



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT MIGORI**

**(Coram: A. C. Mrima, J.)**

**MISC. CIVIL APPLN. NO. 274 OF 2018 (O.S.)**

**SAMUEL OLER KICHULA & 4 OTHERS.....PLAINTIFFS/RESPONDENTS**

**VERSUS**

**TOBIAS ONYANGO KICHULA & 2 OTHERS.....DEFENDANTS/APPLICANTS**

**RULING**

1. On 15/10/2019, this Court delivered the judgment in this matter. The decision was in favour of the Plaintiffs.
2. On 12/11/2019, Messrs. Bruce Odeny & Company Advocates filed an evenly dated Notice of Motion (hereinafter referred to as '**the application**'). The application sought the following prayers: -
  1. *For purposes of the record this application be certified urgent.*
  2. *That the law firm of Bruce Odeny & Company Advocates be granted leave to formally come on record for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents in place of the law firm of Kwanga Mboya & Company Advocates.*
  3. *Pending the hearing and determination of this application, there be stay of execution of the Judgment of the Court dated 15<sup>th</sup> October 2019.*
  4. *Time be enlarged to permit the 1<sup>st</sup> and 2<sup>nd</sup> Respondents to seek leave to appeal against the Judgment of this Court dated 15<sup>th</sup> October, 2019.*
  5. *Upon grant or prayer 4 above, leave be granted to the 1<sup>st</sup> and 2<sup>nd</sup> Respondent to appeal against the Judgment of this Court dated 15<sup>th</sup> October, 2019.*
  6. *Costs of this application be provided for.*
3. That is the application subject of this ruling.
4. The application was supported by the Affidavit of Mary Kichula, the second Applicant, sworn and evenly filed on 12/11/2019. In further support of the application a written consent was executed by the firms of Messrs. Bruce Odeny & Company Advocates and Messrs. Kwanga Mboya & Company Advocates. The consent was filed on 20/11/2019.
5. The application was opposed. Edward Akongo Oyugi, the fourth Applicant, swore a Replying Affidavit on 11/12/2019. The affidavit was filed on 18/12/2019.
6. Directions on the hearing of the application were taken. The parties proposed and the Court approved the hearing of the application by way of written submissions. The Applicants duly complied whereas the Respondents instead made oral submissions.
7. The Applicants submitted that the application was merited. On the issue of the leave of the Court for the firm of Messrs. Bruce Odeny & Company Advocates come on record for the Applicants in place of the firm of Messrs. Kwanga Mboya & Company Advocates, it was submitted that the outgoing Advocates and the incoming Advocates had executed and filed a consent in respect of the take-over of the conduct of the matter by the firm of Messrs. Bruce Odeny & Company Advocates.

