REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

(Coram: Odunga, J)

MISC. APPLICATION NO. 84 OF 2020

PATRICK CASTRO MWONGELA.....1ST APPLICANT

PETER MULWA MUINDE.....2ND APPLICANT

VERSUS

FAITH MWENDE NTHIWA.....RESPONDENT

RULING

1. By a Motion on Notice dated 21st July, 2020, the applicants herein seek the following orders:

> **1) THAT this application be certified as urgent and be heard *ex parte* in the first instance.**
>
> **2) THAT the honourable court be pleased to grant leave to the applicants to appeal out of time against the judgment of the Hon Magistrate C. Ocharo in chief Magistrates Court Civil No. 115 of 2019 and the judgment delivered on 15th June,2020**
>
> **3) THAT the honourable court be pleased to stay execution of the judgment and decree in Machakos Chief Magistrates Court Civil Suit No. 115 of 2019 pending the hearing and determination of the application herein**
>
> **4) THAT the honourable court be pleased to stay execution of the judgment and decree in Machakos Chief Magistrates court Civil Suit No. 115 of 2019 pending the hearing and determination of the intended appeal herein**
>
> **5) THAT the cost of this application abide the outcome of the intended appeal.**

2. In the support of the Application, the Applicants filed an affidavit sworn by **Isabella Nyambura**, the Legal Counsel at Directline Assurance Company Limited, the applicant's insurers.

3. It was deposed that on 15th June, 2020, judgement was delivered against the Applicants in which they were held 80% liable and ordered to pay the Respondent General Damages in the sum of Kshs 2,000,000.00, Special Damages of Kshs 27,000.00 plus costs and interests.

4. It was deposed that the advocate who was handling the matter left the firm without proper handover and that the judgement was discovered after the stay had lapsed when the Respondent forwarded a letter stating that judgement had been delivered. Aggrieved by the said judgement the present firm on record was instructed to appeal against the said judgement. However, the time prescribed for appealing lapsed on 15th July, 2020, 30 days after the judgement was delivered. In the applicants' view, the intended appeal is merited, arguable and raises pertinent points of law hence has overwhelming chances of success.

5. It was averred that the inadvertent delay was highly regretted and since the Applicants had nothing to do with it, they should not be penalised for the mistake of their advocates.

6. The Applicants averred that they are desirous of filing the appeal against the judgement on both liability and quantum which in their view was excessive.

7. According to the Applicants, the judgement sum is substantial and they are apprehensive that should the same be paid and the intended appeal is successful, they might not be able to recover the same from the Respondent whose means are unknown. The applicants disclosed that they were ready and willing to deposit the whole decretal amount in Court.

8. In the Applicants' view, the application has been made without undue delay and the delay is in any case not so inordinate as to ne inexcusable and that the Respondent will not suffer any prejudice or damage not capable of being compensated by way of costs. On the other hand, the Applicants stand to suffer substantial loss as there is likelihood that they will not recover the decretal amount were it to be paid over to the Respondent.

9. In opposing the application, the Respondent swore that the present firm of advocates came on record on 23rd June, 2020 while the judgement was entered on 15th June, 2020 hence they cannot allege lack of knowledge of the judgement. It was therefore averred that the present application is an afterthought and is a delaying tactic intended to deny the Respondent the fruits of a lawfully obtained judgement.

10. According to her legal advisers, an application for leave to file an appeal out of time cannot be merged with an application for stay pending appeal hence the application is bad in law and incompetent.

11. The Respondent deposed that the applicants have not met the set criteria for grant of stay pending appeal and in any case there is no properly filed appeal hence the orders sought cannot be granted.

12. It was disclosed that judgement on liability was entered by consent of the parties in the ratio of 80:20 in favour of the Respondent hence it cannot be said that there is likelihood of substantial loss which the Applicants have in any case not demonstrated.

