REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT MAKUENI

ELC CASE NO. 46 OF 2017

WILFRED MUNAI KILUNGU.....1ST PLAINTIFF/RESPONDENT

ALFRED WANZA MUSAU.....2ND PLAINTIFF/RESPONDENT

-VS-

MUTAVI MUNAI.....DEFENDANT/APPLICANT

RULING

The Application

1. The application for determination is dated 12th October, 2020 and was filed under certificate of urgency. It is brought under section 3, 3A of the Appellate Jurisdiction Act , Rule 75 of the Court of Appeal Rules, 2010, Order 9 Rule 1 and Order 42 Rule 6 of the Civil Procedure Rules 2010 and all other enabling provisions of the Law. It seeks;

a) Spent.

b) THAT the firm of B.M Mung'ata & Co. Advocates be granted leave to come on record for the defendant/applicant.

c) THAT this honorable Court be pleased to extend the time within which the applicant may lodge a notice of appeal.

d) THAT the notice of appeal filed on 12/10/2020 be deemed to have been filed on time.

e) Spent.

f) THAT there be stay of execution of the judgment delivered on 21/05/2020 and decree pending the hearing and determination of the intended appeal.

g) THAT the warrants of attachment issued to Mambu Auctioneers be lifted and/or set aside.

h) THAT the Auctioneers fees be met by the plaintiff/respondent.

i) THAT costs be provided for.

2. The application is supported by the grounds on its face, the applicant's affidavit sworn on the same day and his supplementary affidavit sworn on 08th December, 2020. The applicant has deposed that he was unaware of the judgment due to a communication breakdown between him and his Advocate. A copy of the judgment is exhibited as **MM-1**. He has deposed that he only became aware after attachment of his livestock. Copies of warrants of attachment and sale are exhibited as **MM-2(a)** and **(b)** respectively. It is also his deposition that he was never served with a proclamation notice, warrants of attachment or notice of auction. Further, he deposed that he has an arguable appeal with high chances of success. The notice of appeal is exhibited as **MM-3**.

3. The application is opposed through the replying affidavit sworn by the 1st respondent on 22nd October,2020.The gist of the opposition is that the respondent was aware of the judgment and all the processes leading up to execution. He has exhibited an email *(marked **WMK-1**)* from the Deputy Registrar *(DR)* notifying the parties that judgment would be delivered on 21/05/2020. He deposes that on the day of delivery, the advocates of all parties were present. He has exhibited another email from the DR notifying the parties that a stay of 60 days had been granted. The same is exhibited as **WMK-2**.

4. He deposed that after the expiry of the 60 days, his Advocate forwarded the draft decree to the applicant's Advocate for amendment and has exhibited the forwarding letter as **WKM-3**. Further, he deposes that on 02nd July, 2020, his Advocate wrote to the DR to sign as there was no objection from the applicant's Advocate. The letter to that effect is exhibited as **WKM-4**. The signed decree was then forwarded to the applicant's Advocate and the letter to that effect is exhibited as **WKM-5**. He deposed that the applicant's Advocate participated in the whole process hence it is a falsity for the applicant to allege that there was a communication breakdown.

5. He deposed that the applicant's Advocate responded to the bill of costs by filing a preliminary objection (P.O) and he even participated in arguing the P.O. The bill of costs and P.O are exhibited as **WMK-6** while the ruling is exhibited as **WKM-7**. Accordingly, he deposed that the warrants of attachment cannot be lifted and the auctioneers' fees cannot be paid by him.

6. He deposed that no valid reason has been given for the delay in filing the notice of appeal and that this Court has no jurisdiction to extend time as that is the province of a full bench of the Court of Appeal. It is also his deposition that the applicant has hinged his application on the Court of Appeal Rules which are not applicable in this Court.

7. Further, he deposed that the notice of appeal was lodged in the High Court of Kenya hence cannot be deemed to be properly on record in this Court.

8. It is also his deposition that he has incurred kshs 207,866/= and the applicant has not demonstrated willingness to deposit security for costs. The warrants of attachment and sale are exhibited as **WKM-8.** He deposed that the applicant has already sold the proclaimed properties and a letter from Mambu auctioneers is exhibited as **WMK-9.**

9. In rejoinder, the applicant insists that his former Advocate never informed him about the judgment and all the correspondence between him and the applicant's Advocates. He deposed that this Court has jurisdiction to enlarge time by dint of section 75 of the Appellate Jurisdiction Act and Rule 4 of the Court of Appeal Rules.

