



**Fredrick v Wilson (Environment & Land Case E029 of 2022)
[2023] KEELC 942 (KLR) (22 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 942 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE E029 OF 2022
CK YANO, J
FEBRUARY 22, 2023**

BETWEEN

FELIX MWIRIGI FREDRICK APPLICANT

AND

GERRALIMARANGU WILSON RESPONDENT

RULING

1. For determination is the applicant's notice of motion dated September 1, 2022 seeking leave to file an appeal out of time against the judgment of Hon. S.K Ngetich Principal Magistrate delivered on July 13, 2022 in Nkubu ELC No. 105 of 2018 as well as an order of stay of execution of the judgment of the lower court pending the hearing and determination of the intended appeal.
2. The application is brought under article 159 (2)(d) of the Constitution, Order 42 Rule 6 of the Civil Procedure Rules and section 1A, 1B, 3A and 78G of the Civil Procedure Act. The application is supported by the affidavit of Felix Mwirigi Fredrick, the applicant, sworn on September 1, 2022 and a further affidavit filed on November 21, 2022. The applicant avers that he was unwell and was not able to institute an appeal in time and also could not afford the services of an advocate. The applicant has annexed a copy the medical notes and a draft memorandum of appeal which he states raises arguable grounds with chances of success.
3. The applicant states that the execution of the decree of the lower court would subvert the ends of justice and render the appeal nugatory, adding that this application has been filed timeously and without any inordinate delay. The applicant has given an undertaking that he would abide with conditions of the court that are necessary for expeditious disposal of the intended appeal.
4. In the further affidavit, the applicant has annexed a consent signed by his former advocate and the current one. He states that the advocate on record has mistakenly left out the said consent and urged



the court not to visit that mistake on the applicant, but instead promote substantive justice over undue procedural technicalities.

5. In opposing the application, the respondent filed a replying affidavit sworn on October 23, 2022. The respondent argues that the application lacks merit since the trial court delivered typed judgment in the presence of all the parties and their respective advocates and that there is unreasonable delay in bringing the application and there is no reasonable explanation or reasons advanced for the delay in filing the appeal on time. The respondent avers that the application has been overtaken by events after the issuance of eviction orders which are due for implementation. The respondent argued that the application is incompetent because it was filed by an advocate who is not properly on record contrary to the Rules of Procedure. That the applicant has not even offered any security for stay of execution as required by law.
6. The application was canvassed by way of written submissions. The applicant filed his submissions on November 21, 2022 through the firm of Kuria Karatu & Company Advocates while the respondent filed his on October 31, 2022 through the firm of Gikunda Anampiu & Co. Advocates.
7. Counsel for the applicant submitted that it is just and fair that the applicant should be allowed to file an appeal out of time and relied on the case of *Leo Sila Mutiso vs Rose Hellen Wangari Mwangi* Civil application No. Nai 255 of 1997 in which the court of appeal enunciated the principles for extension of time. It was the applicant's submissions that judgment was delivered on July 13, 2022 and this application brought on September 1, 2022 and so there was no inordinate delay and a reason for delay has been given, adding that the intended appeal has great chances of success and that no prejudice is to be suffered by the respondent who has been living elsewhere prior to the judgment.
8. On the issue of an order of stay of execution, the applicant's counsel submitted that the purpose of stay of execution is to preserve the substratum of the case and relied on the case of *Consolidated Marine v Nampijja & another*, Civil App. No. 93 of 1989 (Nairobi) in which 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.”
9. The applicant's counsel cited Rule 6(2) of Order 42 which provides for the conditions to be met before stay is granted. The applicant relied in the Court of Appeal case of *Kenya Shell Ltd v Kibiru & another* [1986] KLR 410 regarding the issue of substantial loss and *Butt v Rent Restriction Tribunal* [1982] KLR 417 in which the Court of Appeal gave guidance on how a court should exercise discretion.
10. Regarding the issue whether the firm of Kuria Karatu & Company Advocates is properly on record, the applicant states that a notice of appointment and then a consent between that firm and the outgoing counsel has been filed and so regularized his position. It was submitted that courts are called upon to allow parties ventilate their disputes than to allow procedural technicalities override the substantive justice, and relied on *Gitau v Kenya Methodist University (Kemu)* (petition 5 of 2020) [2021] KEHC 322 KLR, *James Mangli Musoo v Ezeetec Limited* [2014]eKLR and *Philip Chemwolo & another v Augustine Kubende* [1982] KLR 103
11. On the issue of who is to bear costs of the application, counsel for the applicant relied on *Republic v Rosemary Wairimu Munene, ex-parte applicant v Iburu Dairy Farmers Co-operative Society* in which was held that “The issue of costs follow the event... it is not used to penalize the losing party, rather it is for compensating the successful party for the trouble taken in prosecuting or defending the case.”



