



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 55 OF 2008

PAUL GACHINA MWAURA.....PLAINTIFF/RESPONDENT

-VERSUS-

MOHAMUD J. AWALE.....1ST DEFENDANT/APPLICANT

BAJABER HAULIERS LIMITED.....2ND DEFENDANT/RESPONDENT

RULING

1. The 1st defendant/applicant has filed the Notice of Motion dated 13th March, 2019. The same stands supported by the grounds presented on its face and the facts deponed in the sworn affidavit of the 1st defendant/applicant. The following are the orders being sought in the Motion:

i. Spent.

ii. THAT the firm of Ochieng' Omolo & Co. Advocates be granted leave to come on record for the 1st defendant/applicant in place of M/S Osundwa & Co. Advocates.

iii. Spent.

iv. THAT there be a stay of execution of the decree herein pending the hearing and determination of the intended appeal.

v. THAT this Honourable Court do extend the time for filing and serving the Notice of Appeal together with the letter requesting for copies of the proceedings and judgment.

vi. Any other/further orders that this Honourable Court may deem fit to grant.

2. The plaintiff/respondent opposed the application by way of Grounds of Opposition filed on 9th April, 2019. On its part, the 2nd defendant/respondent did not participate in these particular proceedings.

3. Pursuant to this court's directions, the parties presented oral

arguments in respect to the application. I have considered the same as well as the grounds set out on the face of the application, the affidavit filed in support and the Grounds of Opposition.

4. A brief background of the matter is that the plaintiff/ respondent instituted the suit against the defendants herein, seeking for damages for the injuries sustained as a result of an accident on or about the 22nd of August, 2003. This court, upon taking into the parties' evidence and upon perusing their respective written submissions, rendered its decision in favour of the plaintiff/respondent on 30th November, 2018 as follows:

i. Liability-90%:10% against the 1st and 2nd defendants respectively.

ii. Quantum:

iii. General damages for pain and suffering Kshs.3,000,000/=

iv. <i>Special damages</i>	Kshs. 90,656/=
v. <i>Future medical expenses</i>	Kshs. 900,000/=
TOTAL	Kshs.3,990,656/=

5. This court similarly awarded costs of the suit together with interest thereon to the plaintiff/respondent.

6. In the motion the applicant sought for three main prayers. The first prayer is for leave to have the firm of Ochieng' Omolo & Co. Advocates come on record. Pursuant to **Order 9, Rule 9** of the **Civil Procedure Rules** which stipulates that:

“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.”

7. When the parties appeared before this court on 4th June, 2019 *Jaoko*, counsel appearing for the 1st defendant/applicant, mentioned that the firm of Ochieng' Omolo & Co. Advocates had sought for and obtained the consent of the erstwhile advocates to come on record. It was agreed between the parties before this court that the hearing proceeds on the understanding that the firm taking over would undertake to file the consent between the two firms of advocates prior to the date of this ruling. As it stands, however, no copy of such consent was availed to this court and it remains unclear whether the same was filed.

8. I have perused the affidavit of service filed on 8th April, 2019 and note that the erstwhile firm of advocates are indicated as having been served with a copy of the application and there is a copy of their stamp to evidence this.

9. In the circumstances, I am satisfied that the outgoing advocates were well notified of the intended change of advocates and I will therefore grant the current firm of advocates for the 1st defendant/applicant leave to come on record as prayed.

10. The second aspect the Motion relates to the extension of time to lodge a notice of appeal. On his part, the 1st defendant/ applicant has stated in his supporting affidavit that he was not made aware of the existence of the judgment until when he received the letter dated 25th January informing him of its delivery.

11. The 1st defendant/applicant further avers that he instructed his advocates to lodge an appeal against the judgment in its entirety but that this was not done.

12. The plaintiff/respondent opposed the application arguing that the 1st defendant/applicant cannot be heard to blame his erstwhile advocates for any delay occasioned, stating that leave to file the notice of appeal can only be sought in the Court of Appeal. Mr. Okeyo learned counsel for the plaintiff/respondent argues that the Appellate Jurisdiction Act has not donated power to this court to extend the time for filing a notice of appeal out of time.

13. I have considered the respective arguments and take the following view. On the one hand, it is clear that pursuant to **Rule 4** of the **Court of Appeal Rules**, the Court of Appeal is given power to enlarge the time for filing an appeal from the High Court. On the other hand and with all due respect to counsel for the plaintiff/respondent, such power is not the preserve of the Court of Appeal. Under **Section 7** of the **Appellate Jurisdiction Act** the High Court is given similar powers. Section 7 provides thus:

“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 ...notwithstanding that the time for giving such notice or making such appeal may have already expired...”

14. In view of the foregoing and having considered the explanation offered by the 1st defendant/applicant and find the same to be reasonable, I deem it fair to exercise my discretion in favour of the applicant by enlarging the time required to file the notice of appeal.

15. The third prayer is that for granting a stay of execution.

Without necessarily going into the substance of the same, it is important to note that the intended appeal lies with the Court of Appeal. It is apparent that the appeal is yet to be filed therefore there is no basis for granting the order for stay. In other words, the order is dependent on the existence of an appeal.

16. In my reasoned view, it would be more practical and appropriate for the 1st defendant/applicant to seek the order for a stay before the Court of Appeal or immediately upon lodging the notice of appeal.

17. Consequently, the Motion succeeds in terms of orders (ii) and (v) and the following orders made:

a) The firm of Ochieng' Omolo & Co. Advocates is hereby granted leave to come on record for the 1st defendant/applicant in place of M/S Osundwa & Co. Advocates.

b) The 1st defendant/applicant is given 7 days from the date of this ruling to lodge a notice of appeal.

c) Each party shall meet its own costs.

Dated, Signed and Delivered at Nairobi this 25th day of September, 2019.

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J. K. SERGON

JUDGE

In the presence of:

..... for the Plaintiff/ Respondent

..... for the 1st Defendant/Applicant

..... for the 2nd Defendant/Respondent