



**Guya v Mbaye & another (Environment and Land Appeal
54 of 2019) [2022] KEELC 3564 (KLR) (13 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3564 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL 54 OF 2019**

**A OMBWAYO, J
MAY 13, 2022**

BETWEEN

WILLIAM ODONGO GUYA APPELLANT

AND

GEORGE OTIATO MBAYE 1ST RESPONDENT

BONDO SUB COUNTY 2ND RESPONDENT

*(Being an appeal from the Judgement and/or Decree of the Hon. Wasike
(SRM) delivered on the 13th December 2019 in Bondo ELC NO. 15 of 2019)*

RULING

- 1 William Odongo Guya the Applicant herein filed a Notice of Motion Application dated 6th September 2021 under Order 22 Rule 22, 42 Rule 6 and Order 51 of the [Civil Procedure Rules](#), Section 3, 3A, 63(e) of the [Civil Procedure Act](#) seeking for the following orders:
 1. That this Honourable Court be pleased to grant stay of the execution herein pending hearing and determination of the Appeal.
 2. That the Honourable Court be pleased to grant an order for staying of the 1st Defendant Bill of Cost dated 17th May 2021 pending hearing and determination of the Appeal.
 3. That the costs of this Application be in the cause.
- 2 The Application was based on grounds that the Applicant has already filed a Notice of Appeal and that the Respondent has now filed a Bill of Costs dated 17th May 2021. It was stated that the Applicant is apprehensive that unless this Honourable court grants the orders prayed, the Applicant stands to suffer substantial loss and it is in the interest of justice that the court do grant the prayers sought.



- 3 The Application was supported by the Affidavit of William Odongo Guyawho deposed and stated that on 29th April 2021 the High Court delivered its Judgment dismissing the Applicant's Appeal and on 5th May 2021, the Applicant filed a Notice of Appeal. That the Applicant applied for the Proceedings, Judgment and Decree on 5th May 2021. That the Respondent filed a Bill of Costs on 17th May 2021 and the said Bill of costs if not stayed will lead to the Applicant suffering loss and damages.
- 4 It was stated that his Appeal has a high chance of success and it is in the interest of justice that the Honourable Court grant the orders sought and the Respondent will not suffer any prejudice.
- 5 The 1st Respondent filed a Replying Affidavit on 9th December 2021 where he deposed and stated as that on 29th April 2021 this court delivered its Judgment in this matter where the Applicant's Appeal was dismissed. That his Advocates proceeded to prepare, file and serve the Applicant's Advocates with the Bill of costs.
- 6 That his Bill of Costs was filed on 17th May 2021 and served upon the firm of Mungao Rachier & Company Advocates on 28th May 2021 and the same was duly received. That the act of his Advocates presenting the Bill of Costs is what provoked the present application which has been filed by a stranger. He stated that the present application smacks of bad faith and is an afterthought as costs follow the event and were rightfully ordered by this court.
- 7 It was further stated that the assertion by the Applicant that he is likely to suffer irreparable loss if the Bill of costs is taxed is not only mischievous but a deliberate attempt to delaying and denying the 1st Respondent from enjoying the fruits of his Judgment. That the purported irreparable loss is a mirage as the 1st Respondent has been in possession and occupation of the suit property since 1990 and there is no justifiable reason adduced by the Applicant as to why the taxation of his Bill of costs should be forestalled.
- 8 The 1st Respondent further stated in his Affidavit that he stands to suffer great prejudice by this Application as it seeks to deprive him of his rightful fruits of litigation without any reasonable or justifiable cause and the interest of fairness and justice demand that the Deputy Registrar be allowed to ascertain the amount of costs due and payable to him and thereafter be allowed to realize and enjoy the rightful fruits of his Judgment. That this Application has been brought under the wrong provision of the law and the relief sought cannot be granted.
- 9 It was stated that the present Application seeks to forestall the inevitable consequence of a valid judicial proceeding without advancing any justifiable reason and the Application is made in bad faith, it is premature as no decree capable of execution has been extracted. That the Applicant has not met the minimum threshold for the grant of the orders sought. The 1st Respondent stated that the reasons why the Application is not competent because the firm of Mungao Rachier & Company Advocates has been on record for the Applicant and Mr. Mungao Rachier Advocate has since passed on. That no Notice of Change of Advocates or Notice of Appointment of Advocates has been fled by the firm of Ochanda Onguru & Company Advocates which has filed the present Application.
- 10 The matter came up for hearing on 20th January 2022 and the Applicant requested for time to file a further Affidavit to the Application where the Applicant had no objection to the same. The court directed the Applicant to file and serve a Supplementary Affidavit together with submissions within 10 days and the Respondents to file and serve submissions within 10 days.
- 11 The Applicant filed a further Affidavit on 31st January 2022 where he stated that the Notice of Change of Advocates together with the present Application and on 15th October 2021, they sent to court the Notice of Change of Advocates for assessment after they realized that it had not been acted upon and



