



Odhiambo & 2 others v Okoth (Personal Representative of the estate of Timothy Masingo Ojewu (Deceased)) & another (Environment & Land Case 23 of 2020) [2022] KEELC 3637 (KLR) (25 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3637 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 23 OF 2020**

**AA OMOLLO, J
JULY 25, 2022**

BETWEEN

**JOSEPH ODUORI ODHIAMBO 1ST APPLICANT
MAURICE AKULA OPANYI 2ND APPLICANT
SIMON OWINO OPANYI 3RD APPLICANT**

AND

**FLORA AUMA OKOTH (PERSONAL REPRESENTATIVE OF THE ESTATE OF
TIMOTHY MASINGO OJEWU (DECEASED)) 1ST RESPONDENT
HOSEA OJUO MASINGO 2ND RESPONDENT**

RULING

1. The applicant brought an application dated March 29, 2022 under section 3A of the [Civil Procedure Act](#) seeking for the following orders;
 - i. The execution of the judgment given herein on November 11, 2021 in relation to costs be stayed;
 - a. until Kisumu Court of Appeal, Civil Appeal No 2 of 2022 thereof is heard and decided.
 - ii. Costs of this motion be in the cause.



2. The application was supported by grounds on the face of it and the affidavit of Maurice Akula Opanyi *inter alia*;
 - a. In case the said appeal succeeds, the respondents herein have no capacity to pay back the money to the applicants.
 - b. The money is not the cost paid by the respondent to their advocates directly, its demanded by their advocates under Advocate Remuneration Order and in case the said appeal succeeds, it's not the advocate to pay back the money but it is the respondents who have no capacity to do so.
 - c. The respondent's advocate has threatened to execute the decree by way of arrest and detention in prison.
 - d. The respondents are neither employed nor have any other property other than that in dispute to enable them to pay back the money in case the said appeal succeeds.
 - e. This honourable court has inherent powers to consider this application.
3. The respondents filed grounds of opposition dated April 8, 2022 opposing the application. they listed out the following grounds;
 - i. The application is incompetent and fatally defective for want of compliance with order 9 rule 9 of the [Civil Procedure Rules](#).
 - ii. The application is frivolous, vexatious and an abuse of the court process as payment of costs cannot be subject to an order of stay pending appeal while a dismissal order cannot be stayed.
 - iii. The application is misconceived.
4. The parties agreed to dispense with the hearing of the application by way of written submissions which the court has looked at and considered. I frame the following questions for determination of the application;
 - a. Whether this court can stay the execution for costs
 - b. Whether the application offends order 9 rule 9 of the [Civil Procedure Rules](#).
5. On the first issue, the applicants contend that a stay of execution should be issued because if they are the successful party in their appeal, the respondents might be unable to pay back the said costs. That respondents have not brought any evidence showing that they have any other property other than the one in dispute or are in gainful employment to refund the money back in case their appeal succeeds. The applicants added that they are likely to be condemned to civil jail for failure to pay the advocate's money since they have no means of income.
6. The legal provision governing stay pending appeal is order 42 rule 6(2) of the [Civil Procedure Rules](#) which provides that:

"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."

7. In *Visbram Ravji Halai & another v Thornton & Turpin [1963] LTD* [1990] KLR 365, the court said:-

"Thus the superior court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; the court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay."

8. In opposing the application, the respondents relied on the decision of the Court of Appeal in Nairobi Civil Application No 298 of 1996 *Francis Kabaa v Nancy Wambui and Anr*, where it was held that a stay of execution cannot be granted in respect of costs. The case law cited is binding on this court but it does not take away the discretion given by the provisions of section 3 and 3A of the *Civil Procedure Act*. The grant of an order of stay is the exercise of a discretionary power so the issue here is whether the applicants have provided explanations or reasons that merit favourable exercise of discretion.

9. In their submissions, the applicants raised two issues, first is their inability to pay the costs as they see themselves being committed to civil jail unless the stay is granted. The second issue they submit is no evidence the costs as taxed were truly paid by the Respondents to their advocate, and that the advocate will not be the person responsible to pay them back. Section 27 of the *Civil Procedure Act* states that costs follow the event in this case the conclusion of a suit. Those costs have been taxed. The applicants have not filed any reference against the taxation. If the stay is being sought on the basis of their inability to pay yet they are still pursuing an appeal, what guarantee does the respondents get that their costs will be paid in the event the appeal is unsuccessful? The proposition of inability to pay and without any offer of security makes it difficult for the court to exercise discretion on their favour.

10. In the case of *Aron C Sharma v Ashana Raikundalia T/A Rairundalia & Co Advocates* the court held as follows on the issue of security:

"The purpose of the security needed under order 42 is to guarantee the due performance of such decree or order as may ultimately be binding on the applicant. It is not to punish the judgment debtor ... Civil process is quite different because in civil process the judgment is like a debt hence the applicants become and are judgment debtors in relation to the respondent. That is why any security given under order 42 rule 6 of the Civil Procedure Rules acts as security for due performance of such decree or order as may ultimately be binding on the applicants. I presume the security must be one which can serve that purpose."

11. The burden of provision of security is not upon the respondents as the respondents are not the ones seeking stay. In any event, the costs are being paid to counsel and the applicants have not pleaded why they think Mr Omondi advocate is incapable of refunding their money in the event the appeal is successful. Yet still, their fear can be cured by an order that the costs be deposited in a joint account pending hearing and determination of their appeal.

12. On the second issue of the applicants' application offending order 9 rule 9 of the *Civil Procedure Rules*, the applicants have submitted that their advocate had told them that he had ceased acting for them and sought refuge in articles 25 (c), 50 (1) and 159 (2) (a, d, e). The respondents said that no leave was sought as required under order 9 rule 9 of the *Civil Procedure Rules* and thus the application is made at the instance of a stranger and liable for dismissal.



13. Order 9 rule 9 of the *Civil Procedure Rules, 2010* (CPR) provides 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 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.”

14. In the case of *Lalji Bhimji Shangani Builders & Contractors v City Council of Nairobi* [2012] eKLR the court held as follows:

“A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

15. One of the orderly conduct order 9 rule 9 was intended to cure was provide of payment of costs of the advocate previously in conduct of the matter. This matter is already concluded and although the applicants have contravened rule 9, the same is not a bar for their previous advocate to tax advocate-client costs. Therefore, I find the omission is not fatal and fall under a procedural technicality which can be cured by article 159(2)(d) of the *Constitution*.

16. In conclusion, I find that the applicants have failed to satisfy conditions necessary for granting a stay of execution and their notice of motion dated March 29, 2022 is without merit and is accordingly dismissed with no order as to costs.

DATED, SIGNED AND DELIVERED AT BUSIA THIS 25TH DAY OF JULY 2022.

A OMOLLO

JUDGE

