**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT KITUI**

**CIVIL APPEAL NO. 22 OF 2017**

**KYALO KOMU.....APPELLANT/APPLICANT**

**VERSUS**

**FELIX MALITI MULINGATA.....RESPONDENT**

**R U L I N G**

1. By a Notice of Motion dated **13th September, 2017,** the Applicant seeks orders that:

(i) The Applicant/Appellant be released forthwith from Civil Jail pending hearing and determination of the application.

(ii) There be stay of execution of the Ruling delivered on **4th September, 2017** by **Hon. R. Ombata (RM)** in **Civil Suit No. 269 of 2014** (Suit) pending hearing and determination of the Appeal.

2. The application is premised on grounds that the suit was filed by the firm of **J. M. Muinde & Co. Advocates** at a time when **Joseph Mutinda Muinde** was not qualified to act as an Advocate for lack of a valid Practicing Certificate. The Judgment was entered in favour of the Plaintiff following exparte proceedings and execution proceedings conducted by an Advocate who was suspended from the roll of Advocates. The Applicant's application dated **4th August, 2017** seeking to set aside proceedings conducted by a person not qualified to act as an Advocate was dismissed with costs on **4th September, 2017** necessitating the instant Appeal.

3. The Applicant swore an affidavit in support of the application where he deponed that he was not allowed to defend himself after the matter proceeded exparte against him where an award of **Kshs. 250,000/=** was made for alleged defamation. A suit that was prosecuted by an unqualified Advocate. That subsequent orders that emanated therefrom are nullity. That the replacement of **Muinde & Co. Advocates** by the firm of **Kiongera Kariuki & Co. Advocates** on **14th July, 2017** does not cure the nullity.

4. In response, **Felix Maliti Mulingata** filed a Replying Affidavit where he deposed that the Applicant was given a hearing in Court when he argued his application to set aside the Judgment and file a defence that was unmerited and an abuse of the Court process, hence dismissed. That the matter was heard and determined on the **1st** day of **March, 2016** and the judgment delivered on the **31st** day of **January, 2017** therefore the proceedings of the Court cannot be declared as nullity based on information received from the website that contains a disclaimer.

5. Further, he averred that it is now trite law that the failure of an Advocate to take out a Practicing Certificate does not invalidate the action of the Court and a client should not be penalized for the mistakes of an Advocate. That the Applicant was procedurally committed to Civil Jail and is now looking for loopholes and technicalities instead of paying the decretal amount or giving a reasonable proposal towards the payments of the decretal sum.

6. In a Supplementary Affidavit, the Applicant averred that:

***"2. That the Respondent's Affidavit sworn on 1st October, 2017 has been read over and explained to me by my Advocates on record M/S Mulu & Company Advocates and I have understood the purport thereof and wish to state that the instant Appeal and application are against the orders issued on 4/9/2017 by Hon. R. Ombata (R.M) in Civil Suit No. 269 of 2014 as such I am at liberty to re-state my case to the superior court and that cannot amount to abuse of the court process.***

***3. That the Respondent in his application dated 28/6/2017 in Civil Suit No. 269 of 2014, seeking to replace his former Advocate on record; J. M. Muinde & Company Advocates to his current Advocates on record used as evidence of Joseph Mutinda Muinde's inability to continue acting for him on account of suspension from the Roll of Advocates, the same extract from the***

***L.S.K. Website that I have availed…….***

***4. <u>That</u> the said application was then allowed primarily on the basis of the extract from the L.S.K. Website. In turn the Respondent now claims that the extract from the L.S.K. Website indicating the practicing status of Joseph Mutinda Muinde is not adequate and there ought to be "a higher standard of proof". Plainly absurd. The Respondent ought not approbate and reprobate.***

***5. <u>That</u> I am advised by my Advocates that the Respondent cannot benefit as a result of a flawed process."***

7. Pursuant to the order sought on interim basis, the Applicant was released from Civil Jail forthwith by **Kemei J.**

8. The application was canvassed by way of written submissions that I have taken into consideration alongside the affidavit evidence filed. The main issue for determination in this application is whether a stay of execution should issue pending hearing and determination of the Appeal that has been filed against the Ruling of the Lower Court delivered on the **4th** day of **September, 2017.**

9. The application is basically brought pursuant to the provisions of **Order 42 Rule 6** of the **Civil Procedure Rules. Sub-Rules (1), (2)** and **(6)** provide thus:

***"(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except appeal case of in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.***

***(2) No order for stay of execution shall be made under subrule (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.***

***(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with."***

10. Guided by the provisions of **Order 42 Rule 6,** it is apparent that stay of execution is not automatic. I must consider if the Appeal instituted against the order of the learned Magistrate may succeed. In the case of **Erinford Properties Limited vs. Chesire County Council (1974) 2 ALL ER 443 Meggary J.** was of the view that when a party is exercising the right of Appeal the question whether the Appeal if successful will not be rendered nugatory was considered.

11. The contention of the Applicant is that proceedings in the Lower Court were instituted and prosecuted by an unqualified Advocate and his effort to seek the opportunity of defending the case has been denied hence he has been condemned unheard. Consequences of the allegation set out will be determined at the Appellate stage.

12. The question to be answered is therefore whether the Applicant shall suffer any substantial loss if the order sought is not granted. In the case of **Butt vs. Rent Restriction Tribunal (1982) KLR 47** the Court of Appeal held that:

***"The power of the court to grant or refuse an application for stay of execution is a discretionary power. ... The general principle in granting or refusing stay is; If there is no other overwhelming hindrance, a stay ought to be granted so that an appeal if successful may not be rendered nugatory should that appeal court reverse the judge's (read tribunal's) discretion. A stay which would otherwise be granted ought not to be refused because the judge considers that another, which in his opinion will be a better remedy, will become available to the applicant at the conclusion of the proceedings."***

13. It has been demonstrated that the Applicant was already incarcerated in a Civil Jail at the point of filing this application and Appeal. If the incarceration continues and the Appeal succeeds he will definitely suffer irreparable damage.

14. In declining to grant an order of stay, the learned trial Magistrate was of the view that the Applicant was fully aware of the suit but disregarded it by not challenging it. It is evident that he has not made any proposal as to giving security for due performance of the order. Looking at the events that transpired I find that this is a case that calls for imposing of some conditions.

15. In the premises I grant the Applicant's Notice of Motion in terms of **prayer 4,** on condition that he deposits **Kshs. 75,000/=** in Court within **21 days** from the date hereof. In default the order to stand vacated. The Applicant shall pay costs of the application to the Respondent.

16. It is so ordered.

**Dated, Signed** and **Delivered** at **Kitui** this **31st** day of **July, 2018.**

**L. N. MUTENDE**

**JUDGE**