10. Directions were given that the application be canvassed by way of written submissions. Accordingly, the parties complied and filed their respective submissions.

The Applicant's Submissions

11. Relying on Order 9 of the Civil Procedure Rules, the applicant submits that an Advocate wishing to come on record after delivery of judgment has to seek leave of Court or consent with the outgoing Advocate. He submits that the prayer to change his Advocate has not been opposed and should be allowed.

12. With regard to extension of time, he relies on the case of **Stanley Kahoro Mwangi & 2 others –vs- Kanyamwi Trading Company Limited [2015] eKLR** where the Court of Appeal stated that;

> *"The principles guiding the court on an application for extension of time premised upon **Rule 4 of the Rules** are well settled and there are several authorities on it. The principles are to the effect that the powers of the court in deciding such an application are discretionary and unfettered. It is, therefore, upon an applicant under this rule to explain to the satisfaction of the Court that he is entitled to the discretion being exercised in his favour.*
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> *The parameters for the exercise of such discretion are clear. See MUTISO V MWANGI, CIVIL APPLN NO. NAI 255 OF 1997 (UR), MWANGI V KENYA AIRWAYS LTD, {2003} KLR 486 and FAKIR MOHAMMED V JOSEPH MUGAMBI & 2 OTHERS, CIVIL APPLN NO. NAI 332 OF 2004 (unreported) where this court rendered itself thus:*
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> *"The exercise of this Court's discretion under Rule 4 **has followed a well-beaten path since the structure of** "sufficient reason" **was removed by amendment in 1985. As it is unfettered, there is no limit to the number of factors the court would consider so long as they are relevant. The period of delay, the reason for the delay, (possibly) the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted, the effect of delay on public administration, the importance of compliance with time limits, the resources of the parties, whether the matter raises issues of public importance- are all relevant but not exhaustive factors."***

13. He submits that the power of Court to grant stay is discretionary and the respondents have not given any compelling reasons to prevent the Court from exercising its discretion in his favor. He submits that there are compelling reasons to grant stay in that the effect of the judgment is to sub-divide the suit land into two portions and leave him with almost nothing.

Submissions by the Respondent

14. The respondents maintain that no good reason has been given for filing the notice of appeal out of time and without leave of Court. They rely *inter alia* on the case of **Kenya Railways Corporation –vs- Quick Lubes E.A Ltd (2015) eKLR** where the Court of Appeal stated that;

> *"That right of appeal must be balanced against an equally weighty right, that of the plaintiff to enjoy the fruits of the judgment delivered in his favor. There must be a just cause for depriving the plaintiff of that right."*

15. They have also cited the case of **Marangu Rucha & another –vs- Bernadette Muthina Nzioki & 8 others [2015] eKLR** where the Court of Appeal stated that;

> *"A mistake of advocate is one of the factors that the court may consider in determining whether or not time can be extended under Rule 4 of the Court's rules. However, the mistake must be an excusable mistake for it to inure to the benefit of the applicant. It is not the law that every mistake or error committed by an Advocate ought to be excused or forgiven, when his client puts all the blame on the Advocate. In this case, the applicants took long to find out whether the former Advocate acted on their instructions. That itself smacks of some indolence or blame attributable to the applicants. What is apparent is a party who allegedly gave instructions but did nothing to the fulfillment or performance of he said instruction. Consequently, I think the reasons for the delay is somewhat unexplained and unclear."*

16. They submit that the discretion to extend time is for a single Judge of the Court of Appeal and rely *inter alia* on the **CA No. 112 of 1999 : Dolphin Palms Ltd –vs- Al-Nasibh Trading Co. Ltd & Others where the Court of Appeal (Omollo. JA)** stated that;

> *"The prayer is that I should extend time to enable the applicant to file a fresh notice of appeal. There is in fact a notice of appeal on record. Whether or not that notice is a valid one cannot be a decision to be made by a single judge; that is the province of a full bench. Mrs. Gudra at first told me that I should treat the notice of appeal before me to be deemed to have been withdrawn pursuant to rule 82. I do not know that a single Judge of the Court can validly deem a notice of appeal to have been withdrawn and then proceed to act as though there was no notice of appeal."*

