



**Ali v Macharia (Environment & Land Case 3 of 2021)
[2023] KEELC 19810 (KLR) (18 September 2023) (Ruling)**

Neutral citation: [2023] KEELC 19810 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT & LAND CASE 3 OF 2021
MN GICHERU, J
SEPTEMBER 18, 2023**

BETWEEN

MURSAL HAJI ALI PLAINTIFF

AND

STANLEY MAINA MACHARIA DEFENDANT

RULING

1. This ruling is on the notice of motion dated November 24, 2021 and filed on December 21, 2021. It is brought under Articles 159 (2) and 40 (1) of the [Constitution of Kenya, 2010](#), Sections 1A, 3A and 63 (e) of the [Civil Procedure Act](#), orders 40, rules 1 and 2, 42 rule 6(1) and (2), 51 rule 1 of the [Civil Procedure Rules](#) and all enabling provisions of the law.
2. The motion seeks the following residual orders-
 - i. Stay of execution and or setting aside of the ruling dated October 4, 2021 and the resultant orders of eviction.
 - ii. Leave be granted to the defendant to defend his position and testify if need be.
 - iii. That costs be in the cause.
3. The motion is supported by eight grounds and an affidavit sworn by the Defendant Stanley Maina Macharia. The gist of the grounds and supporting affidavit can be summarized as follows.

Firstly, the Defendant was let down by his former counsel who failed to argue a preliminary objection, to represent the Defendant and to comply with court directions as a result of which the Defendant lost an otherwise good case.

Secondly, the Defendant's land which was valued at between Kshs. 5 million and 6 million was sold at a patty Kshs. 1.2 million in an irregular sale.



Thirdly, the suit property is occupied by the Defendant, his nucleus and extended families in addition to other dependents of his. Their eviction from the suit land will cause untold misery to the occupants of the land.

Fourthly, the Defendant was condemned unheard where he got no chance to refute the Plaintiff's case and this is contrary to the rules of natural justice.

Finally, the Defendant has a good case and should be heard on merit before such drastic action as eviction takes place.

4. The Defendant's motion is opposed by the Plaintiff who filed the following grounds of opposition.

Firstly, the motion cannot be allowed since there is no pending appeal.

Secondly, this court is of concurrent jurisdiction with the one that issued the decree herein and for this reason, it cannot sit on appeal over the judgment herein as it is indeed *functus officio*.

Thirdly, the Defendant's current counsel on record has not complied with Order 9 Rule 9 of the [Civil Procedure Rules](#) which requires that the incoming counsel obtains the consent of the outgoing counsel to come on record.

Fourthly, the current application is wrongly before the court as it has been brought under Order 42 which deals with appeals when there is no appeal pending. The appeal, if any should have been filed within the time stipulated in law.

5. I have carefully considered the application in its entirety including the grounds, supporting affidavits, the grounds of opposition and the entire record. I find that the following issues arise for determination.

- a. Whether the Defendant was condemned unheard?
- b. Whether the current application is for review?
- c. Whether the current application is for stay of execution pending appeal?
- d. Whether the incoming counsel for the Defendant has complied with Order 9, Rule 9?

6. On the first issue, I find that the Defendant was not condemned unheard. At page 3, second paragraph of the ruling dated 4/10/2021, the Defendant's notice of preliminary objection, grounds of opposition and his replying affidavit are all considered. Again at page 4, last paragraph of the same ruling, the Defendant's submissions have been considered. Finally at page 5, last paragraph, the ruling considers the issues raised by the Defendant.

Given the above clear instances, the Defendant cannot be heard to say that he was condemned unheard. This is not correct. He was heard.

7. On the second issue, I find that current application is not for review. I say this because it has not cited Order 45 of the [Civil Procedure Rules](#). It has also not mentioned any of the three grounds that would warrant a review as per Rule 1 of Order 45. No new evidence has been referred to neither has a mistake or error apparent on the face of the record or any other important matter been mentioned. Those three are the only ingredients for an order of review. None of them exists in this case.

8. On the third issue, I find that the current motion is not for stay of execution pending appeal. There is no mention of any pending appeal or even one that is to be filed. In fact, the second residual prayer is that the Defendant be granted "leave to defend his position and testify if need be". Considering that the Defendant was heard; that this is not an application for review or stay of execution pending the hearing and determination of an appeal, then one fails to understand exactly what the motion is all about.



Naturally, it is not difficult to understand the Defendant's predicament if what he says in his replying affidavit is true. However, the fact that he charged the suit parcels knowing very well that one of the consequences of his failure to service the loan would be sale of the land, he cannot say that the current scenario has taken him by surprise or that it is not lawful.

9. On the final issue, I find that the Defendant's incoming counsel is not properly on record. He has not complied with Order 9 Rule 9 of the *Civil Procedure Rules* which requires that an advocate who comes on record after judgment has been passed obtains the consent of the outgoing counsel. Before the judgment and decree was passed, the Defendant was represented by the firm of Maosa and Company Advocates. After judgment was passed Swaka Advocates came on record. Swaka advocates did not file any consent from Maosa and Company Advocates saying that the latter firm did object to their coming on record for the Defendant.

Secondly, Swaka Advocates did not file and serve on Maosa and Company Advocates an application to come on record for the Defendant. For failure to comply with the mandatory provisions of Order 9 Rule 9 *Civil Procedure Rules*, I find that the firm of Swaka Advocates is not properly on record for the Defendant.

For the above stated reasons, I find no merit in the notice of motion dated November 24, 2021 and I dismiss it with costs to the plaintiff.

It is so ordered.

DATED,SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 18TH DAY OF SEPTEMBER, 2023.

M.N. GICHERU

JUDGE

