



**REPUBLIC OF KENYA**

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

**SUCC CAUSE NO. 5 OF 2019**

**(FORMERLY MACHAKOS HC SUCCESSION CAUSE NO. 78 OF 1992)**

**IN THE MATTER OF THE ESTATE OF MASILIA MWAVU (DECEASED)**

ANNAH MBULA MASILIA.....1<sup>ST</sup> ADMINISTRATOR/PROTESTOR

THOMAS MUTHIANI MASILIA.....2<sup>ND</sup> ADMINISTRATOR/PROTESTOR

VERSUS

PETRONILLA WANZA

J.M MBINDYO.....3<sup>RD</sup> ADMINISTRATOR/APPLICANT

JACINTA MUTIO MASILIA.....4<sup>TH</sup> ADMINISTRATOR/APPLICANT

**RULING**

1. The application for determination is dated 09/06/2020 and was filed under certificate of urgency. It is brought under Sections 3A, 3B & 95 of the Civil Procedure Act, Order 9 Rule 9 of the Civil Procedure Rules (CPR), Rule 59, 67 & 73 of the Probate & Administration Rules and all other enabling provisions of the law. It seeks;

a) *Spent.*

b) **That**, leave be granted to the firm of Kivuva Omuga & Co. advocates to come on record on behalf of the 3<sup>rd</sup> and 4<sup>th</sup> Administrator/Applicants in the place of the firm of E.K Njagi & Co. advocates and Wambua & Wambua advocates.

c) **That**, the time for lodging and filing an appeal against the judgment of this Honourable court delivered on, and dated 13/02/2020, be enlarged or extended to allow the filing and serving of the same within such time as the court shall deem fit.

d) **That**, costs be provided for.

2. The application is supported by the grounds on its the face and the supporting affidavit of Jacinta Mutio Masilia sworn on the same day. She deposes that after delivery of judgment on 13/0/2020, they instructed their advocates, E.K Njagi & Co. advocates, to lodge a notice of appeal and presumed that it had been done. She was not in contact with their advocates because her phone was stolen but since she was operating from the village, she decided to visit the court registry on 16/03/2020 but it was closed due to the Covid-19 pandemic.

3. Information was finally given to her by the registry staff on 01/04/2020 and she realized that the notice of appeal was never filed hence their decision to instruct the firm of Wambua & Wambua advocates. The new firm filed a notice of appointment without seeking leave to be on record and the same was struck out.

4. She deposes that the firm of Wambua & Wambua advocates has consented to the firm of Kivuva Omuga & Co. advocates coming on record but the firm of E.K Njagi & Co. advocates insists that their taxed bill has to be deposited in court before they consent. She has exhibited a letter from the firm of Wambua as JMM-1(a) and a draft consent between the firms of Njagi and Kivuva as JMM-1(b).

5. She deposes that they should not be penalized for the failure of their advocate to lodge the notice of appeal. It is also her deposition that they have raised serious issues of law which require the input of the Court of Appeal. She deposes that they were granted bequests whose titles no longer exist. The draft memorandum of appeal is exhibited as JMM-2.

