



**Murrunka & another v Maki (Environment and Land Appeal
E004 of 2022) [2022] KEELC 14646 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14646 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS
ENVIRONMENT AND LAND APPEAL E004 OF 2022**

EM WASHE, J

NOVEMBER 2, 2022

BETWEEN

JOSEPH MBATIAN L MURRUNKA 1ST APPLICANT

JANET TUYUNI YIAMPOI 2ND APPLICANT

AND

JOSEPH L K MAKI RESPONDENT

RULING

1. The 1st and 2nd Applicants (hereinafter referred to as “the Applicants”) have moved the Court by way of a Notice of Motion Application dated August 25, 2022 (hereinafter referred to as “the present application”) seeking for the following Orders; -
 - i. The instant application be certified urgent and be heard in the first instance.
 - ii. The Honourable Court be pleased to grant leave to the firm of Ochwangi & Company Advocates to come on record for the Applicants herein.
 - iii. Upon granting prayer two (2) hereinabove, the notice of change attached herein be deemed as duly filed upon payment of requisite court fees.
 - iv. The Honourable Court be pleased to issue an order of interim stay of execution of the judgement and decree in respect to MCL& E No 40 of 2018 and Misc Civil Application No 4 of 2022 and all other consequential orders pending the hearing and determination of this Application inter-parte.
 - v. The Honourable Court be pleased to issue an order of stay of execution of the judgement and decree in respect of MCL& E No 40 of 2018 and Misc Civil Application No 4 Of 2022 pending the hearing of the intended Appeal.



- vi. The Honourable Court be pleased to grant leave and/or permission to the Applicants to lodge and/or file an appeal out of time against the decision and/or judgement of the Honourable R.M.Oanda (P.M) dated 9th day of July 2020.
 - vii. Consequently, to prayer (4) hereinabove being granted, the Applicants to lodge and/or file the intended Appeal within 30 days from the date of this Order of this Honourable Court and/or such other shorter duration as the Honourable Court may deem fit and expedient.
 - viii. The Honourable Court be pleased to issue an interim order of stay of proceedings in MCL& E No 40 of 2018 and Misc Civil Application No 4 of 2022 pending the hearing and determination of the instant application.
 - ix. The Honourable Court be pleased to stay proceedings in respect of MCL& E. No 40 Of 2018 And Misc Civil Application No 4 Of 2022 pending the hearing and determination of the intended Appeal.
 - x. Costs of this application do abide the intended Appeal.
2. The grounds in support of the prayers hereinabove have been outlined in the body of the present application and further supported by the Affidavit of the 1st Applicant sworn on the 25th of August 2022.
 3. In summary, the Applicants grounds in support of the present application are as follows; -
 - a. The Trial Court in MCL&E No 40 of 2018 pronounced judgement on the 9th of July 2020 and the Decree thereof extracted on the August 28, 2020.
 - b. The Applicants being dissatisfied with the judgement pronounced on the July 9, 2020 have been desirous of filing an Appeal against the same.
 - c. However, despite instructing advocates to file the intended Appeal, the intended Appeal has not been filed upto date.
 - d. The failure to file the intended Appeal has been occasioned by the inaction and/or omission of the previous advocates.
 - e. Consequently therefore, the advocates inactions and/or omissions of the previous advocates should not be visited on the Applicants herein.
 - f. The Applicants further submit that if the prayers sought in this present application are not granted, they will have suffered prejudice by the time the intended Appeal is heard and determined.
 4. The Affidavit in support of the present application has also placed before the Court five annexures namely (i) An Authority to Plead, Act and/or Swear dated August 25, 2022 (ii) copy of the Decree issued on the 28th of August 2020 (iii) Warrant of Sale of property on execution of Decree for Money dated 26th November 2021(iv) a draft Notice of Change of Advocates (v) Draft Memorandum of Appeal.
 5. The present Application was duly served on the Respondent who filed a Replying Affidavit sworn on the 20th of September 2022.
 6. The Respondent opposed the present application based on various grounds.



