



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

FAMILY DIVISION

SUCCESSION CAUSE NO. 112 OF 2004

**IN THE MATTER OF THE ESTATE OF EDWARD MAGHANGAMWANG'OMBE
(DECEASED)**

MOHAMED SHEE BWANAAPPELLANT/APPLICANT

VERSUS

THE PUBLIC TRUSTEE.....RESPONDENT

RULING

1. Before this Court is a Notice of Motion dated 20.7.15 seeking the following orders:
 - a. That leave be granted to the Applicant to file the appeal out of time;
 - b. That the Court grants an injunction against the Respondent restraining the Respondents from interfering with the suit premises pending hearing and determination of the Appeal;
 - c. That costs of this Application be provided for.
2. The Application is supported by the grounds on the face of it as well as the Supporting Affidavit of the Applicant, Mohamed Shee Bwana sworn on 21.7.15. The Respondent filed a Replying Affidavit sworn on 31.7.15 by Jafred Erima Maliro the Assistant Public Trustee opposing the Application. The Applicant filed a Further Affidavit sworn on 25.9.15 in response to the Replying Affidavit.

The Applicant's Case

3. The Applicant avers in his Supporting Affidavit that his former advocates Y. A. Ali Advocates never informed him that judgement herein was entered against him on 3.11.14; that he only got to know about it on 13.11.14 when he went to the said advocates and was given a copy of the same upon enquiry; that he instructed the said advocates to file an appeal on his behalf but realized that by 19.11.14 the appeal had not been filed and that he was time barred. The Applicant further deponed that he has since appointed his current advocates Aboubakar Mwanakitina & Company Advocates who have advised him that his appeal has a high probability of success if heard and determined on its merit; that the delay in filing the appeal is not inordinate and is excusable in the circumstances; that he has an arguable appeal with a high probability of success and would suffer irreparable loss which may not be capable of compensation if the orders sought are not granted.
4. In a Further Affidavit sworn on 25.9.15, the Applicant avers that being aggrieved with the judgement delivered by Odero, J. on 3.11.14, he exercised his right to appeal and hence the

application. He depones that his advocates did file a Notice of Motion on 8.12.14 seeking leave to file the appeal out of time; that his advocates were unable to get a hearing date as the file could not be traced at the Registry; that the file was eventually found on 8.4.15 and the Application was then fixed for hearing on 14.7.15.

The Respondent's Case

5. In response to the Application, the Respondent filed a Replying Affidavit claiming that the same lacks merit, is misplaced, premature made in bad faith and is a calculated move by the Applicant to delay the estate's enjoyment of the fruits of the judgement delivered by this Court on 3.11.14. The Respondent depones that leave of the Court to change advocates after judgement was not sought as required by law rendering the Application herein incompetent. The Respondent further depones that this Court lacks jurisdiction to entertain the Application herein having become *functus officio* upon delivery of the judgement; that this Court lacks jurisdiction to hear an application for leave to file an appeal from a superior court out of time as this is the preserve of the Court of Appeal; that no sufficient reason for the delay in filing the appeal has been provided; that the Application was premature as no notice of appeal was filed as required by the Court of Appeals Rules 2010; that the orders sought if granted will prejudice the estate herein. In his submissions, the Respondent reiterated the contents of the Replying Affidavit and buttressed the points raised therein with several authorities.

Determination

6. When the matter came up before me, the Applicant's counsel informed the Court that the Applicant would rely entirely on his Affidavits while the Respondent expressed the wish to put in written submissions which he did shortly after. I have carefully considered the Application and the Supporting Affidavits, the Replying Affidavits as well as the Submissions and the cited authorities, Grounds of Opposition as well as the written submissions filed by the Petitioners.
7. The issues for determination are the following:
 - i. Whether or not failure by the Applicant to obtain leave of the Court to change advocates in filing the instant Application after judgement rendered the Application incompetent.
 - ii. Whether this Court has jurisdiction to entertain the Application herein after delivery of judgement.
 - iii. Whether this Court has jurisdiction to hear an application for leave to file an appeal from a superior court out of time.
 - iv. Whether the reasons provided by the Applicant for the delay in filing the appeal are sufficient to warrant the granting of the orders sought.
 - v. Whether the Application was premature given that no notice of appeal was filed as required by the Court of Appeal Rules 2010;
 - vi. Whether the orders sought if granted would prejudice the estate herein.
8. In my view, this Application will turn on the first issue for determination viz.

Whether or not failure by the Applicant to obtain leave of the Court to change advocates in filing the instant Application after judgement rendered the Application incompetent.

9. I have perused the court record herein and I find that the Applicant was represented by the firm of Y. A. Ali Advocates herein upto the time of delivery of judgement on 3.11.14 by Odero, J. The instant Notice of Motion was filed by Aboubakar Mwanakitina & Company Advocates. The said advocates filed a Notice of Change of Advocates dated 25.9.15 on 28.9.15.
10. Order 9 Rule (9) of the Civil Procedure 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.**

11. The above provision is couched in mandatory terms. After judgement has been passed, a change of advocate **“shall not be effected without an order of the court”**. This very question was before Sitati, J. in **Monica Moraa v. Kenindia Assurance Co. Ltd.** [2012]eKLR, one of the authorities cited by the Respondent where she held that

“ there is no doubt in mind that the issue of representation is critical especially in cases such as this one where the Applicant’s advocates intend to come on record after delivery of judgement. There are specific provisions governing such change of advocate. In my view, the firm of Kibichiy& Co. Advocates should have sought this court’s leave to come on record as acting for the applicant...”

The learned judge went on to say

“The firm of Kibichiy& Co. Advocates is unprocedurally on record for the applicant and therefore the notice of appointment as filed does not support the Notice of Motion...”

I agree with the learned Judge entirely.

I further agree with Makau, J. who in **Jackline Wakesho v Aroma Cafe** [2014] eKLR delivered himself thus

“Although the foregoing objection appears like a technical procedural issue, this court finds that the default by the applicant goes to the jurisdiction of the court to entertain the motion. The reason for the foregoing reasoning is that the court has no jurisdiction to preside over incompetent proceedings filed by counsel who lack locus standi. The court has been asked to invoke the oxygen principle under Section 1A and 1B of the Civil Procedure Act and entertain the Motion. The court will not however do that. The reason for the foregoing is twofold. Firstly, there are several judicial pronouncements cited by the claimant which show that courts have over the time declined to entertain proceedings filed by new advocates appointed after judgment without complying with Order 9 rule 9...”

12. Given the provisions of Order 9 Rule (9) of the Civil Procedure Rules, Aboubakar Mwanakitina & Company Advocates could not competently and procedurally come on record without an order of this Court. As stated above, this Application will turn on this one issue. In view of the foregoing it is unnecessary for this Court to proceed to deal with the other issues listed above because the Motion has already collapsed. It is therefore the finding of this Court that the Notice of Motion herein is incompetent and is accordingly struck out with costs to the Respondent.

DATED, SIGNED and DELIVERED in MOMBASA THIS 7TH DAY OF DECEMBER, 2015.

M. THANDE

JUDGE

In the presence of: -

..... **for the Applicant**

..... **for the Respondent**

..... **Court Assistant**