17. They have also cited the case of **Patrick Kirunja Kithinji –vs- Victor Mugiva Marete (2015) eKLR** where the Court of Appeal held that;

> *"In our view, whether or not an appeal is filed on time goes to the jurisdiction of this Court. It is trite that this Court has jurisdiction to entertain appeals filed within the requisite time and/or appeals filed out of time with leave of the Court. To hold otherwise would upset the established clear principles of institution of an appeal in this Court. Consequently, we find that an appeal filed out of time is not curable under article 159."*

18. They submit that there are procedural lapses which cannot be salvaged by the prayers in the motion. They contend that the applicant did not write a letter requesting the typed proceedings and did not serve the same. It is also their contention that the notice of appeal was not served within 7 days as required under rule 77(1). They rely on **County Government of Mombasa –vs- Kooba Kenya Limited [2019] eKLR** where the Court of Appeal (Sichale JA) stated that;

> *"It is however not lost to me that although the ruling of **Ogola, J.** was delivered on **3rd May, 2018** and the applicant filed a Notice of Appeal on **18th May, 2018** and on **31st May 2018** wrote the letter bespeaking the typed proceedings; these were served upon the respondent on **18th July, 2018.** The applicant is required to serve the Notice of Appeal within 7 days, (Rule 77(1) of this Court's Rules), hence on or before **25th May, 2018.** The Notice was served on **18th July, 2018**. The letter bespeaking the proceedings ought to have been served within thirty (30) days. The applicant applied for proceedings on **31st May, 2018** but served the letter bespeaking the proceedings on **18th July, 2018**, clearly outside the thirty (30) days. These procedural lapses do not feature in the motion before me. Supposing I were to grant the orders sought, which orders are confined to two substantive prayers, what happens to the late service of the Notice of Appeal and the late service of the letter bespeaking typed proceedings? In my view, there will still be procedural lapses not salvaged by the two prayers in this motion i.e an extension of time to file the Notice of Appeal as well as an extension of time to file the record of appeal. There are no prayers seeking extension of time as regards late service of the Notice of Appeal as well as the letter bespeaking the proceedings."*

19. With regard to stay of execution, they submit that this application was made after an unreasonable delay which has not been explained. They contend that the applicant has not demonstrated the substantial loss that he will suffer and that the balance of convenience lies in refusing the stay orders sought. They submit that the applicant refused to pay the taxed costs and sold the items which had been proclaimed.

Analysis and determination

20. On the issue of jurisdiction, I will simply reproduce the sentiments of Munyao .J in, **Loise Chemutai Ngurule & Another –vs- Winfred Leshwari Kimung'en & 2 Others (2015) eKLR**, which I totally agree with. He expressed himself as follows;

> *"It was argued that this court has no jurisdiction to entertain an application for extension of time to lodge a Notice of Appeal out of time, and that jurisdiction is only in the Court of Appeal. Reliance was made on the decision in the case of Simon Towett Martim v Jotham Muiruri Kibaru, Nakuru High Court, Miscellaneous Civil Application No. 172 of 2004 (2004)eKLR. In the matter, it was held that Rule 4 of the Court of Appeal Rules grants the Court of Appeal exclusive jurisdiction to grant extension of time to file an Appeal to the Court of Appeal. The Court (Kimaru J) held that in the circumstances, the High Court had no jurisdiction to entertain an application for extension of time to lodge Notice of Appeal out of time.*
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> *With respect I disagree with the above decision. Section 7 of the Appellate Jurisdiction Act, CAP 9, is drawn as follows:-*
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> *S. 7 Power of High Court to extend time*

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal, notwithstanding that the time for giving such notice or making such appeal may have already expired:

Provided that in the case of a sentence of death no extension of time shall be granted after the issue of the warrant for the execution of that sentence.

It will be seen from the above that Section 7 is explicit, that the High Court (which now in light of the Constitution of Kenya, 2010 needs to be construed as also including the Environment and Land Court and the Industrial Court), may extend time for giving notice of intention to appeal from a judgment of the High Court. The intention to appeal is the Notice of Appeal. I think Section 7 does not need any more than a literal interpretation. Jurisdiction is clearly conferred to the High Court to extend time for the filing of a Notice of Appeal. To decide otherwise is akin to completely disregarding, what in my view, is a clear provision in the law.

