



**Kent v Kanyua & 3 others (Environment & Land Case
1567 of 2016) [2024] KEELC 348 (KLR) (1 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1567 OF 2016**

JA MOGENI, J

FEBRUARY 1, 2024

BETWEEN

TREVOR KENT PLAINTIFF

AND

CHARITY NJERI KANYUA 1ST DEFENDANT

IVY WANJIRU 2ND DEFENDANT

JEFF GITONGA 3RD DEFENDANT

COUNTY REGISTRAR OF LANDS 4TH DEFENDANT

RULING

1. On 2/11/2023, this Court delivered judgment in favour of the Plaintiff as prayed in his Plaint dated 14/12/2016. The Applicants/Defendants being aggrieved by the said judgment, filed a Notice of Motion Application dated 9/11/2023. The Application is brought under the provisions of Order 9 Rule 9, Order 42 Rule 6, Order 51 of the Civil Procedure Rules 2010, Sections 1A, 1B & 3A of the [Civil Procedure Act](#) and Article 159 (2) (d) of [the Constitution](#) of Kenya, 2010. The Applicants are seeking to move this court for the following orders: -
 1. Spent.
 2. That the firm of M/s Wanja & Kibe Advocates be granted leave to file a Notice of Change of Advocates so as to come on record in the matter for the 1st 2nd and 3rd Defendants/Applicants.
 3. Spent.
 4. That after the inter partes hearing of this application, the Honourable Court be pleased to grant a stay of execution of the judgment and orders of the Honourable Mogeni J, delivered on 2/11/2023 pending the hearing and determination of the Applicants' intended Appeal.



5. That this Honourable Court be pleased to grant an order of stay of further proceedings in this matter pending the hearing and determination of the Applicants' intended Appeal.
 6. That this Honourable Court be pleased to grant any other relief it may deem fit.
 7. That the costs of this application be provided for.
2. The Application is supported by way of an Affidavit sworn by Charity Njeri Kanyua, the 1st Defendant on behalf of the 2nd and 3rd Defendants and is premised on the grounds on the face of the Application. I do not need to reproduce the same.
 3. The Plaintiff/Respondent opposed the Application vide a Replying Affidavit sworn by Trevor Kent on 29/11/2023 and filed on 30/11/2023. It is his contention that the Applicant filed an application on 9/11/2023, and the court directed them to serve it within 5 days, but he was not served until 24/11/2023, violating court orders. The Plaintiff/ Respondent argues that the Applicant must show an arguable case, which has not been done. The application introduces a new cause of action not raised during the trial and pertains to a commercial dispute, outside the court's jurisdiction. The Plaintiff/ Respondent cited Section 13 of the *Environment and Land Court Act*, stating that commercial disputes are not within the court's jurisdiction. The Plaintiff/Respondent asserts that the court's judgment already established the Applicant's role as a trustee, preventing any dealings without involving him. The Plaintiff/Respondent contends that, due to fraud by the Applicant, they should not benefit from their misdeeds, emphasizing the lack of an arguable appeal and urging the court to reject the application based on jurisdictional issues and commercial nature.
 4. Directions were given on 28/11/2023 that the application be canvassed by way of written submissions as agreed by the advocates for the parties. By the time of writing this Ruling, none of the parties had duly submitted.
 5. I have perused and considered the application and the rival affidavit thereto. The issue for determination in the present application is whether, firstly, the Applicants' prayer for change of advocates is merited and secondly whether an order for stay of execution can issue against the decree and the judgment dated 2/11/2023 pending hearing and determination of the intended appeal.
 6. Order 9 Rule 9 of the Civil Procedure Rules provides as follows: -
 - a. Upon an application with notice to all the parties; or
 - b. Upon a consent filed between the out-going advocate and the proposed incoming advocate or party intending to act in person as the case may be."
 7. The full purport of Order 9 Rule 9 (a) and (b) is that there must be an order of the court. In this case though there was a consent of the incoming and outgoing advocate, there was no order of the court. Further, the essence of Order 9 Rule 9 is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away.



Indeed, Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 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.”

