



**Ogola v Alila (Environmental and Land Originating Summons  
E025 of 2022) [2024] KEELC 13747 (KLR) (5 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13747 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E025 OF 2022  
AY KOROSS, J  
DECEMBER 5, 2024**

**BETWEEN**

**JOHN OWITI OGOLA ..... PLAINTIFF**

**AND**

**JARED ODONGO ALILA ..... DEFENDANT**

**RULING**

1. This is a ruling concerning the plaintiff's notice of motion dated 8/04/2024 and the defendant's notice of preliminary objection (PO) dated 24/05/2024.

**Defendant's PO**

2. By the law firm of Bruce Odeny & Co. Advocates who represent the defendant, the defendant raised the following points of law against the notice of motion dated 8/04/2024;
  - a. The motion filed by the law firm of Ms. Juliet Kokeyo & Co. Advocates is defective and should be struck out with costs.
  - b. The law firm of Ms. Juliet Kokeyo & Co. Advocates is not on record according to the provisions of Order 9 Rule 7 of the Civil Procedure Rules.

**The plaintiff's response to the PO**

3. In rebuttal, counsel M/s. Kokeyo whose law firm M/s. Juliet Kokeyo & Co. Advocates has sought leave to come on record for the plaintiff filed a replying affidavit in which she contended inter alia, that she sought to take over the conduct of the suit from Ms. Ashioya & Co. Advocates as required by Order 9 Rule 9 and 10 of the Civil Procedure Rules; the PO was bad in law and an abuse of court process; she was privy a notice to act in person had been filed and urged the court to dismiss the PO.



#### **Notice of motion dated 8/04/2024**

4. Some of the prayers sought in the motion are spent and the residual reliefs pending resolution are: -
  - a. The Hon. Court does grant leave for the applicant's counsel to come on record for the plaintiff.
  - b. The Hon. Court does issue orders of stay of execution of the judgment and decree issued on 30/11/2023 and the bill of costs pending the intended appeal.
  - c. Costs be provided for.
5. The grounds in support thereof and the plaintiff's affidavit sworn on 8/04/2024 stated that the defendant was in the process of evicting him, his previous advocates delayed in informing him of this court's ruling, he has been served with a ruling on taxation of a bill of costs, the court has the discretion to grant stay orders, and it would be in the interests of justice if orders of stay of execution were granted.

#### **The defendant's replying affidavit against the motion**

6. On matters of fact, the defendant filed a replying affidavit which he swore on 24/05/2024. He averred this court rendered a ruling and not a judgment and substantial loss had not been demonstrated by the plaintiff.
7. He further averred a substantial appeal had not been filed, security which was a pre-requisite in an application for stay of execution had not been proffered, the court had only issued negative orders that were incapable of being stayed and therefore the relief of stay of execution was untenable.

#### **Parties' submissions**

8. As directed by the court, parties filed written submissions. M/s. Kokeyo filed written submissions dated 9/09/2024 in which counsel identified the following issues as arising for determination; whether the law firm of M/s. Juliet Kokeyo & Co. Advocates should be granted leave to come on record for the plaintiff, whether the PO is merited, and whether this court should grant an order of stay of execution.
9. The defendant's counsel's submissions dated 12/07/2024 identified 2 issues for determination; whether the PO is merited and whether the plaintiff has established a reasonable case for a stay of execution pending an appeal.
10. Upon identifying and considering the issues for determination, this ruling shall later on in its analysis and determination, consider each of the counsels' arguments on the particular issue and also bear in mind the provisions of law and judicial precedents that they have both relied upon to buttress their respective arguments.

#### **Issues for determination**

11. Accordingly, having carefully considered the grounds of the PO, the plaintiff's motion and grounds thereof, and affidavits together with rival submissions, it is the considered view of this court that the following issues which shall be dealt with consecutively commend themselves for determination: -
  - a. Whether the PO has met the legal threshold.
  - b. If (a) is in the positive, are the grounds of the PO merited?
  - c. Should the law firm of Ms. Juliet Kokeyo & Co. Advocates be granted leave to come on record for the plaintiff?



- d. Has the plaintiff appealed against the decisions of this court, if not, does this court have jurisdiction to grant an order for a stay of execution?
- e. What orders should this court issue including an order as to costs?

