REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT EMBU

MISC. CIVIL APPLICATION NO. 9 OF 2020

JOHNSON M.S. NJOGURI……...…….APPLICANT

VERSUS

SAMUEL MAKINDU GACHEGU…….…….…….RESPONDENT

RULING

1. Before this court is a Notice of Motion dated 19.12.2019 brought under certificate of urgency and wherein the applicant seeks the orders to wit;-

> ***1)*** *That the firm of Mrs. Githongori & Harrison Associates Advocates be granted leave to come on record as advocates for the Defendant herein in place of Messrs. Munyasya & Company Advocates*
>
> ***2)*** *That this Honourable court be pleased to grant an extension of time to enable the applicant to file an appeal out of time and the Notice of Appeal herein be deemed properly filed subject to such extension and payment to the requisite court fees.*
>
> ***3)*** *..spent*
>
> ***4)*** *That this Honourable Court be pleased to issue an order of stay of execution of the judgment delivered by Hon. M.N. Gicheru on 3.12.2018 and all other consequential orders issued thereafter pending the hearing and determination of the intended appeal.*
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> ***5)*** *That this Honourable Court be pleased to issue an order stating that the memorandum of appeal annexed herein be deemed as properly filed subject to such extension and payment of the requisite court fees.*
>
> ***6)*** *That the applicant be at liberty to apply for further orders and/ or directions as this Honourable Court may deem just and expedient.*
>
> ***7)*** *That costs of this application be provided for.*

2. The application is premised on the grounds on its face and further supported by the affidavit sworn by the applicant on the even date. The applicant's case is that he was dissatisfied by the judgment delivered by Hon. M.N Gicheru on 3.12.2018 and wherein the trial court gave him 14 days to appeal and he decided to appeal against the same but he was dissatisfied with the representation by his former advocates on record (Ms. Munyasya & Co. Advocates) and decided to look for another advocates to represent him. That he has now appointed the firm of Githongori & Harrison Associates but the new advocates inform him that once judgment has been entered, the applicant had only 14 days to file a Notice of Appeal and that since he was not aware of the said predicament, he has been informed by his said new advocates that he has to seek leave of the court to file the intended appeal out of time. Reasons whereof, he now seeks extension of time to file the appeal against the judgment of the trial court.

3. The application is opposed by the respondent herein vide a replying affidavit sworn on 9.12.2020 and wherein the respondent deposed that the application is frivolous, vexatious, an abuse of the court process and devoid of merits and the same ought to be struck out and/or dismissed with costs. That section 27 of the Limitation of Actions Act under which the application is brought is not relevant to the orders and is therefore of no avail to the applicant and that the instant application is an afterthought and only meant to reopen a longstanding dispute in Embu High Court Succession Cause No. 92B of 2001 which was transferred to Embu Chief Magistrate's Court and allocated file Number Succession Cause No. 221 of 2017 and which was determined on 3.12.2018. Further that, the applicant has not satisfied the provisions of Section 79G of the Civil Procedure Act as he has not disclosed to the court when he applied for a copy of the decree or order he intends to appeal against or when the same was supplied to him.

4. Further that the applicant has concealed from the court that he filed an incompetent application similar to the instant application in the lower court and that is where he squandered his statutory period for filing an appeal and as such, he is not entitled to the exercise of the court's discretion. Further that the applicant is not entitled to the orders of stay of execution as the estate was distributed as per the will of the deceased and that it is not true that the applicant was given 14 days within which to file an appeal and that the depositions that he failed to file an appeal within time for the reason that he was looking for an advocate is not true as he was all along represented by an advocate even at the time of the delivery of the judgment. Further that there is inordinate delay which has not been explained and that he is not entitled to prayer 1 of the application as he has not served the application upon his previous advocates or filed a consent between the previous advocates on record and the incoming advocate as required by Order 9 of the Civil Procedure Rules 2010. That the respondent shall suffer prejudice as the applicant's aim is to ensure that the litigation between them shall not come to end.

5. The application was canvassed by way of written submissions. The applicant in support of the application submitted that he has satisfied the conditions for leave to file an appeal out of time and that he has a good and sufficient cause for failing to file the appeal out of time. He relied on the Supreme Court's decision in **Nicholas Kiptoo Arap Salat –vs- IEBC & 7 Others (2014) eKLR** on the principles which needs to be satisfied so as to be granted leave to appeal out of time. He submitted that the delay was caused by inadvertent actions by his former advocates on record who failed to file an appeal to this court and he was not aware that no notice of appeal had been filed after the judgment was delivered and upon discovery of the said omission, he instructed the firms of Githogori & Harrison Associates to act on his behalf on 11.02.2019 and who filed a Notice of Appeal on the said date and further proceeded to request for certified copies of proceedings and which were availed on 17.06.2019 and then the instant application was filed. As such, it was submitted, there was sufficient justification for the delay.

