REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

HIGH COURT SUCESSION CAUSE NO. 51 OF 2006

IN THE MATTER OF THE ESTATE OF THE LATE BENSON MUYA

ELIZABETH J. TUNOI.....APPLICANT

VERSUS

CHARLES MBATIAH.....1ST RESPONDENT

JOHNSON MBATIAH.....2ND RESPONDENT

ELLY MBATIAH.....3RD RESPONDENT

RULING

The applicant(s) filed an application dated 6th February 2020 seeking the following orders;

a. That leave be granted to the company of Mwaka & Company Advocates to come on record on behalf of the applicants

b. That stay of execution of the ruling and orders of Hon. Justice S.M Githinji on the 7th day of November 2019, and more specifically the notice to show cause for the 10th day of February 2020 be issued pending the hearing and determination of this application.

c. That the court be pleased to grant leave to the applicants to appeal out of time against the ruling and the orders of Hon S. M Githinji of 7th day of November 2019

d. The applicants be granted leave to file and serve the court of appeal and/or file of fixing and service of the notice of appeal be extended

e. That the said leave do operate as stay of all proceedings in the matter herein.

f. That costs of this application be provided for.

The respondent replied by filing grounds of opposition dated 7th February 2020.

APPLICANT'S CASE

There are no submissions on record for the applicant.

The applicant filed a supporting affidavit wherein he states the grounds of the application. They aver that they were not aware of the orders of the court as they were never briefed of the same on 30th January 2020. They only became aware when they were served with the order and the notice to show cause. They have discovered that they were unrepresented when the application was heard as their advocate had ceased to act for them and appear in court and they were never served with the hearing and mention dates.

The applicants were due to appear for a notice to show cause on 10th February 2020. The time for filing the notice of appeal and the substantive appeal has lapsed due to their being unaware of the ruling.

They further aver that it will be in the best interest of justice that the court do issue preservatory or restraining orders as prayed until they are

allowed to appeal out of time and the Notice of appeal is validated and a stay issued pending the appeal.

The applicants stand to suffer great loss in the event that the prayers are not granted. The application has been brought without delay and the applicants/respondent will not be prejudiced in any way if the orders are granted.

RESPONDENT'S CASE

The respondent filed their submissions on 31st October 2020.

They submit that the application is incompetent as it offends *rule 49* of the *Probate and Administration Rules*. They cite the case of ***Re Estate of Omar Abdalla Taib (2017) EKLR*** where the court observed that a succession matter is governed by the law of succession.

The respondents submit that the High Court has no jurisdiction to grant leave to appeal out of time, leave to file and serve notice of appeal and extension of time under the law of Succession Act and the probate and administration rules. It is only the court of appeal under *rule 4* of the *Court of Appeal Rules, 2010* that has the jurisdiction to consider an application for extension of time. Rule 4 is the substantive rule for the exercise of jurisdiction to extend time for transacting any business under the court of appeal rules.

The respondents cite the case of ***Owners of the Motor vehicle 'Lillian's' v Caltex Oil Kenya Limited (1989) eKLR*** on the issue of jurisdiction. They also cited the case of ***Simon Towett Martim v Jotham Muiruri Kibaru, Misc. Civil Application No. 172 of 2004 eKLR*** where Justice Kimaru held that *Rule 4* of the *Court of Appeal rules* grants exclusive jurisdiction to grant extension of time to file an appeal to the court of appeal. In the circumstances, the High Court has no jurisdiction to entertain an application for extension of time to lodge notice of appeal out of time.

The court has no jurisdiction to consider the grant of a stay of proceedings where no Notice of Appeal has been lodged as required by *Orders 42 Rule 6(4)* of the *Civil Procedure Rules, 2010*. The application is not tenable as the applicant has not filed a notice of appeal and he has not demonstrated that he would suffer substantial loss should the orders not be granted.

An applicant for stay pending appeal is obliged to satisfy the conditions set out in *Order 42 rule 6(4).* As per this rule there is no appeal or notice of appeal filed. The applicants have not come to court with clean hands, they are in contempt by failing to comply with the orders requiring them to deposit kshs. 8,000,000 in court. The court should deny them audience unless they comply.

The application be dismissed with costs.

