Ngari v Ireri (Environment & Land Case 75 of 2015)
[2022] KEELC 3521 (KLR) (28 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3521 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ENVIRONMENT & LAND CASE 75 OF 2015

A KANIARU, J

JUNE 28, 2022

BETWEEN

HORIDA WANJUKI NGARI ..... PLAINTIFF

AND

EDWIN NJERU IRERI ..... DEFENDANT

RULING

1. The application before me for determination is a motion on notice dated 27/8/2021 filed in court on the same date. It is expressed to be brought under Sections 1B and 3A of *Civil Procedure Act*, Order 51 of *Civil Procedure Rules,* 2010 and all other enabling law. The applicant – Edwin Njeru Ireri – is the defendant in the suit while the respondent – Horinda Wanjuki Ireri – is the plaintiff. This is a concluded matter and the respondent has already gone on appeal. This court delivered its judgement on 1/3/2018 and the application under consideration now is a logical consequence of that judgement.

2. The application came with four (4) prayers but one of them – prayer 1 – is spent. The prayers for consideration therefore are 2, 3 and 4 and they appear in the application as follows:

> Prayer 2: That the firm of Gitonga Muthee & Co. Advocates be allowed to come on record in place of M/s Mogusu & Co. Advocates for the applicant/defendant.
>
> Prayer 3: That the honourable court does allow Giant Auctioneers to remove the respondent from L.R. Nos. Nthawa/riandu/1947 and 1948 in execution of the decree of this court dated 26/3/2018.
>
> Prayer 4: That the OCS, Siakago police station to provide security and ensure compliance with the orders sought.

3. The application is anchored on the grounds, interalia, that the applicant is desirous of reaping the fruits of his judgement; that the stay of execution issued in this matter has lapsed; that the respondent has

an alternative place to live; and that the applicant is suffering as he can not enjoy his proprietary rights or enjoy the fruits of his judgement.

4. The application came with a supporting affidavit sworn by the applicant and dated the same as the application. The supporting affidavit is essentially a verbatim regurgation of the grounds upon which the application is premised.

5. The respondent filed a replying affidavit dated 10/10/2021. He opposed the application mainly on the ground that there is a pending appeal and that she and her family will suffer prejudice if the application is allowed.

6. The replying affidavit filed by the respondent provoked the applicant to file a further affidavit. The further affidavit was filed on 8/11/2021. In it, the applicant denied the substance of the replying affidavit; pointed out that the existence of a pending appeal does not serve as a stay of execution; reiterated that the respondent is destroying trees on the land; and that the respondent has not explained the prejudice she will suffer if the application is allowed. The applicant also pointed out that the respondent has another parcel of land where she can settle.

7. The application was canvassed by way of written submissions. The applicant's submissions were filed on 31/1/2022. The submissions give a background of the matter. It was submitted that after judgement was delivered in applicant's favour, the respondent sought orders for stay of execution and got the orders. The orders had a life span of 24 months, which have since elapsed. The applicant also further submitted "that the existence of an appeal does not in itself serve as a stay of execution." The court was asked to grant the prayers sought. To the submissions was attached some rulings – specifically *Machira T/a Machira & Co Advocates Vs East African Standard* Hcc No. 612 Of 1996 Nairobi [2002] Ekr, *Salome Naliaka Wabwire Vs Alfred Okumu Musiwaka;* Elc No. 107 Of 2017 Bungoma (2021)eKLR and *Samuir Trustee Limited Vs Guardian Bank Limited*: Hcc No. 795 Of 1997, Milimani, Nairobi:[2007] eKLR – for consideration: The relevance of the rulings was not explained but I have nevertheless read them.

8. The respondents submissions were filed on 14/4/2022. According to the respondent the appeal should be determined first before the applicant can be allowed to enjoy the fruits of his judgement. The respondent submitted that she is not responsible for the delay of her appeal. She also submitted that she and her family have lived on the land for over 40 years and that the applicant has never lived on the land.

