REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

ELC MISCELLANEOUS APPLICATION NO. E020 OF 2021

MODE OF PROCEEDING...FAST TRACK

MAURICE JUMA MUTALE...1ST APPLICANT/APPELLANT

JUSTINE NAFULA WANYAMA...2ND APPLICANT/APPELLANT

VERSUS

JULLY NASAMBU NABICHENJE...RESPONDENT

R U L I N G

(Being an application for extension of time to appeal and a stay of execution of the Judgment of Hon G. Adhiambo – Principal Magistrate delivered on 18th October 2021 in Kimilili Senior Principal Magistrate's Court ELC Case No 39 of 2018)

1. The dispute relating to the fraudulent sub – division of the land parcel **NO BUNGOMA/TONGAREN/527** to create eight other parcels was heard by **HON G. ADHIAMBO (PRINCIPAL MAGISTRATE)** who delivered her Judgment on 18th October 2021 in favour of **JULLY NASAMBU NABICHENJE** (the Respondent herein).

2. Aggrieved by the said Judgment, **MAURICE JUMA MUTALE** and **JUSTINE NAFULA WANYAMA** (the 1st and 2nd Applicants respectively) desire to appeal. However, they did not file their appeal within 30 days as required by the provisions of **Section 79G** of the **Civil Procedure Act**.

3. I now have before me for my determination the applicants' Notice of Motion dated 22nd December 2021 and filed on 23rd December 2021 seeking the following orders: -

a. Spent

b. Spent

c. The Applicants be granted leave to file an appeal out of time against the Judgment of HON G. ADHIAMBO (PRINCIPAL MAGISTRATE KIMILILI COURT) delivered on 18th October 2021 in KIMILILI SPMCC No 39 of 2018.

d. There be a stay of execution of the said Judgment pending the hearing and final determination of this application.

e. Pending the hearing and determination of this application, there meanwhile be a stay of further proceedings and a stay of execution in KIMILILI SPMCC No 39 of 2018.

f. Upon the said leave to appeal being granted, there be a stay of execution and of further proceedings in KIMILILI SPMCC No 39 of 2018 until the hearing and determination of the appeal.

g. Costs of the application be provided for.

The application is based on the grounds set out therein and is also supported by the affidavit of **MAURICE JUMA** the 1st Applicant herein in which he has deponed, inter alia, that being dissatisfied by the Judgment delivered on 18th October 2021, the Applicants' then Counsel **SITUMA & COMPANY ADVOCATES** promptly wrote a letter to the trial Court on 19th October 2021 requesting for certified copies of

the proceedings and Judgment. That the said proceedings and Judgment were not ready until 15th November 2021 when they were certified ready for collection. The Applicants' then consulted their current Counsel **SIFUNA & SIFUNA ADVOCATES** who advised them to appeal the Judgment. However, by that time, the time for filing the appeal had run out hence this application.

4. That the delay was largely occasioned by the time spent in typing and certifying the proceedings and Judgment and a Certificate of delay is annexed. That the delay in filing the appeal is excusable and is not inordinate and neither are the Applicants guilty of any laches. It is therefore in the interest of justice that this application be allowed otherwise the Applicants may suffer irreparable loss and their appeal will be rendered nugatory and a mere academic exercise.

5. Annexed to the said application are the following documents: -

> **1. Certified copy of proceedings and the Judgment in KIMILILI SPMCC No 39 of 2018.**
>
> **2. Certified copy of the decree in KIMILILI SPMCC No 39 of 2018.**
>
> **3. Letter dated 19th October 2021 addressed to the Executive Officer KIMILILI LAW COURTS by SITUMA & COMPANY ADVOCATES requesting for the copies of proceedings and Judgment.**
>
> **4. Ruling in DAVID MITHAMO GATITU .V. BONIFACE KARIMI NYAMU 2015 eKLR.**

When the application was placed before Justice **ANN KOROSS** on 23rd December 2021, the Judge did not certify it as urgent nor grant any interlocutory orders. Her Ladyship directed that the application be canvassed by way of written submissions with each party having 7 days to file.

