Order 9 Rule 9 of the Civil Procedure Rule are captured in the case *Serah Wanjiru Kungu –v- Peter Munyua Kimani (2021) eKLR*, where the Court held as follows:

“The above frame work was introduced in the Civil Procedure Rule to deal with disruptive changes that litigants and advocates used to effect, often for purposes of unfairly dislodging previous advocates without settling their costs.”
40. It is very clear therefore that after Judgment has been entered, for any change of advocate to be affected, then there must be an Order of the court, upon application, with a Notice to all the parties and/ or upon filing a consent in Court. This was articulated in the case of *S.K.Taiwadi –V- Veronica Muehlmann (2019) eKLR*, where the court held; -

“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 Judgment is delivered, and then sack the advocates and either replace them....”
41. In the present case, though the Plaintiffs/Applicants have filed the application to be allowed to act in person, they did not serve upon the previous advocates. The pleadings show that the same was only served upon the advocates for the Respondents. Order 9 Rule 9 of the Civil Procedure Rules couched in mandatory terms, and so, service was paramount and failure to do so offended the express provision of this Order 9 Rule 9 of the Civil Procedure Rules. Failure to adhere to a mandatory provision of law means that whatever was done with such failure is null and void and cannot stand in law. Therefore, the instant Application cannot stand.
42. It is clear that although the Plaintiffs/Applicants have a right to act in person, or represent themselves, there are clear provisions of law which should be adhered to, and are mandatory. The said provisions of law are not procedural technicality, and cannot be cured by the provisions of Article 159(2) (d) of *the Constitution*.
43. Having found that the Plaintiffs/Applicants did not serve the outgoing advocates, with the instant Application, and having failed to file a consent between themselves and the outgoing advocates confirming no objection to the Applicants to act in persons, this Court holds and finds that the instant Application is not properly before this Court. Consequently, leave cannot be granted to the Applicants herein to act in person, and therefore the Plaintiffs/Applicants application cannot stand, and it is hereby dismissed entirely with costs to the Defendants/Respondents.
44. It is so ordered.



**DATED, SIGNED AND DELIVERED VIRTUALLY ON 27<sup>TH</sup> DAY OF OCTOBER, 2023.**

**L. GACHERU.**

**JUDGE**

**27/10/23**

**Delivered online in the presence of:**

1. Jane Muthoni Waruingi the 1<sup>st</sup> Plaintiff/Applicant in Person.

2. Mr Mwangi Ben for Defendants/Respondents

Joel Njonjo: Court Assistant

