



REPUBLIC OF KENYA



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**Yegon v Rono (Environment & Land Case 5 of 2016)
[2023] KEELC 20880 (KLR) (19 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20880 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 5 OF 2016
MC OUNDO, J
OCTOBER 19, 2023**

BETWEEN

WILSON KIPKORIR YEGON PLAINTIFF

AND

CHRISTOPHER KIPLANGAT RONO DEFENDANT

RULING

1. Pursuant to a judgment delivered by this court on the 24th day of February 2022, the court had dismissed the Plaintiff's suit and found in favour of the Defendant's counter-claim. The Court had ordered that there be a cancellation of the registration of the Plaintiff as proprietor of land parcel LR No. Kericho/Itembe/735 and that the Plaintiff move forthwith out of No Kericho/Itembe/923 and 924 within the next 30 days and in default an eviction shall issue. The Plaintiff/Applicant has now filed an Application dated the 11th April 2022, pursuant to the provisions of Order 51 Rule 1, Order 22 Rule 22, Order 9 Rule 9 of the Civil Procedure Rules, Section 1A, 1B, 3, 3A and 63 (e) of the [Civil Procedure Act](#) and all provisions of the law where he has sought for stay of execution of the judgment pending the hearing and determination of a preferred Appeal. The Application was supported by the grounds thereto as well as a Supporting Affidavit by the Applicant sworn on 11th April 2022
2. On the 23rd May 2022, by consent, parties agreed to canvas the Application by way of written submissions and it was whilst the court was awaiting compliance that the Applicant filed yet another Application under Certificate of Urgency dated the 8th June 2022 seeking to have the interim orders sought in their earlier Application dated April 2022 granted. I am not sure however under what provisions of the law Counsel sought to make such an Application that sought for the court to hear his earlier Application since he did not indicate under what provision of the law he had filed the said Application. The subsequent Application was thus contrary to the provisions of Order 51 Rule 10 of the Civil Procedure Rules which stipulate that 'every order, rule or other statutory provision under or



by virtue of which any Application is made must ordinarily be stated'. The said Application was also not supported by the grounds thereto.

3. Be as it may, on the 18th October 2022, by consent, parties sought to maintain the status quo to the effect that no trees on the suit land would be cut down or buildings thereon destroyed, pending the hearing and determination of the Application for stay of execution.
4. It was while awaiting delivery of the ruling, that the Applicant filed yet again an Application dated the 18th December 2022 pursuant to the provisions of Order 51 rules 1 of the Civil Procedure Rules, Section 5(1) of the *Judicature Act* and Section 3A of the *Civil Procedure Act*, Rule 81.4 of the English Civil Procedure Rules (Amendment No. 3) Rules 2020, and all other enabling provisions of the law seeking that the Respondent herein be held in contempt of the consent orders issued on 18th October /2022. That he be committed to prison for a term not exceeding 6 (six) months or a term that the court may deem fit and just. The said Application was supported by the grounds therein and the Supporting Affidavit by the Applicant sworn on 18th November 2022.
5. In essence thereof, there are two Applications awaiting determination to wit stay of execution of the judgment delivered on the 24th day of February 2022, and an Application for contempt proceedings against the Defendant/Respondent herein.
6. Parties took directions to dispose the said Applications by way of written submissions which I shall summarize as herein under.

Parties' submissions to the Application seeking stay of execution.

7. The Applicant's submission in support of his Application dated 11th April 2022 was that being dissatisfied with the judgment delivered on 24th February 2022, he had expeditiously filed a Notice of Appeal dated 8th March 2022 intending to Appeal against the said judgment.
8. That firstly, the Respondent's Replying affidavit dated 9th May 2022 filed by the firm of F.C Bor & Company Advocates was filed post judgment by a stranger who had not sought leave of court as is envisaged under Order 9 Rule 9 of the Civil Procedure Rules.
9. The Applicant framed their issues for determination as follows;
 - i. Whether the firm of M/S Bor & Company Advocates is properly on record?
 - ii. Whether the court should grant a stay of execution pending the hearing and determination of the Application and Appeal?
10. On the first issue for determination, the Applicant while relying on the provisions of Order 9 Rule 9 of the *Civil Procedure Rule* submitted that the all along, the Respondent herein had been represented by the firm of M/S Mitey & Associates. After judgment had been delivered, the firm of M/S Bor & Company Advocates filed the Replying affidavit dated 9th May 2022 in response to their Application, without seeking for and obtaining leave of court as is envisaged by Order 9 Rule 9 of the *Civil Procedure Rules*. That on record too was a consent dated 9th May 2022 to which there had been no order of the court effecting the change of Advocates.
11. Reliance was placed on the decision in the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* (2012) eKLR to submit that the provisions of Order 9 Rule 9 of the *Civil Procedure Rules* were couched in mandatory terms and the procedure therein should be followed to the letter. That the court in the case of *James Ndonyu Njogu vs Muriuki Macharia* [2020] eKLR had also echoed the same sentiments. That obtaining leave of court before coming on record after judgment had been