6. The Respondent opposed the application through her applying affidavit dated 20th January 2022 and filed on 21st January 2022 in which she has deponed, inter alia, that the application is not only frivolous, vexatious and an abuse of the process of the Court but that it has also been filed by the firm of **SIFUNA & SIFUNA ADVOCATES** who are strangers in these proceedings because the Applicants' lawyers are **SIFUNA & COMPANY ADVOCATES** (that is an error, the lawyers were infact **SITUMA & COMPANY ADVOCATES**). That the firm of **SIFUNA & SIFUNA ADVOCATES** have not sought leave to file this application. That the failure to file the appeal out of time was deliberate since the Applicants only filed this application as an afterthought upon being served with the Bill of Costs. That the Applicants have come to Court with un – clean hands having interfered with the Respondent's peaceful use and occupation of the land in dispute and up – rooting her maize crop contrary to an order of the Court. That having disobeyed the orders of the Court, the Applicants should not be granted audience by this Court. Annexed to the replying affidavit is the Respondent's Bill of Costs filed in the trial Court on 18th November 2021.

7. The application has been canvassed by way of written submissions. These have been filed both by **PROF SIFUNA** instructed by the firm of **SIFUNA & SIFUNA ADVOCATES** for the Applicants and by **MR KASSIM** instructed by the firm of **KASSIM SIFUMA & ASSOCIATES ADVOCATES** for the Respondent.

8. I have considered the application, the rival affidavits and annextures thereto as well as the submissions by counsel.

9. The starting point must be whether the firm of **SIFUNA & SIFUNA ADVOCATES** are properly on record for the Applicants. It is common knowledge that the Applicants were represented by **MR KUNDU** from the firm of **SITUMA & COMPANY ADVOCATES**. There is no evidence to suggest that during the trial in the Subordinate Court, the firm of **SIFUNA & SIFUNA ADVOCATES** took over the Applicants' brief. That is why in paragraph 6 of her replying affidavit, the Respondent states as follows: -

> **6: "That having come on record after Judgment, M/S SIFUNA & SIFUNA ADVOCATES ought to have sought and obtained leave of the Court before filing the present application."**

No doubt the Respondent had in mind the provisions of **Order 9 Rule 9(a)** and **(b)**of the **Civil Procedure Rules** which provides that: -

> **9. "Where 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."**

The above has been reinforced in the submissions by **MR KASSIM** in paragraph two (2) where he states: -

> **"Your Honour, Judgment was delivered on the 18th October 2021 in favour of the Respondent calling up cancellation of the sub – divisions and transfers that had been effected illegally. We got surprised to learn that the Applicants herein had appointed the current Counsel on record while effecting a Taxation Notice and a Decree upon the former Counsel SITUMA & CO ADVOCATES. The current Counsel representing the Applicants never filed nor served the Respondent herein with a Change of Advocates Notice accompanied by a consent for Change of Advocate upto date instead, an application dated**

22.12.21and the order dated 23.12.21 was served upon the Respondent's Counsel of (sic) the 06.01.2022 respectively. The Applicant's Counsel failed to adhere to the provisions of Order 9 Rules 5, 6, and 7 of the Civil Procedure Rules which require service of Notice of Change of Advocate."

Counsel for the Applicants did not specifically address the failure to comply with the above provision.

10. However, while it is true that the firm of **SIFUNA & SIFUNA ADVOCATES** did not comply with the provisions of **Order 9** of the **Civil Procedure Rules** having filed this application on behalf of the Applicants who were previously represented by the firm of **SITUMA & COMPANY ADVOCATES** until 18th October 2021 when Judgment was delivered in the Subordinate Court, that infraction is not fatal to the application. The answer to that was provided by the Court of Appeal in the case of **TOBIAS M. WAFUBWA .V. BISHOP BEN BUTALI 2017 eKLR** when it said: -

> **"Once a Judgment is entered, save for matters such as applications for review or execution or stay of execution, inter alia, an appeal to an appellate Court is not a continuation of proceedings in the lower Court, but a commencement of new proceedings in another Court where different rules may be applicable, for instance, the Court of Appeal Rules 2010 or the Supreme Court Rules 2010. Parties should therefore have the right to choose whether to remain with the same Counsel or to engage other Counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned Court to be placed on record in substitution of the previous advocate. As this dispute concerned an appeal from the Principal Magistrate's Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the Respondent's Counsel was entitled to commence them without filing Notice of Change or seeking the leave of the Court to be placed on record."**

The Court went further to add that: -

> **"We would go further to add that, provided that where the failure to comply with the Rule 9 did not undermine the jurisdiction of the Court, or affect the core of the dispute in question, or prejudice either of the parties in any way as to lead to a miscarriage of justice, then Article 159 of the Constitution and the overriding principles could be called upon to aid the Court to dispense substantive justice through just, efficient and timely disposal of proceedings."**