6. The application is opposed by Thomas Muthiani Masilia through his replying affidavit sworn on 24/06/2020. He deposes that the Applicants have not attached any letter to prove that they actually instructed the firm of E.K Njagi & Co. advocates to lodge a notice of appeal. He has also deposed that the Applicants had sufficient time before closure of courts but they willingly and intentionally failed to file their appeal on time. It is also his deposition that there were practice directions enabling litigants to file matters during the pandemic but the Applicants were indolent hence the delay is inordinate.
7. He deposes that the memorandum of appeal does not raise any arguable appeal on merit and that during the hearing of the succession case, the Applicants produced a valuation report which listed all the properties of the deceased and as such, the issue of non-existent properties does not arise.
8. It is also his deposition that the advocates instructed to pursue this application are not properly on record as they have filed an unexecuted consent hence have not adhered to the provisions of the law. He deposes that he will suffer irreparable loss, unnecessary costs and expenses if the orders sought are granted.
9. There are grounds of objection dated 30/06/2020, filed by counsel E.K Njagi. He avers, firstly, that the firm of Wambua & Wambua Advocates has never been on record for the Applicants and that the application is similar to a previous one which was dismissed by this court hence frivolous, vexatious and an abuse of court process. Secondly, that the application offends Rule 39 (a) of the Court of Appeal rules in that they have only sought extension of time to file notice of appeal instead of seeking extension of prescribed time hence fatally defective.
10. Thirdly, that the Applicants are guilty of perjury because the 4<sup>th</sup> Administrator/Applicant and advocate E.K Njagi share an office hence the issue of not being in contact is a blatant lie. He has also denied ever receiving instructions to lodge an appeal. Fourthly, that all the administrators were in court during the judgment and it clearly states that they had a right to appeal within 28 days which essentially ended on or around 11/03/2020. That the 4<sup>th</sup> Administrator being an advocate of this court was well aware of the time frame to lodge an appeal yet the current application was filed three months after delivery of the judgment. Accordingly, he avers that the delay is inordinate and the intended appeal is an afterthought.
11. Fifthly, that the Applicants have not provided any security for payment of the Advocate on record despite having represented them for over 4 years in Machakos and Makueni until the matter was concluded.
12. Directions were given that the application be canvassed through written submissions. Accordingly, the parties complied and filed their respective submissions, through their counsel
13. The Applicants while relying on Order 9 Rule 9 of the CPR, submit that change of Advocates after judgment can only be through consent or leave after notice to all parties and the firm of Kivuva Omuga filed this application because the firm of Njagi failed to execute the consent. They rely on **Nairobi HCCA 9 of 2007; Protein & Fruits Processors Ltd & Anor –vs- Diamond Trust Bank Kenya Ltd (2015) eKLR** where Onyancha J stated that;
- “In my understanding, the principle behind the provision of Order 9 Rule 9 of the Civil Procedure Rules is to give notice to the previous advocates and those of opposite parties of the entry of a new advocate on the record.”*
14. They contend that once a party seeks leave and informs all parties, no court should have discretion to bar a party from changing advocates as claimed by the respondents.
15. They further submit that Rule 75 of the Appellate Jurisdiction Act requires a notice of appeal to be lodged within 14 days from the date of judgment and that section 7 thereof gives wide powers to this court to grant the orders sought in this application. Further, they submit that the Court of Appeal exercises jurisdiction to extend time under rule 4 of the Court of Appeal rules. They contend that it matters not whether this application is made in this court or Court of Appeal.
16. It's their contention that the power to extend time is discretionary and rely on the Court of Appeal decision in **Andrew Kiplagat Chemaringo –vs- Paul Kipkorir Kibet (2018) eKLR** where it was stated that;
- “It is now well settled that the decision whether or not to extend the time for appealing is essentially discretionary. It is also well settled that in general the matters which this court takes into account in deciding whether to grant an extension of time are: first, the length of the delay, secondly, the reason for the delay, thirdly (possibly) the chances of the appeal succeeding if the application is granted and fourthly, the degree of prejudice to the respondent if the application is granted.”*
17. They submit that the delay herein is about 40 days hence not inordinate and that they have given adequate and reasonable explanation for it. They contend that oral instructions are sufficient as there is no requirement in law for counsels to be instructed in writing by clients.
18. Further, they submit that the grounds of opposition are extraneous as Advocate E.K Njagi is no longer on record and is not a party to the proceedings. They contend that he can only submit on issues relating to his costs before the Deputy Registrar. It is also their submission that grounds of opposition are not evidence and as such, the affidavit in support of the application remains unchallenged.
19. They urge this court to take judicial notice of the many challenges flowing from the Covid-19 pandemic and make a finding that their explanation is sufficient.
20. They submit that the question of whether an agreed schedule of properties survives revocation of grant as an enforceable contract between beneficiaries is a serious legal question worthy of input of higher courts.

21. The Respondents through their counsel Mr. Judah Kioko identify the following as the issues for determination;

- a) Whether the firm of Kivuva & Co. advocates is properly on record.
- b) Whether the Administrator/Applicant should be granted leave to file the Notice of appeal out of time.

22. On the first issue, they urge the court to note the mischief of the Applicants in claiming that the firm of Wambua & Wambua advocates has consented to allow the firm of Kivuva Omuga & Co. advocates to come on record. Relying on the case of **Tarwadi –vs- Muehlemann (2019)**, they submit that Order 9 Rule 9 of the CPR is meant to protect the advocates from mischievous clients who will bolt once judgment is delivered and proceed to do a replacement or to act in person. They have also cited in **Re Estate of Abdulaziz Ahmed (Deceased) (2019) eKLR** where the Court stated that;

*“The law and the rules made thereunder are meant to aid the administration of justice in an orderly manner. They must be followed and Article 159 (d) or even the oxygen rule is not a panacea for all instances of flouting rules. Total disregard of legal procedures in the administration of justice would be a sure invite of anarchy into the administration of justice.”*

23. On the second issue, they submit that the decision of whether or not to extend time for appealing is discretionary and the principles to be considered are;

- a) It is an equitable remedy that is only available to a deserving party at the discretion of the court.
- b) A party seeking extension of time has the burden of laying a basis to the satisfaction of the court.
- c) The discretion to extend time is a consideration to be made on a case by case basis.
- d) The delay should be explained to the satisfaction of the court.
- e) Whether there will be prejudice suffered by the Respondents if extension is granted.
- f) Whether the application has been brought without undue delay and
- g) Consideration of public interest in certain cases like election petitions.