delivered was not a mere technicality and therefore the Replying Affidavit dated 9th May 2022 should be struck out for being irregular.

12. On the second issue for determination as to whether the Applicant should be granted stay of execution pending the hearing and determination of his Appeal, the Applicant relied on the provisions of Order 42 Rule 6(1) and (2) of the Civil Procedure Rules, and the decision in the case of Butt vs. Rent Restriction Tribunal [1979] eKLR that had laid down the guidelines in an Application seeking orders of stay of execution. He then invited the court to exercise its discretionary power in granting orders of stay in accordance with the said guidelines.
13. On the issue as to whether there had been sufficient cause to grant the stay of execution, the Applicant submitted that the goal of the Application was to protect the interests of the Applicant who was exercising his right of Appeal by preserving the subject matter in question that failure to do so would render the Appeal null and void. That considering the nature of the subject matter in this case, the Applicant stood to be worse off as execution would lead to demolition of his structures that had been erected on the subject property and he would be restrained from accessing the subject parcel of land which he had been occupying since 1996.
14. On whether he would suffer substantial loss, the Applicant's submission was that should the court not grant a stay of execution, a state of affairs would arise that would irreparably affect or negate the Applicant's very essential core as the successful party in the Appeal which would be a significant loss because there would be no purpose of success at Appeal. That the Applicant had been in occupation of the subject parcel of land since 1996 and as such, the Respondent would not be prejudiced in anyway if a stay of execution of the judgment dated 24th February 2022 were to be granted for a period of the Appeal. Reliance was placed on the decision by the court of Appeal in the case of Florence Hare Mkaha vs. Pwani Tawakal Mini Coach & Another [2014] eKLR. That this was not a normal and ordinary loss but substantial loss that could not be compensated through the award of damages.
15. On whether the intended Appeal was arguable, the Applicant relied on the decision in Kenya Airports Authority vs. Mitubell Welfare Society & Another [2014] eKLR, to submit that an arguable Appeal was no more than one that raises a legitimate point or points deserving judicial determination. That an arguable point needed not be one that would necessarily succeed when the Appeal is heard. That the thrust of the Applicant's Appeal was that the learned trial judge erred in law and fact in holding that the Respondent was seized with the requisite locus standi to defend and institute a counterclaim when the circumstances of the case militated against. That secondly the learned trial judge erred in law in failing to consider and make a finding as to whether the Respondent's Counterclaim was statutorily time barred thus occasioning a miscarriage of justice among other issues that ought to be heard and determined by the Superior Court. That the intended Appeal was therefore not frivolous.
16. That the Respondent had begun cutting down the trees that the Applicant had planted on the land, digging holes in a bid to erect a fence and he had kick started the process of effecting change in the land registry to the detriment of the Applicant who had filed an Appeal that had a high likelihood of success. That if the stay of execution was not granted, then the Appeal would be rendered nugatory.
17. That the Court had now been invited to ensure that in the intervening period, the apprehended harm did not take place for the purposes that the Appeal whose chances of success are high.
18. On whether the Application had been timeous, the Applicant relied on the decision in the case of Directline Assurance Company Ltd vs. Michael Njima Muchiri & Another [2020] eKLR where the court cited with approval the decision in Anthony Kaburi Kario & 2 Others vs. Ragati Tea Factory Company Limited & 10 Others [2014] eKLR, to submit that the judgment which the Applicant



intended to Appeal against was delivered on the 24th February 2022 wherein the present Application had been filed on the 11th April 2022 hence the Application herein was filed timeously.

