



**Ondara v Mogire (Environment and Land Appeal E008 of 2025)
[2025] KEELC 5050 (KLR) (1 July 2025) (Ruling)**

Neutral citation: [2025] KEELC 5050 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT AND LAND APPEAL E008 OF 2025**

**M SILA, J
JULY 1, 2025**

BETWEEN

JAMES ONGAYO ONDARA & 2 OTHERS APPELLANT

AND

PETER OMBATI MOGIRE & 2 OTHERS RESPONDENT

RULING

1. The application before me is that dated 28 February 2025. The substantive order in that application is to stay execution of an order of eviction issued in the case Ogembo ... pending hearing and determination of an appeal thereof. The application is opposed.
2. From the annexed judgment, I see that the res commenced suit on 23 July 2018 against the respondents seeking orders that the respondents be evicted from the land parcel Majoge/Bombaba/2083. They averred that they held title to this land having inherited it after filing a succession case for the estate of Clement Nyambasora (deceased). On the other hand the applicants averred that they had purchased the land from Clement Nyambasora before his death in 1993 and that the land was subdivided and they got titles bearing the numbers Majoge/Bombaba/2352, 2353, and 2354. The rejoinder of the respondents to this defence was that these titles were nullified by the High Court. The matter proceeded for hearing culminating into the impugned judgment. The trial Magistrate upheld the case of the respondents and issued an order of eviction.
3. Aggrieved, the applicants filed this appeal and followed it up with the present application.
4. The respondents have opposed the application through the replying affidavit of John Moses Ombati. They contend firstly, that the application has been filed by a law firm not on record. They posit that before the lower court, the applicants were represented by the law firm of M/s Bwondika & Company Advocates and there has been no application under Order 9 Rule 9 for the law firm of Okech Nyabuto & Company, who filed the appeal, seeking leave to come on record for the applicants. It is further urged



that the applicants did not offer any counterclaim and that their titles were cancelled through a court order. They assert that the applicants have no valid title documents over the suit land. They complain that the applicants are abusing the interim orders granted to have the respondents harassed by police officers.

5. I have taken note of all the above alongside the submissions of Mr. Nyabuto, learned counsel for the applicants and Mr. Nyambati, learned counsel for the respondents. I take the following view :

“I will start with the issue of whether the application has been irregularly filed by the law firm of M/s Okech Nyabuto & Company Advocates. It is not contested that before the lower court the applicants were represented by M/s Bwondika & Company Advocates and there has not been an application under Order 9 Rule 9 for leave to come on record.”

6. The said Order 9 Rule 9 provides as follows :

“I had occasion to deal with a similar issue in Kisii ELCA No. E007 of 2022. In that case I reviewed the authorities and found that it is not necessary to file an application under Order 9 Rule 9 in order to file an appeal. I will refer to the same authorities in this instance as well.

8. In Francis Omondi Odhiambo v Hippolitus Omondi Ochieng [2022] eKLR Koross J, held as follows :

“17. In my considered view and as has been held in various court decisions and rightly posited by the respondent, the intent of Order 9 Rule 9 and 10 of the Civil Procedure Rules was to cure the mischief of litigants sacking their advocates at the execution stage or at the point of filing their bill of costs thus denying their advocates their hard-earned fees. Had this court been the first court of call, I would not have hesitated but upheld that once judgement has been rendered, leave has to be sought from the trial court.

18. However, the scenario is different in the instant, this court is sitting as an appellate court. Does one need to seek leave in such circumstances? Bearing in mind the provisions of Section 1A of the *Civil Procedure Act* and Section 3 of the *Environment and Land Court Act* that courts have to ensure that cases are conducted in a manner that are just and expeditious. It is my view that Order 9 Rule 9 and 10 of the Civil Procedure Rules does not apply in instances of an appeal because the advocate’s instructions in a lower court are exhausted at the conclusion of a matter and requiring such leave would be tantamount to denying such an appellant a right to legal representation of his choice at an appellate stage thus negating the intent of just and expeditious disposal of a dispute.”

9. In Magereza Savings & Credit Co-operative Society Limited v Samuel Gachini Wahiu & 881 others [2014] eKLR Onyancha J observed as follows:

“The basis of such argument clearly is that the proceedings before the lower tribunal, in this case the Commission, were the same as those in the Appellate court although the latter is a higher and different court. It is however, very clear now that the appeal process or suit is an independent and different process, especially in relation and purpose of rule 9 of order 9 aforesated. In the case of Martin Mutisya Kiio & Another v Benson Mwendo Kasyali Machakos High Court Misc. Application No. 107 of 2013 Makhandia,J (as he then was stated as follows on the issue)



“... such submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial court.”

