



**Kang'ethe v Mwaluma (Miscellaneous Civil Application
E018 of 2022) [2023] KEHC 3948 (KLR) (4 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 3948 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT VOI
MISCELLANEOUS CIVIL APPLICATION E018 OF 2022**

**OA SEWE, J
MAY 4, 2023**

BETWEEN

DAVID MACHARIA KANG'ETHE APPLICANT

AND

PATREMY MWAKWEKA MWALUMA RESPONDENT

RULING

1. The Notice of Motion dated July 18, 2022 was filed herein by the applicant, David Macharia Kang'ethe, under Sections 1A, 1B, 3A, 75 and 95 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya, as well as Order 42 Rule 6 and Order 50 Rule 6 of the *Civil Procedure Rules*, 2010, for orders that:
 - (a) Spent
 - (b) That the applicant be granted leave to appeal out of time against the Judgment, Decree and all consequential orders of the Principal Magistrate's Court at Voi delivered on July 12, 2021 without notice to the respondent.
 - (c) That the Court do grant a stay of execution of the judgment and decree delivered on July 12, 2021 pending the hearing and determination of the intended appeal.
 - (d) The costs of the application be provided for.
2. The application was anchored on the grounds that the applicant wishes to appeal against the decision of the learned magistrate; yet the respondent is in the process of executing the Judgment, and has caused the applicant to be served with a Proclamation Notice. The applicant further averred that, unless the orders sought are granted, his intended appeal will be rendered nugatory; thereby occasioning him substantial loss.
3. In his Supporting Affidavit sworn on July 18, 2022, the applicant averred that, in the year 2014, the respondent filed a suit against him for compensation for malicious prosecution; and that he accordingly



- instructed an advocate to represent him in the matter. The applicant explained that he was never given any update on his case by his erstwhile advocate and was therefore taken by surprise when, on July 14, 2022, he was served with a Proclamation Notice, giving him 7 days to settle the decretal sum, failing which his proclaimed goods would be sold in execution.
4. The applicant explained that, upon following up the matter, he confirmed from the court record that indeed a decree had been issued against him and the matter had reached execution stage. He thereafter contacted his previous advocate over the matter but he was uncooperative. He therefore engaged his present counsel for purposes of being given an opportunity to appeal the decision of the lower court out of time. At paragraphs 11 and 14 of his Supporting Affidavit, the applicant averred that the mistake of his counsel ought not to be visited on him; and therefore that it is only fair and just that his prayers be granted.
 5. The respondent opposed the application and filed a Notice of Preliminary Objection dated July 29, 2022, contending that the application is bad in law pursuant to Order 9 Rule 5 of the Civil Procedure Rules. In addition, the respondent relied on a Replying Affidavit sworn on July 20, 2022 by his counsel, Mr Samuel Odhiambo Eleakim. He averred that it is a blatant lie for the applicant to allege that his Advocates did not keep him abreast of what had transpired in his case. In his view, the instant application is an abuse of the process of the Court as there is no good reason why the applicant did not file his appeal in time. At paragraph 9 of the Replying Affidavit, Mr Odhiambo pointed out that, to the extent that the applicant waited for one year from the date of judgment to move the Court for leave, the application has been filed inordinately late for no plausible cause. He added that should the Court be pleased to grant the prayers sought then the applicant ought to be required to deposit the sum stated in the Proclamation together with security for costs in the sum of Kshs 300,000/= as a condition for stay, in addition to paying the Auctioneer's charges.
 6. The application was canvassed by way of written submissions, pursuant to the directions given on the July 27, 2022. To that end, Mr Mwazighe, the applicant's counsel, filed his written submissions on August 2, 2022, proposing the following issues for determination:
 - (a) Whether the appellant can be granted leave to appeal out of time;
 - (b) Whether the orders of stay of execution of judgment pending the intended appeal can be granted;
 - (c) Who is to bear the costs of the application.
 7. Mr Mwazighe relied on Section 79G of the Civil Procedure Act and the cases of Edith Gichungu v Stephen Njagi Thoitbi [2014] eKLR and Kamlesh Mansukhlal Damki Pattni v Director of Public Prosecutions & 3 Others [2015] eKLR for the proposition that since judicial authority is derived from the people of Kenya, court decisions must be fair; and be made in the best interest of the people. He therefore submitted that a court of law should be hesitant in closing the door to applicants who seek an opportunity to ventilate their grievances. Counsel further relied on Belinda Murai & Others v Amos Wainaina [1978] eKLR and Haman Singh & Others v Mистри [1971] EA 122 to support his argument that the mistakes of a legal advisor is sufficient cause for the Court to grant leave to appeal out of time.
 8. On stay pending the intended appeal, Mr Mwazighe submitted, pursuant to Order 42 Rule 6(2) of the Civil Procedure Rules, that the Court has the discretion to allow the applicant's prayer on the basis of the evidence presented before it. He pointed out that there is a threat of execution of the lower court's judgment by the respondent; and that the judgment is an ex-parte judgment in the sum of Kshs 2,777,571/= in respect of which the applicant was not heard. Counsel reiterated the applicant's



