



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT ELDORET**

**E&L CASE NO. 281 OF 2014**

**PHILEMON SING'OEI.....APPLICANT**

**VERSUS**

**DANIEL BUTUK.....1<sup>ST</sup> RESPONDENT**

**MICHAEL KEMBOI.....2<sup>ND</sup> RESPONDENT**

**RULING**

This ruling is in respect of a notice of preliminary objection dated 17<sup>th</sup> November 2020 by the plaintiff/applicant on the grounds that;

- a) THAT counsel on record for the applicants (respondents) is not properly on record because he has failed to comply with the mandatory provisions of order 9 rules (5), (6) and (9) of the Civil Procedure Rules 2010.
- b) THAT the applicants did not lodge a NOTICE OF APPEAL as it's required by Rule 75 of the Court of Appeal Rules within the prescribed time or at all before filing the application herein.
- c) THAT the application herein is defective in law, incompetent and an abuse of the court process and ought to be struck out.

The respondents had filed an application dated 23<sup>rd</sup> October 2020 seeking for stay of execution pending appeal and further, that the firm of M/s Wabomba Masinde & Associates Advocates be allowed to come on record for the defendants.

**APPLICANT'S CASE**

Counsel for the applicant submitted that the respondents did not lodge a notice of appeal within 14 days as required by Rule 75(2) of the Court of Appeal Rules. Counsel further submitted that the respondent applied for typed proceedings vide a letter dated 16<sup>th</sup> October 2020 which shows that the notice of Appeal was filed 29 days after the judgment.

Mr. Murgor submitted that there was no notice of appeal served within the prescribed time as Rule 75(2) is couched in mandatory terms. The applicant did not seek leave of court to file a notice of appeal out of time.

Counsel further submitted that courts were closed towards the end of March 2020 and that Parties did not file submissions in this matter until virtual courts were constituted. Judgment was delivered on 17<sup>th</sup> September 2020 and the rules had been amended to allow the use of email for service. That if the applicants were able to file submissions and attend court virtually then they could not have failed to file a notice of appeal.

Counsel further submitted that the respondent's counsel is not properly on record as he did not comply with the mandatory provisions of Order 9 Rules 5,6 and 9 as counsel sought to cure this by including it in their application that they be allowed to come on record, however they did not prosecute this prayer. Order 9 Rule 10 is couched in mandatory terms. Rule 9(9) provides that such change or intention to act in person shall not be effected without an order of the court.

Counsel for the applicant referred to the case of **Ngitimbe Hudson Nyanumba v Thomas Ongondo (2018) eKLR** in support of their submission that failure to comply with order 9 is incurable defective. Counsel submitted that the applicant raised the preliminary objection before the conclusion of the case so as not to be accused of acquiescence

Mr Murgor also cited the case of **Machira t/a Machira & Co Advocates v East African Standard [2002] eKLR** where Kuloba J held as follows:

*"to be obsessed with the protection of an appellant or intending appellant in total disregard or flitting mention of the so far successful opposite party is to flirt with one party as crocodile tears are shed for the other, contrary to sound principle for the exercise of a judicial discretion. The ordinary principle is that a successful party is entitled to the fruits of his judgement or of any decision of the court giving him success at any stage. That is trite knowledge and is one of the fundamental procedural values which is acknowledged and normally must be put into effect by the way applications for stay of further proceedings or execution, pending Appeal are handled. In the application of that ordinary principle, the court must have its sight firmly fixed on upholding the overriding objective of the rules of procedure for handling civil cases in Courts, which is to do justice in accordance with the law and to prevent abuse of the process of the Court.*

Counsel therefore urged the court to uphold the preliminary objection.

On the application for stay of counsel, opposed it on the ground that the applicant has not met the requirements set out under Order 42 Rule 6 of the Civil Procedure Rules 2010.

Further that the applicant has failed to demonstrate that they stand to suffer substantive loss if an order of stay is not granted pending the hearing and determination of the intended appeal. That there is no material placed before the court in form of photographs, or evidence to show the kind of property that may be wasted or interfered with if stay is not granted.

Counsel cited the case of **Nairobi High Court Miscellaneous Civil Application No.419 of 2011 OSERO & COMPANY ADVOCATES-VERSUS-EASY PROPERTIES LIMITED** where Gikonyo J. had this to say on the question of substantial loss;

*"As I have often stated, the possibility of substantial loss occurring unless a stay is issued is the cornerstone of the jurisdiction of the court in granting stay of execution under Order 42 Rule 6 of the CPR. And the decision of the Court on whether substantial loss will occur depend on the final analysis by the court in a delicate and always novel balancing act between the rights of the parties; the Applicant's right to his appeal and its prospects, on the one hand; and, the right of the Respondent to the fruits of his judgement, on the other. Where the court decides to grant stay, it must be on sufficient cause being shown, and then securing the pain of postponement of the Respondent's right to realize the judgement with sufficient security for the due performance of the degree that might ultimately become binding on the Applicant. The onus of proving that substantial loss would occur unless stay is issued upon and must be discharged accordingly by the Applicant".*

Counsel submitted that the plaintiff/respondent is entitled to enjoy the fruits of his judgment as the court found that the plaintiff rightfully acquired title to the suit land. Counsel relied on the case **Samvir Trustee Limited Vs Guardian Bank Limited (2007) eKLR** where Warsame J ( as he then was) held that

