



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC APPEAL CASE NO. E028 OF 2021

ABSALOM NGALO,

MICHAEL KONDI,

MUTHONI MWANGI

(Suing as the Chairman,

Secretary and Treasure

Respectively of GITHUNGURI

RIVERSIDE DWELLERS

SELF HELP GROUP.....APPLICANTS/APPELLANTS

VERSUS

MARGARET WAIRIMU NJOROGE.....RESPONDENT

RULING

INTRODUCTION

1. On 7th July 2021, the Appellants herein filed their Memorandum of Appeal through the firm of Lumumba & Ayieko Advocates. Simultaneous with the filing of the Memorandum of Appeal, the Appellants also filed a Notice of Motion application dated 5th July 2021 under certificate of urgency seeking for the following orders;

(a) Spent

(b) Spent

(c) **THAT** pending the hearing and determination of this appeal this Honourable Court do grant stay of execution of decree emanating from the judgment of the Chief Magistrate's Court at Machakos delivered on 11th June 2021 by Honourable C. A. Ocharo (SPM).

(d) **THAT** pending the hearing and determination of this appeal this Honourable Court do issue an injunction restraining the Respondent, her agents or any other person from any dealings in respect of the Land Reference Number 7340/22 situated at Athi River within Machakos County.

(e) **THAT** costs of application be in the cause.

(f) Any other relief that the Honourable Court deems fit and appropriate to grant.

2. The Respondent filed a Replying Affidavit sworn on 19th July 2021. She also filed a preliminary objection dated 19th July 2021 under Order 9 Rule 9 (a) and (b) and Rule 10 of the Civil Procedure Rules on grounds that;

a. The application dated 5th July 2021 by the applicant is fatally and incurably defective for being filed in contravention of

Order 9 Rule (a) and (b).

b. The application is an abuse of the court process.

3. Both the Preliminary Objection and the Application dated 5th July 2021 were heard together. The same were canvassed by Written Submissions. The Applicants/Appellants filed their submissions dated 15th October 2021 on 18th October 2021, while the Respondent's Submissions dated 15th October 2021 were filed on 19th October 2021.

THE PRELIMINARY OBJECTION

4. I will first address and determine the preliminary objection before I address the application dated 5th July 2021. The Respondent has argued that the application dated 5th July 2021 is fatally and incurably defective for being filed in contravention of Order 9 Rule 9 (a) and (b). The Appellants filed an affidavit in response to the preliminary objection dated 1st September 2021 and filed on 22nd September 2021.

THE RESPONDENT'S SUBMISSIONS IN RESPECT OF THE PRELIMINARY OBJECTION

5. The Respondent submitted that counsel for the Appellants filed the application dated 5th July 2021 without leave of the court and that the application is an abuse of the process of the court. He contended that the affidavit filed by the Appellants in response to the preliminary objection was an afterthought. He argued that the consent attached to the affidavit cannot apply retrospectively having been filed 3 months after the application dated 5th July 2021 was filed. Counsel argued that the consent to bring the Appellants' counsel on record ought to have been the initial document on record for the Appellants' advocate to be properly on record.

APPELLANTS' RESPONSE TO THE PRELIMINARY OBJECTION

6. The Appellants filed an affidavit sworn on 1st September 2021 in response to the preliminary objection. The said affidavit was sworn by **ABSALOM NGALO**, the 1st Appellant where he stated that his current advocate entered a consent for change of advocates with their previous advocates on 5th July 2021, but inadvertently omitted to file consent; which action was not deliberate. The Appellants sought for the court to adopt the consent and allow the firm of Lumumba & Ayieko Advocates be deemed as properly on record. Further that the Respondent will not suffer any loss or damage; that they should not be penalized by the inadvertent procedural oversight by their advocates and that the court should focus on justice, fairness and the overriding objective.

APPELLANTS' SUBMISSIONS IN RESPONSE TO THE PRELIMINARY OBJECTION

7. The Appellants submitted that their advocates on record in this matter are properly on record in view of the consent filed for change of advocates between the outgoing advocates and the incoming advocates. The Appellants further argued that this being an appeal in a different court, there was no requirement for an advocate filing an appeal to obtain leave of court before coming on record.

8. It was also contended for the Applicant that the object of Order 9 Rule 9 is to protect advocates from clients who may opt to replace them with other advocates so as to run away with the initial advocate's legal fees, and that since there is a consent in that respect filed in this matter, the mischief has been addressed.