on 20th October 2021, they sent another reminder where the court responded by sending an invoice for payment. He stated that the payments were made and the same was filed.

Applicant's Submissions

- 12 The Applicant filed his submissions on 31st January 2022 where he submitted that the grounds of appeal raise substantial and serious issues to be determined. That the subject matter of the Appeal is the suit property which unless the sought in the application. are granted, the suit property is likely to be disposed or alienated which will render the Appeal nugatory.
- 13 It was the Applicant's submission that the bill of costs filed by the Respondents should be stayed as it will be prejudicial to the Applicant if the Appeal succeeds yet the Bill of Costs has been paid. The Applicant placed reliance in Civil Appeal No.215/98 Nairobi Mainne Management Ltd & Davy Koech vs Heritage Bank Ltd where the court granted stay of execution to allow for conclusion of the Intended Appeal on the grounds that the intended appeal had substantial and serious issues and therefore the intended appeal would be rendered nugatory should the suit property not be preserved through stay order.
- 14 The Applicant submitted that this court should proceed to grant the said orders sought so as to preserve the suit property and also not to render the appeal nugatory. That no party will suffer any prejudice as it is in the interest of justice to grant the orders.

1st Respondent's Submissions

- 15 The 1st Respondent filed his submissions on 3rd February 2022 and raised the following issues for determination:

a. Whether there is a competent application before this court for determination.

- 16 It was submitted that the court's record shows that the instant application was filed on 6th September 2021 and the Notice of Appointment of Advocates by the firm of Ochanda Onguru & Company Advocates who purportedly took over the conduct of the matter was filed on 14th October 2021. It was stated that the Application was drawn by Ochanda Onguru & Company Advocates and is dated 6th September 2021 which means that at the time of filing the Application, the firm of Mungao Rachier & Company Advocates was still on record for the Applicant and given that Mr. Mungao Rachier was dead, this application ought to have been filed by the Applicant on record.
- 17 He further submitted that the email dated 15th October 2021 shows that the purported Notice of Change of Advocates was forwarded to court for filing an assessment which is 39 days after filing the present application. That the Applicant should have attached the email forwarding the application since the receipt for payment of the said Notice of Change of Advocates indicates that payment was made on 20th January 2022. It was stated that Order 9 Rule 5 is clear on the procedure and manner in which a firm is expected to represent a party or take over the conduct of the matter that was handled by another Advocate. The 1st Respondent therefore submitted that the present application is incurably defective and incompetent and the only remedy available is to have it struck out with costs.

b. Whether substantial loss has been demonstrated.

- 18 It was the 1st Respondent's submission that the Applicant has not specified the nature of loss that he is likely to suffer and that the 1st Respondent is likely to suffer as the Applicant has denied him an opportunity to enjoy the fruits of his judgment. That the costs of the Lower Court which provoked



tis present appeal have not been paid since 2019 and the Applicant now seeks to stall the taxation of the costs awarded on appeal.

- 19 The 1st Respondent further submitted that the Applicant has not satisfied the conditions of Order 42 Rule 6 (2) of the Civil Procedure Rules where a party is expected to offer security and reliance was placed in the case of **Malula Mavuti & 3 Others v Paul Musango Mavuti & 4 Others (2016) eKLR**. It was the 1st Respondent's submission that the present application is incompetent and lacks merit and should be dismissed with costs.