19. On the issue of furnishing security, the Applicant relied on the provisions of Order 42 rule 6 (1) (2) of the *Civil Procedure Rules*, to submit that he had always abided by the conditions imposed by the Honorable court and the subordinate court without fail and as such, he was ready and willing to offer security and abide by orders, conditions and/or directions that the Court would impose.
20. That the Applicant having met the conditions set for stay of execution of the court's judgment, the Court be pleased to issue an order of stay pending the hearing and determination of his preferred Appeal and cost of the Application be provided for.
21. The Application was opposed by the Respondent who submitted that the Application lacked merit and had been brought in bad faith in a failed attempt to defeat the cost of justice. That pursuant to delivery of the judgment, the Respondent had extracted the Decree and served the Land Registrar who proceeded to cancel the title to the land comprised in LR No. Kericho/Itembe/735 whereby he had taken full occupation of the property, put up new fences and mended the old fences. That the Applicant's Application was to deprive him the enjoyment of the fruits of the judgment.
22. The Respondent framed his issues for determination as follows;
 - i. Whether the Applicant stands to suffer substantial loss unless the order is made.
 - ii. Whether the Application has been brought without undue delay.
 - iii. Whether the Applicant's Application has merit.
 - iv. Whether the firm of F.C Bor & Company Advocates is properly on record.
23. On the first issue for determination, the Respondent relied on the provisions of Order 42 Rule 6 (2) of the *Civil Procedure Rules* (2010) and the holding in the case of *Elena D. Korir vs Kenyatta University* (2014) eKLR to submit that the Applicant had not satisfied the three conditions therein stated for an order of stay of execution to be granted.
24. On the first condition as to whether he would suffer substantial loss unless the order was made, the Respondent submitted that the Applicant had failed to demonstrate the same. Reliance was placed on the decision in the case of *James Wangalwa & Another vs. Agnes Naliaka Cheseto* (2012) eKLR to submit that whereas the Applicant had stated that he had done extensive developments on the suit land, which developments could be demolished and further that he could be permanently restrained from the suit property, the issue of occupation had been litigated upon during the trial and upon issuance of the orders of status quo, the Respondent had been the only person who had remained in occupation. No evidence had been adduced of the said extensive developments during the trial. The issue of loss therefore did not hold any water. Reliance was placed on the case of *Jumilla Attarwalla & Another vs. Hussein Abdulaziz & Another* [2015] eKLR.
25. That it was not sufficient for the Applicant to claim that he resided on the suit property as a reason for seeking grant of an order for stay of execution because he did not stand to suffer substantial loss now that there was no evidence of the existence of the permanent structures alluded to. Reliance was placed on findings of the court of Appeal in *Charles Wahome Gethi vs. Angela Wairimu Gethi* [2008] eKLR.
26. On the other hand, it was the Respondent who stood to suffer great prejudice and loss should the order for stay of execution be granted, because the Applicant had been illegally enjoying exclusive use and possession of the suit property to his detriment since the year 1996 and as such his assertion that the



Respondent will not be prejudiced in any way if the order was granted ought to be treated with the contempt it deserved.

27. On the issue as to whether the Application had been brought without undue delay, the Respondent's submission was in the negative. That judgment had been rendered by the Court on the 24th February, 2022 wherein the Application was filed on 12th April 2022, almost two months after the judgment had been delivered and which judgment had specified that the orders herein be complied within 30 days. As such, it could be reasonably implied that the Application was made in bad faith with the sole intention of denying the Respondent the fruits of his judgment. Reliance was placed on the decision in the case of *Jaber Mohsen Ali & Another vs. Priscillah Boit & Another* [2014]eKLR. That the Applicant did not offer any explanation for the delay and therefore the Application was clearly not made in good faith.
28. On the issue as to whether the Applicant's Appeal was arguable, the Respondent submitted that the same was devoid of merit and did not meet the threshold required under Rule 5 (2)(b) of the *Court of Appeal Rules*. That the Applicant did not demonstrate that he stood to suffer substantial loss were the orders of stay not granted. He placed reliance on the decision in the case of *Multimedia University & Another vs. Professor Gitile N.Naituli* [2014] eKLR where the court had amplified and restated the principles under Rule 5 (2) (b) of the *Court of Appeal Rules* to submit to that for the Court to grant an order of stay of execution, the Applicant must satisfy the Court that his Appeal was arguable and that if stay was not granted, the same would be rendered nugatory in the event that the Appeal succeeded. Both limbs ought to have been satisfied and demonstrating only one limb would not suffice.
29. On the issue as to whether the firm of F.C Bor and Company Advocates was properly on record, the Respondent's submission was that the said firm of Advocates came on record for the Respondent after the judgment had been delivered in place of the firm of M/S Mitey & Associates via a consent to come on record dated the 9th day of May, 2022 which was the same date that the Replying affidavit had been filed. That the Replying Affidavit was erroneously filed before the Consent to come on record was filed as the Advocate on record was of the mistaken belief that the Consent to come on record had been filed but both the documents were dated the same day and as such the Court should invoke the provisions of Article 159 (2)(d) and (e) of *the Constitution*. That failure to observe the rules of procedure laid down under Order 9 Rule 9 of the Civil Procedure Rules having been justifiably explained, the Court to find that the firm of F.C Bor and Company Advocates was properly on record by dint of the fact that the firm of M/S Mitey and Associate executed a consent before Replying affidavit was filled. Reliance was placed on the decision in the case of *Lalji Bhimji Shangani Builders and Constructors vs. City Council of Nairobi* [2012] eKLR.
30. On the last issue for determination as to whether the Applicant's Application had merit, the Respondent's submission was that failure to satisfy all the three (3) mandatory conditions imputed that the Application for stay of execution lacked merit. Further, the Applicant's Application had also not met the threshold under Rule 5 (2) (b) of the Court of Appeal rules and the same ought to be dismissed. That the right of the Applicant must be balanced against his right to enjoy the fruits of this judgment as was held in the case of *Mohammed Salim T/A Choice Butchery vs. Nasserpuria Memon Jamat* [2013] eKLR. The Respondent sought that the Application be dismissed with costs.