9. The Appellants submitted further that in the unlikely event that the court found that their advocates are not properly on record, then the court should consider their submissions as a formal application pursuant to Order 9 Rule 9 (a) of the Civil Procedure Rules to allow the Appellants' advocates as properly on record, which according to them would be in the best interest of justice, fairness and overriding objective. They also argued that the Respondent does not stand to suffer any loss or damage should the court deem the Appellants' advocates as properly on record. Counsel relied on the case of *Ngitimbe Hudson Nyanumba vs. Thomas Ogondo [2018] eKLR* for the proposition that where there is no prejudice suffered by the other party, failure to comply with Order 9 Rule 9, shall not render a party's documents filed by a non compliant advocate, incompetent.

10. The Appellants also contended that this court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19 of the Environment and Land Court Act, as well as Article 159 (2) (d) of the Constitution of Kenya, to administer Justice expeditiously and justly without undue regard to technicalities of procedure, and that this court is entitled to disregard the strict rules of procedure in order to do substantive justice. The Appellants relied on the cases of *Nicholas Kiptoo Arap Korir Salat vs. Independent and Electoral Boundaries Commission & 7 Others [2015] eKLR* and *Kenya Commercial Bank Ltd vs. Kenya Planters Cooperative Union (2010) eKLR* where the common thread was that the court's authority under Article 159 (2), (d) of the Constitution of Kenya remained unfettered for attainment of the ends of justice and to prevent abuse of the court process and also avoid matters being defeated due to procedural technicalities.

ANALYSIS AND DETERMINATION

11. I have considered the preliminary objection, the affidavit in response to the same and the parties' submissions. The issues that arise for determination are;

(a) **Whether the preliminary objection dated 19th July 2021 meets the threshold of a preliminary objection; and**

(b) **Whether the preliminary objection has merit.**

12. A preliminary objection was described in the case of *Mukisa Biscuits Manufacturing Co. Ltd vs. West End Distributors Ltd (1969) EA*

696 as follows;

“So far as I am aware, a preliminary objection consist of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration”

Further **Sir Charles Newbold, JA** stated as follows;

“A preliminary objection is in the nature of what used to be a demurer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs, and on occasion, confuse the issue. The improper practice should stop.”

13. From the above description a preliminary objection should only raise pure points of law based on facts that are not in dispute as presented in the parties’ pleadings. But where there is need to ascertain the facts by deductions from rival affidavits or evidence of whichever nature, or where the matter calls for the exercise of judicial discretion, then a preliminary objection cannot be raised.

14. In the case of *Oraro vs. Mbaja [2005] KLR 141*, the court held as follows;

“Anything that purports to be a preliminary objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence.”

15. In the instant case, the preliminary objection is based on the fact that the Appellants’ advocates did not obtain leave of court to come on record before filing the application dated 5th July 2021. The fact that leave to come on record was not sought and obtained before filing the application dated 5th May 2021 is not in dispute. Therefore the preliminary objection is on a point of law, thus well taken.

16. The Appellants concede that they did not obtain leave for their counsel to come on record. They however argued that such leave was unnecessary as this appeal is an independent suit from the lower court, whose judgment they have appealed against. They have in the alternative sought that in the event the court finds that leave was a prerequisite for their counsel to be properly on record, then they were applying, by their submissions, to have the consent attached to their replying affidavit to be adopted and an order to issue that their counsel is properly on record. Before I delve into the issue as to whether leave to come on record in the place of another counsel who appeared for a party in the lower court, is necessary before an appeal is filed, I wish to point out at this stage that submissions cannot be deemed as an application, and I therefore reject the Appellant’s proposition that his submissions be treated as an application. Submissions are merely persuasions and arguments and cannot be treated as applications even by invoking Article 159 of the Constitution.

17. The preliminary objection turns on whether an advocate who was not on record in the lower court, can competently file an appeal and any other subsequent pleadings without obtaining leave of court to come on record in the place of the initial advocate. Order 9 Rule 9 of the Civil Procedure Rules states as follows;

“Where 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.”

18. In my considered view Order 9 Rule 9 requires that in a suit, where judgment has been entered and any party intends to either act in person or change their advocate, they can only do so after the court which passed the judgment grants them leave to have the new advocate come on record or the party to act in person. The intention of Order 9 Rule 9 was aptly captured in *S. K. Tarwadi vs. Veronica Muehlmann [2019] eKLR*, where the court stated as follows;

“In my view, the essence of Order 9 Rule 9 of the Civil Procedure Rules 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.....”.