Issues for Determination

- 20 This court has looked into the Application, the Affidavits, the Submissions and Authorities filed by the parties and is of the following view:
- 21 It is the Applicant's case that this court grants him an order for stay of execution pending the hearing and determination of the Appeal and that the court grants stay of the 1st Respondent's Bill of Costs pending the hearing and determination of the Appeal. The Applicant has alleged that if the Bill of costs is not stayed, he stands to suffer loss and damages as the Appeal has a high chance of success.
- 22 The 1st Respondent on the other hand has opposed the said Application by alleging that the present Application has been filed by a stranger and that the Application has been brought in bad faith as the same has been filed to prevent him from enjoying the fruits of his Judgment. It is the 1st Respondent's case that there is no loss that the Applicant is likely to suffer if the Bill of costs is taxed and the he has been on possession of the suit property since 1990 and there is no justifiable reason adduced by the Applicant as to why the bill of costs should not be taxed.

Order 42 Rule 6(2) of the *Civil Procedure Act* sets out the principles that the court should consider while deciding whether to grant Stay of Execution Pending Appeal. These are:-

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.”

- 23 In the case of *RWW ...Vs.... EKW [2019] eKLR*, the Court held that;

The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

- 24 Based on the above case law, it is not in dispute that the Application was brought without unreasonable delay. However, on the limb of substantial loss occurring to the Applicant, it is this court's view that the Applicant has not demonstrated substantial loss that is likely to occur in the event the Bill of cost is



taxed. The Applicant has not demonstrated whether he is willing to offer security as required by Order 42 Rule 6 (2) of the Civil Procedure Rules. This court has power to grant orders of stay of execution pending Appeal but the power is discretionary and it is my finding that the Applicant has not satisfied the parameters set by law for grant of orders of stay of execution pending Appeal.

25 In the case of *Deposit Protection Fund V Rosaline Njeri Macharia* [2006] eKLR, the Court while dealing with an application of stay of taxation proceedings, observed as follows:

Going back to the 2nd defendant's arguments, I note them as saying that if the court did not grant an order for stay of the proceedings, the applicant would not suffer substantial loss, on account of the taxation of the defendants' Bills of Costs. When faced with those submissions, the applicant did not tell the court how the taxation of the defendants' Bill of Costs would cause them substantial loss. To my mind, the taxation of a Bill of Costs cannot occasion any loss to the person against whom it is taxed. Therefore, the issue of taxation causing substantial loss does not even arise. The only effect of taxing a Bill of Costs is the ascertainment of the quantum of costs payable by one person to another. Thereafter, the party whose costs had been ascertained could take out execution proceedings. The applicant did not, in my considered view, make out a case for stay of proceedings, and in particular a stay of the taxation of the defendants' Bills of Costs. Furthermore, if the learned taxing officer were to proceed to tax the defendants' Bills of Costs, the sums would be ascertained, and that would be the foundation upon which this court could base the size of the security which the applicant would need to raise, if the court did order that there be a stay of execution."

26 On whether the court should grant an order for stay of execution of the 1st Respondent's Bill of Costs pending hearing and determination of the Appeal, this court is of the view that taxation proceedings are independent as the Taxing master is mandated to deal with taxation matters. In addition, the Bill of costs filed by the 1st Respondent is not subject of the Appeal and this court therefore cannot grant the Stay on the Taxation of the Bill of Costs.

27 The 1st Respondent in his Replying Affidavit stated that the firm of Ochanda Onguru & Company Advocates is not properly on record as the firm of Mungao Rachier & Company Advocates has all along been on record for the Applicant but has since passed on. The Applicant in his Further Affidavit has alleged that the Notice of Change of Advocates was filed together with the Application but on 15th October 2021, he realized that the same had not been acted upon after sending the same on email.

Order 9 Rule 5 of the Civil Procedure Rules states as follows:

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal."

Order 9 Rule 9 of the Civil Procedure Rules states that 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 by 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.

28 I am not convinced that the Applicant filed the Notice of Change of Advocates together with the Application as the Application is dated 6th September 2021 while the Notice of Motion is dated 14th October 2021. The court file indicates that the Notice of Change of Advocates was filed on 31st January 2022 together with the Applicant's Submission and the Further Affidavit. If the Applicant had filed the Notice of Change of Advocates together with the Application, the same would be dated 6th September 2021. It is this court view that the firm of Ochando Onguru Advocates is not properly on record. In the circumstances, I do find that this Application lacks merit and is hereby dismissed with costs.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 13TH DAY OF MAY, 2022

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