The Court went on to cite it's own decision in the case of **BONIFACE KIRUGA WAWERU .V. JAMES K. MULINGE 2015 eKLR** where, in addressing the issue of non – compliance with **Order 9 Rule 9** of the **Civil Procedure Rules**, it said:-

> **"All in all, we are not persuaded that non – compliance with Order 111 Rule 9A of the Civil Procedure Rules was meant to make the following proceedings incompetent or a nullity; efficacious as the provision was meant to be. Indeed, all times, the set proceedings out to be followed or complied with. However, we find that non – compliance in the present matter did not go to the root of proceedings. The non – compliance we may say, was procedural and not fundamental. It did not cause prejudice to the appellant at all."**

That is the path that I followed in the case of **MOSSY KHAEMBA MUCHANGA & DAVID WABWILE MUCHANGA .V. PAUL LUTOTI KHAWANGA 2020 eKLR** where I declined to strike out a similar application for failure to comply with the provisions of **Order 9 Rule 9** of the **Civil Procedure Rules**. I must take the same road. It is true that there was non – compliance with the Rule but I have not heard the Respondent allege that she has suffered any injustice or prejudice as a result of the failure to apply the law. In any event, these are new proceedings being pursued in an appellate Court and as is clear from **TOBIAS M. WAFUBWA .V. BISHOP BEN BUTALI** (supra), a case which incidentally was also prosecuted by the firm of **KASSIM SIFUMA & ASSOCIATES ADVOCATES**, the Applicant was at liberty to engage a new Counsel. That is preciously the same situation in this case.

11. I therefore find that the firm of **SIFUNA & SIFUNA ADVOCATES** are entitled to prosecute this application on behalf of the Applicants.

12. Having dispensed with that jurisdictional matter, I shall now consider the merits or otherwise of the application.

13. The Applicants seek two substantive orders. These are: -

> **1. Leave to appeal the Judgment delivered on 18th October 2021 out of time.**
>
> **2. Stay of execution of the Judgment dated 18th October 2021 pending the hearing and determination of the intended appeal.**

I shall consider them in that order.

1: <u>LEAVE TO APPEAL OUT OF TIME</u>: -

Section 79G of the **Civil Procedure Act** provides that: -

> **"Every appeal from a Subordinate Court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower Court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: -**

Provided that an appeal may be admitted out of time if the appellant satisfies the Court that he had good and sufficient cause for not filing the appeal in time." Emphasis mine.

The Judgment sought to be appealed was delivered on 18th October 2021. The Applicants therefore had upto 18th November 2021 to lodge their appeal. The above provisions are replicated in **Section 16A (1)** and **(2)** of the **Environment and Land Court Act** which reads: -

16 A (1) "All appeals from Subordinate Court and local tribunals shall be filed within a period of thirty days from the date of the decree or order appealed against in matters in respect of disputes falling within the jurisdiction set out in Section 13(2) of the Environment and Land Court Act, provided that in computing time within which the appeal is to be instituted, there shall be excluded such time that the Subordinate Court or tribunal may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order.

(2) An appeal may be admitted out of time if the appellant satisfies the Court that he had a good and sufficient cause for not filing the appeal in time." Emphasis mine.

Having failed to file an appeal within the thirty-day period, the Applicants have a window, if they can demonstrate **good and sufficient cause**, to seek and obtain an extension of time within which they can file an appeal. The term **good and sufficient cause** mean one and the same thing – **QURESHI & ANOTHER .V. PATEL & OTHERS 1964 EALR 633**.

14. What then is **good and sufficient cause?** In the case of **HON ATTORNEY GENERAL .V. THE LAW SOCIETY OF KENYA & ANOTHER C.A CIVIL APPEAL No 133 of 2011 (2013 eKLR)**, **MUSINGA J.A** defined it as follows: -

"Sufficient cause or good cause in law means: -

'……… the burden placed on a litigant (usually by a Court rule or order) to show why a request should be granted or any action excused.'

See BLACK'S LAW DICTIONARY 9TH EDITION page 251.

Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubt in a Judge's mind. The explanation should not leave unexplained gaps in the sequence of events." Emphasis mine.