13. On behalf of the Applicants, it was submitted that under section 3A of the ***Civil Procedure Act*** this Honourable Court has inherent, immense and considerable power to make such orders as may be necessary for the ends of justice and nothing in the Act or otherwise can affect this power. According to the Applicants, in the circumstances of this case, the ends of justice in this case demand that a genuine, viable, strong and merited Appeal such as the one intended herein should be heard and determined purely on its merits so that all matters and issues in controversy are finally determined. In support of this submission the Applicants cited the pronouncement of **Mativo J.** in **Wachira Karani vs. Bildad Wachira [2016] eKLR**.

14. In view of the foregoing, the Applicants implored this Court to exercise its wide powers under section 3A of the CPA and admit the Appeal herein for hearing and thereafter proceed to hear and determine the same purely on its merits so as to ensure that the ends of justice are met. As was held in **Patel vs. E.A. Cargo Handling Services Ltd., (1974) E.A. 75,** the main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given to it by the rules.

15. The Applicants also relied on Section 95 of the ***Civil Procedure Act*** and submitted that there are numerous consistent provisions that exist under the ***CPA*** and the ***Civil Procedure Rules*** **(CPR)** that gives this Honourable Court wide discretionary power to extend time for filing of an Appeal. According to the Applicants, the existence of numerous, repetitive but consistent provisions on this single subject of law alone point out to the fact that the intention of the legislature and/or the drafters of the ***CPA*** and the ***Rules*** made thereunder was to ensure that a deserving party/appellants is not denied an opportunity to have his/her case heard and determined purely on its merits.

16. It was submitted that an appellant should not be denied an opportunity to prosecute his Appeal or driven from the judgment seat unless the Appeal is unarguable.

17. Accordingly, it is very necessary for this Honourable to consider whether or not the Applicants have an arguable case. In this case it was submitted that the draft Memorandum of appeal annexed to the present Application sets out precisely the grounds upon which the Applicants intend to appeal the decision of the lower court. The main ground which the Applicants intend to rely upon is the excessive award made by the lower court which was not proportionate to the injuries suffered by the Respondent and which was not in tandem with the conventional awards given for similar injuries. It was therefore submitted that the Memorandum of appeal herein is arguable and raises serious points of law and fact that warrant this Court's intervention on appeal.

18. According to the Applicants, in applications for stay pending Appeal in the subordinate courts it is not a requirement to show that the Appeal has high chances of success, the Applicant only needs to show he has an arguable appeal and reliance was placed on **Bake 'N' Bite (Nrb) Limited v Daniel Mutisya Mwalonzi [2015] eKLR**.

19. The Applicants submitted that the exercise of court's discretion has been the subject of numerous court decisions. The principles governing the exercise of the judicial discretion are: Firstly, there are no limits or restrictions on the judge's discretion. The main concern of the court is to do justice to the parties, and the court will not impose conditions on itself to fetter the wide discretion given it by the rules. Secondly, this discretion is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist the person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice. They relied on the decision of **Havelock J.** in **Esther Wamaitha Njihia & 2 others vs. Safaricom Limited [2014] eKLR**.

20. The Applicants then proceeded to make submissions on some matters which were not deposed to by stating that as explained in the Supporting Affidavit sworn by **Isabella Nyambura** on 21st July 2020, the delay in filing the Memorandum of Appeal was occasioned by the fact that when Covid 19 pandemic was declared and courts were closed we were not aware if the judgment had been delivered and only learnt of its delivery when we were sent by the respondents Advocate a latter for the costs of the suit on the 9th of July 2020 and by the time we could obtain a copy of the judgment delivered on 15th June 2020 30 days had already passed from the date of delivery of the said judgment. The Respondents submitted that from the foregoing, the advocate on record was not in a proper position to advise the client fully and comprehensively on time to enable the client issue instructions to appeal and or otherwise act on the judgment.

