



**REPUBLIC OF KENYA**

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

**MISCELLANEOUS APPLICATION NO. 215 OF 2020**

**1. NDUNGU MUHINDI JAMES**

**2. LEONARD WAWERU NGIGI.....APPLICANT**

**VERSUS**

**CECILIA WANJIKU WAWERU.....RESPONDENT**

**R U L I N G**

**1. Ndungu Muhindi James and Leonard Waweru Ngigi**, hereinafter the applicants filed a Notice of Motion application dated 28<sup>th</sup> October 2020 seeking the following prayers:

*(a) The firm of Mwangangi Nzisa & Associates Advocates be granted leave to come on record for the Applicants in place of M/s Simiyu Opondo Kiranga & Co. Advocates.*

*(b) There be a stay of execution of the judgment of the Honourable Court delivered 18.12.2019 pending the hearing and determination of this application.*

*(c) There be a stay of execution of the judgment of the Honourable Court delivered 18.12.2019 pending the hearing and determination of the intended appeal.*

*(d) The Applicant be granted an extension of time within which to file an appeal as set out in the annexed Memorandum of Appeal.*

**2.** The stay of execution sought in prayer (b) and (c) above is in respect to the judgment of the Kikuyu Magistrate's Court in Civil Case No. 322 of 2017. That judgment was delivered on 18<sup>th</sup> December 2019.

**3.** At the hearing of the application preliminary Objection was raised on behalf of **Cecilia Wanjiku Waweru**, the respondent. That preliminary objection is dated 19<sup>th</sup> November 2020. The objections thereof are as follows:

*(a) THAT the application dated 28<sup>th</sup> October, 2020 is irregular, null and void for contravention of the mandatory requirement provided for under Order 9, Rule 9 of the Civil Procedure Rules. The firm of Mwangangi Nzisa & Associates Advocates are not properly on record as the said application was filed without leave of the court.*

*(b) THAT the application is time barred and contrary to the provisions of Section 79 G of the Civil Procedure Act Cap 21 Laws of Kenya. The judgment sought to be appealed against was delivered on 18<sup>th</sup> December, 2019 and Section 79 G of the Civil Procedure requires that a party wishing to appeal against any decision of the subordinate court has to file the memorandum of appeal within 30 days from the date of the judgment.*

*(c) THAT there has been inordinate delay in bringing the application hence an abuse of the court process.*

*(d) THAT the entire application is an abuse of and waste of the court's judicial time and is solely meant to defeat the overriding objective of the court*

*as per the provisions of Section 1A and 1B of the Civil Procedure Act Cap 21.*

*(e) THAT the instant application and in particular, the order for stay execution pending appeal, amounts to and/or constitutes an*

abuse of the due process of the Court. There cannot be a stay of execution of the lower court's decree pending hearing of an appeal which does not exist.

(f) THAT the application is frivolous, vexatious and otherwise an abuse of the process of the court as the orders sought is incapable of being enforced.

(g) THAT the applicants' application is misguided, bad in law, nullity ab-initio, fatally defective and should be dismissed with costs to the Respondent

4. In support of those objections learned counsel **Mrs. Kihika** submitted that the Applicants' application was defective because it is contrary to Section 79 G of the Civil Procedure Act, Cap 21, in that the judgment of the Lower Court was delivered on 18<sup>th</sup> December 2019, that is, it was filed beyond the 30 days period provided to appeal the lower court's judgment. In this case learned counsel **Mrs. Kihika** emphasized that there is no appeal before court.

5. Further on behalf of the respondent it was submitted that the Law firm of Mwangangi Nzisa & Associates were not properly on record for the Applicants, that leave needed to be obtained before the present application was filed. That under Order 9 Rule 9 of the Civil Procedure Rules (hereafter the Rules) an advocate should first seek leave to come on record for a party before filing a substantive application.

6. In response learned counsel **Mr. Havagali** submitted that the present application sought Leave for the Law firm of Mwangangi Nzisa & Associates to come on record for the applicants whilst also seeking stay of execution of the Lower Court's judgment pending the yet to be filed appeal. Learned counsel further argued that this being a Miscellaneous matter it was a fresh matter and therefore was not subject to Order 9 Rules of the Rules.

