



**Agot v Chiambe (Environment & Land Case 7 of 2021)  
[2022] KEELC 2370 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2370 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT SIAYA  
ENVIRONMENT & LAND CASE 7 OF 2021**

**AY KOROSS, J**

**JULY 7, 2022**

**BETWEEN**

**STEWART JALANG'O AGOT ..... PLAINTIFF**

**AND**

**FREDRICK ODHIAMBO CHIAMBE ..... DEFENDANT**

**RULING**

1. Pursuant to the provisions of sections 1A, 1B and 63 (c) and (e) of the *Civil Procedure Act*, Order 22 Rule 22 and Order 42 Rule 6 of the *Civil Procedure Rules*, the defendant filed a motion dated August 4, 2022 seeking several reliefs. Some are spent and the reliefs pending determination are as follows;
  - a) Pending hearing and determination of the intended appeal, there be a stay of execution of the judgment and orders issued by this court; and
  - b) Costs be in the cause.
2. The motion is supported by the grounds thereupon and on the supporting affidavit sworn by the defendant, Fredrick Odhiambo Chiambe. He contended that he was dissatisfied with the judgment of the court and had filed a notice of appeal dated February 23, 2022. He asserted that there was imminent danger that the plaintiff would execute the judgment. He stated that he had an arguable appeal with prospects of success and he would be prejudiced if the orders sought were not granted. He was willing to furnish security.

**Plaintiff's case**

3. In response, the respondent filed grounds of opposition dated May 5, 2022 in which he contended that there was no appeal, the motion was premature because no decree had been extracted, defendant had not met the conditions of stay of execution, he would be denied the fruits of judgment and the motion was an afterthought.



4. He also filed a replying affidavit dated May 5, 2022. He contended that there had been no sufficient reasons proffered by the defendant to forestall taxation, the notice of appeal was filed by an incompetent advocate, the defendant had not demonstrated that he would suffer irreparable loss and damage and there was no evidence that the defendant had an arguable appeal that would be rendered nugatory if stay was not granted.

#### **The defendant's rebuttal**

5. In rebuttal, the defendant filed a further affidavit dated May 18, 2022 and contended that his advocates were properly on record.

#### **Parties' written submissions**

6. When the plaintiff's motion dated 30/3/2022 came up before me on 9/5/2022 for issuance of a ruling date, the defendant sought for similar reservation dates for the two motions; one dated 30/3/2022 and the other dated 8/4/2022. Bearing in mind that the outcome of either one of the motions had a bearing on the other, the court obliged.
7. The plaintiff's Counsel Mr. Odongo asserted that his draft submissions were ready while the defendant's Counsel Mr. Sala sought for time. The court gave the defendant 10 days from 9/5/2022 to file his submissions and gave corresponding leave to the plaintiff upon service. As this court pens down this ruling, the defendant has not complied with the directions of the court and if at all it will be filed, which as at now it has not, this court will consider them as having been filed out time and will not consider them.
8. Despite noncompliance by the defendant, the plaintiff filed written submissions dated 10/06/2022. In it, the plaintiff contended that the firm of Sala & Mudany Advocates were improperly on record and that if the court could not consider this, then the court had to consider whether the ingredients of stay of execution pending appeal had been met as envisaged by Order 42 Rule 6(2) of the *Civil Procedure Rules*. Relying on the case of *Machira t/a Machira & Co. Advocates v East African Standard (No2)* (2002) KLR 63. He submitted that the defendant had not substantiated the loss that he would suffer.
9. Further, that the motion was premature because the plaintiff's bill of costs had neither been taxed nor warrants of execution issued. To this end, he relied on the case of *Deposit Protection Fund v Rosaline Njeri Macharia* [2006] eKLR where the court stated that an assessment of costs did not amount to substantial loss and that in any case, such an assessment would assist the court in determining the amount of security that a party would be required to raise. He contended that the motion was filed with unreasonable delay and he relied on the case of *Jaber Mohsen Ali and another v Priscillah Boit and another* L No.200 of 2012[2014] eKLR. On security, he submitted that it could not be determined in isolation because the other factors as envisaged by Order 42 Rule 6(2) of the *Civil Procedure Rules* had to be determined together. The plaintiff urged the court to dismiss the defendant's assertion that the appeal would be rendered nugatory. None of the authorities cited by the plaintiff were availed to this court and this court will not belabour in considering them.