Submissions in relation to the second Application dated 18th November 2022 on contempt.

31. In support of the said Application the Applicant framed his issue for determination as to whether the Respondent was in contempt of the court orders issued on 18th October 2022. He relied on the definition of the word 'contempt' as found in the Black's law dictionary, 9th Edition to submit that the elements of civil contempt were laid out in "Contempt in Modem New Zealand" that was cited in *North Tetu Farmers Co. Ltd vs. Joseph Ndertiu Wanjohi* [2016] eKLR.



32. That the orders issued by the court on the 18th October 2022, by consent, had been crystal clear and unambiguous to the effect that both the Applicant and the Respondent maintain the status quo than that they shall not cut down any trees or destroy the buildings on the suit land, pending the delivery of the ruling which had been slated for the 1st December 2022. Both the Applicant and the Respondent had knowledge of the said orders.
33. That subsequently, the Respondent had breached the express orders of the court by deliberately and in flagrant disregard of the said orders, proceeding to cut down trees and destroy the building on the subject parcel of land, which contempt had been evidenced by the Applicant through a bundle of photographs which clearly showed recently cut tree stumps, destroyed houses whose windowpanes had been broken, and the interior of the houses totally messed up.
34. That the said destruction would not have been as a result of the houses being unoccupied, but due to serious interference and maneuverings by the Respondent.
35. That in response to their Application, the Respondent had deliberately attached photographs showing the land as properly fenced and the houses still standing, unaffected which had been a convenient way of running away from his actions of disobeying the orders
36. That indeed the court had directed the Deputy Registrar to visit the site wherein a report dated 20th April 2023 had been prepared after the visit to the site on the 6th April 2023 in the company of Counsel on record for the parties.
37. That although the report indicated that the houses and the windowpanes had indeed been destroyed, it had gone on an unprecedented tangent by trying to draw inferences of what might have taken place by trying to allege that it might have been women or thieves. The report should have confined itself to reporting to the court the current situation on the ground and not engaging in speculation.
38. That secondly the report had also noted that there had been stumps of trees which confirmed the Applicant's position that the trees had indeed been cut. However again the report drew inferences that the said trees were cut a long time ago. That the Registrar was not an expert in assessing and or estimating the age of a tree stump and therefore he could not have deduced and estimated when the trees were cut.
39. That the Application had been filed on the 18th November 2022 when the Respondent had already cut down the said trees whereas the court had visited the site on the 6th April 2023. That a period of 6 months apart could make a tree stump to appear as though it had been cut a long time ago.
40. That whereas the report had noted that the land was bushy, yet from the bundle of photographs attached by both the Applicant and the Respondent, it could be seen that the land was well fenced and not in any way bushy so as to allow and or permit thieves and or women to interfere with the property.
41. That there had been nothing to support the allegations that it was thieves and/or women who could have interfered with the property, but that it had been the Respondent who was solely responsible for the destruction of the houses and the cutting down of the trees.
42. That Contempt was conduct that impacted the fair and efficient administration of justice. Court orders needed to be obeyed for the maintenance of the rule of law and for the dignity of the court to be upheld at all material times as was held in the case of Econet Wireless Kenya Ltd vs Minister for Information & Communication of Kenya & another [2005] KLR 828.



