Nungi v Mwaura (Sued in her Capacity as the Administrator of the Estate of Mwaura Njuguna) (Environment and Land Appeal E016 of 2022) [2024] KEELC 14075 (KLR) (19 December 2024) (Ruling)

Neutral citation: [2024] KEELC 14075 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ENVIRONMENT AND LAND APPEAL E016 OF 2022

JG KEMEI, J

DECEMBER 19, 2024

BETWEEN

JOYCE WANGARI NUNGI ..... APPELLANT

AND

BETH WAITHERA MWAURA ..... RESPONDENT

SUED IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF MWAURA NJUGUNA

RULING

1. This Ruling relates to Respondent/Applicant's Notice of Motion dated 24/5/2024, which seeks in the main stay of execution of the Judgment of this Hon Court delivered on 13/5/24. The gist of the Application is that the Applicant is apprehensive that unless an order of stay of execution is granted, the Appellant/Respondent will proceed to execute the Judgment to his detriment. That he has a good and arguable appeal with high chances of success that maybe rendered nugatory if the Application is not allowed. That the Application has been filed timeously.

2. The Application is supported by the Affidavit of even date of the Applicant's Counsel, Catherine Njogu. Reciting the above grounds, she annexed copies of the notice of appeal dated 14/5/2024 and request for typed proceedings in readiness for filing the appeal as CN1.

3. The Application is opposed.

4. Joyce Wangari Nungi swore her Replying Affidavit on 4/6/2024. Terming the Application as fatally defective, she deponed that the Application is filed by an Advocate who lacks locus standi for want of compliance with provisions of Order 9 Rules 5, 6 and 9 of the Civil Procedure Rules; that the Applicant has not demonstrated any substantial loss he stands to suffer if the orders sought are not granted; that she has not filed a draft Memorandum of Appeal to show that she has an arguable appeal;

that the Application is a delaying tactic meant to frustrate enjoyment of the fruits of her Judgment. She urged the Court to dismiss the Application with costs.

5. Further the Respondent filed a Notice of Preliminary Objection dated 30/5/2024 on ground that the Application is defective and ought to be dismissed having been filed by an Advocate who lacks locus standi in violation of Order 9 Rules 5, 6 and 9 of the Civil Procedure Rules.

6. The Application was argued orally before Court on 25/9/2024. Learned Counsel Muturi appeared for the Applicant whereas Learned Counsel Ms. Odhiambo represented the Respondent.

7. The germane issue for determination is whether the Application is merited.

8. I have considered the rival affidavits and submissions. The Respondent's Notice of Preliminary Objection is based on the fact that the Applicant's firm of Advocates is not properly on record and therefore in violation of Order 9 Rules 5, 6 and 9 of the Civil Procedure Rules.

9. Order 9 Rule 9 of the Civil Procedure Rules provides that;

> " Where 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.'

10. From the evidence on record, I have analyzed the Application together with the response thereto and the preliminary objection. My analysis of the matter shows that the incoming Advocate did not file any document denoting the change of Counsel from the previous firm of Advocates to the current firm of Advocates. Courts have held divergent views on the issue of compliance with Order 9 rule 9 of the Civil Procedure Rules with some holding that failure to comply is fatal and proceeded to strike out pleadings. Other Courts have taken a liberal approach and considered the appeal as new cause of action distinct from the trial Court proceedings.

11. The Court of Appeal in Tobias M. Wafubwa Vs. Ben Butali [2017] KECA 142 (KLR) when faced with an appeal that inter alia challenged the High Court decision that declined to strike out an appeal for want of compliance with Order 9 rule 9 of the Civil Procedure Rules held as follows;

> " The Application of rule 9 is an issue that has incessantly recurred vexed the Courts, and in determining the issue, of whether or not compliance is mandatory, the Courts have reached varied conclusions dependent on the circumstances and facts of each case. Needless to say that, in each case, the purport of these rules, their Application, and the mischief that sought to be addressed requires to be taken into account.
>
> This case involved an appeal from the Principal Magistrate's Court to the High Court, and it is with this in mind that we take cognisance of the apt observations of Sitati, J. in the case of Stanley Mugambi Vs. Anthony Mugambi [2005] eKLR where it was stated thus;
>
> > "The issue for determination is whether commencing an appeal by an Advocate other than the one who conducted the case in the lower Court falls within the provisions of Order III Rule 9A. In my considered view, I do not think so. My reading of the provisions of Rule 9A is to the effect that such change or intention is restricted to a suit that is either going on or one that has been concluded. The

> rule does not apply to appeals. If the intention of the drafters was to include appeals under this rule it would have been so stated. To my mind, Rule 9A envisages a situation where after judgment has been entered, a new Advocate desires to come on record for purposes of applying for stay of execution or to proceed with execution proceedings in that suit. If any other meaning were to be assigned to the rule, the High Court and the Court of Appeal would be inundated with time consuming Applications by Advocates wishing to file appeals on behalf of litigants who were represented by different Advocates in the lower Court. I would agree with Mr. C. Kariuki for the Appellant/Respondent that the aim of Rule 9A was only intended to prevent parties from throwing out an Advocate after judgment with the aim of denying the Advocate the fruits of their costs. I therefore find that this Application is misplaced and misconceived. It would, in my view, be draconian to strike out the Appellant's appeal on the ground raised in the Application."

