**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA**

**ELC CASE NO. 83 OF 2012**

**TOM L WANAMBISI.....PLAINTIFF**

**VERSUS**

**DICKSON W. BABANDEGE.....1ST DEFENDANT**

**AGRICULTURAL FINANCE CORPORATION.....2ND DEFENDANT**

**PAUL M. OKECH T/A PAMBO INVESTMENTS.....3RD DEFENDANT**

**R U L I N G**

**1.** By a Judgment delivered on 28th October 2021, this Court made the following disposal orders in relation to the land parcel **NO NDIVISI/ MAKUSELWA/89** (the suit land): -

> **1. The plaintiff's suit is dismissed.**
>
> **2. Judgment is entered for the 1st defendant against the plaintiff as per his Counter – Claim in the following terms: -**
>
> > **(a) The plaintiff shall vacate the land parcel NO NDIVISI/ MAKUSELWA/89 within three (3) months from the date of this Judgment or be evicted therefrom.**
> >
> > **(b) An order of permanent injunction is hereby issued restraining the plaintiff by himself his agents, workers, servants, or whomsoever acting through him from entering, occupying trespassing or in any other way interfering with the 1st defendant's use and occupation of the land parcel NO NDIVISI/MAKUSELWA/89.**
> >
> > **(c) The claim for mesne profits is dismissed.**
> >
> > **(d) The plaintiff shall meet the defendants' costs of the dismissed suit.**
> >
> > **(e) The plaintiff shall also meet the 1st defendant's costs of the Counter – Claim.**

**2.** Though previously represented by **MS TIROP** of **GICHERU & COMPANY ADVOCATES**, the plaintiff has now elected to act in person. He has not filed any notice to that effect. He promptly filed a Notice of Appeal on 11th November 2021,

**3.** The plaintiff has now moved this Court vide his Notice of Motion dated 16th November 2021 in which he seeks the following orders: -

> **1. Spent**
>
> **2. Spent**
>
> **3. That further proceedings and execution of the Decree and Judgment in BUNGOMA ELC CASE No 83 of 2012 be stayed pending the hearing and disposal of the intended appeal.**
>
> **4. Costs of the application be provided for.**

**4.** The application is premised on the grounds set out therein and is also supported by the Applicant's affidavit of even date.

**5.** The gravamen of the application is that the Applicant is aggrieved with the Judgment and subsequent decree issued by this Court and intends to appeal. That the suit land is ancestral land which he has developed and relies on for farming and he and his family stand to suffer psychologically should the grave orders issued by this Court be executed. That he has moved to this Court timeously, is ready to abide by any conditions which this Court may order and his appeal which has high chances of success may be rendered nugatory.

**6.** The application is opposed and by his replying affidavit dated 16th December 2021, the 1st defendant has deponed, inter alia, that he is the registered proprietor of the suit land and is entitled to all the rights thereto. That in the course of this trial, the Court issued injunctive orders against the plaintiff restraining him from interfering with the 1st defendant's use of the suit land which orders were never obeyed and therefore, the plaintiff has approached this Court with un – clean hands. That the 1st defendant has never made use of the suit land ever since he bought it.

**7.** The 1st defendant has deponed further that the Applicant is in breach of the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules** in that he has not sought leave to act in person having previously been represented by Counsel. That the Applicant has not met the threshold for the granting of the orders sought neither is there any evidence that the intended appeal has high chances of success. Further that the Notice of Appeal has not been served upon him as required by **Rule 77 (1)** of the **Court of Appeal Rules**. That the Applicant has also not made any offer for security and this application should be dismissed with costs.

**8.** The application has been canvassed by way of written submissions filed both by the Applicant in person and by **MR MILLIMO** instructed by the firm of **MILLIMO P. M. & ASSOCIATES** for the 1st defendant. The 2nd and 3rd defendants did not file any responses to the application.

**9.** I have considered the application, the rival affidavits and the submissions by the plaintiff and Counsel for the 1st defendant.

I must start with the submissions by **MR MILLIMO** that this application must be struck out for being in breach of the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**. That provision reads: -

> ***9 "Where there is a change of advocate, or where 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 out – going advocate and the proposed incoming advocate or party intending to act in person as the case may be."***

It is true that the plaintiff was previously represented by **MS TIROP** from the firm of **GICHERU & COMPANY ADVOCATES** upto the time when the Judgment sought to be appealed was delivered. The plaintiff has not informed this Court why his previous advocate is not acting for him and why he has personally filed this application and neither has he filed any supplementary affidavit to respond to the 1st defendant's assertion that the application be dismissed for flouting the mandatory provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**. It is not in doubt that the plaintiff has not filed and prosecuted any application seeking leave to act in person and neither is there any consent between him and the firm of **GICHERU & COMPANY ADVOCATES** allowing him to henceforth act in person in this matter. Does that omission render his application flowed and for striking out?