#### **Analysis and determination**

10. I have carefully considered the motion, grounds in support, supporting affidavit, further affidavit, grounds of opposition, replying affidavit and plaintiff's submissions and the issues falling for determination are; (i) whether the defendant's Counsel is properly on record and (ii) whether the application for stay of execution is merited. I will proceed to analyse the legal and jurisprudential frameworks on these issues.



## I. Whether the defendant's Counsel is properly on record

11. Once judgment has been entered against a party and he intended to act in person or change advocates such as in the instance case, the correct procedure as envisaged under Order 9 Rule 9 of the [Civil Procedure Rules](#) was for the incoming advocate to seek leave of the court to either come on record which would be by either filing a consent executed by the incoming and outgoing advocate or file a formal application. Once an order of the court had ensued from the consent or application, the incoming advocate would then file and serve the notice of change of advocates and subsequently file the motion seeking to stay the execution of the judgement.
12. In the circumstances of this case, this provision of law was flouted. The firm of S.M. Onyango & Co. Advocates represented the defendant upto the time of judgment. On 4/03/2022, the firm of Sala & Mudany Advocates purportedly acting for the defendant filed a notice of change of advocates and a notice of appeal. Probably realizing the oversight, a consent filed on 10/03/2022 was executed by Sala & Mudany Advocates and S.M. Onyango & Co. Advocates. The consent has never been adopted as an order of the court. Subsequent thereafter, the defendant filed the instant motion that is the subject of this ruling.
13. Was the unprocedural manner in which the firm of Sala & Mudany Advocates came on record fatal? There are two schools of thoughts. There are those who perceive that the procedure set out above was mandatory and thus could not be termed as a mere technicality and there are those who perceive it as a mere technical error and that substantive justice must prevail. See the analysis of W. Korir J in [S.K. Tarwadi v Veronica Mueblemann](#) [2019] eKLR.
14. Only on the ground that the incoming and outgoing advocate signed a consent, I would lean towards the latter. Had such consent not been obtained, I would not have hesitated but struck out the motion. I am of the humble opinion that the mischief of this particular rule was to ensure that advocates who had spent their valuable time and resources in handling a case would not be left high and dry at the conclusion of a case and that their interests would be protected.
15. In the instant case, the previous advocates have expressed contentment with the firm of Sala & Mudany Advocates being placed on record for the defendant albeit unprocedurally. The plaintiff has not demonstrated any prejudice that he had suffered as a result of such change. It is my finding on this issue that Sala & Mudany Advocates are properly on record and in arriving at this, I am bound by two Court of Appeal decisions; [Boniface Kiragu Waweru v James K Mulinge](#) [2015] eKLR and [Tobias M. Wafubwa v Bishop Ben Butali](#) [2017] eKLR. In the latter, the court had this to say on this provision of law;

“We would go further to add that provided that where the failure to comply with rule 9 did not undermine the jurisdiction of the court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then article 159 of the [Constitution](#) and the overriding principle could be called upon to aid the court to dispense substantive justice through just, efficient and timely disposal of proceedings”

## II. Whether stay of execution shall be granted

16. The granting of stay of execution pending appeal by the ELC is governed by Order 42 Rule 6 of the [Civil Procedure Rules](#) and an applicant has to satisfy that;(i) he will suffer substantial loss (ii)he has moved the court without unreasonable delay and, (iii)furnish security for due performance.



17. Generally, the purpose of stay pending appeal is to preserve the substratum of the case. Preservation in land matters is paramount but one has to bear in mind the unsuccessful party's constitutional right of appeal and that of the successful party's right to enjoy the fruits of his judgment. An intended appeal does not automatically operate as a stay. Such donated powers have to be exercised with judicious discretion. See [RWW v EKW \[2019\]](#) eKLR, where the court stated thus;

“Indeed, to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent.”

18. See also the case of [Kenya Power & Lightning Company Ltd v Esther Wanjiru Wokabi](#)[2014] eKLR where the court was of the view that discretion must be applied judiciously.