19. In the instant case, the Respondent has argued that the Appellants ought to have filed the consent allowing their counsel to come on record for them in the place of their initial counsel. In my considered view, the legal import of Order 9 Rule 9 of the Civil Procedure Rules is not intended to apply beyond the suit in which judgment was delivered. An appeal is a suit independent of the lower court suit, and therefore there is no requirement that before a party files a Memorandum of Appeal, they should begin with a consent or application for leave to either act in person or allow a new advocate to come on record on their behalf. Order 9 Rule 9 of the Civil Procedure Rules will only have effect upon entry of judgement in an appeal, where the suit is commenced by a Memorandum of Appeal, and not before judgment is entered in such appeal.

20. In the case of *Wilfred Mbogo & 5 Others Vs. Nelson Mwaniki [2016] eKLR*, paragraph 9, the court stated as follows;

“Order 9 envisages a situation where judgment has been pronounced and is followed by interlocutory applications for either

stay of execution, enforcement, review or setting aside. In my considered view, the case in the original court forms different proceedings from those in an appeal. At the conclusion of the case in the original court, an appeal may not be anticipated and therefore Order 9 Rule 9 could not have been intended to apply to an appeal. An appeal will have to be heard in the appellate court and determined thereby generating its own judgment that is independent of the one of the original court.”

21. Similarly, in the case of *Kenya Pipeline Co. vs. Lucy Njoki Njuru [2014] eKLR*, the court addressed the same issue as follows;

“At the appeal stage, a party is at liberty to change its advocates without any order of the court or consent of the advocate on record in the trial court, as required under Rule 9 of the said order.”

22. In the premises therefore I find that the provisions of Order 9 Rule 9 are not applicable in these proceedings at this stage, and therefore the firm of Lumumba & Ayieko Advocates is properly on record for the Appellants in this appeal. Consequently the application dated 5th July 2021 is properly on record. I therefore find no merit in the preliminary objection and I proceed to dismiss the same with costs to the Appellants.

THE APPLICATION DATED 5TH JULY 2019

23. The application dated 5th July 2019 was brought under Sections 1A, 1B and 3A of the Civil Procedure Act and Order 46 Rule 6 of the Civil Procedure Rules 2010, and sought for stay of execution of the decree of the Chief Magistrates court pending the hearing and determination of this appeal as well as an order of injunction to restrain the defendant from dealing with Land Reference Number 7340/22, pending the determination of the appeal.

24. The application is premised on the grounds on its face and the affidavit of the 1st Appellant/Applicant who deposed that the applicants will suffer substantial loss if orders of stay of execution are not granted; that the appeal raises triable issues with high chances of success; that the respondent will not be prejudiced in any way by grant of stay orders; that unless orders sought are granted, the appeal shall be rendered nugatory; that the application is made in good faith and without undue delay; and that the judgment ordered the Appellants’ eviction in 60 days.

25. The application is opposed. The Respondent filed a Replying Affidavit sworn on 19th July 2020, where he deposed that the application is an abuse of the court process; that the applicants do not live nor have any relation with the land in issue and no loss shall be occasioned to them; that the appeal is meant to frustrate the Respondent not to enjoy her right to the suit property; that the applicant must deposit a security for costs in court for this appeal and the lower court costs, in the sum of Kshs. 2,500,000/- into a joint interest earning account; that the Applicant has no known assets, and that the Application is in bad faith.

26. In a rejoinder to Respondent’s replying affidavit, the 1st applicant filed a further supporting affidavit on 22nd September 2021 and sworn on 1st September 2021 where he deposed that the Respondent is not the legal owner of the suit land; that the Applicants are the lawful owners of the suit land, with properties on the land including a church and an office. That some members of the applicants live on the suit property while others are farming the same, hence a substantial loss will result if execution of the lower court decree is done; that there is no justification for demand for security for costs that the applicant is a registered self help group with known officials and a known physical office which is located on the suit land; that the judgment appealed against is not for a liquidated sum and that there is no basis for arriving at the sum of Kshs. 2,500,000/- for security for costs; that

THE APPLICANTS’ SUBMISSIONS

27. The Applicants submitted that the Respondent did not challenge the application, save for the prayer for deposit for security for costs. Counsel argued that the lower court judgment had material errors of fact and the law. He contended that the Respondent obtained title during the subsistence of a court order that no transaction should be conducted in respect of the suit property and that the court allowed production of an illegally acquired title. The application stated that ownership of the suit property by the Respondent was not proved. Counsel relied in the case of *Mary Nchekei Paul vs. Francis Mundia Ruga [2009] eKLR* for the proposition that if stay is not granted, the party who faces eviction suffers more prejudice than the party who will be required to wait for the determination of the appeal.