### **Analysis and Determination.**

12. These issues shall shortly be dealt with consecutively.

#### **a. Whether the PO has met the legal threshold.**

13. The decision of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd.* (1969) EA 696 has long settled the tests that a PO has to meet and, in this decision, the court held thus: -

“A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

14. From this decision, it is deduced that for a PO to succeed, it must meet 3 tests which are, it raises a pure point of law, on the assumption that all the facts pleaded by the other side are correct, and it cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In addition, the PO should be capable of disposing of a suit or a motion for that matter.
15. None of the counsels addressed me on this issue. The plaintiff’s submissions merely defined a PO and asserted the PO was premature whilst the defendant’s submissions dwelled on matters of fact and the provisions of Order 9 Rule 7 of the Civil Procedure Rules (CPR).
16. Incontestably, the PO raised matters that have to be verified as it questioned the capacity of the firm of M/s. Juliet Kokeyo & Co. Advocates to file the instant motion as the plaintiff is alleged to have already filed a notice to act in person.
17. Miss. Kokeyo countered this and contended she was not privy to such notice and according to her, her law firm was seeking leave to replace the plaintiff’s previous advocates who were on record for him. Consequently, it follows the PO cannot be sustained. I find the PO has not met the legal threshold. I find it unnecessary to address issue (b).

#### **b. Should the law firm of Ms. Juliet Kokeyo & Co. Advocates be granted leave to come on record for the plaintiff?**

18. Order 9 Rule 9 of the Civil Procedure Rules captures the post-judgment process where an advocate or party seeks to come on record in place of an advocate who was previously on record. This provision 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.”

19. This proviso does not impede a litigant from choosing an advocate of her choice and the mischief of this legal provision is to cure instances of a litigant circumventing paying the legal fees of an advocate who was previously on record and also to inform the court and parties of such change.
20. However, it outlines procedures to be adhered to and if a party seeks to change Advocates, post-judgment, the first scenario is that the incoming advocate or litigant who now wants to act in person must make a formal application to the court with notice to all parties who participated in the suit for grant of leave to come on record or act in person.
21. In the alternate scenario, the incoming advocate or litigant in person, has to obtain the written consent of the previous advocate on record, file the consent in court, and then seek leave to come on record.
22. It ensues, despite the existence of a judgment that was rendered on 20/02/2024, the plaintiff without due process filed a notice to act in person.
23. This court has checked the court’s E-portal and astonishingly, this document was presented for registration by none other than the law firm of M/s. Juliet Kokeyo & Co. Advocates yet M/s. Kokeyo has feigned ignorance of it. Be that as it may, this document did not follow the procedure outlined in Order 9 Rule 9 of the Civil Procedure Rules.
24. On that basis and at this juncture, I find it incompetent. Further, despite M/s Kokeyo contending she intends to take over the conduct of the matter from Ms. Ashioya & Co. Advocates, there is no evidence this law firm was served as required by law. Therefore, this court is reluctant to grant this relief at this point.

**c. Has the plaintiff appealed against the decisions of this court, if not, does this court have jurisdiction to grant an order for a stay of execution?**

25. On the 1<sup>st</sup> limb and as submitted by the defence counsel, the grant of stay of execution finds its basis in Order 42 Rule 6 (1) and (2) of the Civil Procedure Rules. Rule 1 states that:

“(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.’ Emphasis added

26. A reading of this provision of law demonstrates the existence of an appeal from the decision of this court is a jurisdictional prerequisite that enables this court to entertain the motion for a stay of execution.
27. An appeal against the decision of this court comes into existence by lodging a notice of appeal in writing within 14 days from the date of the decision. A copy is usually lodged with the registrar of the superior court See Rule 75 (a) and (b) of the Court of Appeal Rules.



29. However, in the event of a delay, an appeal can come into existence upon issuance of an order for an extension of time to appeal against the decision of this court to the Court of Appeal. See Rule 4 of the Court of Appeal Rules.
30. I have gone through the record and the plaintiff has not presented a notice of appeal to this court or exhibited that the Court of Appeal has granted him leave to appeal out of time. As it stands, there is no appeal against the decision of this court.
31. When faced with circumstances similar to this case in *Wilfrida Arnodah Itolondo v Attorney General & 9 others* [2021] eKLR, the Supreme Court of Kenya's decision in paragraph 39 of its ruling stated: -
- “ Therefore, in the absence of a substantive appeal on record, we are unable to grant the orders of stay of execution of the Order on costs in Civil Appeal No.120 as sought.”
32. I have not been persuaded to depart from the binding decision of the apex court. Accordingly, and in the absence of jurisdiction, I cannot move one step further. This court finds and holds that it has no jurisdiction to entertain the relief for a stay since there is no substantive appeal against its decision. I need not say more.
33. In the end, I hereby strike out the notice of motion dated 8/04/2024. The PO dated 24/05/2024 is hereby dismissed. Because costs follow the event, each party shall bear their respective costs.

It is so ordered.

**DELIVERED AND DATED AT SIAYA THIS 5<sup>TH</sup> DAY OF DECEMBER 2024.**

**HON. A. Y. KOROSS**

**JUDGE**

**5/12/2024**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:**

Miss. Kokeyo for the plaintiff

Miss. Akinyi for the respondent

Court assistant: Ishmael Orwa

