



REPUBLIC OF KENYA



Wagacha & another v Ngaba; Kinya (Interested Party) (Environment & Land Case 5 of 2009) [2024] KEELC 1593 (KLR) (18 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 5 OF 2009**

**CA OCHIENG, J
MARCH 18, 2024**

BETWEEN

WAMBUI WAGACHA 1ST PLAINTIFF

MERCY NJERI NGOIMA 2ND PLAINTIFF

AND

DOMINIC KINYA NGABA DEFENDANT

AND

SARAH WANJIKU KINYA INTERESTED PARTY

RULING

1. What is before Court for determination is Defendant's Notice of Motion Application dated the March 13, 2023 where he seeks the following Orders:-
 - a. That the Honourable Court be pleased to allow the firm of Ndungi Gichui & Company Advocates to come on record for the Defendants herein.
 - b. That the Honourable Court be pleased to issue a stay of execution of the Judgment issued on March 23, 2022 pending Appeal of the same.
 - c. That the Honourable Court do issue a temporary injunction for the ongoing demolition of the property on LR Numbers 20604/69 and 20604/70.
 - d. That the costs of this Application be provided for.
3. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Dominic Kiya Ngaba. He claims he was not well represented by his advocates on record in this matter and Judgment was issued without him being notified. He only learnt of the Judgment delivered on March 28, 2022 on the March 9, 2023 and seeks to Appeal against it. He contends that since he instructed



his advocate, he has not been consistent in updating him as he claims he is ill. Further, that he has also been sick and undergoing dialysis and could not follow up on his matter. He avers that the Advocate never brought to his attention that his case was closed without him testifying nor the position of the Judgment. He insists that prior to the ongoing demolition, he was not informed about the Judgment. He reiterates that the ongoing demolition is unlawful as it is subject to a resultant Decree which was obtained without his attention.

4. The Plaintiff opposed the instant Application by filing Grounds of Opposition where they contend that the said Application is fatally incompetent and incurably defective for contravening the express provisions of Order 9 Rule 9 of the *Civil Procedure Rules*. They insist that the Defendant has not met the legal threshold for stay of execution. Further, that the Application having been brought almost twelve (12) months since the delivery of the Judgment sought to be stayed, has not been brought timeously. They contend that the Defendant unequivocally admitted to their claim in paragraph 4 of his Statement of Defence dated the March 9, 2009. Further, on September 4, 2013, Summary Judgment was entered against the Defendant and eviction orders issued. They aver that on March 28, 2022, Judgment was delivered with the knowledge of the Defendant's legal representative and quantum of damages accruing to them assessed. They reiterate that there is no enforceable order arising from the Judgment dated the March 28, 2022 capable of being stayed in the manner prayed for, by the Defendant. They aver that the Orders of stay sought will be in vain since the demolition is already done, while Judgment and eviction orders have not been challenged. They reaffirm that the Defendant has sneaked in Sarah Wanjiku Kinya as an Interested Party without obtaining leave of Court. The Plaintiffs' further filed a Notice of Preliminary Objection dated the March 27, 2023 contending that the Defendant has not exhibited a Notice of Appeal, Memorandum of Appeal or an Application to enlarge time within which to Appeal against the impugned Judgment. Further, that there is no Appeal or intention to Appeal, to clothe the Court with jurisdiction to grant injunctive orders. They insist that this Court is *functus officio*, lacks jurisdiction to handle the instant Application and any remedy lies with the Court of Appeal.
5. The Defendant filed a Further Affidavit sworn by Dominic Kinya Ngabawhere he reiterated his averments as per the Supporting Affidavit. He explains that he was sick for the better part of 2019, 2020 and 2021. Further, that due to his ill health, it became difficult to follow up on the case but his Advocate assured his wife that everything was in control. He avers that he was unable to communicate properly with his Advocate as at times, he was not receiving his phone calls but only sought legal fees from him, which he paid diligently. He is shocked to learn that his Advocate was not legally allowed to practice, at the time he was representing him. He contends that stay of execution of Judgment is considered on case to case basis. Further, that an Application to enlarge time to Appeal can only be made in the Appellate court and not the trial Court.
6. The Notice of Motion Application and Notice of Preliminary Objection were canvassed by way of written submissions.
Analysis and Determination
7. Upon consideration of the instant Notice of Motion Application including the respective Affidavits, Grounds of Opposition, Notice of Preliminary Objection as well as the rivalling submissions, the following are the issues for determination:
 - a. Whether the firm of messrs Ndungi Gichui & Company Advocates should come on record for the Defendant post Judgment.
 - b. Whether there should be a stay of execution against the Judgment delivered on the March 28, 2022.



- c. Whether the Court should issue an order of temporary injunction stopping the ongoing demolition of the property on LR Numbers 20604/69 and 20604/70 respectively.
8. As to whether the firm of messrs Ndungi Gichui & Company Advocates should come on record for the Defendant post Judgment.
9. I note the aforementioned firm seeks to come on record for the Defendant after the entry of Judgment and issuance of a Decree. The Defendant's current Counsel has not opposed the said Application but the Plaintiffs' have opposed it. On a Counsel coming on record post Judgment, Order 9 Rule 9 of the [Civil Procedure Rules](#) stipulates 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.”

