REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MURANG'A

E.L.C 336 OF 2017

ANTHONY NYAGA NDUNGU.....RESPONDENT /PLAINTIFF

VERSUS

JOSEPH MUCHOKI MUNGAI.....APPLICANT /DEFENDANT

RULING

1. The Applicant filed the instant application on the 10/3/2021 seeking the following orders;

a) Spent.

b) That the firm of Muthuri & Co. Advocates be allowed to come on record on behalf of the Defendant/ Applicant instead of Muia V.M & Co. Advocates who have hitherto acted for the Plaintiff.

c) That there be stay of orders issued on 24/2/2021 pending, hearing and determination of intended Appeal.

d) That the Court be pleased to extend the time within which to file the Notice of Appeal.

e) That the Appeal be filed within such period as the Court shall direct.

f) That the costs of this application be in cause.

2. The application is based on ten grounds and the dispositions by G Muthuri Advocate on behalf of the Applicant. It is the Applicant's contention that he was unavailable to prosecute the matter as he had travelled out of the country where he stayed for long. Further that the Notice to Show Cause and Notice of Taxation were served on his previous Advocate whom he had already retrieved the file from. The Applicant avers that he is now in charge of the file and wishes to challenge the ruling of Court delivered on 12/04/2018. That he should not be condemned unheard as he has an arguable Appeal.

3. In opposing the application, the Respondent avows that the application is not sustainable in law and has no merits. It is the Respondent's case that the Applicant was served in person but failed to appear in Court thus renouncing his right to be heard. Further that the application is brought so late in the time and there is no reason adduced for the delay. That the Applicant only attempted to be in contact with the matter in February, 2021. The Respondent avers that, as the successful litigant, he will be prejudiced should the orders be granted. That the Appeal is not arguable and should not be entertained. In the end he contends that the Applicant has not met the conditions of being granted stay.

4. Parties elected to dispense with the application by way of written submissions which were to be filed on or before 23/ 06/2021. As pert the record it is only the Applicant that filed submissions. I have read and considered the submissions.

5. It is the Applicant's submission that he has complied with the conditions for stay of execution as per the orders of Court of 16/3/2021. As to prayer for extension of time to file Appeal, the Applicant submits he has a right of Appeal. He attributes the delay to the pandemic and in his view the pandemic slowed down the operations of the Court thus impeding him in filing the Appeal. In submitting that the delay was not inordinate, he invites the Court to be guided by the case of **Leo Sila Mutiso vs Hellen Wangari Wangi** as quoted in **Kenya National Highway Authority vs Joseph Ndolo Mutua [2020] eKLR.**

6. The Applicant instituted the suit against the Respondent in March, 2016 in Nairobi but it was transferred to this Court. The Plaintiff subsequently withdrew his application for injunction on the premise that it had been overtaken by events. The Respondent also withdrew his Preliminary Objection ousting the jurisdiction of the High Court. The Respondent subsequently filed an application dated 3/5/2017 which was heard and determined vide the ruling of 12/4/2018. At the delivery of the ruling parties were represented by their Counsels. There was

no Appeal preferred against the ruling striking out the suit.

7. The Defendant commenced taxation process and the Plaintiff's Counsel was actively involved until 24/4/2019 when he expressed intention to file an application to cease acting. No application was filed and counsel continued accepting service of the Notices. The bill was taxed and a Notice to show cause (NTSC) was issued which was served on the Applicant personally. He did not attend Court for the hearing of the NTSC and when warrants were issued he preferred the instant application. There is an Affidavit of Service on record dated 19/2/2021 which indicates the Applicant was served in person. This has not been challenged and a perusal of the same meets the threshold of a competent Affidavit.

8. Having highlighted the background, it is my considered view that the issues for determination are;

a. Whether leave should be granted to the firm of Muthuri & Company Advocates to come on record?

b. Whether time for filing of Appeal should be extended?

c. Whether there should be stay of orders issued on 24/2/2021.

9. Article 48 of the Constitution guarantees every person the right to access justice and in the process be entitled to fair hearing under Article 50(1) of Constitution of Kenya. A litigant too has the right to choose Counsel of his/ her choice. This right is the entitlement of both parties to a suit and must not be used at the expense of the other.

10. Order 9 of the Civil Procedure Rules provides for the procedure for Advocates to come on record for parties to a suit. Where a litigant may wish to change his Advocate after judgment, 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 by 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 Applicant has attached a letter from Muia V.M & Company Advocates which letter shows that the firm is not opposed to Muthuri Advocates coming on record. The Applicant is in compliance with Order 9 Rule 9 of the Civil Procedure Rules above and there is no reason to deny leave, the same is granted.

12. The principles that guide the Court in exercising this discretion with respect to extension of time are now settled vide the Supreme Court Case No. 16 of 2014 **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] Eklr** then the apex Court held:

This being the first case in which this Court is called upon to consider the principles for extension of time, we derive the following as the under-lying principles that a Court should consider in exercise of such discretion:

a. 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;

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 the discretion to extend time, is a consideration to be made on a case to case basis;

d. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;

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

f. Whether the application has been brought without undue delay; and

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

13. Similarly, in the case of First **American Bank of Kenya Ltd Vs. Gulab P Shah & 2 Others Nairobi (Milimani) HCCC NO. 2255 of 2000 [2002] 1 EA 65, (SEE Machakos Civ Appeal No. 142 of 2013 Dilpack Kenya Limited v William Muthama Kitonyi [2018] eKLR) The Court considered the foregoing principles:**

a. The explanation if any for the delay;

b. The merits of the contemplated action, whether the matter is arguable one deserving a day in Court or whether it is a frivolous one which would only result in the delay of the course of justice;

c. Whether or not the Respondent can adequately be compensated in costs for any prejudice that he may suffer as a result of a favorable exercise of discretion in favour of the Applicant.