43. That the Respondent herein ought to be found in contempt, as he had flagrantly violated the orders of the court, so that a clear warning could be sent to those who harbored intentions of desecrating the hallowed corridors of justice.
44. That the court through a number of authorities had established the rationale for contempt orders which was to safeguard the rule of law which was fundamental in the administration of justice. That court orders were serious matters which could not be evaded by ingenuity and innovations. That the court ought not condone and/or tolerate the deliberate disobedience of court orders and should deal firmly with contemnors like the Respondent herein. The Applicant sought that his Application be allowed and the Respondent be found in contempt.
45. In his response and in opposition to the Application seeking that he be found in contempt of court orders, Respondent framed his issue for determination as to whether the Application dated 18th November 2022 was merited.
46. In his submissions, the Respondent submitted that he had been in compliance with the court order for status quo as issued on 7th June 2016 and had neither cut down any trees nor demolished any buildings as alleged. That the building was along the highway and had not been in use since the orders of status quo of 7th June 2016.
47. He relied on the decision in the case of Nyamweya & Others vs. Kenya premier league limited and others [2015] eKLR to submit that the photographs of the structures and alleged trees cut down as annexed to the Application were unsubstantiated affidavit evidence and did not demonstrate contempt of a court order. That the Application had been brought in bad faith and with unclean hands with an intention of unjustly committing him to prison.
48. That in order to establish contempt, the Applicant had to prove the terms of the order, knowledge of these terms by the Respondent, and failure by the Respondent to comply with the terms of the order. That contempt proceedings were in the nature of criminal proceedings and therefore proof against the container was higher than that of a balance of probability because the liberty of the subject was usually at stake and therefore the Applicant had to prove wilful and deliberate disobedience of court order.
49. That the Applicant had not demonstrated that the Respondent had wilfully failed, refused and/or neglected to obey the court order. The Respondent placed his reliance on the decision in the case of Sheila Cassatt Issenberg & Another vs. Antony Machatha Kinyanjui [2021] eKLR where the court cited with approval the case of Gatharia K Mutikika vs Baharini Farm Limited [1985] KLR 227.
50. In his supplementary submissions, pursuant to the site visit and filing of a report by the Deputy Registrar of the court, the Respondent submitted that indeed the report had proved that he had not removed and/or destroyed any part of the houses as alleged by the Applicant. That the buildings had been abandoned for long confirming his assertion that the status quo had been maintained since the year 2016.
51. That in relation to the allegation that he had cut down the trees, he had been exonerated by the Deputy Registrar's report that the stumps were old and the tress had been cut a long time ago.
52. That the Deputy Registrar's visits to the suit land was not as an expert but as an independent and impartial court officer who was expected to give an unbiased report on what he had observed at the site. That the Applicant had failed to meet the prerequisites to have the Respondent held liable for contempt and therefor this Application should be dismissed with costs.



Determination

53. Upon considering both the Applications herein, the submissions, the authorities cited and the relevant law, I find the issues for determination as follows;
- i. Whether the firm of M/S Bor & Company Advocates is properly on record.
 - ii. Whether there should be issued an order of stay of execution
 - iii. Whether the Respondent herein is in contempt of the court orders of 18th October 2022.
54. On the first issue for determination as to whether the firm of M/S Bor & Company Advocates is properly on record, I am minded to look at the provisions of Order 9 rule 9 of the Civil Procedure Rules provide 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”
55. Order 9, rule 10 of the Civil Procedure Rules provides;
- “ 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.”
56. In the present case, and having gone through the proceedings herein, it is evident that the Respondent, up to the time that judgment was delivered, had been represented by the firm of M/S Mitey & Associates. After judgment had been delivered, the Applicant filed an Application dated 9th May 2022 for stay of execution where the firm of M/S Bor & Company Advocates filed a Replying Affidavit dated the 9th May 2022 on an equal date, in response. That on record too was a consent dated 9th May 2022 which had been filed on the 11th May 2022 between both firms of Advocates for the firm of M/S Bor & Company Advocates to come on record. The said firm of advocates further filed their submissions dated 20th July 2022 to the said Application on the 25th July 2022.
57. It is also on record that pursuant to the Applicant filing their second Application dated 18th November 2022, seeking that the Respondent be found in contempt of court orders, the firm of M/S Bor & Company Advocates filed a Replying Affidavit dated 16th December 2022 on the 20th December 2022 in response to the Application, and subsequently their submissions on the 19th January 2023.
58. It is clear herein that the firm M/S Bor & Company Advocates had filed the Replying Affidavit dated the 9th May 2022 on an equal date before filing the Consent to come on record, whereby it had proceeded to represent the Respondent without seeking for and obtaining leave of court to effect the change of Advocates as is enshrined in Order 9 Rule 9 of the Civil Procedure Rules The reasoning



behind the provision was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR 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....”

