



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Mbau v Mbau (Environment and Land Appeal E022 of 2021)  
[2022] KEELC 87 (KLR) (19 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 87 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT AND LAND APPEAL E022 OF 2021**

**YM ANGIMA, J**

**MAY 19, 2022**

**BETWEEN**

**LAWRENCE WACHIRA MBAU ..... APPELLANT**

**AND**

**LAWRENCE GAKUNA MBAU ..... RESPONDENT**

**RULING**

1. By a notice of motion dated November 8, 2021 grounded upon Sections 1A, 1B & 3A of the *Civil Procedure Act* (Cap.21), Order 42 rule 6, Order 51 rule 1 of the *Civil Procedure Rules, 2010* (the Rules), and all enabling provisions of the law, the Appellant sought stay of execution of the judgment and decree of Hon. S.N. Mwangi (SRM) dated 13.10.2021 in Nyahururu ELC No.343 of 2018 Lawrence Wachira Mbau –vs- Lawrence Gakuna Mbau pending the hearing and determination of the appeal. The Appellant also prayed for any other order the court may deem just and reasonable to grant and that the costs of the application be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Appellant on November 8, 2021 and the exhibits thereto. It was contended that the Appellant was aggrieved by the said decree and that he had already lodged an appeal challenging it. It was further contended that the Appellant shall suffer substantial loss unless the stay was granted; that the appeal had high chances of success and might be rendered nugatory if successful; and that the application was filed timeously among other grounds. The Appellant was apprehensive that the Respondent might dispose of the suit property during the pendency of the appeal.
3. The Respondent filed a notice of preliminary objection dated January 18, 2022 in response to the application. The gist of the objection was that the Appellant’s advocates were not properly on record since the firm of Gakuhi Chege & Co. Advocates was the one acting for the Appellant before the trial court whereas the instant appeal was filed by the firm of Frank Mwangi & Co. Advocates. The court was consequently urged to dismiss the appeal on that ground.



4. The Respondent also filed a replying affidavit sworn on 13.01.2022 in opposition to the application. It was contended that the application had not been filed without undue delay; that the Appellant had failed to demonstrate the risk of substantial loss; and that the Appellant had failed to provide security for due performance of the decree should his appeal be unsuccessful. The Respondent was on the view that the application was filed in bad faith for the sole purpose of denying him the fruits of his judgment. The court was therefore urged to dismiss the application with costs.
5. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were given timelines within which to file and exchange their respective submissions. The record shows that the Appellant's submissions were filed on March 8, 2022 whereas the Respondent's submissions were filed on March 22, 2022.
6. The court has considered the Appellant's notice of motion dated 8.11.2021, the replying affidavit in opposition thereto, the notice of preliminary objection as well as the material on record. The court is of the opinion that the following issues arise for determination:
  - (a) Whether the application for stay of execution is bad in law and incurably defective.
  - (b) Whether the Appellant has satisfied the principles for grant of stay pending appeal.
7. The court has considered the submissions and material on record on the 1st issue. The Respondent contended that the application was bad in law, and incurably defective because the Appellant had failed to comply with the provisions of Order 9 rule 9 of the *Rules* on change of advocates. It was contended that no leave of court had been obtained to sanction change of advocates from the firm of Gakuhi Chege & Co. Advocates to the firm of Frank Mwangi & Co. Advocates.
8. Order 9 rule 9 of the Rules stipulated 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”
9. The Appellant submitted that the instant appeal is a separate distinct proceeding from the suit before the trial court hence it was not necessary to obtain leave for change of advocates or to obtain consent from the previous advocates. The Appellant cited the case of *Ezekiel Kiprono Lamai v Lawrence Kibor Nganai* [2020] eKLR in support of his submission. In the said case it was held, inter alia, that:

“That having considered the superior court decisions cited by both counsel in their written submissions, and further to the finding in (c) above, the court agrees with the position taken by the High Court in *Peter Chere Kiiru v Charles Mulanda Manyelo* [2019] eKLR, and *Stanley Mugambi & another v John Kiraithe* [2005] eKLR that an appeal is a separate and distinct suit from the original suit that is the subject matter of the appeal. That Order 9 Rule 9 of the *Civil Procedure Rules* is applicable to representations in an ongoing suit or concluded suit. That position that an appeal is distinct from the suit the appeal emanates from was affirmed in the Court of Appeal decision in *Mary Nchekei Paul v Francis Mundia*



*Ruga* [2019] eKLR, which was dealing with an application under Rule 4 of the Court of Appeal Rules.”