6. As for the order of stay of execution of the judgment by the trial court, the applicant relied on the case of **Victory Constructions –vs- BM (a minor suing through next friend PMM) - Civil Appeal 19 of 2019** and submitted that the intended appeal is arguable and if stay is not granted the appeal will be rendered nugatory. The applicant restated the grounds of appeal on which the intended appeal is premised. (See paragraph 9 of the submissions). Relying on Order 42 Rule 6(2) of the Civil Procedure Rules 2010, he submitted that he stands to suffer substantial loss if the orders are not made as he stands to be left out in the distribution of the estate due to the finding of the trial court that he was not a dependant of the estate of the deceased and which fact was itself sufficient evidence of substantial loss. Reliance was further made on the case of **Congress Rental South Africa –vs- Kenyatta International Convention centre; Co-operative Bank of Kenya Limited another (Garnishee) (2019) eKLR Miscellaneous Application No. 453 of 2017**. The applicant further submitted that the delay was justified on the ground that the same was caused by his earlier advocates on record's failure to file the notice of appeal within time and further by the delay on the part of the court in issuing the certified copies of the proceedings. Further the applicant submitted that he was ready to furnish security for costs. Reliance in that respect was made on the case of **Gianfranco Manenthi & another –vs Africa Merchants Assurance Company Ltd (2019) eKLR** and **Focin Motorcycles Co. Ltd –vs- Ann Wambui Wangui & another (2018) eKLR**.

7. The respondent on his part basically reiterated the contents of his replying affidavit and further submitted that the applicant has not satisfied the prayers for leave to appeal out of time as provided for under section 79G of the Civil Procedure Act as he did not show that he has sufficient cause. The respondent's case is that the applicant left out crucial details as to when the judgment was delivered, the orders or decree appealed from, when he requested for the typed proceedings and when such documents were supplied to him and which were crucial for the court to exercise its discretion.

8. That the applicant did not provide any document from the lower court to be used in the appeal; or a certificate of delay by the trial court and as such, he ought not to benefit from the discretion of this court as he did not give satisfactory account for the inordinate delay and as such, the application for leave ought to be declined with costs. Reliance was made on the case of **Mohammed & Muigai Advocates –vs- Kangethe & Co. Advocates Nairobi Court of Appeal Civil Application No. 19 of 2004** and **Ceasary Muriuki –vs- Catherine Micere & Edith Nyawira, Court of Appeal at Nyeri Civil Application No. NAI 346 of 2005**. Further that the applicant did not attach the copy of Notice of Appeal and the draft Memorandum of Appeal to the application save for the copy of the memorandum of appeal annexed to the earlier application made in the court below (trial court).

9. On the prayer for stay of execution of the judgment of the trial court, the respondent submitted that the same ought not to be allowed on the grounds that there is no existing appeal upon which the grant of stay can be issued (as contemplated under Order 42 Rule 6(2) (a) and (b) and which requires proof of substantial loss. Further that the intended appeal has no chances of succeeding and the same is not arguable. Further that since the applicant was not named as a beneficiary in the will, there is no chance of him suffering any loss whether the appeal is granted or denied and that he failed to show that he can provide security as provided by law. It was further submitted that granting of stay or injunctions in succession matters is not allowed by virtue of Rule 63 of the Probate and Administration Rules. In relation to prayer 1 (leave for the firm of Ms. Githogori & Associates) to come on record, it was submitted that, the applicant having blamed his former advocates on record, he needed to serve the said advocates with the application so that they can respond to the said application.

10. I have considered the application, rival responses and the submissions filed herein. As I have already stated, the applicant seeks leave to change advocates on record, leave to file an appeal against the judgment of the trial court out of time and the Notice of Appeal be deemed to be duly filed upon payment of requisite fees. He also pray for stay of execution of the judgment of the trial court pending the hearing of the appeal.

11. At the preliminary, I note that the applicant cited the provisions of the Civil Procedure Rules as the provisions upon which the application is premised. It is trite law that Civil Procedure Rules do not apply in succession matters save as allowed under Rule 63 (1) of the Probate and Administration Rules. The said rule does not allow the application of Orders 42 Rule 6 of the Civil Procedure Rules to Succession causes. Further rule 49 of the Probate and Administration Rules provides that where the procedure of moving court is not provided for (in the Law of Succession Act and the Probate and Administration Rules), the court ought to be moved by way of Summons supported by an Affidavit. In the instant case, the applicant moved the court by way of a Notice of Motion and citing provisions of law not applicable to succession matters. However, section 47 of the Law of Succession Act gives this court powers to entertain any application and to determine any dispute under the Law of Succession Act. As such, despite the applicant having approached this court in the wrong method and under the wrong provisions of the law, I will proceed to determine the instant application on the basis of the powers bestowed on this court by virtue of section 47 of the Law of Succession Act. (See **In re Estate of Benson Maingi Mulwa (Deceased) [2021] eKLR**).