7. First and foremost, the Respondent indicated that the Applicants had filed an earlier application through Miscellaneous Application No 3 of 2020 which was heard and determined on the 8th of November 2021.
8. According to the ruling emanating from Miscellaneous Application No 3 of 2020, the Applicants were granted leave of Thirty (30) days upon determination of the Application on 8th November 2021 to file and serve their Appeal but the Court declined to issue a stay of execution of the judgement pronounced on the 9th July 2020.
9. Due to non-compliance of the ruling dated November 8, 2021, the Applicants filed another application dated March 11, 2022 seeking similar orders as those declined in the ruling delivered on the 8th of November 2021.
10. The Respondent therefore submits that the present Application is Res judicata and contravenes Section 7 of the Civil procedure Act.
11. The Respondent further allege that the Applicants have come to this Court with unclean hands as they have failed, refused and/or omitted to comply with the Order to pay costs awarded on the June 30, 2022.
12. The Respondent clarified that the execution proceedings taking place in MCL& E No 40 OF 2018 are for a Notice to Show Cause and not a warrant to attach their properties as alleged.
13. The Applicants thereafter filed their written submissions on the 22nd of September 2022 while the Respondents filed theirs on the September 29, 2022.

Analysis & Determination.

14. The Court having gone through the present Application, the Replying Affidavit together with the annexures therein as well as submissions by both parties, the following issues have been identified for determination.
 - i. Whether or not the firm of Ochwangi & Company, Advocates should be granted leave to act for the Applicants herein.
 - ii. Whether or not there are sufficient grounds for leave to be granted for the Applicants to file an Appeal out of time.
 - iii. Whether or not the Applicants have sufficient grounds for the Court to grant a Stay of execution of the judgement pronounced on the 9th of July 2020 pending Appeal.

Issue No1- Whether or Not the Firm of Ochwangi & Company, Advocates Should be Allowed to Come on Record for the Applicants.

15. The first issue before the Court is the representation of the Applicants through the firm of Ochwangi & Company, Advocates.
16. Order 9 Rule 9 of the Civil Procedure Rules require that a party who wishes to change their legal representation after a judgement has been pronounced shall do so only with an Order of the Court.
17. The Applicants herein confirm that a judgement in MCL&E No 40 OF 2018 which was the Trial file was pronounced on the 9th of July 2020.



18. Consequently, the Applicants are now seeking for leave to allow the firm of Ochwangi & Company, Advocates to act for them in their prayer No 2 of the present Application.
19. The particular prayer has not been opposed in the Replying Affidavit and/or the Respondent's submission.
20. In *Connection Joint v Apollo Insurance [2006] eKLR*, Fred Ochieng J held that; -

“.....Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.

By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate...”
21. Looking at the findings in the above cited case, the provisions of Order 9 Rule 9 are to safeguard the previous Counsel in the event there are other pending issues.
22. This rule does not therefore hinder a party from appointing a new Counsel where need be to act for them.
23. In essence therefore, the Court do hereby grant an Order of leave to the firm of Ochwangi & Company, Advocates to come on record for the Applicants herein upon payment of the requisite Court fees.
Issue No2- Whether or Not there are Sufficient Grounds for Leave to be Granted for the Applicant to File an Appeal Out of Time.
24. The Applicants in Prayer 6 and 7 of the present application are seeking leave to file the intended Appeal out of time.
25. The Appeal is against the judgement of Hon. R.M.Oanda (P.M) pronounced on the 9th of July 2020.
26. It is now about Twenty-Four (24) months since the contentious judgement was pronounced by the Court.
27. According to the Applicants submissions, the previous Counsel had clear instructions to institute the intended Appeal but due to unknown reasons, the intended Appeal was never filed.
28. The Applicants further submit that the omission and/or failure to file the intended Appeal by the previous Counsel should not be visited on them as innocent litigants.
29. On the other hand, the Respondents inform the Court that the Applicants have made two other previous applications with similar prayers.



30. Consequently therefore, the present Applicant is Res-judicate and offends the provisions of Section 7 of the *Civil Procedure Act*, Cap 21.
31. In particular, the Respondents have placed before the Court a Ruling dated November 8, 2021 emanating from the Narok Environment & Land Court Appeal No 3 of 2020.
32. In the Ruling dated November 8, 2021 the court was dealing with the following prayers sought by the Applicants in the present application herein who were also the Applicants in the ruling.
 - c) That this Honourable Court be pleased to grant leave to the Defendant/Applicant to appeal out of time against the judgement of the Honourable Principal Magistrate R.M.Oanda delivered on the 9th July 2020 in Kilgoris Principal Magistrate's Court L & E No 40 of 2018.
 - d) That this Honourable Court be pleased to grant a Stay of execution of the Decree arising from the judgement of Kilgoris Principal Magistrate's Court L & E No 40 of 2018 pending the hearing and determination of this Application.
 - e) That this Honourable Court be pleased to grant a stay of execution of the Decree arising from the judgement in Kilgoris Principal Magistrate's Court L & E No 40 of 2018 pending the hearing and determination of the intended Appeal."
33. Indeed, perusing the Prayer No 6 in the present Application and Prayer 6 in the ruling dated 8th November 2021 emanating from ELC Appeal No 3 of 2020, the Court is the considered view that both are similar in every aspect.
34. The determination arrived at by the Learned Judge in ELC Appeal No 3 of 2020 was to the effect that the Applicants were granted leave of Thirty (30) days to file their record of Appeal.
35. In other words, the issue of leave to appeal the judgement delivered on the July 9, 2020 out of time has already been heard and determined on its merits by a concurrent jurisdiction.
36. Consequently, Prayer No 6 in the present application is Res-Judicata in view of prayer C in the Application dated 10th September 2020 in ELC APPEAL No 3 OF 2020.