21. According to the Applicants, they have demonstrated a good and sufficient cause for not filing the Appeal on time and the Applicants therefore pray that they granted leave to file their Appeal out of time since the delay for filing the Appeal has sufficiently been explained by the Applicants and the same constitutes a sufficient cause and they relied on **Wachira Karani vs. Bildad Wachira** *(supra).*

22. On stay, it was submitted that in support of the present Application **Isabella Nyambura** in her Affidavit filed herein specifically stated that the Respondent's means are unknown and it is highly unlikely that the Respondent will be capable of refunding the decretal amount in the event that the Applicants' Appeal succeeds since the Respondent has not disclosed nor furnished the Court with any documentary evidence to prove his financial standing. The Respondent in her Replying Affidavit did not dispute this and/ or show that she had means of paying the decretal amount in the event judgment was delivered in favor of the Applicants. It was submitted that the Respondent herein is the only one who can specifically show that he has means to repay the decretal amount if the court allows the filing of the Memorandum of Appeal and the said appeal succeeds and they relied on **Edward Kamau & Another vs. Hannah Mukui Gichuki & Another [2015] eKLR**.

23. According to the Applicants, in the absence of an Affidavit of means, the Respondent's financial status is still unknown and has not been proven by merely stating that he is in a position to provide an irrevocable bank guarantee. There is therefore still a likelihood that the Respondent has no means to refund the decretal amount. Since **Isabella Nyambura** stated in her affidavit that there is reasonable apprehension that the Respondent will be unable to repay the decretal amount, the evidentiary burden is shifted to the Respondent to show that he has the financial resources to satisfy the decretal amount. To support this position reference was made to the case of **Recoda Freight & Logistic Ltd vs. Elishana Angote Okeyo [2015] eKLR** and **Tabro Transporters Ltd vs. Absalom Dova Lumbasi [2012] eKLR**.

24. According to the Applicants, the award of Kshs 2,027,000 plus costs and interest is a substantial sum and in the event that the Respondent is unable to repay the decretal sum, the Appeal will have been rendered nugatory and the Applicants exposed to irreparable damage since the subsequent Decree would be no more than a paper Decree. In the circumstances, this is a suitable case where this court should exercise its discretion and order stay of execution.

25. It was the Applicants' case that Contrary to what is alleged in the Respondent's Replying Affidavit herein, there was no unreasonable delay in bringing the Application to court. As indicated in the Applicants' only learnt of the judgment when they were served with a letter seeking payment of costs to the suit by which time the stay had already lapsed necessitating the filling of the current application.

26. On the issue of security, it was submitted that the Applicants have already stated in the Supporting Affidavit to the Application that they are willing to deposit Kshs 200,000.00 as had been submitted by the defendants in their submissions in the lower court file in court as security pending the hearing and determination of the appeal.

27. Therefore, the Applicants having satisfied all the conditions set out in Order 42 Rule 6, it was prayed that an order of stay of execution pending the hearing and determination of the Appeal aforesaid be granted.

28. On the part of the Respondent, it was submitted that the application violates the provision of order 9 Rule 1, advocate for the applicant did not seek leave to appear after judgment was entered and therefore improperly before the court and a stranger to the proceedings and relied on **John Langati –vs- Kipkemoi Terere & 2 Others (2013) eKLR**. According to the Respondent, the judgment of the court in this case was entered on 15th June 2020. However, the appellants purported to file a notice of change of advocates on the 29th June 2020 to have the firm of **Kimondo Gachoka** & Company advocates come on record in place of the firm of **Kairu & McCourt advocates** without an order of the court contrary to order 9 rule 9. Accordingly, the firm of **Kimondo Gachoka** and Company advocates are improperly before the court which renders the application and draft memorandum of appeal incompetent and consequently the same should be dismissed with costs.

29. It was submitted that section 79G of the ***Civil Procedure Act*** provides that an appeal may be admitted out of time if the court is satisfied that the appellant has good and sufficient cause for not filing the appeal in time and reliance was placed on **Thuita Mwangi –vs- Kenya Airways ltd (2003) eKLR**.