12. As for the prayer that the firm of Mrs. Githongori & Harrison Associates Advocates be granted leave to come on record as advocates for the Defendant herein in place of Messrs. Munyasya & Company Advocates, the applicant deposed that he was not satisfied with the representation by his former advocates on record and as a result of which, he has now instructed the firm of Githogori & Harrison Associates to represent him in the instant application and in the intended appeal. The respondent in reply deposed that the applicant ought not to be gtanted the said prayer as he has not shown that he served the said advocates with the application and neither is there a consent between the two firms of advocates.

13. Order 9 Rule 9 of the Civil Procedure Rules 2010 provides as follows;

> ***"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;*** *(emphasis mine)*
>
> ***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."***

14. As W. Korir J observed in **S.K. Tarwadi v Veronica Muehlemann [2019] eKLR**;-

> ***"…… the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away…"***

15. In **Connection Joint –vs- Apollo Insurance [2006] eKLR,** Fred Ochieng J held that;-

> ***"……Furthermore, it may be recalled that the mischief which was targeted by the introduction of that rule, was the replacement of advocates who had worked hard to enable a case get to the stage of judgement. In my understanding, some unscrupulous persons used to either appoint new advocates or take over the personal conduct of cases, as soon as judgement had been granted in their favour. Thereafter, the advocates who had been replaced were left chasing after their legal fees, which was not fair to them, especially when the said advocates only learnt about their own replacements, after the same had taken effect.***
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> ***By making it mandatory for the party who seeks to replace his advocate, after judgement was passed, to apply to the court, with notice to his said advocate, the rules committee addressed two concerns. First, it was no longer possible for the advocate to be taken by surprise, by his ouster, as he had to be served with the application seeking to remove him from record: secondly, the fact that the court had the opportunity of giving due consideration to the reasons for and against the application, implied that the court was able, if necessary, to impose terms and conditions. For instance, if it transpired that the advocate's fees had not yet been paid, the court could impose appropriate conditions to the order enabling the party to either act in person or alternatively, to engage another advocate…"***

16. What appears from the above is that the need for leave to change an advocate after judgment is only meant to cater for the interests of the advocate whom the applicant wants to change.

17. Despite the respondent having brought the issue as to service of the instant application upon the firm of Munyasya & Company Advocates, the applicant did not refute these averments or prove that the same was served upon the said firm of advocates.

18. Though the above is the correct legal position, in my view, the change of advocates by a party to proceeding without notifying the previous advocate cannot in any way prejudice the other party in the proceedings so as to warrant a court to deny the party leave to effect the said change. The respondent did not prove any prejudice which he stands to suffer if the change of the advocates is allowed. I say so bearing in mind that an advocate has a right to raise a client- advocate bill of costs for work done or services rendered if the same has not been paid for.

19. As to whether the applicant herein should be granted leave to appeal out of time against the decision of the trial court, it is not in dispute that the decision which the applicant seeks leave to appeal against was delivered by the lower court. When it comes to appeals from the subordinate court to the High Court, the applicable provision is Section 79G of the Civil Procedure Act which expresses that appeals of such nature must be filed within a period of 30 days from the date of the decree or order from which the appeal lies. The proviso to the said section however allows for extension of time to appeal where good and sufficient cause has been shown. As such, extension of time within which an appeal ought to be filed is a matter of judicial discretion. An applicant seeking enlargement of time to file an appeal must show that he has a good cause for doing so.

20. In exercise of that discretion, the court is supposed to take into account 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. (See **Leo Sila Mutiso –v- Rose Hellen Wangari Mwangi - Civil Application No. NAI 255 of 1997 (unreported) and Thuita Mwangi –vs- Kenya Airways Limited [2003] eKLR**.

21. As for the length of the delay, it is not disputed that the judgment of the trial court was delivered on 3.12.2018. The application was filed on 21.02.2020 which is about one year and one month from the date of the said judgment. I note that the applicant moved the trial court vide an application dated 11.02.2019 and which application was amended on 20.06.2019 and by the orders of 23.09.2019, the said application was

withdrawn by consent. The record indicates that the next application to be filed in the trial court was the one filed on 28.08.2020. It is my considered view that the applicant having applied for stay of execution and leave to appeal out of time in the lower court and which application was withdrawn on 23.09.2019, time can only be said to have started running from the date of the withdrawal. It is my view that the delay of five months cannot be said to be inordinate or excessive.

