



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT THIKA

MISC APPLICATION NO 53 OF 2021

THINWA NJOROGHE.....APPLICANT

VERSUS

SAMUEL MURAGE WACHIRA.....1ST RESPONDENT

ANNAH WANJIKU NJOROGHE.....2ND RESPONDENT

RULING

1. On or about 16/12/2021, **Thinwa Njoroge** [the applicant], brought a miscellaneous application by way of notice of motion dated 23/11/2021, seeking: (i) leave to effect a change of advocates; (ii) an order of stay of execution of the judgment and decree in **Thika CMC E & L Case No 966 of 2015**; and (iii) an order enlarging the time within which to file an appeal against the judgment in **Thika CMC E & L Case No. 966 of 2015**. The said application is the subject of this ruling.

2. The application was supported by an affidavit sworn on 23/11/2021 by **John Muturi Njoroge**. It is not clear whether **John Muturi Njoroge** is the same person as **Thinwa Njoroge** who is the applicant in this application. I say so because in paragraph 1 of the affidavit, he deposed that he was the applicant in the motion, hence competent to swear the affidavit. In paragraph 5 of the affidavit, he deposed as follows:

“5. That further the client was in the rural areas and the firm was not able to get instruction on.” (sic)

3. The deponent deposed that judgment in the trial court was rendered on 3/3/2020. The notice of change of advocates dated 9/9/2020 and filed in the trial court on the same day, appointing *M/s Muturi Njoroge & Co advocates*, was filed post-judgment. He added that following the outbreak of the COVID-19 pandemic on 15/3/2020, the Judiciary scaled down operations and courts were closed. He further deposed that “the client” was in the rural areas and the law firm was not able to get instructions from him. He added that on 29/9/2020, a letter was written to the executive officer of the trial court, requesting for certified copies of the typed judgment and proceedings. He contended that by the time the typed judgment and proceedings were received, the time within which to appeal had lapsed. Lastly, he deposed that there was a strong and arguable appeal.

4. The respondents opposed the application through a replying affidavit sworn on 11/1/2022 by **Annah Wanjiku Njoroge** [the 2nd respondent]. She deposed that indeed judgment in the trial court was rendered on 3/3/2020 and that the notice of change of advocates filed in the trial court by *M/s Muturi Njoroge & Co Advocates* was invalid. She added that the lockdown in Kenya was announced on 26/3/2020, which was a total of 23 days from the date when judgment was rendered by the trial court. She further deposed that when judicial operations were scaled down, e-filing was introduced. She added that the present motion was triggered by service of the decree and the certificate of costs on the applicant’s advocate. She contended that a delay of one year and nine months was inordinate, adding that she stood to be prejudiced if the plea was granted after the inordinate delay. She urged the court to reject the application.

5. The application was canvassed through brief oral submissions by **Ms Nyambura Mwangi**. She submitted that at the time of delivery of the judgment by the trial court, the firm of *Muturi Njoroge & Co Advocates* was not on record for the applicant in the trial court. She added that subsequent to delivery of the judgment, there was the Covid-19 pandemic. Counsel submitted that although the appellant was represented in court on the day judgment was rendered by the trial court, the appellant only learnt about the judgment subsequently. Counsel urged the court to grant the order of stay because there was the danger of execution.

6. In response, **Ms Waithira Mwangi**, counsel for the respondents, submitted that there were no excusable circumstances to warrant grant of the orders sought. Counsel added that the judgment by the trial court was rendered in the presence of all the parties and that the lockdown was announced on 26/3/2020. Counsel argued that no request for proceedings was made in the trial court. It was the view of counsel that a delay of one year and nine months was inordinate. Lastly, counsel argued that the applicant was all along aware of the judgment and had elected to do nothing about it, adding that the application was triggered by service of the decree and the certificate of costs on counsel for the

applicant. Counsel urged the court to reject the application.

7. I have considered the application together with the response to the application and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. Three issues fall for determination in the application. The first issue is whether this miscellaneous application is the proper forum where the plea for leave to effect a post – judgment change of advocates in the trial court should be canvassed. The second issue is whether the applicant has satisfied the criteria upon which the discretionary jurisdiction to enlarge time for lodging an appeal is exercised. The third issue is whether the applicant has satisfied the criteria upon which an order of stay of execution pending the hearing and determination of an appeal is granted. I will make brief sequential pronouncements on the three issues in the above order.

