



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL DIVISION

MISC.APPL. NO.12 OF 2019

PETER KAMAU NGUGI.....1ST APPLICANT

JOHN MUNENE.....2ND APPLICANT

VERSUS

GRACE AKINYI OLOO.....1ST RESPONDENT

NOBERT OMONDI.....2ND RESPONDENT

(Suing as the Legal Representative of the Estate of Muriel Achieng Omondi -Deceased)

RULING

1. The applicants filed the notice of motion dated 3rd May 2021 seeking orders of stay of execution of the judgment /decree issued by the trial court, reinstatement of orders granted on 19th May 2019 and leave to file their memorandum of appeal out of time. Before the notice of motion was heard the respondent filed a notice of preliminary objection (P.O) dated 10th May 2021, which is the basis of this ruling.
2. The respondent in its P.O raises the following grounds:
 - (i) *The applicant is not properly on record in accordance to Order 9 Rule 9 and Rule 10 of the Civil Procedure Rules.*
 - (ii) *The application is fatally defective in substance, law and facts and should be dismissed with costs to the respondents.*
 - (iii) *The application is time barred and cannot be allowed under the Civil Procedure Rules.*
 - (iv) *Any other sections of the law as shall be raised during the hearing herein.*
3. Both counsel orally submitted on the P.O. M/s Arati for the respondent submitted that the applicants' counsel is not properly on record. The reason being that in the lower court they had a different advocate and that since the matter was concluded the new counsel should have sought leave to come on record. She submitted that they have not been served with any consent or order of the court regarding the change of advocate.
4. Counsel submitted that they have never been served with the consent (**CK-1**) which has no court stamp and was never filed. She stated that the current advocates have only served them with the application and have denied having any documents to confirm they are on record.
5. She argues that the applicants are time barred in whatever they are trying to do as this is an old matter and the court should not entertain illegalities by parties. She wondered why she had never been served with the consent until recently if indeed the counsel came on record in the year 2020.
6. Further, she submitted that the applicants have never filed their appeal two years down the line and the excuses floated are not plausible. Her take is that their application dated 26th March 2021 is unopposed and should be allowed as there is no opposing counsel.
7. M/s Waikwa for the applicant opposed the P.O for having been filed in bad faith and argued that they are properly on record since 4.6.2020 (**CK1**). She submitted that the consent was submitted on 12th June 2020 then filed electronically and so does not have a date and the E-receipt.

8. Counsel submitted that their application dated 3rd May 2021 was not inordinately late as they had complied with the 1st limb of the stay conditions. She further submitted that the 14 days of filing of the memorandum of appeal had lapsed hence their application dated 3/5/2021 seeking leave to file the appeal out of time.

9. M/S Waikwa argues that the applicant should not be punished for the mistakes of the advocate and further that the P.O should be dismissed. She urges the court to allow the application dated 3rd May 2021 and dismiss the respondent's application dated 25/3/2021 with costs.

Analysis and Determination

10. I have considered the submissions by counsel and the law. The issue for determination is whether the issue raised by the respondents qualifies as a P.O and if so then whether the applicants' claim is time barred and if their advocates are properly on record.

11. On the first issue the definition of a preliminary objection was well set out in the case of **Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd [1969] E.A. 696** where it was held;

“So far as I am aware a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

12. **Sir Charles Newbold** in the same matter stated thus:

“The first matter relates to the increasing practice of raising points, which should be argued in the normal manner, quite improperly by way of preliminary objection. A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or what is sought is the exercise of judicial discretion. The improper raising of points by way of preliminary objection does nothing but unnecessarily increases costs and, on occasion, confuse the issue. The improper practice should stop.”

13. In **Artar Singh Bhamra & Anor v Oriental Commercial Bank Civil Suit No. 53 of 2004 – High Court Kisumu** the court held:

“A preliminary objection must stem or germinate from the pleadings filed by the parties and must be based on pure points of law with no facts to be ascertained.”

14. A perusal of the file confirms that the applicant's consent (CK-1) is dated 6th June 2020 and addressed to the Chief Magistrate Milimani Commercial Court. The application dated 3rd May 2021 seeks to set aside the lower court's judgment, orders for stay as well as leave to file the memorandum of appeal out of time. It was filed by Kimondo Gachoka advocates. The issue being raised in the P.O is whether the applicants' advocate has complied with Order 9 Rule 9 of the Civil Procedure Rules and if so whether the application is time barred. It is a point of law which could dispose of the matter depending on how it goes. I therefore find that the issue raised satisfies the principle in the **Mukisa Biscuit case (supra)**.

