



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT SIAYA

ELC APPEAL NO. EOO3 OF 2022

FRANCIS OMONDI ODHIAMBO.....APPELLANT

VERSUS

HIPPOLITUS OMONDI OCHIENG.....RESPONDENT

RULING

Appellant's case

1. Within the provisions of **Sections 3A, 75, 78, 75G** of the **Civil Procedure Act** and **Order 41 Rule 4** and **Order 51** of the **Civil Procedure Rules** the appellant filed a motion dated 20/01/2022 in which he sought several orders. Prayers 1, 2 and 3 are spent and the main prayer pending determination is as follows;

a) The court be pleased to grant a stay of execution of the judgement and or decree issued by the honourable court on 22/12/2012 in Siaya PM ELC No. 41 of 2018 2003 pending hearing and determination of the appeal.

2. The motion is supported by two supporting affidavits one sworn by the appellant dated 3/01/2022 and the other by the appellant's wife one **Winnie Achieng Omondi** sworn on 20/01/2022. The main ground is that there is high likelihood that there shall be execution of the decree issued by the lower court and the appellant will be evicted from land parcel number **Siaya/Mulaha/2141** thus occasioning him irreparable and substantial loss. He contended that he was willing to abide with any conditions and terms as to security as the court will impose.

The respondent's case

3. In response, the respondent filed a preliminary objection dated 1/02/2022 and a replying affidavit filed on even date.

4. In the preliminary objection, he contended that the firm of **Ooro & Co. Advocates** are improperly on record for having failed to comply with the provisions of **Order 9 Rules 9** and **10** of the **Civil Procedure Rules**.

5. In the replying affidavit, he reiterated the averments in the preliminary objection and contended that this court did not have jurisdiction to entertain the motion because it ought to have been filed in the court that rendered its determination. He urged the court to expunge the affidavit of **Winnie Achieng Omondi** from the court record because she was a stranger in the proceedings and further asserted that security had not been furnished by the appellant.

The appellant's submissions

6. The appellant did not file written submissions in support of the motion.

The respondent's submissions

7. The respondent filed written submissions dated 1/02/2022 and he identified two issues for determination; (i) whether the firm of Ooro & Company Advocates are properly on record and (ii) whether the appellant is entitled to orders sought in the motion.

8. On the 1st issue, the respondent contended that contrary to the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**, the appellant's advocate was improperly on record and he placed reliance on several cases including the case of **John Langat v Kipkemboi Terer & 2 others [2013] eKLR** and **Florence Hare Mkaha v Pani Tawakal Mini Coach and Another [2014] eKLR** which held that a party must seek leave of the court once judgement has been rendered. He submitted that in the lower court, the respondent was represented by the firm

of J.D. Oduor and Co. Advocates and he had neither been served with a consent between the advocates nor had leave been granted to the respondent's advocates to come on record.

9. On 2nd issue, the respondent submitted that the principles for grant of stay of execution are provided for within the provisions of **Order 42 Rule 6 (2)** of the **Civil Procedure Rules** which are; sufficient cause, substantial loss, security and that the application must be filed in timely manner. He submitted that this provision of law had been relived in several cases including **Equity Bank Limited v Taiga Adams Company Limited [2006] eKLR**, **Elena D. Korir v Kenyatta University [2012] eKLR** and **Samvir Trustee Limited v Guardian Bank Limited Nairobi [Milimani] HCCC 795 of 1997**. He urged the court to balance the interests of the parties and that the successful party should enjoy the fruits of his judgement and on this he relied on the case of **Machira T/A Machira & Co. Advocates vs East African Standard (NO.2) [2002] KLR 63**.

The appellant's submissions in rebuttal

10. Though the appellant did not file written submissions, he filed supplementary submissions. He submitted that the preliminary objection did not meet the ingredients of the *locus classicus* case of **Mukisa Biscuits Manufacturing Company Limited vs West End Distributors (1969) EA 696** because the court had been called upon to verify the facts from the lower court record. He urged the court to overlook his advocates non-compliance with **Order 9 Rule 9** of the **Civil Procedure Rules** as a mere technical error and on this, he placed reliance on the case of **Hassan Mohamed Haji v Mohamed Keynan & another [2021] eKLR**.

Analysis and determination

11. Having considered the appellant's and respondent's pleadings and rival submissions, this court is of the considered view that the issues falling for determination are: (a) Whether the preliminary objection is merited. (b) If the answer to is in the negative, whether the appellant's motion is merited.

I will proceed to analyse the legal and jurisprudential framework on the two issues in a sequential manner.

12. Before determining the gravamen of the motion, I have to address my mind on certain issues that emerged from the motion. First is **Winnie Achieng Omondi's** purported supporting affidavit. As it is, she is not a party to these proceedings and for that reason, I expunge from the court record her supporting affidavit dated 20/01/2022 together with all annexures thereto. Second, the appellant has moved this court pursuant to the provisions of **Sections 75 and 79G** of the **Civil Procedure Act** and **Order 41 Rule 4** of the **Civil Procedure Rules** which have no relevance whatsoever to the instant motion. Be that as it may be, I will proceed with the substance of the motion.

a) Whether the preliminary objection is merited.