30. As for the delay, it was submitted that judgment on liability was entered by consent of the parties and recorded in the ration of 80:20 in favour of the plaintiff on 15th June 2020.The appellants lodged this application on the 21st of July 2020. It is important to note here that the appellants purported to file notice of change of advocates on 29th June before the period for appeal expired. Therefore they were aware of change of advocates had the intention of appealing the decision yet they waited until the 30th days of appeal expired to bring this application along with the draft memorandum of appeal. This amounts to inordinate delay.

31. The appellant's reason for the delay is that the advocate who was handling the matter left the firm without proper hand over. The appellants have not however, adduced any evidence whether a notice of resignation or termination to indeed show that the advocate who was handling the matter left the firm. Further as already stated a purported notice of change of advocates was filed on 29th June. This illustrates that the appellant already had the intention of appealing the decision which was rendered on 15th June therefore the reason for delay was simply inaction.

32. It was submitted that the application lacks in merit and should be dismissed with costs.

Determination

33. I have considered the submissions filed in support of the parties' respective positions.

34. Before delving on the merits of the application, the Respondent has raised some issues which go to the competency of the application.

35. First, it is contended that a prayer for stay pending appeal cannot be made in the same application seeking extension of time since stay cannot be granted where there is no appeal. The Respondent has however not cited any authority for this robust but novel submission. With due respect to the Respondent there is nothing inherently wrong in an application seeking the twin prayers for extension and for stay. However, in determining the same it is my view that the Court ought to deal with the limb for extension and depending on its outcome, deal

with the stay thereafter.

36. The second objection was that the firm of advocates that has made this application did not seek leave of the Court to do so since it was not on record at the time of the judgement. It was contended that the judgment of the court in this case was entered on 15th June 2020. However, the appellants purported to file a notice of change of advocates on the 29th June 2020 to have the firm of Kimondo Gachoka & Company advocates come on record in place of the firm of Kairu & McCourt advocates without an order of the court contrary to order 9 rule 9. Accordingly, the firm of Kimondo Gachoka and Company advocates are improperly before the court which renders the application and draft memorandum of appeal incompetent and consequently the same should be dismissed with costs.

37. Order 9 rule 9 of ***the Civil Procedure Rules*** 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—***
>
> ***(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.***

38. In **John Langat vs. Kipkemoi Terere & 2 Others (2013) eKLR**, **Muchelulue, J** expressed himself as hereunder:

> **"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**
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> **"without an order of the court."**
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> **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."**

39. In **Loise Wambui Karigu & another vs. Joel Gatungo Kiragu & Another [2016] eKLR**, **Limo, J** expressed himself as hereunder:

> **It is important to note that the provisions of *Order 9 rule 9* were put in place to cover some mischief by a party who after being represented by an advocate in the entire trial decides to abandon the same advocate after judgment without addressing the issue of legal fees earned to that date. It was also intended to ensure that the advocates or parties on the other side are kept informed about the change of address for service of any further court process. The intention of the drafters of this rule was noble and aimed at having some order in civil practice. In the case of LALJI BHIMJI SHANGANI BUILDERS & CONTRACTORS –VS- CITY COUNCIL OF NAIROBI [2012]eKLR the High Court in Nairobi presided over by Hon. Justice Odunga struck out an application by a defendant who did not comply with *Order 9 rule 9* of the *Civil Procedure Rules* and made the following observation:-**
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> *"A party who without any justification decides not to follow the procedure laid down for orderly conduct of litigation cannot be allowed to fall back on the said objective for assistance and where no explanation has been offered for failure to observe the rules of procedure the court may well be entitled to conclude that failure to comply therewith was deliberate."*
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> **The court went further to quote with approval the holding by Hon. Sitati Judge, in MONICA MORAA –VS- KENINDIA ASSURANCE CO. LTD. [2010] eKLR where the court held as follows:**
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> *"……there is no doubt in my mind that the issue of representation is critical especially in case such as this one where the applicant's advocates intent to come on record after delivery of judgment. There are specific provisions governing such change of advocate. In my view the firm of M/S Kibichiy & Co. Advocate should have sought this court's leave to come on record as acting for the applicant. The firm of M/S Kibichiy & Co. has not complied with the rules and instead just gone ahead and filed Notice of Appointment without following the laid down procedures. The issue of representation is vital component of the civil practice and the courts cannot turn a blind eye to situations where the rules are flagrantly breached.…….."*
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> **The applicant's counsel submitted that the provisions of *Order 9 rule 9* do not apply to miscellaneous applications but after judgment has been entered usually what remains is the execution or application for stay or such other application such as the present application. The firm of Rugaita & Co. Advocates deserved to be informed of intention of his client to engage the services of another firm of advocates. The other parties to the said suit also deserve to be notified of the new change of address hence the need to comply with the said rules. In the absence of such leave of court as provided by the law, the application dated 10th February, 2016 is incompetent and is struck out with costs.**"

