



REPUBLIC OF KENYA



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**Carla v Marelli & 2 others (Environment & Land Case 61 of 2009)  
[2022] KEELC 3625 (KLR) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3625 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 61 OF 2009**

**MAO ODENY, J  
AUGUST 18, 2022**

**BETWEEN**

**RONCAROLA CARLA ..... PLAINTIFF**

**AND**

**FABIO MARELLI ..... 1<sup>ST</sup> DEFENDANT**

**SONGHAI INVESTMENTS LTD ..... 2<sup>ND</sup> DEFENDANT**

**MOHAMMED ESSAK BACHANI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 25<sup>th</sup> November 2020 seeking the following orders: -
  - a) Spent
  - b) That pending hearing and determination of this application, the court be pleased to stay its judgment dated 27<sup>th</sup> May 2020
  - c) That pending the hearing and determination of this suit and intended appeal the court be pleased to stay its judgment dated 27<sup>th</sup> May 2020
  - d) Costs be in the cause.
2. Counsel agreed to canvas the application by way of written submissions which were duly filed.

**Plaintiff/applicant's Submissions**

3. Counsel relied on the Supporting Affidavit sworn by Roncarola Carla the administrator of the estate who deponed that the court delivered a judgment in this matter on 27<sup>th</sup> May 2020 whereby the Defendant was awarded Kshs. 1,950,000/ and that the 3<sup>rd</sup> Defendant has threatened to execute and in



the event that the appeal succeeds, the 3<sup>rd</sup> Defendant may not be in a position to reimburse the decretal amount.

4. Counsel relied on the case of *Antoine Ndiaye v African Virtual University* [2015] eKLR where the court stated that the Applicant must show he will be totally ruined in relation to the appeal if he pays over the decretal sum to the Respondent. Further that in a money decree, substantial loss lies in the inability of the Respondent to refund the decretal sum should the appeal succeed.
5. Counsel further relied on the cases of *Reuben & 9 others v Nderitu & Another* [1989] KLR, *Transouth Conveyors Limited v Kenya Revenue Authority & Another* [2007] eKLR, *Kenya Tea Growers Association & another v Kenya Plantation and Agricultural Workers Union* [2012] eKLR, and submitted that for a party to be granted stay of execution such party must demonstrate that the appeal, if filed, or the intended appeal is arguable and not frivolous. Counsel therefore submitted that the Applicant has met the threshold for grant of stay of execution and urged the court to exercise its discretion to allow the application as prayed.

### **Defendant's Submissions**

6. Counsel relied on the Replying Affidavit sworn by himself dated 19<sup>th</sup> March 2021 in which he deponed that judgment in this case was delivered on 27<sup>th</sup> May 2020 and at the time the judgment was delivered, the Plaintiff was represented by the law firm of Onchangu Kemunto & Associates.
7. Mr. Omollo submitted that Katsoleh & Co Advocates having filed notice of change of Advocates and without leave of the court as required by Order 9 rule 9 of the *Civil Procedure Rules* the Notice of Appeal filed on 5<sup>th</sup> August 2020 is null and void. Further that the Notice of Appeal was not filed within 14 days from the date of judgment as required by rule 75(2) of the Court of Appeal Rules.
8. Counsel submitted that there being no valid Notice of Appeal the Applicant is not entitled to the stay pending appeal. Further that the application was filed two months after delivery of judgment without an explanation for the delay and that the Plaintiff had not demonstrated how he would suffer substantial loss. Counsel therefore urged the court to dismiss the application with costs to the Defendant.

### **Analysis And Determination**

9. The issues for determination is whether the firm of Katsoleh & Company Advocates is properly on record, whether the Applicant has met the threshold for grant of stay of execution and whether there is a valid Notice of Appeal to warrant stay of execution.
10. The issue as to whether Katsoleh & Company Advocates are properly on record, Order 9, Rule 9 of the Civil Procedure Rules provides 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.”

Order 9, rule 10 provides;



“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.”

11. Order 9 Rule 9 the correct procedure to be followed would be to seek leave of the court to come on record or file a consent between the outgoing Advocate and proposed incoming Advocate or party intending to act in person as the case maybe. In this case I notice that there is a consent between Katsoleh & Co Advocates and Onchangu Kemunto & Associates who are the current and the former advocates on record dated 3<sup>rd</sup> February 2021 and filed in court on 28<sup>th</sup> May 2021. This was filed after the Defendant’s advocate had raised a Preliminary Objection that Katsoleh & Co are not on record for the Plaintiff. I think the advocate later filed this consent to sanitize the situation after having filed the documents without first complying with the mandatory procedures of Order 9 Rule 9 of the Civil Procedure Rules.
12. The Applicant filed an application seeking orders of stay of execution and proceeded to file a Notice of Appeal without being properly on record. Counsel acted after the fact and the Notice of Appeal was also not filed within 14 days as required by law and procedure. There is nowhere in the court record that the Applicant sought and obtained leave to file a Notice of Appeal out of time.
13. There is also no evidence in the court record that the consent filed in court was endorsed by the court. A consent filed in court by parties without endorsement as an order of the court remains a paper which has not been given effect by the court. This is because parties file consents which may not be automatically be endorsed by the court as some of the consents might be illegal or obtained by deceit or fraud. Parties must be in court to confirm that they were parties to the consent and agree that the same should be endorsed as an order of the court. The nature of a consent is that the parties are unanimously agreeing to be bound by a consent and that is why it is very difficult to set aside consents unless it was obtained by fraud or misrepresentation.
14. As earlier stated that this consent was filed after counsel for the Defendant raised a Preliminary Objection on 19<sup>th</sup> March 2021 that the firm of Katsoleh & Co Advocates were not properly on record, the said consent was filed on 28<sup>th</sup> May 2021 way after the Preliminary Objection has been raised. Further Katsoleh & Co Advocates had also filed a Notice of Appeal on 5<sup>th</sup> August 2020 while they were not on record and even after filing the consent counsel did not file a Notice of Change of Advocates.
15. In the case of *John Langat -vs- Kipkemoi Terer & 2 Others* (2013) eKLR where Muchelule J faced with similar circumstances stated that: -

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the court.”

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

16. I am in agreement with the above finding that Katsoleh & Co Advocates are not properly on record hence the application is incompetent. I would also state that were the application competent the same would also have suffered the same fate as the Applicant has not met the threshold for grant of stay of execution. No valid Notice of Appeal is in place and further she has not established what loss she would



suffer if the order is not granted. This is also a monetary decree and has not proved that the Respondent would be in a position not to refund the decretal sum should the appeal succeed.

17. Similarly, in the case of *Florence Hare Mkaba v Pwani Tawakal Mini Coach & another* [2014] eKLR Kasango, J held that: -

“The question is; was the execution validly carried out on behalf of the Plaintiff? There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31<sup>st</sup> July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the Plaintiff’s Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff’s case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff’s case.”

18. We cannot throw out procedures put in place by an Act of Parliament and Rules promulgated for the orderly administration of justice to accommodate the laxity of litigants and their counsel in the name of Article 159 of *the Constitution*. In the case of *Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others* [2013] eKLR the court held that: -

“I am not in the least persuaded that Article 159 of *the Constitution* and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

19. The upshot is that the firm of Katsoleh & Co. Advocates are not properly on record and that if they were the Applicant has not met the threshold for grant of stay of execution and the same is dismissed with costs to the Defendant.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 18TH DAY OF AUGUST, 2022.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