28. It was further argued for the Applicants that an order for security for costs is not mandatory, and that resolution of disputes ought to be at an affordable cost. Counsel asserted that the appeal herein is not in respect of a judgment for a liquidated claim and that there is no justification for the Respondent to arrive at a sum of Kshs. 2,500,000/- for security for costs. It was also submitted for the applicant that the Respondent does not live on the suit property, hence she does not stand to suffer any loss during the pendency of the appeal.

THE RESPONDENT’S SUBMISSIONS

29. The Respondent reiterated the contents of her replying affidavit dated 19th July 2021 and submitted that she is the legal owner of the suit land and holds a valid title document thereto. She relied on Section 26 of the Land Registration Act to argue that she has an absolute right to the suit property, being the registered proprietor thereof. She also placed reliance on Order 26 Rules 1, 5, and 6 of the Civil Procedure Rules for the proposition that the purpose of Order 26 is to protect the defendant from situations in which he is dragged to court and made to lose even the costs of litigation. She placed reliance on the case of *Marco Tools & Explosives Ltd vs. Mamujee Brothers Ltd [1988] KLR 730*, where it was held as follows;

“The court has unfettered judicial discretion to order or refuse security. Much will depend upon the circumstances of each case, though the guidance is that the final result must be reasonable and modest.”

30. The Respondent further contended that she does not know where the Applicants live or what they do for a living and is apprehensive that she may not recover her security for costs. Reliance was placed on the cases of *Shah vs. Sheti Civil Appeal No. 34 of 1981*, *Jayesh Hasmukh Shah vs. Narin Haira & Another [2015] eKLR* and *Kenya Education Trust vs. Katherine S. M. Whitton Civil Appeal No. 310 of 2009*, all of which have been put into consideration by this court.

ANALYSIS AND DETERMINATION

31. I have carefully considered the application, the affidavits in support, the replying affidavit and the submissions of the parties. The issue that arise for determination is whether the Appellants/Applicants are entitled to the orders of stay of execution and injunction against the respondent.

32. The law and principles governing grant of orders for stay of execution and injunction pending appeal as well as security are well settled. Order 42 Rules 6 (2) and (6) and 7 (1) provide as follows;

(2) No order for stay of execution shall be made under subrule (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.

(3)

(4)

(5)

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

33. In the case of *Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai 15 of 1990 [1990] KLR 365*, the Court of Appeal held that although the power of the court of Appeal to grant stay pending appeal is unfettered, the High Court's jurisdiction to do so under the Civil Procedure Rules is fettered by three conditions; namely, establishment of a sufficient cause, satisfaction of substantial loss, furnishing of security and that the application must be made without unreasonable delay.

34. In the instant case, the applicant has argued that the lower court ordered for their eviction and that they stand to suffer irreparable loss and damage if the lower court orders are executed. The applicant has annexed to the application photographs to show that they are indeed in occupation of the suit land having a church and other structures on the land. They have stated that their appeal raises triable issues. Having perused the record and the Memorandum of Appeal, I am satisfied that the appeal herein raises triable issues and if eviction proceeds, the appellants shall suffer irreparable loss.

35. Under Order 42 Rule 6 (b), this court has the power to grant a temporary injunction pending appeal on just terms. Having considered the application and the circumstances of this case, and considering the overriding objective provisions contained in Sections 1A and 1B of the Civil Procedure Act as well as Section 3 of the Environment and Land Court, I am of the view that the application dated 5th July 2021 is merited and the same is allowed in the following terms;

(a) THAT pending the hearing and determination of this appeal this Honourable Court hereby grants stay of execution of decree emanating from the judgment of the Chief Magistrate's Court at Machakos delivered on 11th June 2021 by Honourable C. A. Ocharo (SPM).

(b) THAT pending the hearing and determination of this appeal this Honourable Court hereby issues a Temporary Injunction restraining the Respondent, her agents and any other person from any dealings in respect of the Land Reference Number 7340/22 situated at Athi River within Machakos County.

(c) THAT costs of the Application shall be in the cause.

(d) Parties are directed to file and serve their submissions in respect of the appeal within 30 days of this ruling.

36. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 19TH DAY OF JANUARY 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

Mr. Ayieko appearing with Mr. Kitinya for the Appellants

No appearance for the Respondent

Ms. Josephine Misigo – Court Assistant