#### **Analysis and determination**

24. Having considered the application, the responses and the rival submissions it is my view that the following issues arise for determination.

- a) Whether the firm of Kivuva Omuga & Co. advocates should be allowed to come on record for the Applicants.
- b) Whether the time for filing an appeal against the judgment of this court should be extended.

#### **(a) Whether the firm of Kivuva Omuga & Co. advocates should be allowed to come on record for the Applicants**

25. The firm of Wambua & Wambua advocates filed an application, dated 08/04/2020, seeking extension of time to appeal but it was struck out for being incompetent because the firm had not complied with the provisions of Order 9 Rule 9 of the CPR. Consequently, and as correctly submitted by the respondents, that firm has never been on record for the Applicants and cannot purport to consent to bring another firm on record.

26. **Order 9 Rule 5** of the CPR provides as follows;

*“A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.” (emphasis mine)*

27. On the other hand, **Order 9 Rule 9** of the CPR 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.”*

28. The firm of E.K Njagi advocates represented the Applicants until judgment was delivered by this court and since it has not been shown that the firm was removed from the record or that it applied to cease being on record in terms of rule 12 and 13 respectively, my view is that it is considered the 'outgoing advocate' for purposes of Order 9 Rule 9 Civil Procedure Rules.

29. From the grounds of objection, it is clear that the firm is not ready to consent to bring the firm of Kivuva Omuga & Co. advocates on record. That however does not mean that the Applicants will not engage any other advocate until the firm of E.K Njagi advocates agrees. They still have this route that they have followed of filing the current application under Order 9 Rule 9(a) Civil Procedure Rules.

30. The firm of E.K Njagi advocates has raised the issue of nonpayment of fees which in my view should not impede the Applicants in their quest to change representation. The option of taxing their bill is still available. In short, the process of getting their fees is well protected by the law.

31. The upshot is that I am unable to see the hurricane prejudice that will be occasioned if the firm of Kivuva Omuga & Co. advocates are granted leave to come on record for the Applicants.

**(b) Whether the time for filing an appeal against the judgment of this court should be extended.**

32. **Rule 75** of the **Court of Appeal Rules, 2010** provides that a notice of appeal should be lodged within fourteen days of the date of the decision against which it is desired to appeal. The impugned judgment was delivered on 13/02/2020 hence the notice of appeal was supposed to have been lodged by 27/02/2020.

33. The first attempt to seek extension of time was made by the Applicants through their application dated 08/04/2020 but the same was struck out for want of compliance with mandatory legal provisions. In my view, the period between 27/02/2020 and 08/04/2020, which is slightly over one month, (to be specific five weeks is the period of delay that should guide this court.

34. **Section 7** of the **Appellate Jurisdiction Act** provides as follows;

*“The High court may extend the time for giving notice of intention to appeal from a judgment of the High court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired...”*

35. It is evident that the Applicants had time to lodge the notice of appeal before the Covid-19 pandemic landed in this country in mid-March. They claim to have instructed Mr. E.K Njagi to do so immediately after the judgment was delivered but counsel has denied ever getting such instructions. He has also questioned the Applicant's deposition of having lost contact with him.

36. These statements by counsel are however not contained in an affidavit and as such, are less weighty compared to the Applicant's depositions. Be that as it may, I do not agree with the respondents that the period of delay is inordinate. Accordingly, the reasons advanced by the Applicants for the delay should be considered.

37. Mr. E. Njagi has also cited Rule 39 of the Court of Appeal Rules 2010 which deals with cases where appeals lie on certification by superior courts or with the leave of the court. In the instant case, the Applicants have a right to go to the Court of Appeal upon being dissatisfied with the ruling of this court. Accordingly, the intended appeal is one that lies as of right as opposed to one that needs certification or leave.

38. On the merits or otherwise of the intended appeal, I choose to say nothing about it because what is being challenged was specifically decided on by this court. The interests of justice would demand for a relook on that decision by a higher court which is the Court of Appeal.

39. I therefore allow the application and make the following orders:

- i. The firm of Kivuva Omuga & Co advocates are granted leave to come on record for the 3<sup>rd</sup> and 4<sup>th</sup> Administrators/Applicants in place of the firm of E.K Njagi & Co. advocates.
- ii. Time for lodging and filing appeal against the judgment delivered on 13<sup>th</sup> February 2020 is hereby extended by seven (7) days from today's date.
- iii. The firm of E.K. Njagi & Co advocates has the liberty to file its bill of costs for taxation.
- iv. Costs of this application to the Respondents in any event.

Orders accordingly.

**Delivered, signed & dated this 29<sup>th</sup> day of July 2020, in open court at Makueni.**

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**H. I. Ong'udi**

**Judge**