INTERESTED PARTIES' CASE

The interested parties submitted that a party has a right of choice of a counsel to represent him or her in a matter, the right of choice should not be used to disadvantage other parties. M/s Mwaka & Company, coming on record should not be used to take the matter backwards. This matter proceeded with full representation by counsel on record for the applicants.

The applicants had a duty to participate in the proceedings and if he felt he was not adequately represented he ought to have sought the change but not after the court has made its finding on the issues in question. *Order 9 rule 9* of the *Civil Procedure Rules* is clear on what circumstances the court can grant leave to a party formerly represented to change an advocate. There is no evidence that Lel Bungei & Company advocates on record had been properly served with the instant application to warrant this court to consider it.

The rule must be adhered to. It was brought into existence to protect advocates from losing their fees after having represented a party in a matter and the party fires such advocate and moves to another in an attempt to avoid paying fees.

This court must be satisfied that indeed the firm of M/s Lel Bungei & Company had been duly served and duly paid before allowing the change to be effected. The change of advocates should not be used to set aside and interfere with proceedings or the orders of this court.

The application is incompetent, bad in law, lacks merit and ought to fail. The conditions set out for grant of stay of execution is provided under *Order 42 rule 6(2)* of the *Civil Procedure Rules*. The applicants have not demonstrated what loss they would suffer should the orders sought be denied. The applicant must specifically demonstrate that substantial loss is likely to result in the event the orders are not granted.

The matter was heard and concluded on 7th November 2019 when this court delivered its ruling. The applicants were duly represented by a competent counsel on record. It took the applicants four months to seek stay. This is a sign of someone who is not serious and this court ought not entertain this application. No explanation has been advanced for the delay in filing the application. The applicant relies on the case of ***David Kihara Murage vs Jacinta Kamana Nyangi & Another (2015) eKLR.***

The respondents submitted that leave to appeal out of time should not be granted. Under *Order 43 rule 3* of the *Civil Procedure Rules, 2010,* an application of this nature must be filed within 14 days of the ruling/judgment of the court. The application was filed 4 months after the decision and must without wasting time be rejected. The applicants have made no effort to explain the delay in filing an appeal to warrant the court to grant leave. The applicant's advocate, M/s Lel Bungei & Co has not sworn any affidavit to explain the delay in filing an appeal and the move to bring another counsel

so as to seek leave is mischievous and this court ought not entertain it. The court is also called upon to consider the issue of whether the intended appeal has any chances of success and the applicant has not presented anything on this, to warrant the consideration of leave.

The prayer for leave of appeal to be granted is alien and strange in law for want of sound legal foundation. The interested party wishes to point out that the provisions under *Order 53* of the *Civil Procedure Rules* are not applicable in this case since it is not a judicial review application.

The applicant should bear the costs of the application as the application is incompetent and must fail purely on points of law.

ISSUES TO DETERMINATION

1. **Whether leave should be granted to the firm of Mwaka and Company Advocates to come on record**

2. **Whether stay of execution orders should issue on the orders of 7th November 2019**

3. **Whether the applicants should be granted leave to file their appeal and Notice of Appeal out of time**

4. **Whether such leave should operate as stay of execution, if granted.**

WHETHER LEAVE SHOULD BE GRANTED TO THE FIRM OF MWAKA AND COMPANY ADVOCATES TO COME ON RECORD

The firm of Mwaka & Company advocates is already on record for the applicants and therefore this prayer is overtaken by events and is already spent.

WHETHER STAY OF EXECUTION ORDERS SHOULD ISSUE ON THE ORDERS OF 7TH NOVEMBER 2019

Order 42 Rule 6(2) of the Civil procedure rules provides;

> **No order for stay of execution shall be made under sub rule (1) unless—**
>
> > **(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
> >
> > **(b) 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.**

Whether Substantial loss may result to the applicant

In James ***Wangalwa & Another V Agnes Naliaka Cheseto [2012] eKLR*** the Court held;

> **No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process.**
>
> **The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the Applicant as the successful party in the appeal. This is what substantial loss would entail, a question that was aptly discussed in the case of *Silverstein N. Chesoni [2002] 1KLR 867*, and also in the case of *Mukuma V Abuoga* quoted above. The last case, referring to the exercise of discretion by the High Court and the Court of Appeal in the granting stay of execution, under Order 42 of the CPR and Rule 5(2) (b) of the Court of Appeal Rules, respectively, emphasized the centrality of substantial loss thus:**
>
> ***"…the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."***

In the premises the applicant has failed on this limb in particular.