12. It was submitted that the applicant has demonstrated all the elements of extension of time and stay of execution in his favour hence it is fair and just that the application is allowed with costs.
13. On their party, the advocate for the respondent submitted that the legal basis for grant of stay pending appeal is Order 42 Rule 6 of the [Civil Procedure Rules](#) in which the applicant is required to demonstrate that substantial loss may result unless the order is made, that the application has been made without unreasonable delay and security as the court orders for the due performance of the decree has been given by the applicant.
14. It was submitted that the subject matter of the suit belongs to the respondent who is the registered owner having bought the suit land at a consideration. That in the judgment sought to be appealed against, the applicant was given 3 months to vacate the suit land. That all these makes it clear that the applicant has no legal interest in the land to occasion him any substantial loss if the orders are not granted. That the applicant has taken over two months to bring this application and the reasons given for delay are vague. It was further submitted that the appeal as filed is a non-starter.
15. The respondent argued that the applicant has not even shown interest in offering security as required by law and that his only intention is to deprive the respondent his right in enjoying the fruits of his judgment which should not be allowed by this court. It is the respondent's submission that the intended appeal has no chances of success and would only result into a waste of the court's precious time. The respondent therefore urged the court to dismiss the application with costs.
16. I have considered the application, the affidavits on record and the submissions filed. The issues for determination are-;
 - i. Whether the application is competent.
 - ii. Whether the orders sought should be granted.
17. In his response, the respondent has stated that the application is incompetent because it has been filed by an advocate who is not properly on record as per the Rules of Procedure. In this matter, there is no dispute that the applicant was being represented by the firm of Vivian Aketch & Co. Advocates. There is also no dispute that judgment was entered by the subordinate court on July 13, 2022. The applicant filed the application dated September 1, 2022 through the firm of M/s Kuria Karatu & Co. Advocates. Among the prayers sought in the application, there is no order for leave to the firm of M/s Kuria Karatu & Co. Advocates to act on behalf of the applicant in place of the firm of M/s Vivian Aketch & Co. Advocates. Instead, M/s Kuria & Karatu & Co. Advocates filed notice of appointment of advocate on 2/9/2022.
18. Order 9 Rule 9 of the [Civil Procedure Rules](#) provides as follows-;
 - “9. . 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
 - 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. An application under Rule 9 may be combined with other prayers provided that the question of change of advocate or a party intending to act in person shall be determined first”
19. In this case, it is clear that after the respondent filed his replying affidavit on October 17, 2022 which raised the issue of the competency of the application on account that the same was filed by an advocate who is not properly on record, the applicant filed a further affidavit on November 21, 2022 in which he annexed a consent signed by the firm of Vivian Aketch & Co. Advocates and Kuria Karatu & Co. Advocates. I note that the said consent is dated November 1, 2022. It is therefore clear that no consent had been filed between the said firms by September 2, 2022 when the application herein was filed.
20. Order 9 Rule 9 of the Civil Procedure Rules is clear that no new advocate can take over the conduct of a suit which was finally determined, and judgment passed without the leave of the court through a formal application or by consent of the outgoing advocate and the incoming advocate. In the present case, the firm of Kuria Karatu & Co. Advocates filed the application dated September 1, 2022 without leave of the court. As already stated, in the said application, there is no prayer for leave to file a notice of change of advocate which the court could have determined first before the other prayers sought in the application. In addition, there was no consent filed that had been signed by the outgoing advocate and the incoming advocate as at the time the application was filed. The consent on record was filed two months after the application had been filed. The application herein is no doubt the continuation of the determined matter. I do not therefore agree with the argument that the issue of representation under Order 9 Rule 9 is one of a mere technicality. The provisions of Order 9 Rule 9 are couched in mandatory terms. In my view, the mandatory provisions of Order 9 Rule 9 cannot be regarded as a mere technicality. Further, Order 9 Rule 12 stipulates that the advocate is considered the advocate of the party to the final conclusion of the cause or matter including review or appeal, unless change of representation is effected in accordance with the law. In this case, there was not even a notice of change of advocate that has been filed. The firm of Kuria Karatu simply filed a notice of appointment of an advocate as though there was no advocate on record for the applicant. In my view, the late filing of the consent dated November 1, 2022 must have been an afterthought and cannot cure the omission done on September 2, 2022 when the application herein was filed contrary to the said clear rules of procedure.
21. Accordingly, I find that the application before court is incompetent as it was filed by an advocate who was not properly on record and without leave of the court. As a consequence, the application dated September 1, 2022 is hereby struck out with costs to the respondent. I do not think it is necessary to consider the other issues of the application.
22. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 22ND DAY OF FEBRUARY, 2023.

In the presence of

C.a Kibagendi

Ms Maore holding brief for Karatu for applicant

No appearance for respondent

C.K YANO

ELC JUDGE