### **ANALYSIS AND DETERMINATIONS**

What the Respondent has brought is preliminary objection. Preliminary objection is considered under strict strictures which have been the subject of several court decisions. In the case **County Government of Migori -v- INB Management IT Consulting Limited (2019) e KLR Justice Mrima** considered those strictures and stated:

*“As the issue under consideration was raised by way of a Preliminary Objection, it will be in order for me to have a look at the law on preliminary objections. Law, J.A. in the much-celebrated case of **Mukisa Biscuits Manufacturing Company Limited -vs- West End Distributors (1969) EA 696** had the following to say: -*

*So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded or which raises by clear implication out of pleadings, and which if argued as a preliminary point, will dispose of the suit. Examples are an objection to jurisdiction of the court, a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the matter to arbitration.....*

My brother **Mwita, J.** in the case of **John Musakali vs. Speaker County of Bungoma & 4 others (2015) eKLR** put the foregone legal position in clearer terms when he stated that: -

*The position in law is that a Preliminary Objection should arise from the pleadings and on the basis that facts are agreed by both sides. Once raised the Preliminary Objection should have the potential to disposing of the suit at that point without the need to go for trial. If, however, facts are disputed and remain to be ascertained, that would not be a suitable Preliminary Objection on a point of law.*

7. It is clear that a preliminary objection can only be raised on pure points of Law which has been pleaded and which does not seek the court to exercise its discretion. It would therefore follow that most of the objections raised by the Respondent fail to meet the mark of a preliminary objection. Such preliminary objection which fail the Legal test of a preliminary objection are objection seeking the striking out of the application on the ground that the same was filed after inordinate delay; objection that it is an abused and waste of court's judicial time; objection that the application is frivolous and vexatious; and objection that the application is misguided and bad in Law. It follows that those objections will be dismissed for they seek this court to exercise its discretion.

8. The objections that subsist for consideration are that the application contravenes Order 9 Rule 9 of the Rules; that the application is contrary to Section 79G of Cap 21 and therefore a stay of execution cannot be entertained.

9. Order 9 Rule 9 of the 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. (emphasis mine)*

The Applicants' advocate sought to argue, and in my view in error, that the present matter was a fresh matter and was not therefore caught by the provision of the above Rule. The mischief that this rule sought to remedy is instances where clients changed advocates after judgment was entered with a view to deny such an advocate receiving their fees from the judgment amount. This was also the point of view of the Learned **Justice Okwany** in the case **Mombasa Highway Transport Limited -v- Gulf Africa Bank Limited [2019] eKLR** thus:

*“Order 9 rule 9 of the Civil Procedure Rules is applicable in instances where a party changes the advocate after judgment has already been entered in the suit. The reasoning behind the provision was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where the judge observed as follows:*

*“...In my view, the essence of the order 9 rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...”*

10. The Respondent erred to argue that this matter before this court was a fresh matter under a miscellaneous application and therefore there was no need to comply with Order 9 Rule 9 of the Rules. Nothing could be further from the truth. The Respondent seeks to appeal from and to stay the lower court's judgment. The Lower court's judgment is a continuous matter to this matter, they cannot be separated. It follows that because there is judgment against the Respondent in that Lower court matter the Law firm of Mwangangi Nzisa & Associates is obligated to seek leave to act for the Respondent in place of the previous advocate as provided under Order 9 Rule 9 of the Rules. I suspect that Law Firm was of that same opinion because as it will be recalled in the application it sought Leave to act for the Respondent.

11. Where however I part company with the arguments of the Applicants is that the firm of Mwangangi Nzisa & Associates should have sought Leave to act for the Respondent before seeking other prayers. There is in my view no error in seeking Leave to act for the Respondent in combination with other prayers. For that reason, the prayer to seek to act for the Respondent has merit and will not be struck out.

12. The other preliminary objection touches on the validity of the prayers for leave to file an appeal out of time and for stay pending the hearing and determination of the yet to be filed appeal.

