REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL CASE NO. 18 OF 2011 (O.S.)

SAMUEL KIRIMI NGARUNI.....PLAINTIFF/RESPONDENT

VERSUS

IMATHIU NAITIRIA.....DEFENDANT/APPLICANT

R U L I N G

1. By a notice of motion dated 20/02/2020, **IMATHIU NAITIRA** ("the applicant") sought a stay of execution of the judgment delivered on 11/10/2018 pending the hearing and determination of **Nyeri Civil Appeal No. 64 of 2019 (hereinafter "the appeal case).**

2. He also sought an order that all the trees cut down in **LR. No. Ntima/Ntakira/700** be sold and the proceeds therefrom be deposited in court to await the outcome of the appeal case. He further sought that the respondent desist from causing any further wastage to the subject matter until the appeal is heard and determined.

3. The application was supported by his affidavit sworn on the same date. He averred that judgment was delivered on 11/10/2018 in favour of the respondent. That being aggrieved by the said judgment, he had lodged the appeal case.

4. That the respondent has now resulted to wanton wastage of the suit property by cutting down all the mature trees. He therefore contended that should his appeal be successful, he will suffer substantial loss as his investment would have been wasted away by the respondent. That in the premises, it was appropriate that the mature trees which have already been cut down be sold and the proceeds thereof deposited in court to await the outcome of the appeal.

5. The respondent opposed the application vide his replying affidavit sworn on 16/3/2020. He started that there was delay in bringing the application. That the property had already been registered in his name. That in any event, the application was defective as it did not comply with the provisions of ***Order 9 Rule 9 of the Civil Procedure Rules*** and did not satisfy the requirements of ***Order 42 Rule 6.***

6. The parties were directed to file their respective submissions but only the respondent who filed his. The Court has considered the said submissions and the authorities relied on.

7. The issues for determination are; ***whether the application is properly on record and Whether the orders sought by applicant should be granted.***

8. On record is a consent signed by the former advocates on record for the applicant agreeing to the new advocates to come on record. That was followed with a notice of change of advocates by the present advocates ***Order 9 Rule 9 of the Civil Procedure Rules*** provides: -

> ***"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".***

9. In **Protein & Fruits Processors Limited & another v Diamond Trust Bank Kenya Limited [2015] Eklr**, the court explained the two instances that arise under ***Order 9 Rule 9 of the Civil Procedure Rules*** and held: -

> ***"The commonality in the two scenarios is that there is previous advocate and the change is happening after judgment has been passed. 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. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. Under the second scenario a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court."

10. In **Bridges Exploration Limited v Stephen Karanja [2019] Eklr,** the court held: -

"It is evident that before a Notice of Change of Advocates can only be filed after judgment has been delivered, it must be preceded by either an application wherein an incoming advocate seeks leave to come on record for a party or by a consent between the outgoing and proposed incoming advocate or party intending to act in person as the case may be."

11. In this regard, it is clear that where a consent is procured from the outgoing advocate after judgment, there is no requirement for the new advocate or party to make a formal application for leave. An informal or oral application will suffice. Although the present advocate did not make any such application or include such a prayer in the motion before me, I will deem the same sought and grant it. This is because there is already on record a consent executed by the previous advocate,

12. In this regard, I hold that the application is properly before court. It is only regrettable that Mr. Kioga, advocate did not serve Mr. Rimita with both the consent and Notice of Change of Advocate before filing the present motion.

13. As regards the prayer for stay, the conditions for consideration are well set out under ***Order 42 Rule 6 of the Civil Procedure Rules.*** The application must be made timeously, the applicant must demonstrate that he will suffer substantial loss if the stay is declined and security should be offered for the performance of the order or decree that will ultimately be binding upon the applicant.

14. The judgment appealed against was made on 11/10/2018. The application was made on 20/2/2020, well over 20 months later. That in my view is inordinate. The requirement for timeous filing of an application for stay is to maintain the status quo obtaining at the time of the judgment or order. It is meant to prevent the successful party or 3rd parties acting on the order and thereby changing their position.

15. In the present case, the delay has resulted in the respondent even having the title registered in his own name. In this regard, I am satisfied that the first condition has not been satisfied.

16. As regards substantial loss, none was shown to be suffered. The so called mature trees have been on the property and were, at the trial, alleged to have been planted by the respondent. They can be valued and the value thereof be paid over to the applicant if the appeal succeeds. There is nothing special about the said trees. The loss will not be substantial.

17. The applicant did not offer any security for the grant of the orders sought. In this regard, the court finds that the applicant has not satisfied the conditions set out in ***Order 42 Rule 6 of the Civil Procedure Rules*** for the grant of the stay sought.

18. In the premises, the application is found to be without merit and the same is hereby dismissed with costs.

DATED and DELIVERED at Meru this 18th day of June, 2020.

A. MABEYA

JUDGE