



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYAMIRA

ELC APPEAL NO. 2 OF 2021

{Formerly at Environment and Land Court at Kisii Case No. 5 of 2021}

{Being an appeal from the judgment delivered on the 7th of April 2021, in the Chief Magistrate’s Court at Nyamira by the learned trial Principal Magistrate Hon. M.C. NYIGEI in Nyamira ELC Case No. 35 of 2019}

WILLIAM OSANO KIANYAGA.....APPELLANT/APPLICANT

VERSUS

MATOKE NYABERO.....RESPONDENT

RULING

In this Application dated 12/05/21 the Appellant seeks an order of stay of execution pending appeal on the ground that if the stay is not granted then the appeal, if successful, would be rendered nugatory. The same is opposed through the Respondent’s Replying Affidavit sworn on 02/06/21 and filed in court on 07/06/21. The issue of representation of the Appellant has also been raised by the Second Respondent.

I will first deal with the issue of representation raised under paragraphs 7,8,9,10 & 11 of the said Affidavit where the Respondent argues that the Appeal lodged in this court on 07/05/21 together with the Application dated 13/05/21 were filed by a stranger to the suit. This issue ought to have been brought by way of a Preliminary Objection but there is no harm in it falling part of the Replying Affidavit in opposition to the Application for stay of execution. It is argued on behalf of the Respondent that since the Appellant was being represented by the firm of M/s Maroro and Omariba Associates Advocates in the lower court, then the firm of Omwando Mbaka & Co. Advocates ought to have sought leave of the court or consent from the previous Advocates (in the lower court) in order to come on record for the Appellant. Hence the latter being said to be improperly on record. The Respondent further argues that this appeal is a continuation of the proceedings from the trial court.

Order 9 Rule 9 of the Civil Procedure Rules 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 parties

(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.

I do agree with Weldon Korir, J in the case of ***K. Tarwadi -vs- Veronica Muehlemann (2019) e KLR*** that;

“the essence of Order 9 Rule 9 is to protect advocates from mischievous clients who will wait until a judgment has been delivered and they sack the advocate and either replace him with another advocate or act in person.”

I will go further than this and say that such mischievous clients will do so in order to avoid their responsibilities towards their Advocates. Before this provision was introduced in the Civil Procedure Rules in 2010 it was not uncommon to find a new advocate in the court registry filing a Notice of change of Advocates immediately upon the delivery of judgment. The argument was always that a litigant has a constitutional right of representation and therefore was at liberty to change his Advocate any time. Others would file a Notice of change of Advocates or Notice to act in person on the eve of delivery of judgment. What followed was a Bill of Costs being filed by the new Advocates or the party himself. The consequence of this was to deny the former Advocates the tiny fruits of their long night hours of preparing for and prosecuting the case so successfully to the end. The committee reviewing the rules in their undoubted wisdom thought that this must come to

an end. This exercise was tantamount to riding on others' backs and reaping where one had not sown. How I wish the caveat was extended from the close of the case so that one is not allowed to change Advocates or act in person when all the litigation work has been completed.

Having said so, does this mean that the same rule applies when an appeal is filed by the unsuccessful client. From the wording of the rule, this is not what was intended. Were it to be the case, then the wise Rules Committee would have said so in no uncertain terms. A party picking a new Advocate for purposes of Appeal is not changing Advocates. He is only appointing one. An appeal is a new brief with a complete set of terms between the client and his Advocate. The Bills of Costs in the trial and appellate courts are also separate. Even if a party decides to act in person or through representation by a new Advocate, the obligations arising out of the suit the Appeal lies from do not cease. The Advocates in the lower court have already done their work to completion. An Advocate representing a party in the lower court does not have to defend the matter on Appeal nor prosecute an Appeal on behalf of a party he has been representing in the lower court. Doing so would mean unnecessarily tying a client to his Advocate with a very tight rope. It does not follow that an aggrieved party has to be tied to his trial Advocate nor should a party defending an Appeal be glued to his trial Advocate. In the opinion of the client, whether right or wrong, the Advocate being abandoned is to blame for his loss. He therefore should be allowed a free hand to pick another Advocate. However, this does not discharge him from any outstanding obligations to his trial Advocate.

On this point, the Respondent is not successful and I do not agree with him that the Appellant was wrong in engaging a new firm of Advocates without the leave of court or without the consent of the previous Advocates. I therefore disagree with the Advocates for the Respondent in their contention that the firm of Omwando Mbaka & Co. Advocates is improperly on record.

On the second issue which is the substratum of the current Application, the Applicant claims he knows of no other home except the suit land where he has lived the whole of his life and that should he and his family be evicted from the said land the Appeal will be rendered nugatory and the developments he has put up there demolished, this would occasion him substantial loss which cannot be restored in the event that the Appeal succeeds. I am not persuaded that the Applicant has nowhere else to stay with his family, but giving him the benefit of doubt, I will exercise my discretion as follows: -

(a) Pending the Hearing and determination of the Appellant's Appeal dated 04/05/21 there be a stay of execution of order (ii) of the judgment of the Honourable M.C. Nyigei in Nyamira Magistrate's Court ELC No. 35 of 2019 to the extent that the Appellant and his family shall not be evicted from NORTH MUGIRANGO/BOISANGA/934 but subject to the following limitations;

(i) The Appellant shall not put up any further buildings and/or development on the suit property nor shall pull down or interfere with any building, structure or anything on the suit property.

(ii) If there are any buildings on rent on the suit premises the said rent shall be deposited in court from now henceforth.

(iii) The Appellant shall respect the rights of the Respondent and shall not extend to any part he was not in occupation of prior to the Judgment.

(b) The Respondent shall not transfer the suit property to any other person without the leave of this Court.

(c) For the sake of clarity these reprieves are not to be enjoyed by any other person save the Appellant and his immediate family i.e. his wife, children under the age of 25 years and any other child that is still dependent on him.

(d) The Appellant shall deposit the sum of Kshs. 40,000/= in court as security for costs within the next 60 days from the date this Ruling is delivered in default of which the stay orders shall automatically lapse.

(e) To achieve the above the Appellant shall file and serve the Record of Appeal within the next 30 days.

(f) Thereafter parties shall file and serve their written submissions on the Appeal within the next 28 days (14 days for the Appellant and 14 days for the Respondent) from the date hereof and the matter will be mentioned in court on 15th December, 2021 to confirm compliance.

(g) All the parties in this appeal shall ensure that this appeal is heard and finalized within the next 120 Days.

(h) The above orders shall not be enjoyed by other persons who are not parties in this Appeal and particularly the other Defendants in the lower court.

Orders Accordingly.

Ruling dated, signed and delivered at Nyamira this 27th Day of October, 2021.

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Mobisa

Appellant's Counsel – N/A

Respondents' Counsel – Mr. Kipngetich