19. In my view, the fulcrum that balances these conflicting interests is well delineated by this provision of law. The question that begs to be answered is has the defendant met the conditions of stay of execution? But before I answer this. I must address pertinent issues that have been raised by the plaintiff and the defendant.

20. On whether, there is an appeal or not, this court is uncertain if one has been filed or not. The notice of appeal that was filed before this court does not bear the Court of Appeal's stamp. Further, such a requirement is a preserve of the Court of Appeal which has an opportunity to peruse the memorandum of appeal. Additionally, in the absence of a memorandum of appeal, this court is not in a position to satisfy itself that there is an arguable appeal or not. In my humble opinion, the absence of a decree is not a substantive issue. Prior to 2010 [Constitution](#), such an argument would have passed. I do not think such an approach would pass the muster requirement under article 159 (2) (d) of the [Constitution](#) that provides that “justice shall be administered without undue regard to procedural technicalities.” In any case the plaintiff has not demonstrated any prejudice occasioned to him. The Supreme Court of Kenya when faced with an improper decree in its record in the case of [Zacharia Okoth Obado v Edward Akong'o Oyugi & 2 others](#) [2014] eKLR had this to say;

“Consequently, as to whether the record of appeal is fatally defective, thus warranting the striking out of the appeal on the basis that the order was not extracted in accordance to the Court of Appeal Rules, this Court holds in the negative. There was no prejudice occasioned to the 1<sup>st</sup> respondent in this regard”

21. Now back to the issue for this court's determination. Judgment was rendered by this court on 10/2/2022. The defendant filed this motion on 19/04/2022 which is a period of close to two months. I do not consider it inordinate. The defendant succeeds on the 1<sup>st</sup> limb.

22. On substantial loss, the defendant has contended that he risks to “suffer irreparable loss and damage”. He advanced his loss on two fronts; one, the plaintiff intended to execute the judgment and two, he risked losing his only home which he has lived upon for over a decade.

23. Substantial loss is expressed as the cornerstone in determining whether a stay of execution should ensue. This was the position of the Court of Appeal in [Kenya Shell Limited v Benjamin Karuga Kibiru &](#)



another [1986] e KLR and Rhoda Mukuma v John Abuoga [1988] e KLR. The case of James Wangalwa & Another v Agnes Naliaka Cheseto [2012] e KLR went further and stated:

“No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed”

24. Applying this position of law, the 1<sup>st</sup> front fails. On the 2<sup>nd</sup> front, the location of the defendant’s residence is a question of fact. The court resolved it upon hearing the parties. Although the defendant has proffered that he had stayed on land parcel number South Sakwa/Barkowino/2730 and that it was his only property, the evidence on record demonstrates otherwise. On my part, I would have been prepared to grant stay of execution if the defendant demonstrated that he had suffered substantial loss. However, he has done not so. In the case of Charles Wabome Gethi v Angela Wairimu Gethi [2008] eKLR, the Court of Appeal stated;

“... it is not enough for the Applicants to say that they live or reside on the suit land and that they will suffer substantial loss. The Applicants must go further and show the substantial loss that the Applicants stand to suffer if the Respondent execute the decree in this suit against them.”

25. In the absence evidence of substantial loss, it would be a rare case that an appeal would be rendered nugatory by some other event. See Kenya Shell Limited v Benjamin Karuga Kibiru (supra). The defendant fails on the 2<sup>nd</sup> limb.

26. On the 3<sup>rd</sup> limb, the defendant offered to deposit security for costs. Had the defendant persuaded this court that he would suffer substantive loss which he has not, I would have exercised my discretion and ordered that he deposits the sum of Kshs. 302,010/- which is the total amount stated in the plaintiff’s bill of costs in a joint interest account of the advocates on record and that pending the determination of the appeal, restricted him from transacting on land parcel number South Sakwa/Barkowino/2730 and or interfering with its register.

27. Ultimately, it is my finding that the motion is not merited and because it is trite law that costs abide the event, I award the costs of this motion to the plaintiff.

**DELIVERED AND DATED AT SIAYA THIS 7TH DAY OF JULY 2022.**

**HON. A. Y. KOROSS**

**JUDGE**

**7/7/2022**

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

**Mr. Odongo for the plaintiff**

**Mr. Sala for the defendant**

**Court assistant: Ishmael Orwa**