9. I have considered the application, the response made by the respondent, the applicants further affidavit, rival submissions, and the rest of the court record generally. It appears clear to me that judgement in this matter was delivered on 1/3/2018. The respondent, who was the plaintiff, lost the case. She felt aggrieved and decided to go on appeal. In the meantime, and as an interim measure, she sought for stay of execution and by a ruling delivered on 25/10/2018, she was granted stay orders to last for 24 months. It is plain to me that by the time the application under consideration now was filed, the stay orders had already lapsed.

10. The lapse of stay orders mean that as things stand now, there is nothing preventing the applicant from executing the judgement. As pointed out by the applicant in his submissions, the existence or pendency of the appeal does not operate as stay of execution. It seems well clear to me that the applicant is well aware of the law. Yet, despite being aware, he still filed this application to grant him orders to proceed. To me, this application is un-necessary and clearly unwarranted. The judgement speaks for itself and unless there is an order of stay stopping its execution, an application for orders to execute is superfluous and/or redundant. This makes me feel justified to reject and dismiss the application. In my view, the application should not have been filed in the first place.

11. But I have another reason that makes me feel even more justified to do so. The reason is this: prayer 2 in the application is about allowing the counsel now purporting to prosecute this application to come on record. When the application was first filed, it is clear that Meru ELC court handled it and it declined to certify the application urgent. It also ordered that service be effected. Thereafter, the matter appeared before me several times and at no time was the issue of the applicant's counsel being allowed to come on record canvassed. As I write this ruling now, that issue remains unresolved and the submissions filed have not addressed it. That issue should have been given first place in the applicant submissions before anything else was addressed.

12. Order 9 rule 9 of the *Civil Procedure Rules, 2010* states as follows:

> "When there is a change of advocate, or when a person decides to act in person having previously engaged an advocate, after judgement has been passed, such change or intention to act in person shall not be effected without an order of the court:
>
> a. Upon application with notice to all parties; or
>
> b. Upon consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.

Subrule 10 of order 9 further states as follows:

> "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.

13. It appears to me clear from the above provisions that a court order is required before a new counsel intends to come on record post – judgement or where a party intends to act in person having previously been represented by an advocate. To procure such order, an application, much like the one before court now, needs to me made. In the alternative, a consent can be filed between the outgoing advocate and the incoming advocate allowing the latter to come on record. Such consent can also be filed between the out-going advocate and his client allowing such client to act in person. Either way, the court needs to give an order.

14. The mischief sought to be cured by the above requirement has much to do with the issue of costs owed to the outgoing advocate. There are some mischievous or crafty parties who would wish to evade or avoid paying costs to their advocates after such advocates have represented them in a matter. Such advocates are entitled to costs no matter what the outcome of the case may be.

15. In this matter itself, it appears clear that a counsel called Mogusu represented the applicant. I don't see any consent on record from Mogusu allowing the counsel in this application to come on record. I don't also see anything on record to show that Mogusu was served with this application. Nothing shows that the issues of costs as between Mogusu and the applicant has been settled. There is therefore genuine concern and/or apprehension that the applicant may be trying to shortchange Mogusu on costs.

16. But there is also another consideration: Counsel for the applicant needed to address the issue of representation in his submissions. He is the one who sought that order. He has been in the application all along. He knew that no such order had been granted. The audience granted to him by the court was informal and it was granted pending formal engagement with a view to issuance of an order allowing his formal entry into the matter. It appears clear to me that the applicant's counsel mistook the audience given to him to mean formal endorsement by the court to enter into the matter. He was wrong; he needed to formalize everything in accordance with the applicable law.

17. It is clear now that the court is even more justified to reject and dismiss this application. In my considered view, I need not consider the merits urged in the submissions. It is enough that the application has been found not only manifestly un-necessary but also in contravention of the law.

18. The upshot, in light of the foregoing, is that the application is hereby dismissed. The parties seem to belong to the same clan. They are therefore somewhat related in the customary sense. I therefore make no order as to costs.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 28TH DAY OF JUNE, 2022.

In the presence of Muthee for applicant and Mogaka for Momanyi for respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE