



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC CASE NO. 75 OF 2019

BENSON GICHOBI MUTAHL.....PLAINTIFF

VERSUS

ALEX NJUE KITHANGARI.....1ST DEFENDANT

MURIITHI KITHANGARI 2ND DEFENDANT

BONIFACE MUTHEE NJERU..... 3RD DEFENDANT

PETERSON MUGO KITHANGARI4TH DEFENDANT

MWANIKI KITHANGARI5TH DEFENDANT

NJERU TETU 6TH DEFENDANT

MURIITHI MUCHARO7TH DEFENDANT

KITHANGARI KING'ANGI8TH DEFENDANT

RULING

1. The ruling relates to applications dated 27.7.2021, 30.8.2021 and 2.9.2021 hereafter the 1st, 2nd and 3rd application.
2. In the first application, Benson Gichobi Mutahi seeks for stay of execution pending hearing of the intended appeal. The application is supported by an affidavit sworn on 27.7.2021.
3. The grounds are that upon the delivery of judgment on 21.7.2021, he intends to appeal to the Court of Appeal; execution is underway; the respondents are likely to resume occupation; the appeal is arguable and likely to be rendered nugatory; subdivision is imminent; there has no inordinate delay and it is in the interest of justice the orders sought are issued.
4. In the 2nd application, the applicant seeks for review and or setting aside the orders of 11.8.2021 for conditional grant of stay by depositing Kshs. 800,000/=; enlargement of time in which to comply and in the alternative the applicant be allowed to substitute the security by depositing the original title deed for L.R Mbeere/Kirima/3065.
5. The application is based on the grounds on the face of the application and a supporting affidavit of Benson Gichobi Mutahi sworn on 30.8.2021.
6. The basis of the application is that following the filing of the 1st application, he was ordered to deposit Kshs. 800,000/= as security which is punitive and beyond his capacity to comply given he is servicing a loan and his business has suffered due to Covid 19 pandemic.
7. In the 3rd application, the applicant more or less prays for similar orders as in the 1st and 2nd applications save he invokes **Sections 95 and 3A of the Civil Procedure Act and Article 50 of the Constitution.**
8. The applications are opposed by the 2nd respondent through replying affidavits sworn on 17.9.2021 and 14.10.2021 on behalf of the

respondents.

9. The 2nd respondent states the applicant is a man of means; he is not entitled to the orders sought; he does not indicate what steps he has taken to adhere to the conditions; the application is overtaken by events for the stay period has lapsed; it is an abuse of the court process; there is no demonstration of any substantial loss; there is no indication on how the appeal shall be rendered nugatory if no stay is granted; the respondents are entitled to enjoy fruits of their judgment; the applicant had evicted the respondents in most inhumane way during the pendency of the suit by destroying their crops and homestead which left them almost destitute a situation they are yet to recover from and that they should not continue to suffer even after judgment has been entered in their favour.

10. With leave of court parties agreed to dispose the applications through written submissions dated 21.10.2021 and 5.11.2021 respectively.

11. The applicant submits he is entitled to stay and has met the conditions set out under Order 42 and the principles underscored in **Butt –vs- Rent Restriction Tribunal [1979] eKLR, HE –vs- SM [2020] eKLR.**

12. Further the applicant submits he is willing to deposit security in terms of an original title deed for L.R No. Mbeere/Kirima/3065 and relies on **Focin Motorcycle Co. Ltd. –vs- Ann Wambui Wangui & Another [2018] eKLR and RWW –vs- EKW [2019] eKLR** on the need to preserve the substratum of the appeal.

13. As regards the review of conditional security ordered herein, the applicant relies on **David Kipkemoi Koskei –vs- Kenya Commercial Bank & 2 Others [2021] eKLR** since he is financially constrained as per the outstanding loan arrears and on **Simba Coach Ltd –vs- Kiriyyu Merchants’ Auctioneers [2018] eKLR** on the nature of security to be offered and its purpose as held in **Arun S. Sharma –vs- Ashana Raikundalia T/A Rairundalia & Co. Advocates and 2 Others [2014] eKLR.**

14. Further, the applicant submits the security must also be reasonable and relies on **Marco Tools & Explosives Ltd –vs- Mamujee Brothers Ltd [1988] KLR 730.**

15. As regards the extension of time to comply, the applicant relies on **Sections 3A and 95 of the Civil Procedure Act and Nicholas Kiptooo Arap Korir –vs- IEBC & 7Others [2014] eKLR.**

16. Concerning the issue of legal representation, the applicant relies on **Connection Joint –vs- Apollo Insurance [2006] eKLR** and lastly urges the court to be guided by **Article 159 (2) (d) of the Constitution.**

17. The respondent on the other hand submit that the applicant has not demonstrated by substantial loss, he came to court late and that he is not willing to offer security and that even after being given conditional stay, he has not complied yet he purports to dictate the terms of stay orders.

18. The respondents rely on **Kanamai Timber Hardware –vs- Benard Katuti [2021] eKLR** on the issue of failure to adhere to the conditional terms granted.

19. Regarding the time for filing the application and compliance with the terms vis a vis a request for extension of time, the respondents submit the reasons given for non-compliance are mere excuses, delay has not been explained and hence the period having expired there is nothing to extend. The respondents rely on **Rodah Cheptonui Lagat –vs- Aggey Watindi & 2 Others [2021] eKLR.**

20. On the issue of substantial loss, the respondents submit there is nothing demonstrated but on the contrary it is them who are suffering for they were forcefully and inhumanly evicted during the pendency of the suit with their homestead being destroyed together with their livelihoods.

21. On the issue of the capacity to represent the applicant, the respondents deny there was any alleged notice to act in person filed and served to allow the two law firms who have filed the applications to represent the applicant.

22. As a starting point, the court record indicates the firm of Mugambi Njeru & Co. Advocates was on record for the plaintiff up to and including the date the matter was fixed for judgment on 21.7.2021. This is event from the mention notice dated 12.2.2021 by the respondent’s advocate to the said law firm for the taking of a judgment date on 15.4.2021.

23. The record for 15.4.2021 indicates the plaintiff was duly represented by M/s Mugambi Njeru & Co. Advocates who took the judgment date on his behalf for 21.7.2021, the plaintiff was therefore not acting in person at the time as alleged.

24. Following the delivery of judgment, the plaintiff through the firm of Agnes Wanjiku Maina & Co. Advocates filed a notice of appeal which was received by the Deputy Registrar on 27.7.2021. The said law firm did not file any notice to act for the plaintiff in the matter post-judgment in place of the firm of Mugambi Njeru & Co. Advocates. See **Order 9 Rules 6, 9 and 11 of the Civil Procedure Rules.**

25. Whereas it was legally in order for the said law firm to represent the plaintiff at the Court of Appeal, it had no capacity in law to file the application dated 27.7.2021 and by extension enter into a consent to come on record with M/s Benard Odero Okello Odero & Partners Advocates on 30.8.2021. In the said consent the aforesaid law firm purports to be on record for the plaintiff yet no such record existed and hence the said law firm could not possibly pass on any such powers M/s Benard Odero Okello Odero & Partners Advocates.

26. Further and assuming the said law firm of M/s Benard Odero Okello Odero & Partners Advocates filed no notice to come on record. They did not serve upon the defendants/respondents any such notice in line with **Order 9 of the Civil Procedure Rules.**

27. It therefore goes without saying that the firm of Benard Odero Okello Odero & Partners Advocates had no capacity in law to file the 2nd and 3rd applications herein. The court has been urged to be guided by **Article 159 2 (2)** of the **Constitution and Sections 1A, 1B and 3A of the Civil procedure Act**.

28. In the further affidavit sworn on 21.10.2021 regarding the issue of legal representation, the applicant states he filed a notice of intention to act in person on 2.6.2021 before judgment was entered on 21.7.2021 hence no leave needed to have M/s Agnes Wanjiku Maina & Co. Advocates to represent him. The said notice is neither stamped by the court nor is there any proof that the requisite fees were ever paid for it. More importantly, the applicant has not indicated if he ever served such a notice to act in person upon the respondents together with his former lawyers.

29. As indicated above, even assuming the plaintiff was acting in person at the delivery of judgment, the subsequent law firm had the obligation to comply with the law and properly come on record for him.

30. This court is aware the mischief rule behind **Order 9 rule 9** and the need for honesty and candidness in the dispensation of justice without trying to steal a match at the expense of the opposite party.

31. The applicant is seeking discretionary orders and must approach the court with clean hands. He came to court through the back door and obtained conditional orders. He has however not played by the rules and instead of conceding the mistake, he is not trying to sneak in purported a notice to act in person which was never paid for, filed or served as per the law upon the respondents.

32. This court therefore cannot cure that defect under **Article 159 2 (2) of the Constitution** for a party who has exhibited scant respect for the rules as held in *Nicholas Kiptoo Arap Korir Salat –vs- IEBC & 6 Others.*

33. There was nothing stopping the two law firms from regularizing the position when the issue of representation was raised. See *Aswa Developers & Constructors Systems Ltd [2021] eKLR.*

34. The upshot is that the law firms of M/s Agnes Wanjiku Maina & Benard Odero Okello Odero & Partners Advocates having been improperly on record, the 1st, 2nd and 3rd applications filed by them are hereby struck out with costs to the respondents.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT MERU THIS 19TH DAY OF JANUARY, 2022

In presence of:

Sarange holding brief for Odero applicant

Rose Njeru for respondents

Court Assistant - Kananu

HON. C.K. NZILI

ELC JUDGE