Mutemi v Gababa & another (Suing as the legal representative of Estate of Abdi Mohamed Kula alias Abdi Mohamed (Deceased)) (Civil Appeal E059 of 2023) [2023] KEHC 23275 (KLR) (26 September 2023) (Ruling)

Neutral citation: [2023] KEHC 23275 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KITUI

CIVIL APPEAL E059 OF 2023

RK LIMO, J

SEPTEMBER 26, 2023

BETWEEN

MUTUKU MUTEMI ..... APPELLANT

AND

HADIJA ILOW NAMU ..... 1ST RESPONDENT

ABDI WAB GABABA ..... 2ND RESPONDENT

SUING AS THE LEGAL REPRESENTATIVE OF ESTATE OF ABDI MOHAMED KULA ALIAS ABDI MOHAMED (DECEASED)

(Being an Appeal from the ruling of Hon. M.K. Mwangi- Chief Magistrate Delivered on 2nd August 2022 in Mwingi CMCC No. 25 of 2020)

RULING

1. The matter before the court is a Notice of Motion Application dated 21st August 2023 and is brought under Order 42 Rule 6 of the *Civil Procedure Rules 2010* and Rule 3 (2) of the *Judicature Act*. The applicant is seeking orders that;

    i. That this application be certified urgent and fit to be heard during the current summer vacation (spent)

    ii. That the ruling delivered on 2nd August 2023 by Honourable M.K Mwangi (CM) be stayed pending the hearing of this application inter-parties

    iii. That pending the hearing of the appeal herein, the Ruling delivered on 2nd August 2023 by Hon M.K Mwangi be stayed.

    iv. That costs of this application be provided for.

2. The application is supported by the affidavit of Mutuku Mutemi sworn on 21st August 2023 and the following 5 grounds;

   i. On 29th May 2023, the Applicant herein filed an application for review

   ii. On 21st June 2023 when the said application was coming up for inter-parte hearing the same was called out when counsel for the Applicant was on his feet in a physical court in Nairobi and consequently the application was dismissed for non-attendance.

   iii. On 27th June 2023, the Applicant filed an agent application for reinstatement for the dismissal application.

   iv. On 2nd August 2023, the Chief Magistrate instead of dealing with the application before him for reinstatement delivered the yet to be application for review and ordered the Applicant to deposit Kshs 2,218,635 in an interest earning account between the parties' advocates.

   v. The applicant is dissatisfied with the said ruling and wishes to appeal against the said ruling.

3. In his Supporting affidavit the applicant avers that the Respondents obtained a decree against him of Kshs 6,053,550/- in civil suit No 25 of 2020 arising from a traffic road accident. He contends that he was not aware of the proceedings in the aforementioned suit and only became privy to the same when he was served with a Notice to Show cause dated 14th February 2023 demanding Kshs 7,34,270.75/-. He avers that he contacted his insurer, Direct Line Assurance who informed him that they had paid Kshs 3,000,000/- to the Respondents, being the maximum compensation under Section 10 of the *Insurance (Third Party Risk) Act*. The applicant contends that despite the payment, the decree was never amended to reflect the same which prompted his filing of an application for review which was dismissed for non-attendance when it came up for inter-parties hearing on 12th June 2023. That the applicant then filed an application for reinstatement dated 27th June 2023 from which a ruling dated 2nd August 2023 was delivered by the trial court. The applicant took issue with the ruling as the trial magistrate reinstated his application for review on condition that he deposited Kshs 2,218,635 in a joint interest earning account in the name of advocates of both parties as security. According to the Applicant, the trial magistrate did not have the jurisdiction to make such orders and that the same is in breach of Order 12 and 45 of the *Civil Procedure Rules* as well as Article 48 of *the Constitution* of Kenya.

4. The Applicant through Counsel submits that the trial erred by giving a conditional relief arguing that it lacked the discretion or jurisdiction to do so within the scope of the application placed before it. He contends that the conditions given were premature.

5. He insists that he is properly on record contrary to the contention by the respondent arguing that Order 9 Rule 9 of the *Civil Procedure Rule* do not apply to this situation because the Counsel is on appeal filed.

6. He further contends that unless a temporary stay is granted he is likely to suffer substantial loss and in his view substantial loss should not just be viewed on monetary terms adding that he may face hardship in recovering the amount from the Respondent if h close to execute.

7. The Respondent on the other hand has opposed this application vide grounds dated 19th September, 2023 that raises the following: -

   i. The firm of D. Muinde & Associates who have filed the application are not on record for the Appellant having not complied with the requirements of Order 9 rule 9 of the Civil Procedure Rules and are therefore strangers to the appeal and have no right of audience

ii. The application is incompetent and an abuse of the court process

iii. The Appellant has not demonstrated any irreparable loss he is likely to suffer if no stay of execution is granted

iv. The Appellant has not offered any security for the performance of the decree that might ultimately be binding upon him.

8. The Respondent's Counsel submits that under Order 9 Rule 5 the applicant's Counsel needed leave first before coming on record and that the firm of D. Muinde never sought leave.