These observations were supported by Makhandia, J, (as he then was) in the case of Martin Mutisya Kiio & Another vs Benson Mwendo Kasyali, Machakos High Court Misc. Application No. 107 of 2013 where in respect of order 9 rule 9 it was asserted that;

> " ... such submission has no legal basis, ... that where a firm of Advocates has acted for a party in the lower Court, those instructions are terminated and/or were spent or exhausted with the conclusion of the trial in the lower Court. An appeal is different ball game; it can be filed by any other firm of Advocates on instructions of the Appellant without necessarily having to file Notice of Change of Advocates or filing an Application to come on record in place of the previous Advocates. In other words, an appeal is fresh proceedings which can be initiated by any other firm of Advocates on instructions of the Appellant without regard to the previous Advocates who acted in the trial Court."
>
> And echoed by Emukule J, in the case of Kenya Pipeline Company Limited vs Lucy Njoki Njuru [2014] eKLR who adopted the same approach when he stated;
>
> > "More importantly unlike the ordinary trial or review, or other interlocutory Applications within the same cause or matter, an appeal is a "different ball game". The proceedings are fresh or new, and are before a Superior Court, and a party, including both the Appellant or Respondent, are at liberty to change or instruct a new set of Counsel to represent them."

We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as Applications for review or execution or stay of execution inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same Counsel or to engage other Counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous Advocate.

As this dispute concerned an appeal from the Principal Magistrate's Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the Respondent's Counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the Court to be placed on record.

We would go further to add that, provided that where the failure to comply with the rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then, Article 159 of *the Constitution* and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings. A similar approach was invoked in the case of Boniface Kiragu Waweru vs James K. Mulinge [2015] eKLR where in addressing the issue of non-compliance with Order 9 rule 9 this Court observed thus;

> " All in all we are not persuaded that non-compliance with Order III rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity, efficacious as the provision was meant to be. Indeed all times, the set procedures ought to be followed or complied with. However, we find that non-compliance, in the present matter, did not go to the root of the proceedings. The non-compliance we may say, was procedural and not fundamental. It did not cause prejudice to the Appellant at all ..."

In the instant case, the learned Judge took the view that, the issue being one of failure to comply with rule 9 was a procedural lapse that did not go to the root of the appeal and duly invoked the directions of Article 159 of *the Constitution* in dismissing the Appellant's Application."

12. Taking cue from the above binding precedent I am of the view that the Preliminary Objection challenging the locus of the Applicant's locus standi for want of compliance with Order 9 Rule 9 of the Civil Procedure Rules is unmerited.

13. Onto the merits of the Application, the legal underpinnings for stay of execution pending appeal are anchored in Order 42 rule 6 (1) & (2) of the Civil Procedure Rules that;-

> " (1) 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 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. The jurisdiction to grant stay lies at the discretion of this Court and is exercised on the basis of sound and settled principles, not arbitrarily or capriciously on a whim or in consideration of any extraneous matters. In the case of Butt Vs. Rent Restriction Tribunal [1982] KLR 417 the Court of Appeal gave

guidance on how a Court should exercise discretion in an Application for stay of execution and held that: -

> " 1. The power of the Court to grant or refusal an Application for a stay of execution is a discretion of power. The discretion should be exercised in such a way as not to prevent an appeal.
>
> 2. The general principle is granting or refusing a stay is: If there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should that appeal Court reverse the Judge's discretion. (sic) (trial Court Judgement).
>
> 3. A Judge should not refuse a stay if there is a good ground for granting it merely because in his opinion a better remedy may be available to the Applicant at the end of the proceedings.
>
> 4. The Court in exercising its powers under Order XLI rule 4 (2) (b) of the Civil Procedure Rules can order security upon Application by either party or on its own motion. Failure to put security of costs as ordered with cause the order for stay of execution to lapse".

15. Has the Applicant satisfied the conditions set in Order 42 rule 6 (2) of the Civil Procedure Rules above? The Applicant contends that the Respondent may execute the Judgment against him to the detriment of his intended appeal. No evidence was tendered to support this contention. It is trite that execution on its own is does not amount to substantial loss because it is a lawful process. See the case of James Wangalwa & Another Vs. Agnes Naliaka Cheseto [2012] eKLR.

16. The Court of Appeal in GNN V LNN [2020] KECA 143 (KLR) emphasized that substantial loss is what has to be prevented by preserving the status quo because such loss would render it nugatory. In my view the Applicant has not demonstrated the substantial loss he stands to suffer if the order of stay of execution is not granted.

17. On whether the Application was timeously filed, I note that the Application was filed on 24/5/2024 being eleven (11) days after delivery of the impugned Judgment, the Court takes the view that the same is not inordinate. Lastly the Applicant deposed that he is ready and willing to abide by terms of security if so ordered by the Court.

18. Having failed to prove substantial loss herein, the prayer for stay of execution is unmerited and it fails.

19. Each party to bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 19TH DAY OF DECEMBER, 2024 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Muchiri HB Njoki Njogu for the Appellant

Ms. Odhiambo HB Kinyanjui for the Respondent

Court Assistant – Phyllis