In the case of **NICHOLAS KIPTOO arap KORIR SALAT .V. I.E.B.C & OTHERS 2014 eKLR**, the Supreme Court also laid down the following broad principles to guide a Court considering an application for extension of time. These are: -

a. Extension of time is not a right. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.

b. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the Court.

c. Whether the Court should exercise it's discretion to extend time is a consideration to be made on a case to case basis.

d. Where there is a reason for delay, it should be explained to the satisfaction of the Court.

e. Whether there will be any prejudice suffered by the Respondent if extension is granted.

f. Whether the application has been brought without delay.

g. Whether in certain cases like election petitions, public interest should be a consideration.

See **BAGAJO .V. CHRISTIAN'S CHILDREN FUND INC 2004 2 KLR 73** and also **FAHMI TWAHA .V. TIMAMU ABDALLA & OTHERS SUPREME COURT CIVIL APPLICATION No 35 of 2014**.

15. What comes out clearly from the above precedents and the law is that the Court has a discretion, for **"good and sufficient cause,"** to extend the time for filing an appeal. That discretion, like any other, must be exercised judicially based on bona fide grounds. And whereas the law has not set out any mathematical formula as to what amounts to a delay, it follows that any delay which exceeds the thirty-day period must be satisfactorily explained because such extension is not a right but is an equitable remedy. Each case must therefore be considered on the basis of it's peculiar circumstances.

16. Have the Applicants herein met the above threshold? What is the **good and sufficient cause** placed before this Court?

17. The Judgment sought to be appealed was delivered on 18th October 2021. According to the Certificate of delay, the proceedings and Judgment were ready on 15th November 2021. Thereafter, as per paragraph 7 of the supporting affidavit by **MAURICE JUMA** the 1st Applicant herein, they consulted their new Counsel **SIFUNA & SIFUNA ADVOCATES** who advised on filing the appeal a draft memorandum whereof has been annexed. From the letters annexed herein, the Applicants applied for a copy of the proceedings and

Judgment on 19th October 2021 only a day after the delivery of the Judgment sought to be appealed. Time ran out on 18th November 2021 and the delay of thirty-five (35) days upto 23rd December 2021 when they filed this application is not inordinate in the circumstances taking into account that they had to seek the services of a new Counsel. That explanation is satisfactory and I am persuaded that the reasons given are rational, plausible logical, convincing, reasonable and truthful which leave no un – explained gaps – **HON ATTORNEY GENERAL .V. LAW SOCIETY OF KENYA** (supra). I do not detect any evidence of malafides on the part of the Applicants nor any prejudice that will be caused to the Respondent if extension of time is allowed.

18. The prayer to extend time within which to file an appeal is merited. It is for allowing.

2: STAY OF EXECUTION PENDING APPEAL: -

Order 42 Rule 6(1) and **(2)** of the **Civil Procedure Rules** provides that: -

> **6(1) "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except 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 applicant 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 sub rule (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."** Emphasis added.

It is clear from the above that a party seeking an order for stay of execution pending appeal must satisfy the following conditions

> **1. Show sufficient cause**
>
> **2. Demonstrate that unless the order for stay is granted, substantial loss will ensue to him.**
>
> **3. File the application without unreasonable delay.**
>
> **4. Officer security.**

The Applicants have annexed to their application a Draft Memorandum of Appeal and the delay in moving to this Court is not unreasonable and has been satisfactorily explained. However, the Applicants are required to satisfy **all** the conditions set out in **Order 42 Rule 6(1)** and **(2)**, not only some of them. They have only explained the delay, which is not inordinate and also shown sufficient cause by annexing the Draft Memorandum of Appeal.

19. However, the cornerstone of an application for stay of execution pending appeal is, as was explained by **PLATT Ag J.A** (as he then was), substantial loss. The Judge stated thus in **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER 1986 KLR 410**: -

> **"It is usually a good rule to see if Order XLI Rule 4 of the Civil Procedure Rules can be substantiated. If there is no evidence of substantial loss to the applicant, it would be a rare case when an appeal would be rendered nugatory by some other event. Substantial loss in it's various forms is the cornerstone of both jurisdictions for granting a stay. That is what has to be prevented. Therefore, without this evidence, it is difficult to see why the respondents should be kept out of their money."** Emphasis added.

In **VISHRAM RAVJI HALAI & ANOTHER .V. THORNTON & TURPIN (1963) LTD 1990 KLR 365**, the Court said: -

> **"Thus the superior Court's discretion is fettered by three conditions. Firstly, the applicant must establish a sufficient cause; Secondly, the Court must be satisfied that substantial loss would ensue from a refusal to grant a stay; and thirdly, the applicant must furnish security. The application must of course be made without unreasonable delay.** Emphasis added.