Issue No 3- Whether or not the Applicants Have Sufficient Grounds for the Court to Grant a Stay of Execution of the Judgement Pronounced on the 9th July 2020 Pending the Hearing & Determination of the Intended Appeal.

37. The Applicants in prayer No 9 are seeking a stay of the proceedings in MCL& E No 40 of 2018 and Miscellaneous Civil Application No 4 of 2022 pending the hearing and determination of the intended Appeal.
38. The Applicants submitted that the stay is necessary to ensure that there will be no prejudice occasioned to them.
39. The Respondent opposed the prayer stating that the judgement pronounced on the 9th July 2020 was a dismissal of the Applicants case and therefore there was nothing to stay in the said judgement.
40. Indeed, the judgement pronounced on the 9th of July 2020 was a dismissal of the Applicants suit against the Respondent.



41. The said judgement pronounced on the 9th of July 2020 did not bestow any new legal lights on the Respondents.
42. In other words, this Court indeed concurs with the Respondent's submission that there can not be any stay of execution against the judgement pronounced on the 9th of July 2020.
43. In addition to the same, the Respondent further submitted that this prayer is also Res-judicata and contrary to Section 7 of the Civil Procedure Act, Cap 21.
44. Prayer No 9 in the present Application and prayer (d) and (e) in the Application dated September 10, 2020 from ELC Appeal No 3 OF 2020 are similar in all aspects.
45. The ruling dated November 8, 2021 in ELC Appeal No 3 OF 2020 considered the merits relating to the Stay of Execution and declined to grant the same.
46. Clearly therefore, Prayer No 9 in this present application is Res-judicata to prayer (d) and (e) in the Application dated 10th September 2020 in ELC Appeal No 3 of 2020 in terms of the Stay of Execution of the judgement pronounced on 9th September 2020.
47. In essence therefore, the Court in its considered view declines to grant any prayer in relation to Stay of execution of the judgement pronounced on the 9th of July 2020.
48. As to the aspect relating to Miscellaneous Application No 4 of 2020, the same relates to the Bill of Taxation emanating from MCL&E No 40 of 2018.
49. According to the Warrant of Sale of Property in Execution of Decree for Money dated 26th November 2021, the Respondent successfully obtained a sum of Kshs 715,970/- in term of costs awarded from the judgement pronounced on the 9th July 2020.
50. The Respondent submit that on the 30th of June 2022, the Applicants were directed to pay the sum of Kshs 715, 970/- within 45 days from that material day.
51. However, the same was not complied with and as a result of this failure, the Respondents took out Warrants of Sale of property in execution of decree for money.
52. The Court in its considered view does not find any irregularity and/or grounds to interfere with the jurisdiction of the Trial Court in MCL&E No 40 of 2018.
53. If there is any challenge emanating from these proceedings, the Trial Court has the requisite jurisdiction to handle the same.

Conclusion

54. In conclusion therefore, the Court makes the following Orders as relates to the Application dated August 25, 2022; -
 - a. The Notice of Motion Application dated August 25, 2022 be and is hereby dismissed.
 - b. Each party to bear its own costs.

DATED, SIGNED & DELIVERED VIRTUALLY IN KILGORIS ELC COURT ON 2ND NOVEMBER 2022.

EMMANUEL M WASHE

JUDGE



IN THE PRESENCE OF:

COURT ASSISTANT: MR. NGENO/MS. MEMPE

ADVOCATE FOR THE APPLICANT: MR. OCHWANGI

ADVOCATE FOR THE RESPONDENT: N/A

