



**Mutua v County Government of Narok (Environment & Land Case E007 of 2021) [2024] KEELC 7198 (KLR) (29 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7198 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT & LAND CASE E007 OF 2021  
CG MBOGO, J  
OCTOBER 29, 2024**

**BETWEEN**

**GODFREY MUTUA ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF NAROK ..... DEFENDANT**

**RULING**

1. Before the court for determination is the notice of motion dated 2<sup>nd</sup> November, 2023 filed by the plaintiff/ applicant and it is expressed to be brought under article 48 of *the Constitution* and order 42 rule 6 of the *Civil Procedure Rules* seeking the following orders: -
  1. Spent.
  2. Spent.
  3. That upon hearing this application inter partes, this court grants the applicant an order of stay of execution of the decree issued on 26<sup>th</sup> October, 2023.
  4. That this court issues such orders of security for the due performance of the decree as may be fair under the circumstances of this case.
  5. That costs of this application to abide the outcome of the appeal.
2. The application is premised on the grounds on its face. The application is further supported by the affidavit of the plaintiff/ applicant sworn on even date. The plaintiff/ applicant deposed that this court dismissed his plaint and issued permanent orders of injunction against him. That being dissatisfied with the judgment, he has filed a notice of appeal.
3. The plaintiff/ applicant further deposed that the effect of the orders is to deny him access to the business premises, and that he is aware that the appeal in the Court of Appeal may take a while which



would result in substantial loss. He deposed that although the court cannot consider the merits of the appeal, the same is not frivolous. He further deposed that he is ready to abide by reasonable conditions in respect to the security for the due performance of the decree. Further, he invited the court to strike a balance between his right to appeal and the right of the defendant/ respondent to enforce the judgment.

4. In response thereto, Vincent Onyango Osewe, filed the replying affidavit sworn on 22<sup>nd</sup> January, 2024 on behalf of the defendant/ respondent. The defendant/ respondent deposed that the plaintiff/ applicant has neither met the requisite conditions for stay of the decree pursuant to Order 42 Rule 6 of the Civil Procedure Rules, nor has he demonstrated the manner in which he would suffer substantial loss or irreparable damage. The defendant/ respondent further deposed that it was incumbent upon the plaintiff/ applicant to prove the specific details and particulars of the loss that he would suffer in the event that he is denied entry into the suit property. It was also deposed that this court having found that the plaintiff/ applicant failed to satisfy that he is the owner of the suit property, it follows that there is nothing this court can do to effect the judgment.
5. The defendant/ respondent further deposed that the plaintiff/ applicant has failed to demonstrate that the defendant/ respondent is on the verge of enforcing the terms of the judgment and decree geared towards dispossessing him of the suit property. It was deposed that the subject matter is an immovable asset which would still be available to any party who eventually wins, and the situation on the ground is that the plaintiff/ applicant is still in occupation of the suit property. Finally, it was deposed that the defendant/ respondent ought to be allowed to enjoy the fruits of its judgment, and this application ought to be dismissed in its entirety.
6. The application was canvassed by way of written submissions. The plaintiff/ applicant filed his written submissions dated 31<sup>st</sup> January, 2024 where he submitted that the provisions of order 42 rule 6 of the Civil Procedure Rules are couched in discretionary terms, which discretion is judicial and the overriding objective is to do justice to the parties. The plaintiff/ applicant further submitted that an appellant who has filed an application for stay of execution has expressed his right to challenge the decision at a higher court, and the defendant/ respondent is entitled to the fruits of the judgment. That it is in the interest of justice that the subject matter of the suit, and the integrity of the appellate process be maintained before the appeal is heard and determined. Reliance was placed in the case of Kenya Tanzania Uganda Leasing Limited versus Mukenya Ndunda & Another [2013] eKLR.
7. The plaintiff/ applicant further submitted that he must demonstrate that he will suffer substantial loss if the stay is not granted, and that he is ready to provide security for the due performance of the decree. To buttress on this submission, the plaintiff/ applicant relied on the cases of RWW versus EKW [2019] eKLR, Masisi Mwita versus Damaris Wanjiku Njeri [2016] eKLR and Jamii Bora Bank Limited & Another versus Samuel Wambugu Ndirangu, Civil Appeal No. E030 of 2021.
8. The plaintiff/ applicant further submitted that he has been using the suit property as a ware house for a substantial period of time for his business which is his source of livelihood. That in the event that execution is implemented, the same will have a negative impact on his livelihood and it will render the entire appeal an academic exercise. He submitted that non-access to the suit property may present difficulty in establishing the appropriate security for the due performance. That in this regard, he undertakes to deposit the taxed costs in a joint account pending the hearing and determination of the appeal.
9. The defendant/ respondent filed its written submissions dated 28<sup>th</sup> March, 2024 where it raised three issues for determination as listed below: -
  - a. Whether the court is functus officio.



