



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET**

**E & L CASE NO. 376 OF 2014**

**ROSE CHEPKOECH ROTICH.....PLAINTIFF**

**VERSUS**

**ELIAS KIPLAGAT BUSIENEL.....DEFENDANT**

**RULING**

**[NOTICE OF MOTION DATED 22<sup>ND</sup> MAY, 2018]**

1. The Plaintiff moved the Court vide the Notice of Motion dated 22<sup>nd</sup> May, 2018, seeking for Morgan Omusundi Law Firm Advocates to be granted leave to come on record for her after entry of judgment, and stay of execution of decree pending the hearing of the “*intended lodged appeal*”. The application is based on the three grounds on its face and is supported by the affidavit sworn by **Rose Jepkoech Rotich**, the Plaintiff, on the 22<sup>nd</sup> May, 2018.

2. The application is opposed by the Defendant through his replying affidavit sworn on the 17<sup>th</sup> February, 2019 and filed on the 17<sup>th</sup> February, 2020.

3. That the Court issued directions on the 7<sup>th</sup> May, 2020 for the application dated the 22<sup>nd</sup> May, 2018 to be dealt with through written submissions. The learned Counsel for the Plaintiff and Defendant filed their written submissions dated the 27<sup>th</sup> October, 2020 and 11<sup>th</sup> March, 2021 respectively.

4. The following are the issues for determinations by the Court;

*(a) Whether M/s Morgan Omusundi Law Firm Advocates should be granted leave to come on record for the Plaintiff after judgment.*

*(b) Whether the Plaintiff has made a reasonable case for grant of stay of execution order, pending the determination of the appeal.*

*(c) Who pays the costs of the application?*

5. The Court has carefully considered the grounds on the application, the affidavit evidence by both parties, the learned Counsel’s written submissions, the superior Courts’ decisions cited therein and come to the following findings;

(a) That the Notice of Motion invokes **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act, and Order 40 Rules 1, 2, 3(3) and 9 of the Civil Procedure Rules** as can be confirmed from its heading. That **Order 40 of Civil Procedure Rules** provides for temporary injunctions and interlocutory orders, and not stay of execution pending appeal, which is what the Plaintiff actually seeks under prayer 3 of the application. That the order for stay of execution pending appeal is provided for under **Order 42 Rule 6 of the Civil Procedure Rules** which has not been cited or invoked in this application. That **Sections 1A, 1B, 3 and 3A of the Civil Procedure Act**, provides for the objective of the Act, duty of the Court, saving of special jurisdiction and inherent powers of the Court respectively. That the foregoing Sections of the Act do not provide for appeals of orders, and or decrees from this Court and their relevance to the prayers sought in the application is not apparent.

(b) That **Order 9 Rule 9 of Civil Procedure Rules** provides for change of representation after judgment has been entered. That provision has not been invoked in the application though prayer 2 seeks for leave for M/s Morgan Omusundi Law Firm Advocate to come on record for the Plaintiff after judgment has been passed. That prayer has however not been opposed.

(c) That both parties concedes, and the record confirms, that judgment in this suit was delivered on the 26<sup>th</sup> January, 2016 in the

presence of the Plaintiff who made an oral application for a copy of the proceedings immediately after that. That the record further shows that the Plaintiff made a written application for typed proceedings vide her letter dated 10<sup>th</sup> February, 2016 and on 9<sup>th</sup> February, 2016 filed a **“Notice of Appeal”** dated 8<sup>th</sup> February, 2016 under receipt No. 7356392. That the said Notice of Appeal has not been signed in acknowledgment or dated by the Deputy Registrar. That the existence of the said Notice of Appeal filed by the Plaintiff in person appear not to be known to M/s Morgan Omusundi Law Firm as what is annexed to the application and marked **“RJR2”** is an undated copy of Notice of Appeal bearing the year 2018 that has not been filed. That going by the said undated and unfiled Notice of Appeal, then the position taken by the Defendant that the Plaintiff has not shown that she had filed a notice of appeal would have been correct, but for the existence of the Notice of Appeal dated 8<sup>th</sup> February, 2016 and filed by the Plaintiff in person that is in the record.

(d) That the prayer for M/s Morgan Omusundi Law Firm to come on record for the Plaintiff at this juncture has not been opposed by the Defendant. That having found that the Plaintiff had been in person, and she has through the current application shown her intention to be represented by Counsel, the prayer is allowed.

(e) That considering that the time that has lapsed from the 26<sup>th</sup> January, 2016 when the judgment was delivered, and the date the application dated the 22<sup>nd</sup> May, 2018 was filed is about two (2) years four (4) months, the Court finds that the Plaintiff has delayed unduly long before moving the Court for stay of execution. That further, the Plaintiff has not shown what substantial loss she is likely to suffer should the Court not grant her prayer for stay of execution pending appeal. That in any case, the import of the judgment delivered on the 26<sup>th</sup> January, 2016 was to dismiss her claim (**suit**) against the Defendant, with costs. That execution on costs is not a basis for any stay of execution order.

(f) That though the Plaintiff has succeeded on prayer 2 only, the Court is of the considered view that she should pay the Defendant the costs of the application notwithstanding the provision of **Section 27 of the Civil Procedure Act**.

6. That from the foregoing, the Court finds and orders as follows;

(a) That the Plaintiff’s Notice of Motion dated and filed on the 22<sup>nd</sup> May, 2018 is allowed limited to granting M/s Morgan Omusundi Law Firm leave to come on record for the Plaintiff after entry of judgment.

(b) That the Plaintiff to pay the Defendant the costs of the application.

Orders accordingly.

**Delivered virtually and dated at Eldoret this 12<sup>th</sup> day of April, 2021.**

**S. M. KIBUNJA**

**JUDGE**

**In the presence of:**

Plaintiff: Absent.

Defendant: Absent.

Counsel: Mr. Sambu for Defendant only.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.