8. In the matter before me, it is not contested that judgment was delivered herein on 2/11/2023. I note that the firm of M/s Wanja & Kibe Advocates have complied with the provisions of Order 9 Rule 9 (b) of the Civil Procedure Rules by filing a consent dated 9/11/2023 between themselves and the firm of M/s WJ Ithondeka & Co. Advocates. This being the position, it is my considered view that the firm of M/s Wanja & Kibe Advocates can be granted leave to come on record as they followed the right procedure as required by law. Accordingly, I am persuaded that there is merit in the prayer 2 of the present Application and the same is allowed.
9. With regard to an order for stay of execution, Order 42 Rule 6(1) of the Civil Procedure Rules, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -
 - (2) 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.

Whether an Order for stay of execution can issue against the decree and judgment dated 2/11/2023

10. The purpose and objective of the order for stay of execution is to preserve the substratum of the appeal in order to ensure that the appeal is not defeated. In the case of Consolidated Marine. vs. Nampijja & Another, Civil App.No.93 of 1989 (Nairobi), the Court held that: -

“The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
11. From the provisions in Order 42 Rule (2) of the Civil Procedure Rules, there are three conditions for granting an Order for Stay pending Appeal which include:
 - i. The Court is satisfied that substantial loss may result to the Applicant unless stay of execution is ordered;
 - ii. The application is brought without undue delay and
 - iii. 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.
12. In an application under Order 42 Rule 6 of the Civil Procedure Rules, the central issue that the Court must determine is that of substantial loss. Platt Ag. J.A (as he then was) addressed that issue in Kenya Shell Ltd vs Kibiru 1986 K.L.R 410 at page 416 as follows: -

“It is usually a good rule to see if order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare



case when an appeal would be rendered nugatory by some other event. Substantial loss in its various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented”.

13. The above principles are the route that Courts have taken in applications of such. Guided by the same, I shall now examine if the applicants have established that they will suffer substantial loss which, in my view, must be such loss that if they were to succeed on appeal, the very substratum on which their claim was founded would have been defeated if not wholly but at least to a substantial degree.
14. The first ground to be established is whether substantial loss may result to the Applicant unless stay of execution is granted. What amounts to substantial loss was expressed by the Court of Appeal in the case of *Mukuma vs Abuoga* (1988) KLR 645 where their Lordships stated that;

“Substantial loss is what has to be prevented by preserving the status quo because such loss would render the Appeal nugatory.”
15. The onus is on the applicant to show the damages they would suffer if the order for stay of execution sought is not granted for the reason that; by granting such stay, it would mean that the status quo should remain as it were before the judgment and that would be denying a successful litigant the fruits of his judgment, which should not be done unless the applicant has given sufficient cause to the court to enable it to exercise its discretion in granting the orders sought. Besides, it not merely sufficient to state that substantial loss may occasion on the applicant. (See *New Stanley Hotel Ltd –vs- Arcade Tobacconist* (1980) KLR 757).
16. The applicants have stated that they will incur loss if the orders sought are not granted for reasons that; the suit property is also the subject matter of the intended appeal therefore, if it is disposed of or interfered with in a manner that changes its character the intended appeal and this application will be overtaken by events, that the Respondent can execute the Judgment any time rendering the intended appeal nugatory because the Applicants will have the right to have their appeal determined on merit, that the 1st Defendant is a partner in the businesses owned jointly with the Plaintiff which are operated on the suit property and because the judgment also restrains the Defendants from interfering with the suit property, it has the effect of evicting the Applicants from the suit property and the said businesses and lastly that the Applicants have a meritorious appeal and their constitutional right to exhaust their right to appeal will be lost if the appeal is rendered nugatory by disposal or removal of the suit property.
17. On the other hand, the Plaintiff/Respondent deponed that the application seeks to introduce a totally new cause of action which was not argued before the court during the trial. that the application is hinged on the Applicants' claim to her stake in the business on the suit property which is in the nature of a commercial dispute not a land dispute which is what the court has jurisdiction to adjudicate upon. Further, he contends that section 13 of the *Environment and Land Court act* 2011 clearly sets out the jurisdiction of the Environment and land court and commercial disputes is not one of them. That the applicant expresses apprehension that the suit property could change hands or be interfered with in a manner that would change the character of the intended appeal rendering the appeal and the application nugatory which is totally misplaced. The judgment of the court was very clear that the Applicant held the suit property in trust for the plaintiff and that the Defendants/Applicants could not have any dealings in the property without involving him. That being the case, it follows that it is not possible to have any dealings or alienate the property without her involvement since the order of the court obligates her to transfer the title of the suit property into her name though holding the same in trust for the plaintiff.