13. **Order 9 Rule 9** and **10** of the **Civil Procedure Rules** states thus:

"9. 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. 10. 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"

14. The case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696** has long settled the principle of a preliminary objection as thus;

"So far as I am aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit"

15. This court must now consider whether the issue raised in the preliminary objection is a matter of fact or law. In my humble opinion, the preliminary objection requires this court to investigate and verify the facts from the lower court record to establish whether or not the respondent's counsel is properly on record and for that reason, it is my finding that the objection does not meet the ambit of a preliminary objection and I hereby dismiss it.

b) If the answer to is in the negative, whether the appellant's motion is merited.

16. Having addressed my mind on the preliminary issue, the respondent has raised a similar issue in his replying affidavit; the appellants advocate is not properly on record.

17. In my considered view and as has been held in various court decisions and rightly posited by the respondent, the intent of **Order 9 Rule 9** and **10** of the **Civil Procedure Rules** was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court of call, I would not have hesitated but upheld that once judgement has been rendered, leave has to be sought from the trial court.

18. However, the scenario is different in the instant, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? Bearing in mind the provisions of **Section 1A** of the **Civil Procedure Act** and **Section 3** of the **Environment and Land Court Act** that courts have to ensure that cases are conducted in a manner that are just and expeditious. It is my view that **Order 9 Rule 9** and **10** of the **Civil Procedure Rules** does not apply in instances of an appeal because the advocate's instructions in a lower court are

exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an appellant a right to legal representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute.

19. I am persuaded by a line of court decisions including; **Magereza Savings & Credit Co-operative Society Limited v Samuel Gachini Wahi & 881 others [2014] eKLR**, **Martin Mutisya Kiio & Another Vs Benson Mwendo Kasyali Machakos High Court Misc. Application No. 107 of 2013**, **Tobias M. Wafubwa v Ben Butali [2017] eKLR** and **Kenya Pipeline Company Limited vs Lucy Njoki Njuru [2014] eKLR**. The Court of Appeal when faced with a similar issue in the case of **Tobias M. Wafubwa v Ben Butali [2017] eKLR** held thus;

“Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, ... Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate”.

20. I am not persuaded to hold otherwise and I find that the firm of **Ooro & Company Advocates** are properly on record for the appellant.

21. The appellant has sought a stay of execution in **“SIAYA PM ELC Case No. 41 of 2018 2003”**. The memorandum of appeal demonstrates that the case that is the subject of appeal is **“SIAYA PM ELC Case No. 41 of 2018”**. The particulars of the case could be a typographic error or an oversight on the part of the appellant however, it is trite law that pleadings must be specifically pleaded and a party must endeavour to seek clear and specific orders because court orders can never be issued in vain.

22. In an adversarial system such as ours and subject to the relevant provisions of the law on the structure of particular pleadings, each party has the burden to chart his own case which binds him. The essence of this is to ensure certainty and finality so that each party knows well in advance the case that he has to meet and cannot be taken by surprise. It is trite law that courts are bound by pleadings presented before it by the parties and the court cannot enter the arena of litigation. As an independent arbiter, the courts role is to adjudicate upon the specific matters in dispute which the parties themselves have raised in their pleadings and not otherwise. This position of law was upheld by the Court of Appeal in the case of **Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others [2016] eKLR** that cited the decision of **Malawi Railways Ltd. -vs- Nyasulu [1998] MWSC 3** which equally quoted an article by **Sir Jack Jacob** entitled **“The Present Importance of Pleadings.” published in [1960] Current Legal problems, at page174** which stated thus;

“Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation”.

23. In upshot, it is my finding that the motion is not merited and I decline to grant the orders sought. Had the appellant sought a stay of execution in the case that is the subject of appeal, I would not have hesitated but exercised my discretion to grant him stay of execution subject to him depositing the sum of Kshs. 150,000/- in a joint interest earning account of the advocates on record because he has proffered to abide by any conditions as to security that maybe issued by the court and the respondent too has equally submitted that if this court is inclined to grant the orders sought, then half of the estimated costs of Kshs. 300,000/- be deposited in an interest earning account.

24. It is trite law that costs follow the event and I award costs to the respondent.

25. Ultimately, I issue the following disposal orders;

a) The Notice of Motion dated 20/01/2022 is hereby dismissed with costs to the respondent.

b) Matter to be mentioned for directions on 18/05/2022.

26. It is so ordered.

Ruling delivered virtually

DATED, SIGNED AND DELIVERED THIS 28TH DAY OF MARCH 2022

In the Presence of:

MR. OORO FOR THE APPELLANT

N/A FOR THE RESPONDENT

COURT ASSISTANT: ISHMAEL ORWA

HON. A. Y. KOROSS

JUDGE