59. In the case of Lalji Bhimji Shangani Builders & Contractors –vs- City Council of Nairobi [2012] eKLR the Court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the Rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

60. The court went further to quote with approval the holding by Hon. Sitati Judge, in Monica Moraa – vs- Kenindia Assurance Co. Ltd. [2010] eKLR where the court held as follows:

“.....there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the Applicant’s Advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the Applicant. The firm of M/S Kibichiy & Co. has not complied with the Rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the Rules are flagrantly breached.....”

61. In the present case, after Judgment had been rendered, the provision of Order 9 Rule 9 became applicable. The firm of M/S Bor & Company Advocates, without leave of the Court, purported by consent to come on record and filed Replying Affidavits and submissions to the Applicant’s Applications, on behalf of the Respondent which action clearly offended the express provisions of Order 9 Rule 9 of the Civil Procedure Rules.

62. It must be remembered that the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not impede the right of a party to be represented by an Advocate of his/her choice, but sets out the procedure to be adhered to when a party wants to change counsel after judgment has been delivered so as to avert any undercutting and or chaos. Thus a party so wishing to change his counsel after judgment had been passed, must notify the Court and other parties.

63. 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 as the Respondent’s counsel would want to submit as herein above.

64. Thus having found that this procedure was not followed by M/S Bor & Company Advocates, the said firm is not properly on record, and has no legal standing to move the Court on behalf of the Respondent and therefore the Replying Affidavits and Submissions herein filed by the said firm are hereby struck out.



65. Having found as such, I shall herein proceed to determine, as unopposed, the two Applications on their merits as it is trite that not all prayers to unopposed Applications can be granted ex-parte.
66. The second issue for determination therefore is whether there should be issued an order of stay of execution. The law applicable is Order 42 Rule 6 of the Civil Procedure Rules which stipulates as follows:
- “No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except in so far as the court Appealed from may order but, the court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether 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.
- (2) No order for stay of execution shall be made under 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.”
67. There are three conditions for granting of stay order pending an intended Appeal under Order 42 Rule (6) (2) of the Civil Procedure Rules to which :
- a. The court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
- b. The Application is brought without undue delay and
- c. 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.
68. On the first condition of proving that substantial loss may result unless stay order is made. It was incumbent upon the Applicant to demonstrate what kind of substantial loss he would suffer were the stay order not made in his favour.
69. What amounts to substantial loss was expressed by the Court of Appeal in the case of Mukuma vs. Abuoga (1988) KLR 645 where their Lordships stated that;
- “Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
70. The Applicant contends that he would suffer irreparable loss if he is not granted the stay as the execution would create a state of affair that would affect the chances of success of the Appeal. That he had been in occupation of the subject parcel of land since 1996 and therefore the Respondent would not be prejudiced in anyway. From the court’s own finding, which shall be discussed herein under (on the second Application dated the 18th November 2022) it had been established that the Applicant had not been either in possession or occupation of the suit land and buildings therein, and therefore this



court finds that no evidence was been provided on the kind of irreparable loss he would suffer if the order of stay was not granted.

71. In regard to the second condition, upon perusal of the court record, the Court finds that the Plaintiff/Applicant filed the Application for stay of execution on 11th April 2022 some 45 days after the judgments had been delivered on the 24th February 2022. I find the delay of 15 days was not inordinate in the circumstance.
72. On the last condition as to provision of security, I find that Order 42 Rule 6 (2)(b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. The Applicant has not offered to furnish security for due performance of such decree or order as may ultimately be binding on him.
73. The grant of stay remains a discretionary order that must also take into account the fact that the Court ought not to make a practice of denying a successful litigant the fruits of their judgment.
74. In the persuasive decision, the court in the case of *Loice Khachendi Onyango –vs- Alex Inyangu & Another* [2017] eKLR held that;

