REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

MISC. CIVIL APPLICATION NO.446 OF 2019

DENNIS ODHIAMBO.....APPLICANT

-VERSUS-

1. ELIUS NJOKA

2. JANE NJERI.....RESPONDENTS

RULING

1. What is for determination is a **Notice of Motion** application dated **2nd January, 2021** filed under certificate of urgency and brought under **Article 159(2)** of the **Constitution of Kenya**, **Sections 1A, 1B, 3** and **3A** all of the **Civil Procedure Act** and **Order 12 Rule 7** of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law in which the Applicant seeks for orders that:-

a) Spent;

b) That leave be granted to the firm of Kimondo, Gachoka & Company Advocates be granted leave to come on record on behalf of the Applicant herein;

c) Spent;

d) That this Honoiurable court be pleased to stay execution of the judgment and decree in Mombasa Chief Magistrate's Court Civil Suit No.837 of 2014 pending the hearing and determination of the application dated 12th November, 2019;

e) That the Honourable court be pleased to set aside and review the order for dismissal of the Defendant's Application dated 12th November, 2019 made on 23rd November, 2020 and reinstate the same for prosecution.

f) That the costs of the application be costs in the cause.

2. The application is supported by the grounds on the face thereof and the **affidavit** sworn on **25th January, 2021** by **Frerick Nyabuti**, the Applicant's Counsel.

3. He deponed that the application dated **12th November, 2019** had been filed by the firm of **Kairu & McCourt** and subsequently set for inter-parties hearing on **23rd November, 2020**. He added that the advocate having the conduct over this matter left the firm of **Kairu & McCourt** without diarizing the matter hence the firm was unware that the matter was coming up for hearing and that explains why the Applicant was unrepresented when the matter was dismissed for non-attendance on **23rd November, 2020**.

4. According to the Applicant's Counsel, the non-attendance was not deliberate but a mistake on mis-diarisation of the date by the Counsel then on record for the Applicant. It is deposited that the Applicant is interested in prosecuting the application dated **12th November, 2019** and the intended Appeal, such that unless the application dated **12th November, 2019** is reinstated, the Applicant will be exposed to the risks of execution and possible irreparable loss.

5. In opposing the application, the Respondents filed **Grounds of Opposition** dated **5th February, 2021** which are summarized as follows; That the Applicant is a perennial litigant who has been indolent in prosecuting the application dated **12th November, 2019** ever since it was filed; That the said application has been dismissed two times for want of prosecution and this court should not be taken for a ride by the Applicant to exercise its discretion in his favour while he is not at all keen in having the application prosecuted. Further, that the application

for stay has been filed in the wrong forum by virtue of **Order 41 Rule 4(1)** of the **Civil Procedure Rules** which provides that such an application should be filed at the court of first *instance*. That, the excuse of failing to diarize the matter is a lame one which has not been substantiated and in any event another advocate should have taken up the matter. It is also averred that the 1st Respondent had been involved in a tragic road accident in **2013** and since then he has been suffering in anguish due to lack of funds to enable him seek better medication. As such, this court should ensure that there is an end to litigation and allow the 1st Respondent to enjoy the fruits of the successful Judgment.

6. The instant application was disposed by way of oral submissions on **15th April, 2021**, with Learned Counsel **M/S Khalifa** submitting on behalf of the Applicant whereas **Mr. Asena** submitted on behalf of the Respondents.

7. **M/S Khalifa,** Counsel for the Applicant submitted that the previous applications on this matter which have been dismissed had been filed by the Applicant's erstwhile advocates. That the application dated **12th November, 2019** was dismissed for the failure to attend court by the Applicant's former advocates and the mistake of an advocate should not be meted on an innocent client. It is the counsel's assertion that dismissal of an application does not speak on its merit and this court in observance of the rules on natural justice should reinstate the application for hearing on its merit so that the Applicant is not condemned unheard or suffering miscarriage of justice which was occasioned by the former advocates.

8. The learned Counsel further submitted that the Applicant moved timeously after he learnt that the application had been dismissed for non-attendance hence no inordinate delay can be attributed to him. Further, that if the orders sought are not granted, the Applicant will suffer great prejudice or be exposed to the process of execution to the extend that his right of appeal will be curtailed and/or reduced to a mere academic exercise. In her view the court should strike a balance between the Appellant's right to appeal and the Respondent's right to enjoy the fruits of a successful Judgment. The Respondent's Counsel was however faulted for having sworn on matters which are not in his general knowledge and therefore as the matter stands, there is no valid opposition to the application by the Respondent.