- b. Whether the orders of stay of execution pending appeal should issue.
  - c. Who bears the costs of this application.
10. On the first issue, the defendant/ respondent submitted that this court is functus officio and eviction must be carried out if that is the only way to remove the judgment debtor from the decree holder's property, and that the same can be done in a humane manner. The defendant/respondent relied on the case of *Jersey Evening Post Limited versus Al Thani* [2002] JLR 542 at 550.
  11. On the second issue, the defendant/ respondent submitted that the plaintiff/ applicant has not established that he is likely to suffer any irreparable loss since the subject matter being land is an immovable asset which would be available to any party who would eventually succeed in the appeal. That the fact that the plaintiff/ applicant was in occupation of the suit land which was found to have been illegal was not a ground to claim substantial loss. To buttress on this submission, the defendant/ respondent relied on the cases of *Mukuma versus Abuoga* (1988) KLR 645, *David Kipkoskei Kimeli versus Titus Barmasai* [2019] eKLR, *Faith Homes of Kenya versus Robert Cherukwo* [2021] eKLR, *Kausbik Panchamatia & 3 Others versus Prime Bank Limited & Another* [2020] eKLR and *Victory Construction versus BM (A minor Suing Through Next Friend One PMM)* [2019] eKLR.
  12. In conclusion, the defendant/ respondent submitted that the plaintiff/ applicant is not entitled to have the orders of stay of execution pending appeal, and that for this reason the application ought to be dismissed with costs.
  13. I have considered the application, replying affidavit and the written submissions filed by the parties. In my view, the issue for determination is whether the orders of stay of execution should issue.
  14. Order 42 rule 6 of the [Civil Procedure Rules](#) provides as follows:
 

“No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

    - (2) No order for stay of execution shall be made under sub rule (1) unless—
      - (a) the court is satisfied that substantial loss may result to the 1st 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 1st applicant.”
  15. There are three conditions for grant of stay order pending appeal under order 42 rule 6 (2) of the [Civil Procedure Rules](#) to which: -
    - i. The court is satisfied that substantial loss may result to the applicant unless stay of execution is ordered;



- ii. The application is brought without undue delay and
  - iii. 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.
16. The purpose of stay of execution is to preserve the substratum of the case. In the case of *Consolidated Marine. vs. Nampijja & Another*, Civil App.No.93 of 1989 (Nairobi), the court held that: -
- “The purpose of the application for stay of execution pending appeal is to preserve the subject matter in dispute so that the right of the appellant who is exercising his undoubted right of appeal are safeguarded and the appeal if successful is not rendered nugatory”.
17. Before I delve further, and upon perusal of the pleadings herein, I do note that the plaintiff/ applicant was represented by the firm of Meingati & Company Advocates up until judgment was delivered in the matter. From the record, it appears that the plaintiff/ applicant has now sought the legal services of Githui & Co. Advocates. In a bid to regularize its’ appearance, the firm of Githui & Co. Advocates has filed a notice of change of advocates accompanied with an undated consent. As I understand it and, in my opinion, the consent lies lifeless within the court file with no much effect.
18. Order 9, rule 9 of the *Civil Procedure Rules* provides as follows;
- “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.” (underline with emphasis.
19. Order 9, Rule 10 provides;
- “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.”
20. The provisions of order 9 rule 9 of the *Civil Procedure Rules* make it mandatory that for any change of advocates after judgment has been entered to be effected, then there must be an order of the court upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate. The reasoning behind the provision was well articulated in the case of *S. K. Tarwadi versus Veronica Mueblmann* [2019] eKLR where the judge observed as follows:
- “...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”
21. In the case of *Lalji Bhimji Sanghani Builders & Contractors versus City Council of Nairobi* [2012] eKLR the Court held as follows:
- “A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of



procedure the court may well be entitled to conclude that failure to comply therewith was deliberate.”

22. The court went further to quote with approval the holding by Hon. Sitati, J in *Monica Moraa versus Kenindia Assurance Co. Ltd.* [2010] eKLR where the court held as follows:

“...there is no doubt in my mind that the issue of representation is critical, especially in case such as this one where the applicant’s advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court’s leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the rules and instead just gone ahead and filed notice of appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached...”

23. From the above, and persuaded by the holding of the authorities cited above, I find that the firm of Githui & Company Advocates is not properly on record to represent the plaintiff/ applicant for failure to seek leave [to come on record]. In view of that, the court is constrained to delve into the merits or otherwise of the instant application. The notice of motion dated 2<sup>nd</sup> November, 2023, is hereby struck out. Each party to bear its own costs. Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 29<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**29/10/2024.**

**In the presence of: -**

Mr. Meyoki Pere – C. A