Neither am I of the view that there is any conflict between the above provision and the provisions in the Court of Appeal Rules. Rule 4 of the Court of Appeal Rules also gives the Court of Appeal power to extend time, but it does not say that it is the Court of Appeal with exclusive power, in so far as the filing of a Notice of Appeal is concerned. That provision is drawn as follows:-

Rule 4 : Extension of time

The Court may, on such terms as it thinks just, by order extend the time limited by these Rules, or by any decision of the Court or a superior count, for the doing of any act authorized or required by the Rules, whether before or after the doing of the act, and a reference in these Rules to any such time shall be construed as a reference to that time as extended.

In my opinion, the power to extend time for the filing of a Notice of Appeal is vested in both the High Court (and courts of equal status) and the Court of Appeal. One can approach either court for the order. This is indeed the import of Rule 41 of the Court of Appeal Rules which provides as follows:-….

One is therefore free to approach either the High Court or the Court of Appeal for extension of time to lodge Notice of Appeal out of time.

The matter indeed arose in the case of Kenya Airports Authority & Another vs Timothy Nduvi Mutungi, Court of Appeal, Civil Application NO. NAI 165 of 2013 (UR 113/2013) (2014) eKLR. In the case, an application for extension of time to lodge Notice of Appeal was filed in the High Court and the High Court declined to hear it, instead asking the applicant to file the application in the Court of Appeal. Githinji JA, had this to say on that point:-

"The application of 10th December, 2012 (the application for extension of time to lodge Notice of Appeal out of time), was properly made in the High Court as High Court has power to extend time for giving notice of intention to appeal pursuant to Rule 7 of the Court of Appeal Rules (sic) (clearly meant Section 7 of the Appellate Jurisdiction Act) which provides:- (Section 7 of the Appellate Jurisdiction Act set down)… Since the application for extension of time for lodging a notice of appeal made in the High Court was competent and which the High Court should have determined…"

It will be observed that the Court of Appeal did hold that the application for extension of time to lodge a Notice of Appeal out of time had been filed properly in the High Court and the High Court ought to have determined it.

I do not therefore agree with the argument that this court has no jurisdiction to entertain the present application in so far as it seeks extension of time to lodge a Notice of Appeal out of time…"

21. Accordingly, I find that this Court has jurisdiction to extend time to lodge a notice of appeal.

22. As for the change of Advocates, the same is not opposed and is hereby allowed.

23. I now turn to consider whether this Court's discretion to extend time should be exercised in favor of the applicant.

24. The judgment was delivered on 21st May, 2020 and the Notice of Appeal was filed on 12th October, 2020. That was approximately 4 months after the prescribed period of 14 days. I have perused the record and it is indeed true that on 19th May, 2020, the DR gave notice of judgment delivery *via* email. The applicant's former Advocate, Mr. Kisongoa was one of the recipients of that email. The judgment was then sent to the parties' Advocates on 21st May, 2020 followed by communication that a 60 days stay of execution had been granted.

25. On 25th June, 2020, the firm of Kisongoa received the draft decree which had been forwarded by the respondent's Counsel. In the absence of reaction from the firm of Kisongoa, the Court proceeded to sign the decree. The respondent's Counsel proceeded to file a bill of costs which the firm of Kisongoa respondent to by way of Preliminary Objection filed on 22nd July, 2020. The P.O was dismissed and the DR proceeded to tax the bill of costs. A certificate of costs was then issued and the respondents commenced the process of execution.

26. From the chronology of events after delivery of judgment, I agree with the respondents that there was no communication breakdown

between the applicant and his former Advocate. It makes little sense that an Advocate so senior like Mr. Kisongoa would engage in a resource wasting venture by representing a client without proper instructions. The applicant did not even indicate the action *(if any)* he took against his former Advocate for acting without instructions. In my view, the applicant is simply using his former Advocate as a scapegoat for his indolence. Accordingly, I find that the delay has not been explained hence the applicant does not qualify for a favourable exercise of discretion.

27. Having declined to extend the time for lodging an appeal, it is unnecessary to delve into the issues of stay, warrants of attachment and auctioneer's fees. Save for prayer (b), the rest of the prayers are declined with costs.

Signed and delivered at Makueni this 2nd day of March, 2021

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MBOGO C.G

JUDGE