9. Lastly, the Applicant's Counsel invited the court to consider the provision of **Article 159** of the **Constitution, 2010** which states that the court should sparingly exercise its discretion in dismissing any case for want of prosecution. She adds that the same principle should also apply in an application for reinstatement of suits and the court should consider whether there are reasonable grounds to reinstate a suit after weighing the prejudice that would be suffered by the Plaintiff against what the Defendants would suffer. To buttress this point of view, the counsel relied on the case of **Joseph Kinyua –vrs- G. O. Ombach [2019]eKLR.**

10. **Mr. Asena**, Counsel for the Respondent on the other hand submitted that the application dated **12th November, 2019** was filed by the firm of **M/S Kairu & McCourt, Advocates** which firm has changed its management to be **M/S Kimondo Gachoka & Company, Advocates** without any change in its associates. In his view, the advocates by pleading mistake of a former Counsel are trying to shift blame against themselves and the instant application is nothing more than a delaying tactic.

11. The Counsel faulted the Applicant for failing to prosecute the application which is sought to be reinstated even after being availed two chances to do so. He explained that assertion in that, the application dated **12th November, 2019** was first set for hearing on **3rd March, 2020** but the Applicant's Counsel failed to attend court and the same was dismissed for want for want of prosecution. The Applicant then sought, and was granted an order reinstating the application for hearing vide a **Ruling** delivered on **9th September, 2020**. On that date, and in the presence of advocates for both parties, the application dated **12th November, 2019** was again set for inter-parties hearing on **23rd November, 2020.** For and for a second time, the advocates failed to attend court on **23rd November, 2020** and the application was once again dismissed for want of prosecution. The Applicant has now filed the application subject of this Ruling. The Respondent's Counsel is thus of a strong view that the Applicants are abusing the process of the court and such behavior should not be tolerated by the court.

12. The Counsel however takes issue with the instant application and submits that the same has been filed in the wrong forum contrary to **Order 41 Rule 4(12)** of the **Civil Procedure Rules** which provides that an application for stay should be made in the court of first instance so that that the court can evaluate the evidence and facts of the case to determine whether the prayer for stay is merited or not. In his view, what was before the c0urt were not the facts of the dispute but a miscellaneous file which is not privy to the facts behind this case.

13. Be that as it may, **Mr. Asena** submitted that the Applicants have not fulfilled the conditions for stay as provided for under **Order 42 Rule 6(2)** of the **Civil Procedure Rules, 2010**. First, Counsel submitted that the trial court's Judgment was delivered on **20th September, 2019** and the delay for a period of almost **1 1/2 years** has not been explained at all. He terms the explanations that the delay was as a result of failing to diarize the matter by a Counsel who had left employment as mere allegation by the application and further enjoins that the Applicant's firm of advocates has other competent advocates who could have taken up the matter. Secondly, the learned Counsel submitted that Applicant is only alleging substantial loss without substantiating what form of loss would be occasioned. Lastly, that the Applicant has not offered any security as a performance of the decree which is crucial ingredient to grant an order for stay. In the upshot, the Counsel opined that the Applicant had not proved a case that would avail the exercise of the court's discretion in his favour.

14. In responding to **Mr. Asena's** submissions, **M/S Khalifa** submitted by reiterating that the firm of **Kimondo Gachoka** never participated in the prior proceedings in this matter. She rebuts the submission that the instant application has been filed in the wrong forum by submitting that there was a similar application filed before the lower court but the same was not successful. In any event, she asserted that the court should refrain

from determining the matter based on procedural technicalities rather than the merits of the case. As to whether the conditions for stay of execution have been met, the Counsel submitted that the present application is merely seeking reinstatement of an application that was dismissed and the conditions for stay are not applicable.

Analysis and Determination

15. I have considered the subject application and the grounds relied upon by the parties in support and opposition of the same. In the

circumstances, I see the following issues as the issues which distilled for determination;

> ***a) Whether there is a reasonable excuse why the Applicant's Counsel did not attend court?***
>
> ***b) If the orders to reinstate the application are not issued would there be prejudice on the part of the applicant?***
>
> ***c) Whether the Applicant is justified to seek orders of stay before this court without first seeking the orders before the trial court?***
>
> ***d) In any event what are the appropriate orders to be granted by this Court?***

16. On the first issue, it is the Applicant's case that his former advocate failed to diarize the matter leading to it being dismissed for non-attendance on **23rd November, 2020**. That being a mistake of the former Counsel, it was submitted that the same should not be visited upon the innocent Applicant.