**10.** That issue was considered by the Court of Appeal in the case of **TOBIAS M. WAFUBWA .V. BISHOP BEN BUTALI 2017 eKLR** where it said: -

> ***"Once a Judgment is entered, save for matters such as application for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceeding in the lower Court, but a commencement of new proceedings in another Court where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules 2010. 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.***
>
> ***As this dispute concerned an appeal from the Principal Magistrate, Court to the High Court, it involved the commencement of new proceedings and we are satisfied that the Respondent's Counsel was entitled to commence them without filing a Notice of Change seeking the leave of the Court to be placed on record."***

The Court of Appeal then went on to add, and which is relevant in this case, that: -

> ***"We would go further to add that provided that where the failure to comply with rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the Constitution and the overriding principle could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings."*** Emphasis mine.

The Court also cited it's own decision in the case of **BONIFACE KIRAGU WAWERU .V. JAMES K. MULINGE 2015 eKLR** where, while addressing the issue of non – compliance with the then **Order 111 Rule 9A** of the **Civil Procedure Rules** which was similar to the current **Order 9 Rule 9** said:-

***"First, non – compliance with order 111 Rule 9A of the Civil Procedure Rules did not go to the root of the proceedings. By that we do not mean to say that that provision was put on the Statute book simply to decorate it. It has a purpose to serve in that the Court should sanction the change of representation, in person or by advocate particularly after Judgment has been entered. The lawyer to be "replaced' should be notified of the changes because, after Judgment has been entered, proceedings are at a crucial stage …….***

***Accordingly, we hold the view that Counsel who, all along, was on record having expended money and time in the process, ought to know when a change in representation occurs in order to take course to secure his costs.***

***And for the Court, it is necessary to give an order for the change so that it is known as to the course further conduct of the case shall take and who to serve with Court process. So either way, the change of representation after Judgment has been entered, to us, meant ensuring the orderly conduct of further proceedings and not to expose the lawyer being replaced to the risk of loss of fees or other.***

***All in all, we are not persuaded that non – compliance with Order 111 Rule 9 A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed, all times, the set procedures ought to be followed or complied with. However, we find that non – compliance in the present matter did not go to the root of the proceedings. The non – compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all …….."*** Emphasis mine.

Although the 1st defendant has averred in paragraph 12 of his replying that this application is incompetent and should therefore be dismissed for failure to comply with the mandatory provision of **Order 9 Rule 9** of the **Civil Procedure Rules**, I did not hear him or Counsel state that the lapse has prejudiced them in either way. The application will therefore be considered on its merits.

**11.** The plaintiff seeks the main order of stay of execution of the Judgment and decree herein pending the hearing and determination of his appeal.

**Order 6(1)** and **(2)** of the **Civil Procedure Rules** provides that: -

***6(1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in as 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"***

It is clear from the above that the plaintiff, in order to be entitled to an order of stay of execution, has to satisfy **all** the following: -

**1. Show sufficient cause.**

**2. Demonstrate that unless the order is granted, he will suffer substantial loss.**

**3. Offer security.**

**4. File the application without unreasonable delay.**

The plaintiff filed the Notice of Appeal on 11th November 2021 barely two weeks after the impugned Judgment. He therefore moved without unreasonable delay. The filing of the Notice of Appeal is sufficient cause. Similarly, in paragraph 15 of his supporting affidavit, he has deponed that he is ***"willing and ready to abide by the conditions this Court will set."*** I am satisfied therefore that the plaintiff has met there (3) out of the four (4) conditions stipulated under **Order 42 Rule 6(2)** of the **Civil Procedure Rules**.