10. In this case I am fully persuaded of the correctness of the reasoning of the court in the above quoted case. I fully accept that appeal proceedings from a determination of the suit before the lower court or tribunal, as was in this matter, is a completely different and independent suit. The parties who are presently concerned in the appeal, have full and independent right and authority to appoint a new advocate to conduct the appeal proceedings whether such Advocate appointed is the same Advocate who conducted the lower court proceedings or a different one. That is to say that Mr. Oira’s argument that M/s Oraro & Company Advocates required leave of the court to take over the conduct of this appeal from the firm of Ratemo Oira & Company Advocates, is incorrect and has no legal basis. This same position was taken as correct by my sister Kasango, J in the case of *Florence Hare Mkaha v Pwani Takawal Mini Coach and Mohamed Athman in Mombasa HCCC NO. 85 of 2010.*”
11. In the case of Wilfred Mbogo & 5 others v Nelson Mwaniki [2016] eKLR, Muchemi J observed as follows:
 10. Order 9 envisages a situation where judgment has been pronounced and is followed by interlocutory applications for either stay of execution, enforcement, review or setting aside. In my considered view, the case in the original court forms different proceedings from those in an appeal. At the conclusion of the case in the original court, an appeal may not be anticipated and therefore Order 9 Rule 9 could not have been intended to apply to an appeal. An appeal will have to be heard in the appellate court and determined thereby generating its own judgment that is independent of the one of the original court.
 11. It was held in the case of Kenya Pipeline Co. v Lucy Njoki Njuru [2014] eKLR:

At the appeal stage, a party is at liberty to change its advocates without any order of the court or consent of the advocate on record in the trial court, as required under Rule 9 of the said order.
 12. Similarly, I hold the same view that the provisions of Order 9 Rule 9 do not apply to appeals before the appellate court. The provision was intended to protect advocates in suits in the event that one may be denied his/her fees by a client after the case has been concluded and is in the process of execution.
 13. I reach a conclusion that the firm of P.N. Mugo is properly on record in this appeal. The appellant’s counsel was not to apply for an order of the court since Order 9 Rule 9 is not applicable in these proceedings.”
12. The Court of Appeal in Tobias M. Wafubwa v Ben Butali [2017] eKLR , after reviewing various authorities supporting the position, held as follows :

“We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings



in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counselor to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.

As this dispute concerned an appeal from the Principal Magistrate's Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondent's counsel was entitled to commence them without filing a Notice of Change or seeking the leave of the court to be placed on record."

13. From the above authorities, it appears settled that an appeal is a new process and therefore a new advocate who was not on record in the proceedings of the court appealed from, need not file an application to come on record. The argument of the applicant, that the appeal was filed by counsel not properly on record cannot therefore succeed.
14. In ELCA E007 I posited that in so far as the proceedings in the lower court are concerned, unless there will be compliance with Order 9 Rule 9, the advocate in the appeal file cannot file anything in the lower court file, and the advocate on record therein up to the time of judgment still remains on record for purposes of any proceedings in the lower court. Thus, if execution proceedings are being undertaken in the lower court, the advocate on record up to the time of judgment is the one to proceed with that process and not the advocate in the appeal file. If the advocate in the appeal file wishes to take over, then, given that there is already judgment, there will be need to first comply with Order 9 Rule 9.
15. I still hold the same view. For any process in the lower court, there will need to be filed an application under Order 9 Rule 9, but for this appeal, that is not necessary.
16. It follows that I am not persuaded to strike out this application because it was filed by M/s Oketch Nyabuto & Co.
17. On the substance of the application, this is an application for stay pending appeal and I stand guided by Order 42 Rule 6 (2) which provides 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.
18. From the above, it will be noted that the court ought to consider three issues when addressing an application for stay of execution pending appeal. These are :-
 - (i) That the application has been made without unreasonable delay;
 - (ii) That the applicant satisfies the court that she stands to suffer substantial loss if the order for stay is not made;
 - (iii) That there is provision of security as the court may order for the due performance of the decree.
19. I am aware that in his reply, Mr. Nyambati asserted that the titles of the applicants were cancelled and that they cannot possibly have any good appeal. I opt not to go into the issue therein as doing so will be going to the merits of the appeal. I will remain focused on the three principles laid down under Order 42 Rule 6 (2) above.



20. Starting with the issue of delay, I do not think, that the applicants can be accused of delay given that the judgment was delivered on 18 February 2025 and the application filed about 2 weeks thereafter. On the issue of substantive loss, it would appear that the applicants have been the ones in possession. Indeed, that is why the respondents sued them for eviction. I am prepared to hold that they stand to suffer irreparable loss if they are evicted.
21. The next issue is security. The respondents already have an order of eviction. If stay is granted, it means that they cannot execute it and will not therefore benefit from the suit land for the duration of the appeal. It is not clear to me the value of their loss. However from the judgment it would appear that this is agricultural land which has some tea on it and is probably also used for cultivation of seasonal crops. The land measures 1.5 Ha which is sizable. Doing the best I can, I will order each applicant to deposit Kshs. 100,000/= as security to the respondents. This money be deposited within the next 30 days, either in court or in a joint interest earning account held by counsel for the applicants and the respondents. In the event that the applicants lose their appeal, this money be released to the respondents to compensate them for not having used the land for the duration of the appeal. If the applicants succeed in their appeal, the money will be released to them. This order is several against the applicants i.e the applicant who does not deposit the Kshs. 100,000/= may be evicted. In addition to the above, the applicants to also deposit the taxed costs of the lower court within 30 days, if already assessed, and if not assessed, within 30 days from the date of assessment. The deposit of the taxed costs is joint against the applicants. If the monies above are not deposited as directed, then the applicants will not benefit from any order of stay of execution and the respondents will be at liberty to execute the judgment.
22. If the money is deposited then the costs of this application will be costs in the appeal. If the monies are not deposited, then the respondents will have the costs of this application.

Orders accordingly.

DATED AND DELIVERED THIS 1st DAY OF JULY 2025

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

Delivered in the presence of:

Mr. Oketch for the applicants

Mr. Nyambati for the respondents

Court Assistant: Allan