17. The general principles governing applications like the one at hand are anchored in the realm of judicial discretion. However, I find it relevant to invoke the provisions of **Section 1A(1)** of the **Civil Procedure Act** which provides for the overriding objective of the court so as to facilitate the just, expeditious, proportionate and affordable resolution of disputes in court. A party in civil proceedings or an advocate for such a party is under a duty in accordance to the Act, to assist the court to further the overriding objective by participating in the processes of the court and to complying with the directions and orders of the court as directed. The foregoing discussion is in tandem with the spirit under **Article 159** of the **Constitution,** which guides the courts in exercise of its judicial authority to administer substantive justice without undue regard to procedural technicalities.

18. I also find the case of **Esther Wamaitha –vs- Safaricom** relevant in determining the issue at hand. Therein the court held as follows:-

> ***"…The discretion is free and the main concern of the courts is to do justice to the parties before it (See Patel Versus EA Cargo Handling Services Ltd) the discretion is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but is not designed to assist a person who deliberately sought, whether by evasion or otherwise, to obstruct or delay the cause of justice (See shah Versus Mbogo). The nature of the action should be considered, the defence if any should also be considered; and so should the question as to whether the plaintiff can reasonably be compensated by costs for any delay bearing in mind that to deny a litigant a hearing should be the last resort of a court. (See Sebei District Administration Versus Gasyali). It also goes without saying that the reason for failure to attend should be considered".*** (Emphasis mine)

19. Further, in the case of **Philip & another –vs- Augustine Kibede 1982-88 KLR 103,** the court expressed itself thus;

> ***"Blunder will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having this case heard on merit. I mind the broad equity approach to this matter is that unless there is fraud or intention to overreact, there is no error or default that cannot be put right by payment of costs. The court as is often said else for the people of deciding the rights of the parties and not the people imposing discipline".***

20. The stand that this court takes is not far from what the courts in the above cited cases have taken. I agree that parties to a litigation are bound to make mistakes and sometimes the mistake is on the part of the legal counsel retained by those parties who is guilty of laches without the knowledge of the client. However, such a scenario does not leave them without a remedy for the court to exercise discretion in the interest of justice. I reiterate the view that a litigant who is not guilty of dilatory conduct should not be debarred from pursuing his/her rights in court because of the negligence of his/her Counsel.

21. In this particular case, it is without doubt that the matter was being handled by a different by the firm of **M/S Kairu & McCourt, Advocates** on behalf of the Applicant and the said firm has not been diligent in prosecuting the matter. I note that when the said firm was on record on behalf of the Applicant, the application dated **12th November, 2019** was dismissed on two occasions and now the firm of **M/S Kimondo Gachoka & Company, Advocates** expresses the desire and commitment to diligently prosecute the matter on behalf of the Applicant.

22. **Mr. Asena** on the other hand, invites the court to take notice that the firm of **M/S Kimondo, Gachoka, Advocates** is still the firm of **M/S Kairu & McCourt, Advocates** which has only changed its management. Well, I find there is no evidence on record to substantiate that assertion and will not take it on further than that.

23. I am inclined to avail the Applicant another chance to prosecute his case rather than having the case dismissed on grounds of omissions by his former advocates. I am also satisfied that the loss which the Respondents might suffer as a result can be compensated by an award of damages. In the upshot, the prayer requesting this Court to set aside the dismissal order is hereby allowed.

24. The second issue I pointed out for determination has also been addressed in the analysis above and made a conclusion that the Respondents can adequately be compensated by award of costs.

25. The third issue in my Ruling addresses the point raised by **Mr. Asena** as to whether the Applicant, not having seized the opportunity to seek orders of stay of execution before the lower court at first instance, was not justified to seek those orders before this court by virtues of **Order 41 Rule 4(1)** of the **Civil Procedure Rules**. **M/S Khalifa,** Counsel for the Respondent briefly stated that there was such an application before the trial court which later necessitated the mother application in this suit. I have not seen such an application for stay

which had been filed before the lower annexed to any of the applications in this matter. However, I first wish to point out the provisions cited by **Mr. Asena** deal with a completely different subject than what he submitted on. **Order 41** of the **Civil Procedure Rules, 2010** provides for appointment of receivers and to be more specific **Rule 4** thereof provides on enforcement of receiver's duties.

