REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 82 OF 2019

JONATHAN WEPUKHULI

t/a GATI CLEANING AGENCY LIMITED.....APPELLANT

VERSUS

JULIUS ODHIAMBO ODUOR.....RESPONDENT

R U L I N G

1. By an application by way of Notice of Motion dated 31/5/2019 and expressed to be brought pursuant to Order 42 Rule 6, the Appellant sought in the main that it be granted an Order of stay pending appeal together with auxiliary reliefs that it gets interim stay pending determination of the Application and for an order that there be change of advocates on its behalf.

2. The application was supported by the Affidavit of the Applicant/Appellant which essentially sets out the grounds of the application as being that he was aggrieved by the decision by the trial court hence this appeal and that there has been set a process of execution by which the Appellant's office equipment and furniture, being his tools of trade, had been proclaimed upon and that unless stay be granted he was exposed to suffer irreparably and the appeal rendered nugatory.

3. On the need for leave to file a notice of change of Advocates, it was asserted that the former advocates had been asked to consent to the change by way of written letter which went unacknowledged. It was then added that the Applicant is prepared to furnish security for costs (sic) pending the appeal. To demonstrate the real threat of execution, a proclamation was exhibited as annexture JW7. That application was placed before the court under certificate of urgency when interim orders of stay were granted and a date directed to be taken at the Registry on priority basis.

4. When served the respondent instead of filing a Replying Affidavit opted to file yet another Application under certificate of urgency seeking in the main that the *experte* orders of stay be set aside and the entire papers filed by Ms. Lawrence Obonyo Legal advocates together with all proceedings taken pursuant therefore be expunged and declared improperly before court. The substratum of that application was revealed to be the fact that the firm of Lawrence Obonyo Legal, having not acted for the Applicant at trial could not acts by filing the appeal prior to getting a court order to that effect and that the papers so improperly filed had been employed to frustrate the execution of a judgment validly obtained.

5. When the two applications were placed before the court, counsel agreed with the court that the two be heard together and directions were given for filing further Affidavit as well as submissions. Pursuant to those directions Replying Affidavits to both applications as well as a supplementary affidavit by the Appellant and submissions were filed and exchange. It is those materials parties have placed before the court that the court has to employ to determine the two applications. Even though the later application can be seen as an opposition to the earlier one, it questions the propriety of not former the application as well as the appeal hence I consider it appropriate to be dealt with first.

6. As framed and grounds disclosed to premise the application and even the prayer no. 2 in the Appellant's Application, both counsel take the view that for an advocate who did not participate at trial to file an appeal, he need the leave of the court. That must be the interpretation both counsel give to the provisions of Order 9 Rule 9 Civil Procedure Rules. That provisions says:-

> **"Change to be effected by order of court or consent of parties [Order 9, rule 9.]**
>
> **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 incoming advocate or party intending to act in person as the case may be".

7. Giving the words of the Rule their ordinary and natural meaning, there ought to be a judgment in the file before the rule can be invited. I understand the position to be that an appeal file is an independent file from the file in which the judgment giving rise to the appeal was passed. The two must be treated as separate in that both are instituted differently. An appeal when instituted by a Memorandum of Appeal starts its new life and journey and is only determined when dealt with as by law provided. In the appeal file the judgment at trial is the dispute and cannot be treated as a judgment determining the appeal. As known to law, a judgment is a final adjudication of a court dispute and cannot in reality be deemed to exist before the dispute is heard and adjudged. In this file the appeal has not been heard and a decision made or as the Rule says, judgment passed, to require any court orders for a Notice of Change of advocate.

8. To me to hold that a Notice of change is required in this matter is to stretch the law to extreme, ridiculous and very anomalous levels. I ask change from who? The memorandum of appeal instituting the appeal is drawn by the same advocate seeking to be granted leave to come on record. When did he cease to be on record after filing that document? I hold that the interpretation given to Order 9 Rule 9 by the two counsel in this matter is wholly erroneous and ought not be the case. In coming to this conclusion I am not questioning the decision by my sister **Kemei J**. in **Muranga ELC No. 219 of 2017**. That decision is clear that an advocate walked into the ELC file after judgment and purported to file a Notice of Appeal and an application without first seeking and obtaining leave in that regard. In that decision the invitation of Order 9 Rule 9 was apt and unquestionable.