22. As for the reasons for the said delay, the applicant's case is that he was let down by his former advocates on record who failed to file the appeal within time. Further that he applied for the copies of typed proceedings which were issued to him on 17.06.2019. The respondent deposed that the applicant did not attach any evidence to show that he applied for the said proceedings. I agree with the respondent that such evidence was required to prove that he indeed applied for typed proceedings in the trial court. The court observed in **Andrew Kiplagat Chemaringo –vs- Paul Kipkorir Kibet [2018] eKLR** that:-

> ***"The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court's flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable."***

23. Despite him submitting that the typed proceedings were issued on 17.06.2019 and after which he instructed his incoming advocates, it is not clear why the said advocates did not file the instant application till 21.02.2021 when the instant application was filed. Further, it is trite law that a case belongs to a litigant and he ought to follow up on his case. It is not clear as to what steps he made to follow up with the said advocates.

24. However, as the Court of Appeal in Nairobi held in **Vishva Stone Suppliers Company Limited v RSR Stone [2006] Limited [2020] eKLR** (Nambuye J.A) while quoting with approval the case of **Richard Nchapi Leiyagu vs. IEBC & 2 Others (supra); Mbaki & Others vs. Macharia & Another [2005] 2EA 206** and **the Tanzanian case of Abbas Sherally & Another vs. Abdul Fazaiboy, Civil Application No. 33 of 2003**, right to be heard is not only constitutionally entrenched but it is also the corner stone of the Rule of law; a valued right; and is so basic that a decision which is arrived at in violation of it will be nullified, even if the same decision would have been reached had the party been heard, because, the violation is considered to be a breach of natural justice.

25. As for the prejudice which the parties might suffer, it is my considered view that the same ought to be weighed as against the right to be heard and which is a constitutional right. The applicant deposed that the respondent will not suffer any prejudice if the orders of leave are granted. The respondent deposed that he stands to suffer prejudice as the applicant is aimed at ensuring that there is no end to litigation between him and the respondent. I note that the dispute herein is in relation to land and inheritance. It is definitely clear that the applicant will indeed suffer prejudice if leave to appeal out of time is not granted. Any beneficiary has a right to inherit the estate of his deceased intestate so long as the law allows. Locking the applicant from pursuing his appeal indeed means that the issues upon which he challenges the decision of the trial court will not have been resolved. The respondent's deposition as to the prejudice he will suffer cannot dislodge the clear prejudice the applicant stands to suffer.

26. Extension of time to file appeal is a matter of exercise of discretion. Where a party is aggrieved and wishes to pursue an appeal it would be fair to exercise discretion in his favour and especially where the delay in filing the appeal is not inordinate and the adverse party will not be prejudiced in any way. Discretion of the court must always be exercised judiciously. The applicant having expressed his intentions to be heard by this court on appeal, it is my considered view that he ought to be given an opportunity to pursue the appeal.

27. For the above reasons, it is my considered view that the applicant herein has satisfied the conditions for grant of leave to appeal out of time. The prayer in that respect (prayer 2) as thus is merited and the same is hereby allowed. The appeal to be filed within 21 days from the date of this ruling.

28. The prayer for leave to file an appeal having been allowed, this court will then proceed to determine the issue as to whether there ought to be stay of execution of the order, judgment of the trial court pending the hearing and determination of the appeal. The principles upon which the above prayer can be allowed are now well settled from the authorities from this court and from the superior courts. Generally, stay of execution is provided for under Order 42 Rule 6 of the Civil Procedure Rules 2010. As a rule, for orders of stay of execution to be granted, the applicant must satisfy the conditions to wit;- that substantial loss may result to the Applicant unless the order is made; that the Application has been made without undue delay; and that 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.