Finally, on the issue of substantial loss, **KULOBA J** captured it well in **MACHIRA t/a MACHIRA & COMPANY ADVOCATES .V. EAST AFRICAN STANDARD (No 2) 2002 2KLR** as follows: -

> **"If the applicant cites as a ground, substantial loss, the kind of loss likely to be sustained must be specified, details or particulars thereof must be given and the conscience of the Court, looking at what will happen unless a suspension or stay is ordered, must be satisfied that such loss will really ensue and that if it comes to pass, the applicant is likely to suffer substantial injury by letting the other party proceed further with what may still be remaining to be done or in execution of an awarded decree or order, before disposal of the applicant's business (e.g. appeal or intended appeal)."**

The Judge went on to add: -

> **"Moreover, a Court will not order a stay upon mere vague speculation; there must be the clearest ground of necessity disclosed on evidence ………... Another common factor in favour of the applicant is whether to proceed further or to execute may destroy the subject matter of the action and deprive the appellant or intended applicant of the means of prosecuting the appeal or intended appeal. So, really, a stay is normally not to be granted, save in exceptional circumstances."**

In paragraph 13 of his supporting affidavit, the 1st Applicant has deponed as follows: -

> **13: "That we will suffer irreparable loss and our intended appeal rendered nugatory and a mere academic exercise unless the said stay execution and of proceedings are granted, and we allowed to file their appeal."**

The same averment is repeated on the face of the Notice of Motion. There is no indication of what **"irreparable loss"** or indeed **"substantial loss"** the Applicants will suffer if the order of stay of execution pending appeal is not granted and yet that is the ***"cornerstone"*** of such an application. It should not be a matter of conjecture. The Applicants must persuade the Court as to what substantial loss they will suffer. This can only be done by placing before the Court credible evidence in that respect. As **GACHUHI Ag J.A** (as he then was) said in **KENYA SHELL LTD .V. BENJAMIN KIBIRU & ANOTHER** (supra): -

> **"It is not sufficient by merely stating that the sum of Kshs. 20,380/= is a lot of money and the applicant would suffer loss if the money is paid. What sort of loss would this be? In an application of this nature, the applicant should show the damages it would suffer if the order for stay is not granted. By granting a stay would mean that status quo should remain as it were before Judgment. What assurance can there be of appeal succeeding? On the other hand, granting the stay would be denying a successful litigant of the fruits of his Judgment."** Emphasis added

In the absence of what substantial loss the Applicants will suffer if stay of execution is not granted, there can be no basis for granting an order of stay.

20. The Applicants have also not offered any security nor averred that they are ready and willing to abide by any conditions which this Court may impose for the due performance of such decree or order as may ultimately be binding on them. As was held in **WYCLIFF SIKUKU WALUSAKA.V. PHILIP KAITA WEKESA 2020 eKLR**: -

> **"The offer for security must of course come from the Applicant himself as a sign of good faith to demonstrate that the application for stay of execution pending appeal is being pursued in the interest of justice and not merely as a decoy to obstruct and delay the Respondent's right to enjoy the fruits of his Judgment."**

It is also not lost to this Court that the Applicants only moved to file this application on 23rd December 2021 some twenty (20) days after being served with the Respondent's Bill of Costs on 3rd December 2021 a copy of which is annexed to the replying affidavit.

21. It is clear from the above that the Applicants have not met the threshold for the grant of an order for stay of execution pending appeal. That prayer must therefore be dismissed.

22. The up – shot of all the above is that having considered the Notice of Motion dated 22nd December 2021, this Court makes the following orders: -

1. **Leave is hereby granted to the Applicants to file and serve their appeal out of time.**

2. **The appeal be filed and served within fifteen (15) days from to – day.**

3. **The record of appeal be filed and served within fourty five (45) days from the date of filing and serving the appeal.**

4. **The prayer for stay of execution pending appeal is declined.**

5. **Costs of this application shall abide the outcome of the appeal.**

BOAZ N. OLAO.

J U D G E

23RD MARCH, 2022

Ruling dated, signed and delivered at **BUNGOMA** on this 23rd day of March 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines as was advised to the parties on 9th February 2022.

BOAZ N. OLAO.

J U D G E

23RD MARCH, 2022