



**Bett v Barngetuny & another (Environment & Land Case
29 of 2021) [2024] KEELC 4853 (KLR) (20 June 2024) (Ruling)**

Neutral citation: [2024] KEELC 4853 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 29 OF 2021
MN MWANYALE, J
JUNE 20, 2024**

BETWEEN

JOHN KIPTOO BETT ALIAS KIPTIONY ARAP BETT PLAINTIFF

AND

JOSEPH KIPTOO BARNGETUNY 1ST DEFENDANT

PHILIP BARGENTUNY 2ND DEFENDANT

RULING

1. Vide the Notice of Motion dated 15th April 2024, the Applicants seek orders
 - i. Spent
 - ii. For the firm of Cheronojepkosgey and Co. Advocates to come on record for the defendants/ applicants and
 - iii. Spent
 - iv. For the court to grant a stay of execution of the Judgment, decree and all consequential orders issued on 12th October 2022 pending the hearing and determination of the intended appeal.
 - v. Spent
 - vi. Upon grant of the two orders above the Honourable Court be pleased to release the Applicants from Kapsabet GK prison pending hearing and determination of the intended appeal.
2. Some of the grounds in support of the application are grounds that ordinarily would fit to be Grounds of Appeal and not grounds in support of an application for stay of execution like the one before court but nonetheless the grounds include that; -



- a. There is appending appeal filed pursuant to a Notice of Appeal having been filed and that the delay in prosecuting the appeal was occasioned by the previous counsel on record
 - b. the plaintiff had proceeded to evict the applicants on 15/12/2023 after issuance of a notice to evict issued 14/12/2023.
 - c. The process of the eviction was flouted since the applicants were not properly issued with a notice which notice was very short in any event.
 - d. that taxation was done and the applicants were committed to civil jail.
3. On the strength of the above the Applicants sought the orders set out at paragraph 1 above. The Application is further supported by the supporting affidavit of Joseph Kiptoo Bargentuny who depones on the grounds above and has annexed, inter alia, a copy of the decree notice of appeal orders dated 3rd November 2023 eviction notice dated 22nd November 2023, and certificate of costs and photographs showing the applicants homes having been destroyed among other annexures.
 4. The application is opposed by a Notice of Preliminary objection dated 3rd of May 2024 whose grounds is that this application is Res judicata a similar application having being dismissed and that the application is disguised as an appeal.
 5. The Court at the exparte stage was not satisfied that grant of interim reliefs would assist the Applicants as it noted that from the application and the affidavit execution of the decree had been done and the applicants had been committed to civil jail in respect of costs and thus gave the Applicants a date to be heard inter partes orally in court on 22/5/2024 and the ruling reserved for today.

Applicants Submissions: -

6. Ms. Koech Learned counsel for the Applicant's submitted that the P/O raised factual issues rather than points of law as the court would have to ascertain whether or not a previous application had been filed and dealt with and in support of this application the Applicant placed reliance on the decision in the case of in *Margaret Njeri Gitau v Julius Mburu Gitau and 2 others* [2022] eKLR as well as the decision in the case of *Cheruiyot v Siror*. On the strength of the said submission the Applicant sought dismissal of the P/O and urged the court to treat the application as unopposed and allow the same. The applicant urged the court to allow prayer 1 and the provisions of order 9 rule 1 of the *Civil Procedure Rules* as well as the decision in the case of *Julieta Marigu Njagi v Virginia Njoki Mwangi and another* [2022] eKLR. On stay of execution counsel for the Applicant submitted that the judgment herein was delivered on 12/10/2024 and that there was laxity by the then advocates on record to file an application for stay although they filed an appeal and that stay orders are meant to preserve the subject matter pending appeal and the applicant placed reliance on the decision in the case of *Muema Kitulu v Elizabeth Ndolo*
7. In opposition to the application Mr. Songok learned counsel for the Plaintiff/ Respondent submitted that a respondent could oppose an application by way of Notice of Preliminary Objection, Grounds of Opposition or through a Replying Affidavit hence the P/O was properly before court. He submitted further that similar application had been filed by Messrs Oburu Seneti Advocates under Miscellaneous Civil Application no E005 of 2023 filed at Kapsabet ELC which matter was not prosecuted but was dismissed. That as there was a prayer in the application to come on record after judgment the same ought to have been served on the previous Advocates and having not served the same the court cannot allow the said prayers. That the applicant is guilty of laches as judgment herein was delivered on 12.10.2022, 17 months down the line. The counsel urged the court to call the record of Miscellaneous Civil Application E035/2023, and to dismiss the application as lacking merits.