“The relief is discretionary but the discretion must be exercised judiciously and upon defined principles of law; not capriciously or whimsically. Therefore, stay of execution should only be granted where sufficient cause has been shown by the Applicant. In determining whether sufficient cause has been shown, the Court should be guided by the three pre-requisites provided under Order 42 Rule 6 of the Civil Procedure Rules. Firstly, the Application must be brought without undue delay; secondly, the court will satisfy itself that substantial loss may result to the Applicants unless stay of execution is granted; and thirdly 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...”
75. I have considered whether there exists any special circumstances which can sway my discretion to either grant or refuse the Application for stay wherein I have also balanced the scales of justice which in my view would not render the Appeal nugatory while at the same time ensuring that the successful party is not impeded from the enjoyment of the fruits of his judgment.
76. I find that since the Applicant has not satisfied two conditions necessary for the grant of Orders for stay of execution to issue under Order 42 Rule 6(2) of the Civil Procedure Rules, in regard to the provisions of the law as stipulated under Section 3A of the *Civil Procedure Act*, I am not inclined to grant the Order of stay of execution so sought.
77. The Applicant in his second Application dated the dated 18th November 2022 seeks that the Respondent be found in contempt of the court orders issued on 18th October 2022.
78. His submission was to the effect that court had on the 18th October 2022, by consent issued orders that both parties (the Applicant and Respondent) maintain the status quo prevailing at the time. That they shall not cut down any trees or destroy the buildings on the suit land, pending the delivery of the ruling which had been slated for the 1st December 2022.
79. That before the said ruling could be delivered, the Respondent had breached the express orders of the court by deliberately and in flagrant disregard of the said orders, proceeded to cut down trees and destroy the buildings on the subject parcel of land as per a bundle of photographs annexed to his Application which clearly showed cut tree stumps, destroyed houses whose windowpanes had been



broken, and the interior of the houses totally messed up. That the Respondent therefore ought to be found in contempt of the said court orders and punished accordingly.

80. I have considered the Application, the law and authorities herein cited as well as the submissions by Counsel for the Applicant. The Black's Law Dictionary (Ninth Edition) defines contempt of Court as:-

“Conduct that defies the authority or dignity of a Court. Because such conduct interferes with the administration of justice, it is punishable usually by fine or imprisonment.”

81. The law guiding the present Application is Order 40 Rule 3(1) of the Civil Procedure Rules which stipulates as follows:-

“In cases of disobedience, or of breach of any such terms, the Court granting an injunction may order the property of the person guilty of such disobedience or breach to be attached, and may also order such person to be detained in prison for a term not exceeding six months unless in the meantime the Court directs his release.”

82. Section 5(1) of the *Judicature Act* which provided that:

“The High Court and the Court of Appeal shall have the same power to punish for contempt of Court as is for the time being possessed by the High Court of Justice in England, and that power shall extend to upholding the authority and dignity of subordinate Courts.”

83. Section 29 of the *Environment and Land Court Act* is clear to the effect that;

Any person who refuses, fails or neglects to obey an order or direction of the Court given under this Act, commits an offence, and shall, on conviction, be liable to a fine not exceeding twenty million shillings or to imprisonment for a term not exceeding two years, or to both “

84. It is an established principle of law as was held in the case of Kristen Carla Burchell vs Barry Grant Burchell, Eastern Cape Division Case No. 364 of 2005 that in order to succeed in civil contempt proceedings, the Applicant has to prove (i) the terms of the order, (ii) Knowledge of these terms by the Respondent, (iii). Failure by the Respondent to comply with the terms of the order.

85. From the sworn affidavits, and submissions by the Applicant's Counsel on record, the applicable law and the decided cases law, the following issues stand out for determination:-

- i. Whether the Respondent herein was served with or was made aware of the order of 18th October 2022.
- ii. Whether there was any valid Court order issued by this Court on the 18th October 2022.
- iii. Whether the Respondent is guilty of contempt of Court order issued on 18th October 2022.

86. On the first issue as to whether the Respondent herein was served with or was made aware of the order of 18th October 2022, in the case of Kenya Tourist Development Corporation vs. Kenya National Capital Corporation & Another, Nairobi High Court Civil Case No. 6776 of 1992, it was held that the knowledge of an order supersedes personal service. On this line, there is no dispute that the Respondent was aware of the order as the same was issued by consent. There is nothing more to add.



87. On the second issue for determination as to whether there were any valid orders issued by the Court on the 18th October 2022, I find that on the date in question, the 18th October 2022, the parties herein had obtained a consent of the following order.

“By consent the parties herein are directed to maintain the status quo to the effect that they shall not cut down any trees or destroy the buildings on the suit land herein, pending the delivery of the ruling which was slated for the 1/12/2022”.