14. As to whether the application has been brought without unreasonable delay, the Applicant through the Advocate avers that he was out of the country for a considerable period of time and blames the delay on Covid pandemic. There has been no attempt to attach a visa to demonstrate that indeed he was out of the country and when. The ruling was delivered three years ago. There was need to elaborate to this Court the difficulty that prevented the Applicant from filing the Appeal within the stipulated period. The Covid pandemic struck in March, 2020 but the ruling was delivered in 2018. By March 2020 the Applicant was 2 years out of time.

15. It is trite that a delay is delay even it is for one day. A party seeking the indulgence of Court must endeavor to give reason for the delay. As enumerated above it is an equitable remedy granted to deserving parties. The fact that the Applicant's counsel was actively participating in the suit meant he had instructions from his client. I have found no reason to believe that Counsel was not in communication with his client. In addition, the Applicant was personally served with the NTSC but his Advocate appeared for the hearing.

16. The Applicant asserts that he has an arguable Appeal as per the draft memorandum of Appeal. Whereas it is one of the principles to consider, it is best left to be tested in the Appellate Court as this Court cannot sit on its own appeal.

17. Equity aids the vigilant and not the indolent; the Applicant seeking equity ought to have at least demonstrated to this Court adequately the reason for his delay. His conduct towards the matter portrays him as an indolent party undeserving the seat of equity. Having opined so, the standard of probability tilts in favour of not granting leave to Appeal**. (See Eldoret Court of Appeal App No. 4 of 2018 Alfred Induvuagwa Savatia v Nandi Tea Estates & another [2019] eKLR).**

18. The Applicant is praying for stay of orders for warrant of arrest. The impugned orders were issued in the presence of counsel for the Applicant. The same emanates from a NTSC which was duly served on the Applicant in person. The Applicant alleges that he was not served in person yet there is an unchallenged Affidavit of Service.

19. The provision on granting stay is laid down in Order 42 Rule 6 of the Civil Procedure Rules provides:

> 1. No Appeal or second Appeal shall operate as a stay of execution or proceedings under a decree or order Appealed from except Appeal case of 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 application 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.
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> 2. No order for stay of execution shall be made under sub rule (1) unless—
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> > 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.

20. The foregoing provision enunciates three conditions for granting stay to wit, substantial loss on the part of the Applicant, application is made without delay and the Applicant to furnish such security as will be directed by Court.

21. On whether the application is timely and/ or brought without undue delay. The impugned order was made on 24/2/2021 and the application was filed on 9/3/2021 close to two weeks. What amounts to inordinate delay differs from case to case. Borrowing from Nairobi Civ No. 32 of 2010, **Utalii Transport Company Limited & 3 others v Nic Bank Limited & another [2014] eKLR** the Court attempted to consider what amounted to inordinate delay and had this to say;

> "Whereas there is no precise measure of what amounts to inordinate delay. And whereas what amounts to inordinate delay will differ from case to case will depend on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the Court to an inescapable conclusion that it is inordinate and therefore, inexcusable".

22. Once a Court makes a pronouncement, an aggrieved party is required to take immediate action to avoid execution by way of stay; it is trite that Court orders cannot be issued in vain. I agree with the Learned Judge in Eldoret ELC No. 200 of 2012 **Jaber Mohsen Ali & another v Priscillah Boit & another [2014] eKLR** where he opined that a delay even for a day is delay. In this case the Applicant had filed an application for stay pending an Appeal and the Court considered that a delay for four days was inordinate.

23. The impugned orders were as a result of execution of orders issued in 2018. The Applicant sat on his right of Appeal for three years and being faced with an imminent arrest the Applicant rushed to Court. Filing the application immediately would have been a sign of good faith. In this case, undoubtedly a delay of two weeks is delay and the Applicant must give reason for the delay. No reasons were forthcoming in this case.

24. On whether the Applicant will suffer substantial loss, the Applicant has not demonstrated the loss he will suffer. It is his averments that he should not be condemned unheard. This is not a ground for grant of stay orders and better still the record shows that he was sufficiently

granted an opportunity to be heard.

25. What amounts to substantial was determined by Platt G A J (as he then was) in **Kenya Shell Limited v Benjamin Karuga Kibiru & another [1986] eKLR** where the Court held;

"Substantial loss in its various forms is the corner stone 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".

The Applicant has not demonstrated substantial loss and consequently I see no reason why the Respondent should not be allowed to enjoy the benefits of the orders of Court.

26. On security for cost, the Applicant submits that he has already deposited the decretal sum as ordered by Court. The amount instructed by Court was conditional on grant of stay pending the hearing of the application and not the intended Appeal. Despite submitting that he has deposited the decretal sum, there is no evidence on record to indicate this. An order for security is the discretion of Court and is a condition precedent for granting stay. The purpose of security is to act as security for due performance of the decree.

27. In the end I disallow prayer c d and e of the application for the reasons given above.

28. I grant costs to the Respondent/Plaintiff.

29. **It is so ordered.**

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 30TH DAY OF JUNE, 2021

J G KEMEI

JUDGE

Delivered in the presence of;

Wangari HB for Muchoki for the Plaintiff/Respondent

Kimemia HB for Muthuri for the Defendant/Applicant

Court Assistant: Alex