



**Oyula & another v Samuel (Environment and Land Appeal
42 of 2022) [2023] KEELC 21065 (KLR) (26 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21065 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT AND LAND APPEAL 42 OF 2022
JM ONYANGO, J
OCTOBER 26, 2023**

BETWEEN

JOSEPH MAERO OYULA 1ST APPELLANT

ABDUL KADIR ADAN 2ND APPELLANT

AND

REUBEN SIMIYU SAMUEL RESPONDENT

RULING

1. By a Notice of Motion dated 5th December, 2022 Abdul Kadir Adan, the 2nd Appellant herein filed an application seeking a stay of execution of the judgment delivered by the Business Premises Rent Tribunal on 7th November, 2022 pending appeal. The application is premised on the grounds enumerated on the face of the Notice of Motion and the Applicant's Supporting Affidavit sworn on 5th December, 2022.
2. Upon being served with the application, the Respondent filed a Notice of Preliminary Objection dated 4th May, 2023 in which he raised 2 grounds. The first one is that the Applicant, Abdul Kadir Adan has no appeal lodged on his behalf that can be the subject of an application for stay of execution as the Memorandum of Appeal lodged has only been signed for the 1st Appellant. Secondly that the law firm of Sallah & Company Advocates is a stranger to this Appeal as no Notice of Change of Advocates has been filed from the firm of Ndinya Omollo & Co Advocates who filed the Memorandum of Appeal which was signed only for the 1st Appellant.
3. The court directed that the Preliminary objection be dealt with first and that the same be canvassed by way of written submissions. However, by the time of writing this ruling, only the Respondent had filed his submissions dated 12th July, 2023 through the firm of Wambua Kigamwa & Co Advocates which I have duly considered.



4. In his submissions learned counsel for the Respondent raises two key issues; whether the Applicant has *locus standi* to present the application and whether the firm of Sallah & Company Advocates is properly on record.

5. On the question of locus standi counsel submits that in the Memorandum of Appeal dated 6th December, 2022, the opening paragraph reads as follows:

“The Appellants Joseph Maero Oyula being dissatisfied and aggrieved with the entire ruling of the Hon. Gakuhi Chege the Vice Chairperson in Eldoret BPRT E011 of 2021 delivered on the 7th November 2022 wishes to appeal against the entire ruling on the following grounds....”

6. He adds that the said Memorandum of Appeal has been signed by the firm of Ndinya Omollo & Co Advocates for the 1st Appellant only which means that the 1st Appellant is yet to file his appeal and he is thus devoid of the locus standi to present the motion for stay of execution pending appeal under order 42 rule 6 of the [Civil Procedure Rules](#) as he is not a party to the appeal herein.

7. It is counsel’s contention that at paragraph 3 of the application, the Applicant admits to not having filed an appeal as he prays for stay

“pending the hearing and determination of the intended appeal”.

He therefore submits that the applicant is inviting the court to issue a stay in vacuo. He relied on the case of [Abubakar Mohamed Al Amin v Firdaus Siwa Somo](#) (2018) eKLR where the court held that

“However, the learned judge was correct in holding that in the absence of an appeal, there was nothing upon which the stay orders sought under Order 42 Rule 6 of the [Civil Procedure Rules](#) could be anchored”

8. With regard to the second issue, he submitted that the application is incompetent and void ab initio as the firm of Sallah & Company Advocates had not filed a Notice of Change of Advocates since the Memorandum of Appeal was filed by the firm of Ndinya Omollo & Company Advocates. It is therefore his contention that he firm of Sallah & Company Advocates lacks the locus to represent the Applicant. He relied on the case [John Langat v Kipkemboi Terer & 2 Others](#) (2013) eKLR where the court held that an applicant filed by a firm of Advocates who had not filed a Notice of change of Advocates was incompetent.

Analysis and Determination

9. Having considered Notice of Preliminary Objection and the Respondent’s submissions as well as the relevant law, the following issues arise for determination:

1. Whether the 2nd Appellant has locus standi to file the application for stay pending appeal.
2. Whether the firm of Sallah & Company Advocates is properly on record.

10. With regard to the first issue it is not in dispute that the Memorandum of Appeal dated 1.12.22 filed by the firm of Ndinya Omollo & Company Advocates only refers to the 1st Appellant. The opening paragraph refers to Joseph Maero Oyula, the 1st Appellant. The firm of Ndinya Omollo which filed the Memorandum of Appeal has signed the said Memorandum of Appeal as Advocates for the 1st Appellant. Had they intended to act for both Appellants, they would clearly have stated so on the



Memorandum of Appeal. In the absence of proof that the appeal was filed on behalf of Joseph Maero Oyula and Abdul Kadir Adan, the Applicant cannot claim to have filed an appeal.

11. Having arrived at the finding that the 2nd Appellant has not yet filed an appeal, it follows that the order for stay pending appeal cannot be granted as the 2nd Appellant has no locus standi to bring the application.
12. Turning to the second issue, order 9 rule 5 of the [Civil Procedure Rules](#), 2010 provides for change of Advocates as follows:

Order 5

“ A Party suing or defending by an Advocate shall be at liberty to change his Advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of Advocate is filed in Court in which such cause or matter is proceedings and served in accordance with rule 5, the former Advocate shall, subject to rules 12 and 13 be considered the Advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

Order 6.

“ The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearances) and on the former advocate a copy of the Notice endorse with a memorandum stating as that the notice has been filed in the appropriate court”.

13. The effect of the above provisions of the law is that the failure to file an application for Change of Advocates by the firm of Sallah & Company Advocates means that the said firm is not properly on record for the Appellant. In the case of [Kipkemoi Terer & 2 Others](#) (2013) eKLR the court in dismissing an appeal and application that had been filed by a firm of Advocates that was not properly on record held as follows:

“ There was no application made to change advocates. In the Replying affidavit, the Appellant swore that there was a consent entered between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the consent. There is no evidence that the Respondents were put in the picture. But more importantly, the consent could not effect the change of advocates “without an order of the court” No such order was sought or obtained. It follows and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the Appellant and therefore the appeal and the application are incompetent.”

14. The inevitable conclusion is that the Preliminary Objection is well founded and it is therefore sustained. Consequently, the application is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY, THIS 26TH DAY OF OCTOBER, 2023.

J.M ONYANGO

JUDGE

In the presence of:

1. Mr. Mogambi for the Respondent



2. No appearance for the Appellant.

Court Assistant: Oniala

