Ngachulot v Sondang (Environment and Land Case 26 of 2023) [2025] KEELC 6053 (KLR) (17 September 2025) (Ruling)

Neutral citation: [2025] KEELC 6053 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT AND LAND CASE 26 OF 2023

CK NZILI, J

SEPTEMBER 17, 2025

BETWEEN

JACKSON NGACHULOT .... JUDGMENT DEBTOR

AND

MUDANG SONDANG .... DECREE HOLDER

RULING

1. The court, by an application dated 4/7/2025, is asked to stay execution of the judgment delivered on 9/6/2025, the decree issued on 20/6/2025, all other proceedings, and consequential orders arising therefrom pending hearing and determination of the defendant's intended appeal. The reasons are on the face of the application and in a supporting affidavit of Jackson Ngachulot, sworn on 4/7/2025.
2. It is deposed that the applicant has an arguable appeal with prospects of success, that since there is an order for the cancellation of title and for eviction form the suit land within 90 days from the date of judgment, he is apprehensive that the said acts will take place soon, that he will be exposed to irreparable substantial loss, great inconvenience, damage, financial harm and disruption since he lives on the suit property and has developed it extensively.
3. The applicant deposes that he has filed the application timeously and urges the court to exercise the discretion it has in his favour. The applicant has attached copies of the judgment, notice of appeal, letter requesting typed proceedings, draft memorandum of appeal, and a decree as annexures marked JN1-5, respectively.
4. The application is opposed through a replying affidavit of Mudang Sondang, sworn on 14/7/2025, for lack of merit. It is deposed that the filing of an appeal per se is not an automatic right for a stay of execution, as he is equally entitled to a right to enjoy the fruits of the judgment, which should not be unjustifiably withheld. The respondent deposes that he will be unduly prejudiced if the orders

sought are granted, because the applicant knowingly and unlawfully registered 12.14 Ha in his name on 8/1/2019, instead of 12 acres, thereby effectively denying him use of 18.35 acres.

5. Further, the respondent deposes that the applicant continues to use and possess the said acreage, hence any stay will make him continue to suffer loss and damage. The respondent deposes that the applicant will not be prejudiced if there is no stay, since the land can still revert to him if the appeal succeeds in respect to the 12 acres that he claims.

6. The applicant relies on written submissions dated 18/7/2025. It is submitted that the process of execution is on, after a decree was obtained on 20/6/2025 which this court under Order 42 Rule 6(2) of the Civil Procedure Rules has the discretion to stay, given that the applicant has demonstrated substantive loss, he applied on time and is willing to furnish security, otherwise, if eviction occurs, he stands to suffer irreparable loss and damage.

7. The applicant relies on Butt -vs- Rent Restriction Tribunal [1979] eKLR, HE -vs- SM [2020] eKLR, RWW -vs- EKWA [2019] eKLR and James Wangalwa & Another -vs- Agnes Naliaka Cheseto [2012] eKLR.

8. The respondent relies on written submissions dated 23/7/2025. It is submitted that although the applicant has been in possession of the suit land, the same is unlawful, and that the intended appeal, if it succeeds, cannot be rendered nugatory, since the suit land can be restored to the applicant. Reliance is placed on Francis Wahome Mwangi & Another -vs- Angelica Wanjiru Mundia C.A No. E009 of 2021.

9. When the matter came up for hearing on 24/7/2025, a preliminary issue was raised whether the firm of Nyachoti & Co. Advocates is properly on record for the applicant. Miss Arunga, learned counsel for the respondent, submitted that a consent to come on record dated 23/6/2025, was only sent to her on the hearing date, and it appeared to have been filed after the application was filed, hence making the application irregular.

10. Learned counsel Mr. Nyachoti told the court that the consent and a notice of change of advocates were sent to the court on 23/6/2025 before the application was filed. Learned counsel in response urged the court to find that had the consent been filed earlier, learned counsel would have sought a prayer for leave to come on record in the body of the application.

11. Order 9 Rule 9 of the Civil Procedure Rules provides that leave of the court must be sought to come on record when a party, after judgment, intends to change legal representation. It is not in dispute that a decree was issued on 20/6/2025. A notice of appeal was lodged on 23/6/2025. A notice of change of advocates was filed on 23/6/2025, at 9:18 a.m., in a letter dated 23/6/2025 seeking typed proceedings and judgment by the firm of Nyachoti & Co. Advocates did not attach any consent duly signed by the two law firms, or seek the court to enlarge the same.

12. Evidence that the said consent was duly paid for in the Case Tracking System is equally lacking. Order 9 Rule 9 of the Civil Procedure Rules is couched in mandatory terms that no change of advocates can be effected without a court order, upon an application with notice to all the parties, or upon consent filed.

13. Order 9 Rule 10 of the Civil Procedure Rules provides that an order under Rule 9 thereof may be combined with other prayers, provided that the prayer for leave shall be determined first.

14. Evidence of an endorsement order by the court or the service of the consent upon the plaintiff is lacking. It cannot be assumed that leave to come on record and the order of the court for leave are automatic, especially in the circumstances obtaining herein, where evidence of payment of the consent and service of the same before the application for stay was filed is lacking.