9. All I have said above lead me to the conclusion that the Prayer 2 in the Appellants application and the entire application by the Respondent having been grounded on the erroneous interpretation of the law were wholly misconceived and cannot be granted. Those prayers are accordingly dismissed.

10. The next question is whether the Appellant should be granted stay pending appeal. For such an application to succeed the Applicant must demonstrate that he has acted without inordinate delay, that he stands to suffer substantial loss unless stay is granted and he must offer security from the due performance of decree, **not security for costs as contended by the Applicant**.

11. Having read the file, I do not take the view that there was ever inordinate delay in bringing the application. The judgment is agreed by both sides to have been entered on the 22/3/2019 and the current application was filed on the 31/5/2019. I do not consider that to be unreasonable or inordinate delay.

12. The next question is whether the applicant is exposed to suffer a loss that wholly changes the purpose of the litigation in the appeal as to be worthless or just an academic exercise. In monetary decrees the measure of such loss is the prospects of recovery of the payment if execution is allowed to proceed and later the appeal succeeds. In such situations the Applicant is free to allege that it would be impossible or just difficult to achieve a recovery because the decree-holder is a manu of the straw. Once he does that there is no burden on him to prove the extent of his adversary's impecuniosity. He is deemed to have discharge his burden and the onus then shifts upon the respondent to prove that he has the capacity to refund the sum should the appeal succeed[1].

13. Put in the context of this file there has not been any material put forth by the Respondent on his ability to refund. In such instances the court has to balance the competing interests of the parties. The Appellant has the undoubted right to approach the court by way of an appeal while the respondent has a decree at hand which must be respected as a property. In that balance comes the need to secure the decretal sum by a deposit. The deposit serves to prove good faith on the part of the judgment-debtor and at the same time gives the assurance to the respondent/decreeholder that upon the conclusion of the appeal, if in his favour, the sum would be available to satisfy his decree. Here the Appellant has deponed to being willing to provide the security and I take the view that is a demonstration of good faith and not just a ploy to delay the respondent from reaping his fruits of litigation.

13. There is a second point that points to prospects of substantial loss being suffered by the Appellant. It is disclosed in the application when the applicant says that execution has issued and levied against his tools of trade. Even though it has not been revealed what his trade is, the proclamation reveals that the proclaimed goods are office equipment and tools. In the present word if one runs any business, computers and furniture are critical and necessary tools for such business or trade and would qualify for protection granted under Section 44 of the Civil Procedure Act. That being the case to allow execution upon such goods would be to allow violation of the law.

14. In a county governed by the rule of law, one of the worst injury that may be visited upon a citizen is to be denied the benefit and protection provided by the law. Accordingly, I do find that the Applicant has demonstrated substantial loss and is thus entitled to a stay of execution pending appeal.

15. Having so found and the Applicant having offered to provide security, I do direct and order that stay is granted but on terms that the appellant shall deposit the entire decretal sum, as disclosed in the warrants of attachment and sale, into an interest bearing account in the joint names of the advocates for the parties within 30 days from today. Should there be no compliance with this condition, the stay hereby granted shall stand discharged.

16. Lastly, warrants were validly taken out and executed by an auctioneer who has thereby incurred costs and earned fees of executing the court orders. Those warrants could have been obviated had the Appellant approached the court earlier than they did. I direct that the auctioneer's costs be paid by the Appellant when agreed upon and in default of agreement, when taxed.

17. It is so ordered.

Dated and delivered at **Mombasa** this **22nd** day of **November 2019**.

P.J.O. OTIENO

JUDGE

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[1] Focin Motorcycle Co. Ltd vs Wambui Wangui [2018] eKLR