10. The court is persuaded by the Appellant’s submission that the instant appeal is a distinct and separate action from the suit before the trial court. The Appellant was not legally obligated to retain the same advocate who represented him before the trial court and neither was he required to obtain leave of court, or the consent of the previous advocates, in order to appoint the firm of Frank Mwangi & Co. Advocates to act for him in the instant appeal.
11. The court is further of the opinion that Order 9 rule 9 contains merely procedural provisions for change of advocates. Any non-compliance with rule does not affect the substantive rights of the parties. This court is obligated to dispense substantive justice expeditiously without undue regard to technicalities of procedure both under Article 159 (2)(d) of the *Constitution* of Kenya and Section 19(2) of the *Environment and Land Court Act, 2011*. Accordingly, the court finds no merit in the Respondent’s preliminary objection and the same is hereby overruled.
12. The court has considered the material and submissions on record on the 2nd issue. Order 42 rule 6(2) of the *Rules* stipulated 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.”
13. Whereas the Appellant submitted that he had satisfied the principles for the grant of a stay pending appeal, the Respondent contended otherwise. The main reason why the Appellant contends that he stands to suffer substantial loss unless the stay is granted is that he is apprehensive that the Respondent might sell or dispose of the suit property. There is, however, no scintilla of evidence on record to demonstrate the basis of this apprehension.
14. The material on record shows that although the Appellant is the registered proprietor of the suit property the Respondent has been in occupation thereof. When the Appellant filed a suit for the Respondent’s eviction, the latter filed a counterclaim alleging that the Appellant had fraudulently obtained title to the suit property and sought its nullification. By its judgment dated October 13, 2021, the trial court dismissed the Appellant’s suit and granted the counterclaim in which rectification of the land register was also ordered.
15. The court is unable to appreciate how rectification of the register can render the pending appeal nugatory should it ultimately succeed. The Appellant has not demonstrated that rectification of the register is not reversible or that there are special circumstances in this matter which shall make it impossible. There is no demonstration as to why the restraining injunction against the Appellant should be stayed since it is the Respondent who has been in possession all along. In the absence of evidence to demonstrate the risk of disposal or alienation of the suit property, the court is not satisfied that the Appellant has demonstrated the risk of substantial loss within the meaning of Order 42 rule 6(2) of the *Rules*.
16. The court has also considered the material on record on the timeliness of filing the instant application. Although the impugned judgment was delivered on October 13, 2021 the Appellant did not file the instant application until November 12, 2021 which is about one month later. The court is of the



opinion that the delay of about 1 month is not inordinate or unreasonable in the circumstances. The court is, therefore, of the opinion that the application was filed expeditiously and without undue delay as required by law. Nevertheless, since the Appellant has failed to satisfy the court on the element of substantial loss, the application for stay of execution must fail.

17. The upshot of the foregoing is that the court finds no merit in both the Defendant's preliminary objection and the Appellant's application for stay pending appeal. Accordingly, the court makes the following orders for disposal of the preliminary objection and the application:
- (a) The Respondent's notice of preliminary objection dated January 18, 2022 is hereby overruled.
  - (b) The Appellant's notice of motion dated November 8, 2021 is hereby dismissed.
  - (c) The costs of the preliminary objection and the application shall be costs in the appeal.

It is so ordered.

**RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 19TH DAY OF MAY, 2022.**

In the presence of:

Ms. Wanjiru holding brief for Njoroge for the Applicant

Ms. Cherono for the Respondent

C/A - Carol

.....

**Y. M. ANGIMA**

**JUDGE**