40. Similarly, in this case, the Applicants have not bothered to deal with this damning contention. Instead the Applicants have hinged their submissions on the inherent powers of the Court.

41. In my view where there a legal provision covering a particular situation, parties ought to bring themselves within the said provision and

ought not to seek refuge in other general provisions since each prescription has its own requirements that parties ought to adhere to. It must be noted that the Court's inherent jurisdiction is not a substitute for the jurisdiction conferred upon the Court under the Constitution or by statute. This is because the Court's inherent jurisdiction is a reserve upon which the Court draws to ensure the ends of justice are met and to prevent abuse of its process and as was held in **Industrial & Commercial Development Corporation vs. Otachi [1977] KLR 101; [1976-80] 1 KLR 529**, section 3A is not a panacea for all ills. It was therefore held in **Elephant Soap Factory Ltd vs. Nahashon Mwangi & Sons Nairobi HCCC No. 913 of 1971** that the court will not invoke its inherent jurisdiction when there is an express provision dealing with the matter since the court may not nullify an express provision by invoking its inherent powers.

42. As was held in **Chelashaw vs. Attorney General & Another [2005] 1 EA 33,** without rules of practice and procedure the application and enforcement of the law and the administration of justice would be chaotic and impossible and their absence or non-adherence would lead to uncertainty of the law and total confusion since laws serve a purpose and they enhance the rule of law.

43. In **Onjula Enterprises Ltd vs. Sumaria [1986] KLR 651,** the Court of Appeal held that:

> **"The rules of the court must be adhered to strictly and if hardship or inconvenience is thereby caused, it would be that easier to seek an amendment to the particular rule. It would be wrong to regard the rules of the court as of no substance. A rule of practice, however technical it may appear, is almost always based on legal principle, and its neglect may easily lead to disregard of the principle involved. See London Association for the Protection of Trade & Another vs. Greenlands Limited [1916] 2 AC 15 at 38.**

44. I associate myself with the decision of the Court of Appeal (**Kiage, JA**) in **Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & 6 Others [2013] eKLR** that:

> **"I am not in the least persuaded that Article 159 of the Constitution and the oxygen principles which both command courts to seek to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an anarchical free-for-all in the administration of justice. This Court, indeed all courts, must never provide succour and cover to parties who exhibit scant respect for rules and timelines. Those rules and timelines serve to make the process of judicial adjudication and determination fair, just, certain and even-handed. Courts cannot aid in the bending or circumventing of rules and a shifting of goal posts for, while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in the even-handed and dispassionate application of rules that courts give assurance that there is clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned."**

45. In **Taracisio Githaiga Ruithibo vs. Mbuthia Nyingi Civil Appeal No. 21 of 1982; [1984] KLR 505,** it was held that no court, could wash away the Rules of Court so ignobly.

46. Accordingly, I agree with the Respondent that the application before me is incompetent and is hereby struck out with costs to the Respondent.

47. It is so ordered.

Read, signed and delivered in open court at Machakos this 28th day of October, 2020.

G V ODUNGA

JUDGE

Delivered in the presence of

Mr Mutinda for Mr Kamollo for the Respondent

CA Geoffrey