15. **Order 9 Rule 9 and 10** of the **Civil Procedure Rules** provides:

Rule 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; 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.

Rule 10. 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.

16. In their submissions counsel for the applicants argues that the consent between them and the previous advocates was filed on 12th June 2020 while their application is dated 3rd May 2021. There is no evidence of service of the consent (CK-1) on the respondents. The respondents stated that they were never served with (CK-1) until recently and the said (CK-1) did not have the court stamp. The applicants on the other hand did not attach the E-receipt as evidence of filing the consent. They also did not deny the fact that they only served the respondents recently with the document CK-1.

17. In the case **John Langat –v- Kipkemoi Terer & 2 others (2013) eKLR** where Justice A. O. Muchelule when faced with similar circumstances stated thus:

“There was no application made to change advocates. In the replying affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He

annexed the said consent. There is no evidence that the respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the court.”

No such order was sought or obtained. It follows, and I agree with Mr. Theuri and Mr. Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

18. Further in the case of **Florence Hare Mkaha v Pwani Tawakal Mini Coach & another [2014] eKLR**; Mary Kasango, J held that:

“The question is; was the execution validly carried out on behalf of the Plaintiff? There are glaring anomalies in respect of the representation of the Plaintiff. As clearly set out above the Plaintiff was represented by Pandya & Talati Advocate up and until judgment was entered in her favour on 31st July 2012. Once judgment was entered the provisions of Order 9 Rule 9 had to be complied with if the Plaintiff required to change the advocates representing her. This was not the case. She was variously represented by Shikely Advocate, who filed the submissions in support of the Plaintiff’s Bill of Costs, and was represented by Kinyua Njagi & Co. Advocates through the execution of the decree stage. In both those occasions the two advocates did not obtain an order of the court to take over the conduct of Plaintiff’s case. Much more Shikely Advocate was not properly on record to enable him consent for Kinyua Njagi & Co. Advocates to conduct the Plaintiff’s case.”

19. The facts before this court clearly show the following undisputed facts:

i) The applicants were represented in the lower court by Kairu and Mc Court who filed this misc. application vide a notice of motion dated 21st January 2019 seeking leave to file appeal out of time and stay of execution.

ii) The said notice of motion was determined by Justice Kamau on 22nd May 2019 and conditions set out.

iii) An application dated 26th March 2021 was filed by the respondents seeking to have the sums deposited released to them.

iv) Another application dated 3rd May, 2021 was filed by the applicants through Kimondo Gachoka seeking extension of time to file appeal and reinstatement of the orders of 22nd May 2019.

v) A P.O dated 10th May 2021 was then filed.

20. Despite Kairu and Mc Court advocates knowing they had filed the application dated 21st January 2019 they never filed a copy of CK-1 in this file. The said consent CK-1 is dated 20th June 2020. The respondents’ application dated 26th March 2021 was served on Kairu Mc Court advocates. There was no indication by them to the respondents that they were no longer acting for the applicants herein. M/s Arati for the respondents confirmed they were just recently served with the document CK-1. This was not disputed by the applicants’ counsel.

21. It is also confirmed that no copy of an E- receipt was availed to this court to confirm that indeed CK-1 was filed in court. Under 9 Rules 9 and 10 of the Civil Procedure Rule Leave to change advocate must be granted by the court. The “consent” by itself is not “Leave”. Under Order 9 Rule 10 of the Civil Procedure Rule one may apply for such leave alongside other prayers in an application. I have perused the applicants’ application dated 3rd May 2021. It has no prayer seeking leave for the present advocates to come on record for the applicants.

22. The above being the position I find merit in the P.O and further find that the firm of Kimondo Gachoka advocates is improperly before this court. It follows that the application dated 3rd May 2021 is incompetent and is struck out alongside the replying affidavit by Chris Kabita sworn on 12th July 2021.

23. The application by the respondents dated 26th March 2021 is unopposed. No appeal has been filed in terms of the orders of 22nd May 2019. The application dated 26th March 2021 is therefore allowed in terms of prayer no. 2 with costs.

Orders accordingly.

Delivered online, signed and dated this 30th day of July, 2021 Nairobi.

H. I. ONG’UDI

JUDGE