Whether the application has been made without unreasonable delay

The ruling was delivered on 7th November 2019. The application was made on 6th February 2020, close to three months after. They have attributed the delay to the fact that they were unrepresented as their advocate had ceased acting and thus they were unaware of the orders. A perusal of the ruling indicates that there was no advocate for the respondent on the day of the ruling.

In re ***Estate of Margaret Njambi Thuo (Deceased) [2020] eKLR*** the court held as follows on unreasonable delay;

> **The applicant has not bothered to explain the delay of two months. What is considered as unreasonable delay will vary from case to case. In *Jaber Mohsen Ali's case*, the court said as follows:**

> ***"The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after Judgment could be unreasonable delay depending on the Judgment of the court and any order given thereafter."*** **The Judge went ahead to state that ……. *"In the case of Christopher Kendagor v Christopher Kipkorir, Eldoret ELC No.919 of 2012 the applicant had been given 14 days to vacate the suit land. He filed an application one day after the 14 days. The application was denied. The court holding that, the application ought to have come before expiry of the period given to vacate the land."***

I find that three months is too long a period to not have followed up on the matter. Further, their advocates while filing an application to cease acting touted the fact that the applicants were not picking their calls or communicating with them. In the premises I find that the delay was unreasonable. The litigants were clearly dragging their feet and ignoring the matter.

Security

The applicants have made no suggestions or proposals on security.

The orders for stay cannot issue in the premises. In ***Charles Nyamweya v Asha Njeri Kimata & another (2017) eKLR*** which cited case of ***Housing Finance Co of Kenya v Sharok Kher Mohamed Ali Hirji & another (2015) eKLR.***where it was stated:

> ***" the mere fact that there are strong grounds of appeal would not, in itself justify an order for stay…the applicant must establish a sufficient course; secondly, the court must be satisfied that substantial loss would ensue from a refusal to grant a stay and thirdly, the applicant must furnish security, and the application must, of cause, be made without unreasonable delay."***

Whether the applicants should be granted leave to file their appeal out of time

The respondents have argued that the court has no jurisdiction to extend time to file an appeal. However, in the case of ***Loise Chemutai Ngurule & Another v. Winfred Leshwari Kimung'en & 2 Others (2015) eKLR*** the court held;

> **"It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of *Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004) eKLR*. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.**
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> **With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows: -**
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> ***S. 7 Power of High Court to extend time***
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> ***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:***
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> **…**
>
> **It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.**
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> **Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows: -**
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> ***Rule 4: Extension of time***
>
> **…**
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> **In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows: -….**
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> **One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of**

Appeal out of time.

This also determines whether the applicants can be granted leave to file their notice of appeal out of time. However, this orders are granted based on the courts' discretion. in the Case of ***Stanley Kahoro Mwangi & 2 others v. Kanyamwi Trading Company Limited (2015) eKLR*** the principles were set out as follows: -

> **"The principles guiding the court on an application for extension of time premised upon *Rule 4 of the Rules* are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding**
>
> **such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.**
>
> **…**
>
> **It is upon the applicant to place sufficient material before the court which would explain why there was delay in filing the Memorandum and Record of Appeal. The Court has to balance the competing interests of the applicant with those of the respondent. This was well stated in the case *M/S PORTREITZ MATERNITY V JAMES KARANGA KABIA, CIVIL APPEAL NO. 63 OF 1997* where the Court stated:**
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> ***"That right of appeal must be balanced against an equally weighty right, that of the Plaintiff to enjoy the fruits of the judgment delivered in his favour. There must be a just cause for depriving the Plaintiff of that right."***
>
> **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 exercised.**

Having weighed the foregoing, I find that the applicant has not given a plausible and satisfactory explanation for the delay and thus the leave to file the notice of appeal lacks merit.

In the premises, the application fails in its entirety and is hereby dismissed with costs.

S.M GITHINJI

JUDGE

DATED, SIGNED and **DELIVERED** at **ELDORET** this **30th** day of **November** 2020.

In the presence of:-

Mr. Mwaka for the applicant (absent)

Mr. Mugambi for respondent

Mr. Mukhabane for the interested party.

Ms Gladys - Court assistant