13. There has been a long line of High Court decisions to the effect that a party should first file an appeal then seek leave to proceed with that appeal, if filed out of time. In other words, that the appeal should be filed and on record as the party seeks it be admitted for hearing out of time. I can do no better than cite the case of **James Njai Githui -v- Equity Bank Limited (2020) eKLR** thus:

*“17. Coming back to the law, it is clear that no appeal has been filed. The applicant intends to file an appeal. That scenario is not foreseen by Section 79G of the Civil Procedure Act. The proviso foresees a situation where an appellant has filed an appeal, then seeks to have it admitted out of time by an application seeking extension of time and explaining the reasons for delay. Hence I find the words of Emukule J in the **Gerald Limbine** case above necessary.*

*“My understanding of the proviso to section 79G is that an applicant seeking “an appeal to be admitted out of time” must in effect file such an appeal, and at the same time seek the court's leave to have such an appeal admitted out of the statutory period of time. The proviso does not mean that an intending appellant first seeks the court's permission to admit a non-existent appeal out of the statutory period. To do so would actually be an abuse of the court's process under section 79B which says:*

*‘Before an appeal from a subordinate court to the High Court is heard, a judge of the High Court shall peruse it, and if he considers that there is no sufficient ground for interfering with the decree part of a decree or order appealed against he may notwithstanding section 79C, reject the appeal summarily’*

*It seems to me therefore that it is not open to the court to exercise its discretion under the proviso to section 79G of the Civil Procedure Act except upon the existence and perusal of the appeal to be “admitted” not to be “filed out of time.” Admission presupposes that the appeal has been filed and will be “admitted” for hearing after a judge has established under Section 79B that there is “sufficient” ground for interfering with the decree part of a decree or order appealed against.”*

18. I need not belabor the point as this decision is in line with numerous other decisions of this court on the requisite process when filing an appeal out of time. See **APA Insurance Limited v Michael Kinyanjui Muturi [2016] eKLR** where the judge observed

*This court as correctly submitted by Mr Ochieng, has had on many occasions to decide on the same issue and has plainly, overtly and authoritatively pronounced itself that an appeal which is filed out of time can be validated by an application for leave to validate the appeal and that is what the proviso to Section 79G of the Civil Procedure Act stipulates. The decisions by Honourable H.M. Okwengu J (as she then was) in **HCC 322/2008 Michael Kinyanjui Mbuthia V John Kamau Nganga**; Honourable R.V.P. Wendoh J in **Richard Ngetich & another V Francis Vozena Kidiga HCCA 75/2012**; and Honourable Mary Kasango J in **Asma Ali Mohamed V Fatime Mwinji Juma HCCA 75/2014 (Mombasa)** among others all positive attestations to that pronouncement and so far there is no contrary decision from the Court of Appeal on that line of interpretation of Section 79G of the Civil Procedure Act Proviso.”*

14. It follows that the prayers for an appeal to be filed out of time and for stay pending the determination of that yet to be filed appeal will fail in view of the jurisprudence pronounced in the above case James Njai Githui (supra).

15. The preliminary objection therefore succeeds in respect number.1, 2 and 5 of the preliminary objection dated 19<sup>th</sup> November 2020. It fails in respect to objection numbers 3, 4, 6 and 7 of that preliminary objection.

16. In the end I make the following orders:

*(a) Prayers Nos. 3, 4 and 5 of the Notice of Motion dated 28<sup>th</sup> October 2020 for the reasons set out above are hereby struck out with costs.*

*(b) The preliminary objection dated 19<sup>th</sup> November 2020 succeeds in objection No. 1, 2 and 5 and fails in objection No. 3, 4, 6 and 7.*

*(c) The Respondent is awarded half the costs of the preliminary objection dated 19<sup>th</sup> November 2020.*

**SIGNED AND DELIVERED VIRTUALLY THIS 26<sup>TH</sup> DAY OF NOVEMBER 2020.**

**MARY KASANGO**

**JUDGE**

26<sup>th</sup> November 2020

Before Justice Mary Kasango

C/A - Kevin

For the Applicants - No appearance

For the Respondent – Mrs. Kihika

**COURT**

Ruling virtually delivered in their presence.

**MARY KASANGO**

**JUDGE**