18. In my view, it is not clear how the Applicant's contentions translate to substantial loss in relation to the suit property. No evidence has been adduced to demonstrate that the Plaintiff will evict the Applicants from the suit property. The Court had ordered that the title be rectified to only have the name of the 1st Defendant as it was the case before the title was reported as "lost". Nowhere in the judgment did the Court direct that the 1st Defendant be evicted. Further, the 1st Defendant herself has contended that she is a partner in the businesses owned jointly with the Plaintiff which are operated on the suit property and because the judgment also restrains the Defendants from interfering with the suit property. Certainly, the interference here has nothing to do with eviction. I am not sure where the Applicants got this assumption from. In the judgment, the Court barred the defendants from any dealings without involving the Plaintiff. This clearly means that any dealings regarding the suit property SHOULD involve the Plaintiff. Seeing that the Plaintiff and the 1st Defendant are partners in their businesses, this should not be an issue.
19. A party must go a step further and establish the loss that they will suffer. In the case of Machira t/a Machira & Co. Advocates vs. East African Standard (No 2) (2002) KLR 63, it was held as follows;
- "In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars... where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay..."
20. It was the Plaintiff/Respondent's contention that the court having established that there was fraud on the part of the Applicant, should not allow her to be a beneficiary of her misdeeds as one must come to equity with clean hands. It is true that the Court already found that the registration to include the names of the 2nd and 3rd Defendant was irregular, unprocedural and/or illegal. The Court cannot sanction continued irregularities and/or illegalities because this will be tantamount to denying the decree holder his right of enjoyment of the fruit of the judgment. It is therefore my finding that the Applicants have not demonstrated what tangible loss they stand to suffer if they stay order is not granted.
21. On the issue on the application being made without delay, I find that the application was filed timeously. It is on record that the judgment was delivered on 2/11/2023 and the Applicants filed an application for stay of execution on 10/11/2023. Eight (8) days after the delivery of the judgment cannot be said to be inordinate delay.
22. The last condition is that of security for costs for the due performance as the court may direct. An applicant seeking stay pending appeal is also required to provide security for the due performance of such decree or order as may ultimately be binding on him. I find that Order 42 Rule 6 (2) (b) of the Civil Procedure Rules stipulate in mandatory terms that the third condition that a party needs to fulfil so as to be granted the stay order pending Appeal is that (s)he must furnish security. In the case of Aron C. Sharma vs. Ashana Raikundalia T/A Rairundalia & Co. Advocates the court held that;-
- "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.”

23. Under the provisions of Order 42 Rule 6 (1)(2) of the Civil Procedure Rules, a party seeking a stay must offer such security for the due performance of the orders as may ultimately be binding on the appellant. In the instant matter, the applicants were required to provide the actual security for consideration by the Court as to its sufficiency. In the case of Equity Bank Ltd –vs- Taiga Adams Company Ltd [2006] eKLR it was held that: -

of even greater impact is the fact that an applicant has not offered security at all, and this is one of the mandatory tenets under which the application is brought ...let me conclude by stressing that of all the four, not one or some, must be met before this court can grant an order of stay...” which principle was also emphasized in Carter & Sons Ltd –vs- Deposit Protection Fund Board & 3 Others.”

24. In the instant matter, the Applicants have not provided any security for the due performance of the decree. Nevertheless, at paragraph 9 of the Supporting Affidavit, the Applicants have deposed that they are willing to provide security or abide by any reasonable conditions given for the grant of the orders sought. The Applicants merely stated that they are willing to provide security or abide with any conditions that the court will require as a condition for granting the stay of execution. The offer for a security should come from the applicant, it should not be inferred or implied or left for the Court to make an order for security for due performance as that would amount to stepping into the arena of dispute.

Disposal Orders

25. Having carefully considered the pleadings herein, the available evidence, the exhibits produced in Court and the relevant provisions of the law, the Court finds that the Applicants have not met the conditions set out under Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules.
26. The upshot of the foregoing is that the Application dated 9/11/2023 only succeeds in terms of Prayer 2. It is so ordered.

DATED, SIGNED AND DELIVERED THIS 1ST DAY OF FEBRUARY 2024

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MOGENI J.

JUDGE

In the virtual presence of;-

Eunice Kibe for the Plaintiff

Mr. Osiemo for the 1st, 2nd and 3rd Defendants

Caroline Sagina: Court Assistant

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MOGENI J.

JUDGE

