



**Wanjiku v Mwanzia (Environment & Land Case 500 of 2014)
[2023] KEELC 865 (KLR) (2 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 865 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 500 OF 2014**

**J OMANGE, J
FEBRUARY 2, 2023**

BETWEEN

ANNE WANJIKU GATHONI ALIAS ANNE WANJIKU LIBONDE ... PLAINTIFF

AND

MONICA MWIKALI MWANZIA DEFENDANT

RULING

1. The subject matter of this application is land title No. Ngong/Ngong/ 21441 hereinafter referred to as the suit property.

Background

2. Before me are two applications. The plaintiff application dated 3rd October, 2022 is a chamber summons application seeking orders that the court issue an order directing the Officer Commanding Police station Kiserian to enforce the court judgement dated and delivered on 23rd June, 2022 in this matter specifically paragraphs c and d requiring the defendant to stop encroaching into the land, invading the land, trespassing into or remaining on the land or in any manner whatsoever and evictions of the defendant from the suit land. The application is supported by the affidavit of Anne Wanjiku Gathoni alias Anne Wanjiku Lidondde in which she depones that she is the owner of land title No. Ngong/Ngong/ 21441. She states that on the 23rd June, 2022 Hon Justice Komingo delivered a judgement in which she pronounced that the defendant is a trespasser without any legal right over the property in dispute.
3. It is the case of the plaintiff/ applicant that the defendant has remained in occupation of the suit land in disobedience of court orders which have been served upon her. As such the plaintiff has not been able to enjoy the fruits of her Judgement. The plaintiff seeks an order authorizing the OCS Kiserian Police station to assist in enforcement of the courts Judgement.



4. The Defendant also filed an application dated 12th September, 2022 seeking orders that the firm of MS Ano Advocate be allowed to come on record on behalf of the Defendant/ Applicant and secondly that Stay of Execution of the court's Judgement dated 23rd June, 2022 be granted pending the hearing and determination of the appeal.
5. I will consider the Defendant/ applicants application first as it will have a bearing on the Plaintiffs application dated 3rd October, 2022. Both counsels filed submissions which I have duly considered.
6. In support of the application for M/S Ano Advocates to come on record. The Defendants advocates submits that Constitution of Kenya recognizes and protects the right to funded legal representation by all accused person in Kenya. From the outset I note that this reference is misplaced as this is not criminal case. Notwithstanding the foregoing counsel request for leave to come on record as provided by Order 9 rule 9.
7. Regarding the application for stay of execution counsel for the defendant argued that the appeal would be rendered nugatory as the subject matter will have lapsed as the parcel of land might have possibly been transferred to a third party. counsel referred the court to the case of Peter Nakupang Lowar v Nautu Lowar (2022) eKLR. The defendant indicated that she is willing to deposit an amount of Kshs 100,000 as security for costs.
8. Counsel for the plaintiff on their part contend that the court is functus officio hence cannot grant leave for an advocate to come on record. Further that the Defendants application is incompetent as the firm of Another and Company filed the application without an order allowing the counsel for the Defendant to come on record. On the question of whether there is an arguable appeal, counsel submits that as there is no appeal as the Notice of appeal filed in the Court of Appeal was filed out of time.

Issues for determination

9. In view of the foregoing the court frames the following issues;
 - a. Should the court grant the firm of Ano and Advocates leave to come on record?
 - b. Is the application dated 12th September, 2022 properly on record give that it was filed by an advocate not properly on record?
 - c. Should the Defendant be granted stay of execution?

Analysis

10. On the first issue Order 9 Rule 9 provides that

“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.”
11. It is not in dispute that counsel has not sought leave of the court before filing the present application. As I have observed above I note that Article 50 of the Constitution which the Defendant has relied on is not applicable. However, I find that Article 159 2 (b) of Constitution enjoins this court to administer justice without undue regard to technicalities of procedure. As such in this instance I consider that



it is in the interest of justice to allow the Defendant applicant to be represented by an advocate of his choice. I therefore allow the firm of Ano & co Advocates to come on record and further hold that the application is properly on record. I will now proceed to consider whether the Defendant/ Applicants prayer for Stay of Execution.

12. The principles guiding the grant of a stay of execution pending appeal are well settled. These principles are provided under Order 42 rule 6(2) of the *Civil Procedure Rules* which provides as follows:

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.

13. In *Visbram Ravji Halai v Thornton & Turpin* Civil Application No. Nai. 15 of 1990 [1990] KLR 365, the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the *Civil Procedure Rules* is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

14. On the question of sufficient cause, the Defendant has stated that she has filed a notice of appeal in the Court of Appeal. It is the contention of the plaintiffs that the Notice of Appeal was filed out of time. The Defendant has not controverted this averment. In view of this, it is my view that sufficient cause has not been proved.

15. On the question of substantial loss, it is the contention of the Defendant that if the order for stay is not granted, there would be substantial loss if the suit property were to be sold to third parties in the event her appeal was allowed. This may be so but the court weighs this risk to parties who are not before this court against the right of a plaintiff who has a lawful Judgement in her favour and who has been unable to enjoy the fruits of her Judgement.

16. This is the balancing act so aptly described in *Machira T/A Machira & Co. Advocates v East African Standard (No 2)* [2002] KLR 63 where it was held that:

“to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in courts, which is to do justice in accordance with the law and to prevent abuse of the process of the court”.

17. Taking into account the foregoing and considering that the application for stay was filed a full three months after the Judgement was pronounced and further that no attempt has been made to explain



the delay in filing the application, I find that I am unable to find good grounds to exercise my discretion in granting the Defendant stay of execution as sought.

18. I now turn to the Plaintiffs application that the OCS Kiserian do assist in the enforcement of the court's Judgement. Having considered the affidavit by the Plaintiff on the challenges thy have faced in executing the court's Judgement I find that the application is warranted. However, the involvement of the police will strictly be limited to maintaining law and order during the execution of the court order.

Determination

19. In the end taking into account the foregoing, the court makes the following orders;
- a. The firm of Ano & Co Advocates is allowed to come on record for the Defendant/ Applicant.
 - b. The application for stay of execution is dismissed with costs.
 - c. The OCS Kiserian do assist in maintaining law and order during execution of the courts Judgement
 - d. The police shall only provide assistance after the process of executing the judgment has been followed.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 2ND DAY OF FEBRUARY 2023.

JUDY OMANGE

JUDGE

In the presence of: -

Mr. Jaoko for the Plaintiff/Respondent

No appearance for the Defendant/Applicant

Steve - Court Assistant