8. The applicants further submitted on two other limbs of the leave of the Court. They were the leave to appeal against the judgment and the extension of time to lodge the appeal before the Court of Appeal. On the first limb it was argued that leave to appeal against the judgment in a matter instituted by way of an Originating Summons under **Order 37** of the **Civil Procedure Rules, 2010** ('hereinafter referred to as '**the Rules**') was mandatory. It was contended that non-compliance with **Order 43** of the **Rules** rendered any appeal incompetent. Counsel for the Applicants further submitted that as no leave to appeal against the judgment was neither sought nor granted then even the Notice of Appeal dated 22/10/2019 lodged by Messrs. Kwanga Mboya & Company Advocates was of no legal effect. Counsel argued that the Notice of Appeal could only be lodged upon the grant of the leave under to **Order 43** of the **Rules**.
9. On the extension of time to lodge the appeal out of time, it was argued that since the judgment in this matter was rendered on 15/10/2019 then any appeal ought to have been lodged within 30 days of course with the leave of the Court. There was therefore the need for extension of time within which the appeal could be lodged.
10. The Applicants alluded the failure to seek for and obtain the leave of the Court to lodge the Notice of Appeal as an error on the part of the outgoing Advocates hence should not be visited upon them. On the delay, it was submitted that the application was filed within 2 months of the judgment as a result of the take-over processes between the outgoing and incoming Advocates.
11. In closing, the Applicants submitted that the Respondents did not oppose the prayers on leave to appeal and extension of time, but the prayer on stay of execution orders. It was argued that the prayer for stay of execution was spent since the Court granted the order on 20/11/2019.
12. In opposing the application, Counsel for the Respondents vehemently protested against any attempt to stay the execution of the decree. It was argued that the decree of this Court was valid and had not been set-aside. This Court was reminded that it found that the Applicants intermeddled with the estate of the deceased and that amounted to a criminal offence. Counsel posited that since there was no competent appeal before the Court of Appeal then the stay order cannot be granted.
13. This Court was urged to dismiss the application with costs.
14. I have carefully considered the application alongside the submissions. It is true that the prayer for stay of execution of the decree was limited to the determination of the application. The good reason for such a prayer was the right realization by the incoming Advocates for the Applicants that there was no competent appeal before the Court of Appeal. I hence agree with the Applicants' Counsel that the prayer for stay of execution of the decree pending the determination of the application can only be deemed spent in view of the orders made by this Court on 20/11/2019.
15. Having so held, there is no basis for this Court to consider the grant of the conditions alluded to by the 4<sup>th</sup> Respondent in his Replying Affidavit. The 4<sup>th</sup> Respondent had sought that if the stay of execution order was to be granted then it ought to have been conditional to depositing all the rental proceeds from the disputed property into an escrow account by the parties and that the management of the premises be undertaken by an entity jointly nominated by the parties' Counsels. It is likely that the Respondents were of the view that the stay of execution of the decree was sought pending the determination of the appeal. That was however not the case.
16. This Court further agrees with the Applicants' Counsel that the Respondents did not in essence oppose the prayers on the leave to appeal and the extension of time within which to lodge the appeal.
17. On the issue of the leave to appeal, it is true that the suit was instituted by way of Originating Summons under **Order XXXVI** of the repealed Civil Procedure Rules. That order was replaced with **Order 37** of the **Rules**. The contents of the two orders did not largely differ.
18. That being the position any intended appeals against orders made in respect to suits instituted under **Order XXXVI** of the repealed Civil Procedure Rules or under **Order 37** of the **Rules** must comply with the provisions of **Order 43** of the **Rules**.
19. **Order 43** of the **Rules** provide for appeals from orders. The Order provides for appeals which lie as of right as well as those which can only lie with the leave of the Court. Appeals from **Order 37** of the **Rules** are among those which can only be preferred with the leave of the Court. The Notice of Appeal which was therefore filed without the grant of the leave remains a nullity. (See the Court of Appeal in **Nairobi Civil Appeal No. 86 of 2015 Peter Nyaga Muvake vs. Joseph Mutunga**).
20. In this case the issue of extension of time to lodge the appeal naturally flows from the grant of leave to appeal.
21. The outgoing Counsel for the Applicants did not seek the requisite leave to appeal. The issue was technical and wholly rested in the hands of the Counsel. The mistake was on the part of the Counsel. There are several decisions of the Court of Appeal to the effect that mistakes of Advocates should not always be visited on the parties. When a Court is faced with a scenario where it is alleged that a Counsel made a mistake, it must remain alive to the fact that mistakes do happen. Even Courts themselves make mistakes which are politely referred to as 'erring'. (See the Court of Appeal in **Murai vs. Wainaina (No.4) (1982) KLR 33** and **Kenya Industrial Estates Ltd vs. Samuel Sang & Another (2008) eKLR**).
22. Courts must therefore endeavour to render substantive justice pursuant to **Article 159(2)(d)** of the **Constitution**. Unless under very compelling circumstances Courts must always strive towards shielding parties from technical errors committed by their Counsels.
23. I am satisfied that this case presents a perfect instance where the Applicants ought not to suffer for technical errors committed by their then Counsels. The application was also filed without unreasonable delay. The time taken to file the application is not inordinate as the law firms were involved in the handing over and the taking over processes which culminated with the execution and filing of the requisite consent.

24. The application is merited. It is hereby allowed in terms of prayers 2, 4 and 5. The Applicants shall bear the costs of the application.

Orders accordingly.

**DELIVERED, DATED and SIGNED at MIGORI this 28<sup>th</sup> day of May, 2020.**

**A.C. MRIMA**

**JUDGE**

**Ruling delivered electronically: -**

1. **info@bruceodenyadvocates.co.ke** Messrs. Bruce Odeny & Co. Advocates for the Applicants.
2. **info@otienoogolaadvocates.co.ke** for Messrs. Otieno Ogola & Company Advocates for the Respondents.
3. Parties are at liberty to obtain hard copies of the Ruling from the Registry upon payment of the requisite charges.

**A. C. MRIMA**

**JUDGE**