88. I find that this was a valid order, which was to remain in force up to the 1st December 2022 on which day the court was not sitting and there had been no extension of the said interim orders.

89. On the 19th January 2023, when parties came before court, Counsel for the Applicant sought that the court visits the site to ascertain the true position on the ground so as to make an informed judgment of the situation, the Respondent having been served with the Application wherein he had denied having been in contempt.

90. Pursuant to this Application, the court directed the Deputy Registrar of the court and Counsel for the parties to liaise and visit the suit site and thereafter file a report within 30 days.

91. Indeed the Deputy Registrar of the court visited the suit site 6th April 2023 wherein he filed his report dated 20th April 2023 which I shall herein reproduce verbatim as follows;

“We reached at the scene at about 4.00pm and the site is on the left hand side of the main tarmac highway when one is heading to Nairobi from Sotik direction area. The site is about three to four kilometers to Bomet town. At the scene, I met about 10 people at the site. The advocate for the Plaintiff and the Defendant were both present, though the advocate for the Defendant came a bit late. There was a big bush with life fence with scattered barbed wire which we used to enter into the premises [building] as there is no gate to access the premises. The place looked bushy, deserted with depreciated and deteriorated houses most of them constructed and subdivided by timber and hard woods. It looked like the same had been abandoned for a long time as most of the structures had seen their better days and hence not suitable for inhabitation.

There was a fence across, the said piece of land with old stems of trees cut long time ago on the upper portion of the said subdivide plot by a fence made of local posts.

On the lower side of the site [land], there were trees that had come up and there was no sign to suggest that the said trees have been cut recently. There was also grazing grass which grass has not been grazed upon recently.

There were old toilets in the abandoned houses which I had to access the same through a bush of wild trees so that I could be able to see the abandoned toilets. There was an allegation by the Plaintiff that windows had been destroyed in the abandoned houses, however one could note that the site is on the road and possibilities of women taking some posts as fire wood could not be ruled out or alternatively, the said alleged windows may also be stolen by thieves as the houses were abandoned with a scrub as you enter into the said abandoned houses. There was no connection of electrify and the Kenya power and lightening company were not at the scene to explain how and why the same was removed. Hence my conclusion is that the site is a place inhibited by a bush from the front side of the buildings towards the main road, built across the land and abandoned structures fit to house thieves. These abandoned structures some without windows have not been occupied or interrupted for a long time.”



92. From the report of an independent observer, it can easily be concluded that the said suit land which harbored houses akin to condemned buildings and had neither been inhabited, interfered with nor destroyed as the Plaintiff wants the court to believe. Instead the interference therein had been as a result of vandalism of the abandoned buildings. I find the Applicant's allegation that the Respondent had cut trees, destroyed the houses and windowpanes as well as messed up the interior of the houses, a fragrant of his imagination and farfetched in line with the report of the Deputy Registrar herein and I am left to wonder if he was trying to fix the Respondent in retaliation and to deny him the fruits of his judgment. Be as it may, the standard of proof in cases of contempt of Court is well established. In the case of Mutitika vs. Baharini Farm Limited [1985] KLR 229, 234 the Court of Appeal held that:

“In our view, the standard of proof in contempt proceedings must be higher than proof on the balance of probabilities, almost but not exactly, beyond reasonable doubt...The standard of proof beyond reasonable doubt ought to be left where it belongs, to wit, in criminal cases. It is not safe to extend it to an offence which can be said to be quasi-criminal in nature.”

93. Contempt proceedings are of a criminal nature and involve, if proved, loss of liberty. The Applicant was therefore tasked to endeavor to prove all facts relied on by way of evidence beyond reasonable doubt. It is not like any other ordinary matter.

94. The Supreme Court of Kenya in Republic vs. Ahmad Abolfathi Mohammed & Another [2018] eKLR held that;

“The power, to commit a person to jail, must be exercised with utmost care, and exercised only as a last resort. It is of utmost importance, therefore, for the Respondents to establish that the alleged Contemnor's conduct was deliberate, in the sense that he or she willfully acted in a manner that flouted the Court Order.”

95. In the end, I find that the Applicant has not proved to the required standard that the Respondent as cited was in brazen disobedience of the Court order issued by this Court on 18th October 2022. I decline to grant the order sought by the Applicant and proceed to dismiss the notice of Motion dated the 18th November 2022. The Respondent is herein acquitted of the charge of being in contempt of Court. There shall be no costs as both the Applications were undefended.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 19TH DAY OF OCTOBER 2023.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