8. In a brief rejoinder Ms. Koech submitted that counsel having proceeded by way of a preliminary objection the issues of Resjudicata needed replying affidavit to be ascertained and that the previous application having not been heard on its merits is not Resjudicata.

Issues For Determination: -

9. It is common ground that the Applicants are firstly seeking leave of the Court to come on record after judgment and secondly a stay of execution of the judgment resultant decree and all the consequential orders
10. That the judgment they seek to Appeal against was delivered on 12th October 2023 and the application was filed on 15th April 2023 hence it was filed 17 months after the judgment was delivered.
11. It is also common ground that an appeal was lodged and that the decree was executed, and that the Applicants are in Kapsabet GK Prison, civil jail, having been committed pursuant to a certificate of costs after taxation on costs that was pursued before the deputy Registrar.
12. The Court agrees with Ms. Koech learned counsel that the preliminary objection before court seeks to ascertain factual issues and indeed Mr. Songok requested the court to call for the record of Miscellaneous Civil application E 035/2023 Ostensibly to ascertain the similar application that was dismissed. Having done so removes the preliminary objection from pure points of law to issues of evidence and the same flies against the definition of a preliminary objection as stated in the decisions in the cases In *Mukisa Biscuit Manufacturer Limited v Westend Distributors Limited*; the Court held in respect of a preliminary objection, that “so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implications out of pleadings, and which if argued as a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the acts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or what is sought is the exercise of judicial discretion....”
13. Similarly in the decision in the case of *Omondi v National Bank of Kenya Limited and 2 others*; as quoted in the decision of *J. N. and 5 others v Board of Management St. G. School Nairobi and another* where it was held that; “a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.....where a Court needs to investigate facts, a matter cannot be raised as a preliminary point. Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence.”
14. Consequently, the preliminary objection as framed and argued fails and the application is thus unopposed but the same shall be subjected to a merit review.
15. Having analyzed the application and the affidavits in support and the replying one, taking into account the submissions by the Learned Counsels as well as the authorities cited, the Court frames the following as issues for determination; -
- i. Whether a notice of change of Advocates was required before filing of this application.
 - ii. Whether the application is merited
 - iii. Who bears the costs of this application?



16. On issue number 1, it is the Respondents submission that Order 9 Rule 9 ought to have been compiled with. The said provision of law proves;
- “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 notice to act in person shall not be effected without an order of the Court –
- a. Upon an application with notice to all parties or
 - b. Upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or
 - c. Party intending to act in person as the case may be.....”
17. None of the Counsels in the matter cited any authorities to support, and or to oppose this point of law raised by the Respondents leaving the task to the Court to find the applicable law.
18. In the cases of *Peter Kamau Ngugi and Another v Grace Akinyi Oloo and Another* 2-21 eKLR, in *Gitau v Githinji and another* E & L Appeal No. 6/2022, among other decisions of the superior Courts the Court found that lack of compiling with Order 9 Rule 9 renders an application as having been filed by a stranger and incompetent.
19. The same fate befalls this application and the same having been filed by strangers in the proceedings, it is incompetent.
20. furthermore, the Court notes that the decree herein was executed and the application was brought after the execution very late in the day and not timeously as required under order 42 rule 6 there is therefore nothing to stay and the application is thus not merited and the same is hereby dismissed.
21. There shall be no orders as to costs.
22. Orders accordingly.

RULING, DELIVERED AND DATED AT KAPSABET THIS 20TH DAY OF JUNE 2024.

HON. M. N. MWANYALE,

JUDGE