While Order 9, rule 10 of the [Civil Procedure Rules](#) provides that:-

“An Application under Rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.”

10. In this instance, I note the firm of messrs Ndungi Gichui & Company Advocates have sought leave to come on record for the Defendant after Judgment. I opine that since this is a legal requirement, noting that the Defendant's erstwhile Advocate was not licensed to practice, I find that there is no prejudice the Plaintiffs' will suffer if the said Application is allowed. Further, there is no legal requirement that makes it mandatory that an Application for leave to come on record for a party who was previously represented, should be heard separately. In the foregoing, I find this prayer merited and will allow the firm of messrs Ndungi Gichui & Company Advocates to come on record for the Defendant, post Judgment.
11. As to whether the Court should grant a stay of execution pending lodging and determination of the intended Appeal.
12. The Defendant has sought for stay of execution of the impugned Judgment, pending the intended Appeal. The Defendant explains that he was not notified of the Judgment and demolition of his property has been undertaken. I note in this instance the Defendant has not yet lodged an Appeal. Further, on perusal of the Court file, I note the Defendant who had been legally represented, had admitted part of the Plaintiff's claim in his Defence but never attended court for hearing and filed the instant application one year later.
13. The legal provisions governing stay pending Appeal are contained in Order 42 Rule 6(2) of the [Civil Procedure Rules](#) which provides inter alia:

“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.”



14. In the [*James Wangalwa & Another v Agnes Naliaka Cheseto*](#) [2014] eKLR the Court held that:-

“The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect on negate the essential are of the Applicant as the successful party in the appeal. This is what substantial loss would entail...”
15. See also the decision of [*Samuel Mwaura Muthumbi v Josephine Ngugi & Another*](#) [2018] eKLR.
16. In this matter, Judgment was delivered on March 28, 2022 in favour of the Plaintiff wherein the Court allowed for the demolition of the Defendant’s house, on the suit land. The Defendant being dissatisfied with the whole of the said Judgment seeks to lodge an Appeal but is yet to file a Notice of Appeal. The Defendant has admitted that the demolition exercise has been conducted. The Plaintiffs’ insist that the Defendant is not entitled to orders of stay since demolition has occurred and no Appeal has been filed. Further, that this court is functus officio to grant the orders as sought.
17. From the averments in the respective Affidavits, I find that the Defendant has come too late in the day, after the Decree has been executed. Further, no Appeal nor application seeking enlargement of time to file an Appeal has been filed.
18. Based on the facts as presented while relying on the legal provisions quoted and associating myself with the decisions cited, I find that since the Defendant is yet to lodge a Notice of Appeal in the Court of Appeal, the instant application for stay of execution pending Appeal is premature. In the circumstances, I find that the Defendant has failed to meet the threshold set for granting stay of execution pending Appeal and will decline to grant the said orders.
19. As to whether the Court should issue an order of temporary injunction stopping the ongoing demolition on the property being LR Numbers 20604/69 and 20604/70.
20. On injunctions pending Appeal, Order 42 Rule of the [*Civil Procedure Rules*](#) envisages it can be issued in instances where an Appeal has been lodged. In [*Patricia Njeri & 3 Others v National Museum of Kenya*](#) [2004] eKLR, the learned Judge while dealing with an Application for injunction pending Appeal observed that:-

“The Appellants did, however, pray (in the alternative) for an order of injunction pending appeal. There was no dispute that the court can, in a proper case grant an injunction pending appeal. What are the principles that guide the court in dealing with such an application”. In the Venture Capital case (*Venture Capital and Credit Ltd v Consolidated Bank of Kenya Ltd* Civil Application No. Nairobi 349 of 2003 (UR)) the Court of Appeal said that an order for injunction pending appeal is a discretionary matter. The discretion must, however, be “exercised judicially and not in a whimsical or arbitrary fashion.” This discretion is guided by certain principles some of which are as follows: (a) The discretion will be exercised against an Applicant whose appeal is frivolous (See [*Madhupaper International Limited v Kerr*](#) [1985] KLR 840 which cited Venture Capital). The Applicant must state that a reasonable argument can be put forward in support of his appeal ([*J. K. Industries v KCB*](#) 1982 – 88) KLR 1088 (also cited in Venture Capital. (b) The discretion should be refused where it would inflict greater hardship that it would avoid (See Madhupaper supra). (c) The Applicant must show that to refuse the injunction would render his appeal nugatory (See [*Butt v Rent Restriction Tribunal*](#) [1982] KLR 417 (cited also in Venture Capital). (d) The Court should also be guided by the principles in [*Giella v Cassman Brown & Company Ltd*](#)



[1973] EA 358 as set out in the case of *Shitukha Mwamodo & Others* [1986] KLR 445 (also cited in Venture Capital).” See also *Mukoma v Abuoga* [1988] KLR 645.”

21. In the foregoing, while associating myself with the decision cited, since there is no Appeal, I find that the Defendant has not met the threshold set for granting an injunction pending an Appeal.
22. It is against the foregoing that I find the Defendant’s Notice of Motion Application dated the March 13, 2023 unmerited and will dismiss it with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 18TH DAY OF MARCH, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Vincent Oloo for Plaintiff/Respondent

Mayodu holding brief for Oganga for Applicant

Court Assistant – Simon/Ashley