29. Without going to the merits of the said issue, I note that the applicant intends to appeal against the judgment of the trial court and wherein the trial court dismissed the applicant's summons for revocation of grant made to the respondent herein. It is now trite that stay orders cannot be issued against an order which is not capable of being executed. In **Titus Kiema –vs- North Eastern Welfare Society [2016] eKLR** and which decision I find persuasive, P.J.O Otieno J stated that:

> ***"I appreciate the order to be a negative one authorizing no action nor placing any obligation upon the Appellant to be performed. In that event, therefore, one would pose the question: what execution is threatened and that needs to be stayed? I have been unable to see any such threat….. The question of executable order is in my view tied to the question of substantial loss. An Applicant need to approach the Court and demonstrate in a word akin to the following: "This is the order against me. It commands me to do a, b & c within this time and if I fail to do so as I await the outcome of this appeal, I stand the peril of the consequences which I need to be saved from facing so that my appeal does not turn out to have been an academic sojourn.***

30. In the instant case, the trial court only dismissed the applicant's summons for revocation of grant made to the respondent herein. Prof J. Ngugi J in the case of **John Mbua Muthoni & Another –vs- Ruth Muthoni Kariuki [2017] eKLR** while determining a similar issue held that;-

> ***34. I am persuaded that the circumstances here are the same as those in the Wananchi Group Case which I find to be persuasive.***

It is in accord with the James Hoseah Gitau Mwara Case cited above. The narrow holding in that case is that a stay of execution is not available where the Court has declined to issue judicial review orders since a refusal to issue the orders cannot be "executed." A broader holding would be that whenever a Court strikes out a suit or refuses to grant the substantive orders sought by the Court, a stay of execution is not available since any such stay would not be directed at a decision against which the intended appeal is not directed.

35. In this case, the Respondent took out Summons for Revocation of a Grant of Letters of Administration Intestate. The Summons was dismissed in the ruling of 20/01/2017. It is readily obvious that there is no single order coming out that ruling by Justice Musyoka that is capable of execution. As such, no stay of execution of the order coming from the ruling of 20/01/2017 can be issued…" (*Emphasis court's****).***

See also **Kaushik Panchamatia & 3 others v Prime Bank Limited & another [2020] eKLR**.

31. In the instant case, there is no positive order which was made by the trial court and which is capable of being stayed. The applicant ought to have sought for stay of the execution of the orders made by the trial court confirming the grant and allowing the distribution of the estate.

32. However, the applicant submitted that (paragraphs 11 and 12) that he stands to suffer substantial loss if the order is not made as he stands not to be included in the distribution of the estate due to the trial court's finding that he is not a dependant of the deceased. I have perused the trial court's record and I indeed note that the applicant subsequent to the orders dismissing the summons for revocation of grant made an application seeking orders that the caution lodged by the applicant on the suit land be lifted. The said application was subsequently allowed by the trial court. It is my considered view that if the respondent implements the certificate of confirmation of the grant issued by the trial court, the applicant will definitely suffer loss whereas there is a pending appeal.

33. In my view, the said implementation will definitely render the intended appeal nugatory (which appeal if it succeeds will definitely alter the mode of distribution in the said certificate of confirmation of grant). This is bearing in mind that the caution which had been lodged by the applicant was lifted and as such, the respondent has nothing barring him from disposing of the suit land before the intended appeal is heard and determined and which might be to the detriment of the applicant herein.

34. Section 47 of the Law of Succession Act vests court with wide discretion in granting protective orders for purposes of safeguarding the estate of a deceased person. Similarly, Rule 73 of the Probate and Administration Rules gives this court inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. This court is therefore clothed with wide powers to do what is necessary to ensure that the ends of justice are met. It is my considered view that considering the above and while invoking the powers of this court as discussed above, this court ought to order that the status quo as prevailing be maintained pending the hearing and determination of the intended appeal.

35. As for prayer No. 5 (that this Honourable Court be pleased to issue an order stating that the memorandum of appeal annexed herein be deemed as properly filed subject to such extension and payment of the requisite court fees) as I have already pointed out, the applicant did not annex the draft memorandum of appeal to the instant application. As such the said prayer cannot be granted and the same fails.

36. As for the costs of the application, this court ought to exercise its discretion and award costs to the respondent. This is since it's the applicant's acts which have drawn the respondent into litigation in respect of the instant application.

37. In the end, the application herein partially succeeds and the court makes the following orders;-

1) That the application dated 19.12.2019 succeeds.

2) That leave is hereby granted to the firm of Mrs. Githongori & Harrison Associates to come on record as advocates for the Applicant herein in place of Messrs. Munyasya & Company Advocates

3) That leave is hereby granted to the applicant to file an appeal out of time. The intended appeal to be filed within 30 days from today.

4) That an order is hereby issued that the status quo be preserved pending the hearing and determination of the intended appeal.

5) That the applicant be and is hereby condemned to pay throw away costs assessed at Kshs. 10,000/= within 14 days of this ruling failure to which the orders issued hereinabove shall lapse and stand discharged.

38. It is so ordered.

Delivered, dated and **signed** at **Embu** this **27th** day of **September, 2021.**

L. NJUGUNA

JUDGE

……for the Respondents

……for the Interested Party/Applicant