15. In Njagi -vs- Mugo & Another Misc. Appl. No. E012 of 2023 (2024) KEELC 5519 [KLR] (25th July 2024) (Ruling), the court said that Order 9 Rule 9 of the Civil Procedure Rules is in mandatory terms and that a consent has to be filed under Order 9 Rule 9 (a) and (b) of the Rules. The court struck out the notice of motion dated 25/4/2023. Order 9 Rule 9 of the Civil Procedure Rules, in my view, sets out the procedure to be followed as counsel to seek leave to come on record, then file and serve the notice of change, and thereafter apply. In this matter, learned counsel for the applicant does not admit that there was an error in the route they undertook. See Chelule & Another -vs- Kuria & Another Appeal E001 of 2023 (2024) KEELC 88 [KLR] (24th January 2024) (Ruling).

16. On the other hand, learned counsel for the respondent does not state what prejudice the plaintiff will suffer if leave is granted. The replying affidavit does not seek the striking out of the notice of motion. Faced with similar circumstances, the court in John Langat -vs- Kipkemboi Terer & Others [2013] eKLR, held that the application is incompetent.

17. In James Ndonga Njogu -vs- Muriuki Macharia [2020] eKLR, the court observed that although an applicant has a constitutional right of legal representation, where there are clear provisions regulating the procedure, the same should be adhered to and cannot be termed as a mere technicality, making such a law firm lack locus standi.

18. Coming to the merits of the application, an applicant has to apply within a reasonable time, demonstrate substantial loss, and offer security for the due realization of the decree, should the appeal not succeed. Judgment was delivered by the court on 9/6/2025. The decree was issued on 20/6/2025, while this application was lodged on 4/7/2025. The bill of costs was filed on 7/7/2025. The applicant has not attempted to explain the delay. The law has not set out a maximum or minimum delay. It all depends on the circumstances of each case, for even a one-day delay could be inordinate.

19. The applicant has said that there will be a substantial loss. Tangible or cogent evidence is what is required to demonstrate substantial loss, as held in Wangalwa James -vs- Agnes Naliaka (supra), since execution per se is not substantial loss. The delay must be explained, given that a decree was extracted and the applicant has not established the nexus between the said delay and how the execution process over the title register is, to avoid the court issuing an order in vain.

20. In National Industrial Credit Bank Ltd & Another [2006] KECA 333 eKLR, the court said that the legal duty is on an applicant to prove how his appeal would be rendered nugatory. The respondent has said that the applicant has unreasonably kept occupying more acreage of the land than he was entitled to in the alleged sale agreement.

21. Detinue and trespass impede the right to use and occupy land under Article 40 of the *Constitution*. It is upon the applicant to justify why he should be allowed to retain a title deed, use and occupation of more land than he acquired from the respondent, since there is a regular judgment finding him unfairly, illegally, unjustly, and unconstitutionally retaining a title deed and occupying more land than he deserves.

22. As to security, the applicant does not offer to surrender the title to the court, cede, or hand over vacant possession of what he is not entitled to, over and above the 12 acres. Though the applicant alleges use, occupation, and development of the suit land, he does not specify which portion he has allegedly developed, lives on, and shall stand to suffer loss, damage, or inconvenience. The particulars of the loss, damage, and inconvenience over and above that to be suffered by the respondent have not been specified.

23. In Ngetich -vs- Goren & Another [2025] KECA 565 [KLR] (25th March 2025) (Ruling), the court held that each case must depend on its own facts and the peculiar circumstances. In this matter, the

applicant is on record to have bought only 12 acres on 3/5/2016, but only discovered the title had more acreage and other errors, long after it was issued to him on 28/1/2019.

24. The applicant admits and seeks to be declared owner of only 12 acres and for the title to be rectified to read 12 acres instead of 12 Ha, and to have the names rectified. Again, the applicant has admitted that there was a caution on the title register. As of the filing of this application, the court has not been furnished with any official search certificate to show that the caution has been removed to pave the way for the execution of the decree by way of cancellation of the title for the land to revert to the respondent's name.

25. There is no evidence that the defendant has taken possession of the entire 12 Ha of land as at the filing of the application. Equally, 90 days for the eviction was to run from 9/6/2025. This means that the earliest time for the eviction order to take effect was on 9/9/2025. The same can only arise upon compliance with the mandatory provisions of the law alluded to above. Regarding the element of security, it is not enough to express willingness to offer security for the due realization of the decree, should the appeal not succeed. The applicant has left the court to second-guess what he means, due to the nature and circumstances of this case.

26. In an application for stay, a party should make a full disclosure and say what it is that he is likely to suffer or change the substratum of the appeal. The discretion of stay is to be exercised as a balancing act, as the respondent also has an undeniable right to enjoy the fruits of his judgment.

27. In my considered view, to drive the respondent from the seat of judgment and postpone the execution must be justified and be based on sound legal principles that the applicant has to surmount. In the premises, I find the application as falling below the threshold of stay. It is dismissed with costs. Leave is granted to come on record.

28. Orders accordingly.

RULING DATED, SIGNED, AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT AT KITALE ON THIS 17TH DAY OF SEPTEMBER 2025.

In the presence of:

Court Assistant - Dennis

Arunga for the defendant/respondent present

Nyachoti for the plaintiff/applicant present

HON. C.K. NZILI

JUDGE, ELC KITALE.