**12.** However, the plaintiff is required to satisfy **all** the above conditions and not only some of them. And the condition which he has not established is the one of ***"substantial loss"*** which, as was held in **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410**, is the ***"cornerstone"*** for the grant of an order of stay of execution pending appeal. In paragraph 7 and 9 of his supporting affidavit, the plaintiff has averred as follows: -

***7: "That the suit land is an ancestral land and the only property I own having developed and depended on it for cash crop farming."***

***9: "That the suit land is where I derive my livelihood together with my family and I stand to <u>suffer psychologically should</u> I remain uncertain of execution."***

This being an equitable remedy, the plaintiff must approach the Court with clean hands. Although the plaintiff has not specifically made reference to ***"substantial loss"*** in his affidavit, I presume that that is what he is referring to when he says that the suit land is ***"<u>the only property</u>"*** which he owns and that he will ***"<u>suffer psychologically</u>"*** if the Judgment is executed. However, it is not true that suit land is the ***"<u>only property</u>"*** which he owns. He is also the registered proprietor of another property being land parcel **NO NDIVISI/MAKUSELWA/90**. In his supporting affidavit dated 25th October 2012 which he filed together with a Notice of Motion of even date seeking to injunct the 1st defendant, he deponed as follows in paragraph 2: -

***"That I was the registered owner of land parcel NO NDIVISI/MAKUSELWA/89 and NDIVISI/MAKUSELWA/90 at all times material to this suit (see the annexed Certificate of Official Search marked as annextures TLW 1 (a) and (b)."***

Further, I have not heard him suggest that the 1st defendants intends to dispose of the suit land and thus render it un – available should the appeal succeed. In the case of **PRISCILLA MUTHONI KIBUGI & 19 OTHERS .V. ELGON INSURANCE CONSULTANTS 2010 eKLR**, the Court declined to grant an order of stay of execution pending appeal having found that the Applicants had other land to which they could relocate should they be evicted. It said: -

***"Thus, should they be evicted, they would have somewhere to relocate to and as they have not alleged that the respondent intends to dispose of the suit property, if they succeed in their intended appeal, the suit land will revert to them or they will be at liberty to seek damages for any loss suffered as a result of execution of the superior Court's order. In short, the results of the success of the intended appeal, were it to succeed, would not be rendered nugatory."***

Clearly, there is no substantial loss disclosed and certainly, there is nothing to suggest that the plaintiff will be rendered destitute should he be evicted from the suit land. I do not consider what he refers to in his supporting affidavit as ***"<u>to suffer psychologically</u>"*** mean the same thing as ***"<u>substantial loss</u>."***

**13.** Finally, it is said that he who comes to equity must not only come with clean hands but must also do equity. However, the conduct of the plaintiff in these proceedings does not endear him to the equitable remedy which he now seeks from this Court. The 1st defendant has deponed in paragraph 7 of his replying affidavit as follows: -

***7: "That during the trial, this Honourable Court had issued temporary injunctive orders restraining the plaintiff from interfering with my use of the land which orders the plaintiff never obeyed forcing me to make an application for contempt of Court whereupon the plaintiff was warned and ordered to ensure the orders are obeyed but sadly, todate the plaintiff keeps chasing away my workers and staff whenever they visit the suit land."***

It is clear from the record herein that on 3rd October 2017, **MUKUNYA J** granted an order restraining the plaintiff by himself, his agents, workers, servants and whomsoever from trespassing or interfering with the 1st defendants use, occupation and access to the suit land. That order was violated by the plaintiff and was the subject of a Notice of Motion by the 1st defendant dated 20th February 2018 seeking, inter alia, an order to commit the plaintiff to civil jail for contempt. That application was allowed vide my ruling delivered on 20th September 2018 and when the plaintiff appeared before me on 4th October 2018 for the contempt proceedings, he said: -

***"I am awfully sorry. I am a retired Colonel. I will abide by the Court orders."***

Before that, his Counsel **MR ASESO** had beseeched the Court saying that his client was ready to purge the contempt. The Court let him off with a caution. Now the 1st defendant has averred in paragraph 9 of his replying affidavit as follows: -

***9 "That it is an abuse of the Court process for the plaintiff to choose which orders to obey and still run to the same Court to seek orders for the discretional orders as sought herein without first of all purging the contempt and allowing me to have free access to the suit land as ordered by the Court."***

Given the above, it will be a travesty of justice for the plaintiff to be a beneficiary of the equitable reliefs from this Court whose orders he has previously treated with contempt.

**14.** The up – shot of all the above is that the plaintiff's Notice of Motion dated 18th November 2021 is devoid of merit. It is accordingly dismissed with costs to the 1st defendant.

**Boaz N. Olao.**

**J U D G E**

**16th March 2022.**

**RULING DATED, SIGNED AND DELIVERED AT BUNGOMA ON THIS 16TH DAY OF MARCH 2022 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.**

**Boaz N. Olao.**

**J U D G E**

**16th March 2022.**