26. Nonetheless, **Order 42 Rule 6** of the **Civil Procedure Rules** is the only provision under law known to me under which this court or the courts subordinate to it may grant orders for stay pending the determination of an Appeal. Nowhere under **Order 42 Rule 6** of the **Civil Procedure Rules** does it expressly provide that an Applicant seeking orders for stay pending appeal has to first make that application before the lower court and thereafter to this court. I agree that the recommended practice for a party seeking for stay of execution is for the Applicant to first seek those orders before the court which heard the case.

27. **Order 42 Rule 6** of the **Civil Procedure Rules** is couched in permissive terms and gives the Applicant an opportunity to elect on whether to file the application before the court of first instance or the appellate court. Locking out the Applicant in an application seeking orders for stay, like the applicant herein, on basis that he/she did not first approach the trial court for such application, would be akin to determining the case, not on its merits but on basis of rules of procedure which may ultimately result in the miscarriage or subversion of justice. I am therefore unable to agree with **Mr. Asena's** submissions on this point.

28. Lastly, I appreciate that the rights of both parties in this particular case ought to be taken into account so as to avoid one party taking advantage of the court process to the detriment of the other. This court has to ultimately strike a balance between the Respondent's right to enjoy fruits of a successful Judgment and the Applicant's right to appeal. In view of the pleadings in this case the applicant seems to focus more on interlocutory application with more laxity and continuous slumbering in addressing the dispute which brought the parties to this court, which is the intended Appeal. It is now more than $1^{1}/_{2}$years since the application seeking for leave to file the intended appeal out time was filed. I agree with the Respondents' Counsel that at one point there must be an end to litigation, and add that justice delayed is justice denied.

29. Having reinstated the application dated **12th November, 2019**, I have read through the same and the **Replying Affidavit** filed in opposition thereof. I do note that the application is a clear-cut one for which determination can be made on the material already presented before this court.

30. On this, I wish to invoke the provisions of **Section 3A** of the **Civil**

Procedure Act which provides *"that nothing in "this Act" shall limit or otherwise affect the inherent power of the court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court*. **Section 1B** of the same Act enjoins this court to timely dispose the proceedings before it at a cost affordable by the respective parties.

31. The Application dated **12th November, 2019** substantively seeks two reliefs, being *leave be granted to the Applicant to appeal out of time against the part of the Judgment delivered on **20th September, 2019;** and secondly, that this court be pleased to issue orders for stay of execution of that judgment pending the hearing and determination of the intended Appeal.*

32. That application is opposed by **Replying Affidavit** sworn by the Respondent on **27th November, 2019**.

33. I have read through the grounds on face of both the application and **Replying Affidavit** and they are sufficient for me to determine on the rights of the parties herein.

34. As regards the first prayer, **Section 79G** of the **Civil Procedure Act** deals with the time for filing appeals from subordinate courts and states:-

> *79(G).*"***Every appeal from a subordinate court to the High***
>
> ***Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:***
>
> ***Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."***

35. I will first point out that whether or not to extend time for filing an Appeal is an exercise of this court's discretion which should be based on reasons and not on whims or caprice. A close glance of **Section 79G** above, the matters which a court should take into account in deciding whether to grant an extension of time are also reiterated in the Court of Appeal case of **Mwangi –vs- Kenya Airways Ltd [2003]KLR**, and they are; *the length of the delay; the reason for the delay; the chances of the Appeal succeeding if the application is granted and the degree of prejudice to the Respondent if the application is granted*.

36. In this particular case, **Judgment** by the trial court and subject of the intended Appeal was delivered on the **20th September, 2019** while the application seeking leave to appeal out of time was filed on **18th November, 2019**. This means that the Applicant was 28 days late in bringing the Appeal. The reason for this delay is explained to be that the Applicant had requested a copy of the Judgment so as appreciate the *ratio decidendi* for him to elect on whether to go for an Appeal or not. By the time the instructions to appeal were issued, the time within which an Appeal could be filed had already lapsed. The Respondent on the other hand faulted the Application for being guilty of laches and added that there was no plausible reason for failing to launch the Appeal within the 30 days of the Judgment.