8. The first issue is whether this miscellaneous application is the proper forum where the plea for leave to effect a post-judgment change of advocates in the trial court should be canvassed. This notice of motion is a new suit initiated as a miscellaneous application. Put differently, this is a new brief given to the firm of *Muturi Njoroge & Co Advocates*. Indeed, accompanying the application was a notice of appointment of advocates dated 23/11/2021. There is no contemplated change of advocates in this miscellaneous application. Further, there is no judgment in this miscellaneous application. Judgment exists in **Thika CMC E & L Case No 966 of 2015**. The suit in the Magistrate Court is where the contemplated change is to be effected. It therefore follows that the suit in the Magistrate Court is the proper platform where the plea for change of advocates should be presented and canvassed. This miscellaneous application is therefore not the proper platform where to canvass the plea for a post judgment change of advocates. That is the finding of this court on the first issue.

9. The second issue is whether the applicant has satisfied the criteria upon which our courts exercise jurisdiction to enlarge time. The Supreme Court of Kenya outlined the following principles in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR* which guide our courts when exercising the jurisdiction to enlarge time:

- 1) ***Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.***
- 2) ***A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court.***
- 3) ***Whether the court should exercise the discretion to extend time is a consideration to be made on a case by case basis.***
- 4) ***Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court.***
- 5) ***Whether there will be any prejudice suffered by the respondent if the extension is granted.***
- 6) ***Whether the application has been brought without undue delay, and;***
- 7) ***Whether in certain cases, like election petitions, public interest should be a consideration for extending time.***

10. In the application under consideration, judgment in the trial court was rendered on 3/3/2020 in the presence of counsel for all the parties. That was before the first case of COVID-19 was detected in Kenya. That was also before the Ministry of Health put any containment measures in place. That was before the Judiciary put in place measures to align its operations with the containment measures that were issued by the Ministry of Health. The applicant did nothing to initiate an appeal between 3/3/2020 and the time when the Judiciary put in place measures to align its operation with the containment measures. It is however noted from the notice of change of advocates dated 9/3/2020 that the applicant was able to access the court file and did file the notice of change of advocates on 9/3/2020. The contention that he was inhibited by COVID-19 against filing a memorandum of appeal is therefore not bona fide.

11. Secondly, the containment measures put in place by the Judiciary did not stop litigants from filing documents in court. The Judiciary simply embraced the e-filing system. If the applicant was serious about initiating an appeal to this court, he had the opportunity to do so. He elected not to do anything about the judgment until when he was served with the decree and the certificate of costs and asked to satisfy them.

12. Thirdly, the impugned judgment was rendered on 3/3/2020. The present application was filed on 16/12/2021. This is a period of one year and nine months. The applicant did not bother to bring an application soon after expiry of the statutory period of thirty (30) days. During that period of one year and nine months, the applicant was aware of the impugned judgment. No plausible and excusable explanation has been tendered to explain the inordinate delay.

13. Fourthly, although the applicant contended that his intended appeal is strong and arguable, he did not exhibit a copy of the Judgment of the trial court to enable the court glean it and be informed appropriately. The totality of the foregoing is that, for the above reasons, this court is not satisfied that the applicant has met the criteria upon which our courts exercise jurisdiction to enlarge time for lodging an appeal.

14. The court having made the above finding on the second issue and, in the absence of an appeal, it follows that there is no proper basis upon which to grant an order of stay of execution pending the hearing and determination of an appeal.

15. In summary, this miscellaneous application is not the proper forum where to canvas the plea for a post-judgment change of advocates. Secondly, the applicant has not satisfied the criteria upon which jurisdiction to enlarge time for lodging an appeal is exercised. Thirdly, in the absence of an appeal and, in view of the court's finding on the second issue, there is no proper basis for granting an order of stay of execution pending the hearing and determination of an appeal.

16. The result is that the notice of motion dated 23/11/2021 is rejected for lack of merit. The applicant shall bear costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 17TH DAY OF MARCH 2022

B M EBOSO

JUDGE

IN THE PRESENCE OF: -

MR. KIBICHO FOR THE DEFENDANTS/RESPONDENTS

COURT ASSISTANT: LUCY MUTHONI