*"the court in considering whether to grant or refuse an application for stay is empowered to see whether there exist any special circumstances which can sway the discretion of the court in a particular manner. But the yardstick is for the court to balance or weigh the scales of justice by ensuring that an appeal is not rendered nugatory while at the same time ensuring that a successful party is not impeded from the enjoyment of the fruits of his judgements. It is fundamental factor to bear in mind that, a successful party is prima facie entitled to the fruits of his judgement; hence the consequence of a judgement is that it has defined the rights of a party with definite conclusion. The respondent is asserting that matured right against the execution pending appeal and the court must ensure that parties fight it out on a level playing ground and on equal footing in an attempt to safeguard the rights and interests of both sides. The overriding objective of the court is to ensure the execution of one party's right should not defeat or derogate the right of the other. The court is therefore empowered to carry out a balancing exercise to ensure justice and fairness thrives within the corridors court"*

Mr Murgor therefore submitted that if the court is inclined to grant stay of execution, then the applicants should be ordered to deposit Kshs. 4,500,000/- as security for depriving the respondent the occupation and use of the property.

Counsel urged the court to dismiss the application with costs to the plaintiff.

## **RESPONDENT'S CASE**

Counsel for the respondent opposed the preliminary objection and submitted that the application to allow the advocates to come on record was allowed before the application for stay was to be heard.

Counsel cited the case **Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR**, where Mutungi, J held that failure to comply with Order 9 Rule 9 CPR is a mere technicality and held that "19. The appellant's Notice of Motion dated 8<sup>th</sup> July 2013 was predicated on the view that the firm of Nyamori Nyasimi came on record for the respondent after judgment without leave of the court and therefore was irregular, null and void and all orders emanating and/or ensuing thereafter were a nullity and ought to be cancelled. The appellant had every opportunity to challenge the appointment but did not do so. Instead the appellant participated in the proceedings and did not raise any issue regarding the irregularity of the Notice of Change of Advocate that placed Nyamori Nyasimi advocate on record. One may ask what injustice was occasioned to the appellant by the appointment of Nyamori Nyasimi advocate after judgment allegedly without leave? I discern none, the appellant continued to participate in the proceedings without raising any objection. The idea/objective behind amending the Civil Procedure Rules to provide that where judgment had been entered any change of advocate was to be with the leave of the court was essentially for the protection of the advocates to safeguard their fees from their clients. The amendment was aimed at preventing mischief where after an advocate worked tirelessly for a client

*upto obtaining a judgment, the advocate is not debriefed by merely another advocate filing a notice of change or the client filing a notice to act in person so that execution of the decree is by another advocate who did not participate in the trial and/or by the client directly with the object of denying the advocate his fees or costs.*

*20. Although I agree with the learned magistrate that there was an inordinate delay in bringing this application challenging the notice of change of advocate without leave, my view is that no leave was required as at the time and that even if it was required I would nevertheless not have been persuaded to annul the subsequent and consequential orders from the date the notice of change was filed. The appellant suffered no prejudice at all by reason of such change of advocate. The appellant participated and/or was not prevented from participating in the proceedings and miscarriage of justice. The court is enjoined under Sections 1A and 1B of the Civil Procedure Act, Sections 3(1) and 19(1) of the Environment and Land Court Act and Article 159 2(d) to administer justice expeditiously and justly and without undue regard to technicalities of procedure and it is my view that this is such a case where the court would have been entitled to disregard the strict rules of procedure in order to do substantive justice.”*

Counsel submitted that Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 and that they are allowed by rule 10 to apply for other orders at the same time with the order of leave to come on record and as such the application is valid. Counsel prayed that the preliminary objection be dismissed with costs.

On the application for stay of execution counsel submitted that it is trite law that one ought to file the notice of appeal within 14 days in case they preferred to lodge an appeal, however the circumstances building up to the filing of this application are that judgment was delivered on 17<sup>th</sup> September 2020 via email and covid 19 led to the closure of the courts.

Counsel further submitted that the applicant’s counsel got the judgment two weeks after the 14 days had lapsed. Counsel urged the court to exercise its discretion and allow the application as prayed.

### **ANALYSIS AND DETERMINATION**

The first issue to deal with is the preliminary objection and the next is the issue whether the applicant has met the threshold for stay of execution. I have looked at the preliminary objection and find that it does not have merit as the court had already granted an order for the counsel for the applicant to come on record when the application was filed together with the application for stay of execution. On the issue as to whether the notice of appeal was filed out of time will be dealt with in the application for stay of execution.

The next issue is whether the applicant has met the threshold for stay of execution. The applicant has admitted that they neither filed a notice of appeal on time nor filed an application for leave to extend time to file the same.

If the court grants the order for stay, what would the stay be hinged on, pending what as there is no appeal that has been filed. There was no application or order to show that there was any notice filed within the prescribed time.

As much as the court is not dealing with an application for leave to file a notice of appeal, no proper reasons have been advanced to explain the delay in filing the same. The country has experienced COVID 19 pandemic and adaptations have been made to deal with the challenges of access the justice. All persons must adapt to enable the wheels of justice to move without hiccups.

I have considered the application, submissions by counsel and find that the applicant’s application for stay of execution lacks merit for the reasons above and is dismissed with costs.

**DATED and DELIVERED at ELDORET this 8<sup>TH</sup> DAY OF JULY, 2021**

**M. A. ODENY**

**JUDGE**