9. He further points out that the order/ruling sought to be stayed by the applicant is in his favour and that staying it means that the dismissal order remains or that the reinstatement order is stayed as well which in turn means execution technically can issue.

10. This Court has considered this application and the response made. The issues for determination are basically two namely: -

i. Whether the applicant's counsel is properly on record.

ii. Whether the applicant has made out a case for this court to grant a stay of execution.

(i) Whether the applicant's counsel is properly on record.

11. The Respondent contends that the firm of D. Muinde who has brought this application needed leave to come on record and cites the provision of Order 9 Rule 5 of the *Civil Procedure Rule* which provides;

> A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose but unless and until notice of change of the advocate is filed in the court in which such cause or matter is proceeding and served in accordance with Rule 6, the former advocate shall subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter including any review or appeal."

Rule 12 is related to a removal of an advocate on grounds of bankruptcy, or being struck off the roll of advocates or for any other reason enable to act.

Rule 13 relates to advocate who has ceased acting.

The exceptions stipulated under Rule 5 above therefore, does not apply in this instance.

Now let me turn my attention to the Provisions of Order 9 Rule 9. The same provides as follows: -

> Order 9 Rule 9
>
> Change to be effected by order of court or consent of parties
>
> 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;
>
> i. upon an application with notice to all the parties; or
>
> ii. 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."

12. In the first scenario the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Consent of the previous advocate is not necessary, but the party must give notice to the other parties. In the second scenario the new advocate or party in person needs the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. The purpose of the provision of is to give notice to the previous advocates and those of opposite parties of the entry of a new advocate on the record.

13. In this case, the applicant was represented by the firm of Kalove & Co Advocate who filed an application for review of decree dated 29th May 2023 which was dismissed for non-attendance and subsequently, filed another application for reinstatement of that application vide application dated 27th July 2023 whose ruling gave rise to the present appeal which was filed by the firm of D. Muinde & Associates.

14. Ordinarily, in my opinion, leave of court would not have been necessary had this been an appeal of the judgment. In such a situation, the appeal would have been a fresh process and commencement of proceedings in a new court hence the new counsel would not have needed to secure consent or leave to represent the applicant. The situation in this case however is different in that it is sought of a continuous process post judgment as it is an appeal of a ruling of an application for review of judgment. The Court of Appeal explained this distinction in the case of *Tobias M. Wafubwa v Ben Butali* [2017] eKLR where it held as follows;

> We will begin by considering whether the appeal from the Principal Magistrate's Court to the High Court was incompetent for non-compliance by the requirements of order 9 rules 9 and 10 of the *Civil Procedure Rules*...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 v Anthony Mugambi* [2005] eKLR where it was stated thus;
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> > 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."

15. These observations were supported by Makhandia, J, (as he then was) in the case of *Martin Mutisya Kiio & another v 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 v 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."

16. This Court finds that, if this matter was basically an appeal of the judgment of the trial court, then the firm of D. Muinde & Associates advocate would not need to seek counsel or leave of this court to come of record. However, what is before me is interlocutory nature and is a continuation of the proceedings in the lower court which was filed by another firm of advocate. The firm of Muinde & Associates need leave and at the very least to file notice of change with a view to notifying the other counsels that he has opted to pursue his rights in a different forum.

(ii) Whether the applicant has made out a case for a stay. This court having found out the above is inclined for good reasons to delve into the merits of the application itself.

17. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the *Civil Procedure Rules*, the relevant part of which states as follows;

> (1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of 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 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.

c. .....

d. ....

Notwithstanding anything contained in sub rule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."

18. To begin with substantial loss. Substantial loss has to mean a loss that is tangible and it could vary from case to case.

19. Substantial loss was explained in the case of *James Wangalwa & another v Agnes Naliaka Cheseto* [2012] eKLR, as follows;

> No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

20. The application was filed 19 days after delivery of the trial court's ruling on 2nd August 2023 on 23rd August 2023 together with the Memorandum of Appeal. This was within the period of stay that was granted by the trial court hence there was no undue delay.

The appeal files herein as observed above is interlocutory in Nature. It is not an appeal against the judgment and decree passed. It contests the exercise of discretion by the trial court to give conditions on reinstating a dismissed application.

21. The applicant contention that the court lacked jurisdiction or discretion to Order a deposit of security as a condition for reinstatement to me appears to contradict the express.

Provisions of Order 42 Rule 6 is a bit reserved in that conclusion though because a copy of the application dated 27.06.2023 which was the subject of the ruling that is now the subject of the appeal filed. The reservation of tis court is further informed by the fact that there is an appeal pending and I would not want to render myself prematurely. But it suffices to state that under Order 42 Rule 6(1) this court finds that the applicant has not demonstrated sufficient cause to warrant the grant of stay of execution.

The applicant has also not offered any security as stipulated under Order 42 Rule 6(2) (b) of the *Civil Procedure Rules*

In the premises this court finds that the Notice of Motion dated 21.8.2023 is simply unsustainable and the same is dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED AT KITUI THIS 26TH DAY OF SEPTEMBER, 2023.

HON. JUSTICE R. LIMO-JUDGE