37. In view of the foregoing, I do not find the period of delay as so inordinate vis-à-vis the explanation given by the Applicant that the Respondent cannot be compensated in costs for any prejudice the he might suffer as a result of favourable exercise of discretion in favour of the applicant. The Applicant explains the circumstances including the delay in communications on instructions to Appeal. The said explanation has not been rebutted by the Respondent. The court finds that there are sufficient reasons presented by the Applicant for not filing the Appeal in time.

38. The other issue pending determination is whether the court should order stay of execution pending hearing and determination of the intended Appeal. **Order 42 Rule 6(1)** of the **Civil Procedure Rules** is the applicable law and it stipulates the conditions under which a stay may be granted. It provides that an Applicant in an application for stay *must satisfy the court that he/she stands to suffer substantial loss if stay is not granted and that the application had been filed without unreasonable delay. The applicant must also show that he was willing to offer such security as may be ordered by the court*.

39. The court notes that the award impugned in the Appeal is Kshs.2,500,000/=. It is said to be manifestly high in view of the injuries that were sustained by the Claimant. However, none of the parties disclosed the injuries sustained by Respondent nor were there annexures of the proceedings to demonstrate how the same award was arrived at. The Respondent on the other hand believes that the application is an effort to delay the matter and defeat the enjoyment of fruits of a successful judgment. However, the Respondent proposes that the Applicant be directed to deposit the decretal sum in court or in a joint interest earning account in the name of both Counsels in the event the application is allowed.

40. However, in the circumstances of this case and in line with the analysis

above, I will consider the conditions for stay of execution as provided for under **Order 42 Rule 6(1) of the Civil Procedure Rules** in light of the overriding objectives which I have emphasized in this Ruling. In so doing, I will have to take into account the likely consequences of granting or not granting the stay and then lean towards a determination which is likely to place the parties on equal footing in an attempt to safeguard rights and interests of both sides. The yardstick is however for this court to balance or weigh the scales of justice by ensuring that the intended Appeal is not rendered nugatory while at the same time ensuring that the Respondent who successfully obtained a Judgment before the lower court is not impeded from the enjoyment of the fruits of his Judgement. Ultimately, the court should ensure that the execution of one party's right should not defeat or derogate the right of the other.

41. In the case at hand, if the stay sought is not granted and execution subsequently happens, then the decretal sum might be out of reach of the Applicant in the event of a successful appeal and thereafter cause hardship by initiating the recovery process. In the long run, that would prejudice the Applicant and cause him substantial loss. Therefore to ensure that justice and fairness thrives in this case it is my view that the court should grant the orders of stay with certain conditions. More so **paragraph 8** of the **Supporting Affidavit** sworn **by Isabella Nyambura**, the Applicant has expressed the willingness to furnish security.

42. I have considered the draft Memorandum of Appeal and out of the three grounds the Applicant intends to raise, it is clear that the intended appeal only challenges the award on quantum of general damages only. I implore that both parties are satisfied with the finding of the trial court in so far as liability is concerned. Thus, whatever the outcome of the Appeal would be, it is unlikely that the award on general damages would decrease to a quarter of the total award made by the trial court.

43. The upshot of my discussion on the following orders, which are geared

towards the facilitation of expeditious resolution of the dispute between

the parties herein issue as follows:-

a) The application dated 25th January, 2021, be and is hereby allowed with costs to the Respondent.

b) As regards the application dated* 12th November, 2019*, the time to appeal is hereby extended.

c) The Applicant is directed to file the intended Appeal within 45 days from the date hereof.

d) Stay of execution of the Judgment/Decree in Mombasa CMCC No.837 of 2014 do and is hereby issued under the conditions that; The Applicant pays to the Respondent Kshs.500,000/= and deposit Kshs.2,000,000/= in a joint interest earning account in the names of the advocates on record for the parties herein within 45 days of delivery of this Ruling.

e) Costs in the application dated* 12th November, 2019 *shall abide with the outcome of the intended Appeal.

It is hereby so ordered.

SIGNED, DATED and **DELIVERED VIRTUALLY** at **MOMBASA** this **20th** day of **MAY, 2021**.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Khalifa Counsel for the Applicant

No appearance for the Respondents

Court Assistant - Winnie