avermment that it is prepared to deposit at least 1/3 of the decretal sum as security. He accordingly prayed that the application be allowed with costs.

9. Mr Odhiambo, learned counsel for the respondent filed his submissions herein on September 6, 2022. He relied on the respondent's Notice of Preliminary Objection and Replying Affidavit to anchor his submission that the application is bad in law and is an abuse of the process of the Court. According to him, the applicant became aware of the impugned judgment well before the expiry of the 30 days' appeal period provided for in law. He added that there is no reasonable cause why the applicant waited for one year after the dismissal of his application.
10. Counsel further submitted that, since no leave has so far been granted for the applicant's current advocates to take over the conduct of the matter on his behalf in place of the firm of M/s Kertiony & Co Advocates, the application is incompetent for purposes of Order 9 Rules 5 and 9 of the Civil Procedure Rules. He accordingly prayed for the dismissal of the application with costs.
11. I have given due consideration to the grounds set out on the face of the application and its Supporting Affidavit as well as the arguments advanced in the written submissions filed herein by counsel for the applicant. The application is two-pronged in that, it not only seeks leave to appeal out of time, but also prays for an order of stay of execution pending appeal. Its brief background is that the respondent sued the applicant before the lower court in the Principal Magistrate's Court at Voi in Civil Case No 152 of 2014: Patremy Mwalima Mwakweka v David Macharia Kang'ethe & the Attorney General seeking compensation in damages for malicious prosecution. The suit was determined in favour of the respondent by Hon D Wangeci, PM, on July 12, 2021. Accordingly, the respondent was awarded general damages for unlawful and malicious arrest, incarceration and prosecution in the sum of Kshs 2,000,000/= together with special damages of Kshs 77,000/=.
12. The applicant now contends that he is aggrieved by that decision and wishes to file an appeal but cannot do so without leave, granted that the appeal window has been shut by operation of the law. On the other hand, counsel for the respondent contends that the application is incompetent for having been filed by a stranger to the proceedings. Accordingly, the first issue to determine is the competence of the application from the standpoint of Order 9 Rules 5 and 9 of the Civil Procedure Rules. Order 9 Rule 5 of the Civil Procedure Rules provides: -

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.
13. There is no dispute that the applicant was represented before the lower court by M/s Kertiony & Company Advocates. There is no indication that the said firm was replaced in the manner envisaged by Rule 9 of Order 9 of the Civil Procedure Rules. That provision is explicit that:

"Where 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 without an 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 intended to act in person as the case may be."



14. In the premises, it is manifest that the firm of M/s Mwazighe & Co Advocates are not properly on record and as such strangers to these proceedings. Viewed from that prism, it follows that the instant application is incompetent and must be struck out accordingly. I find succor for this posturing in *John Langat v Kipkemoi Terer & 2 others* [2013] eKLR, where it was stated:-

“There was no application made to change advocates. In the Replying Affidavit, the appellant swore that there was a consent entered into between his previous advocates and his present advocate to effect change. This was done following the judgment. He annexed the consent. There is no evidence that the Respondents were put in the picture. But more important, the consent could not effect the change of advocates “without an order of the Court.” No such order was sought or obtained. It follows, and I agree with Mr Theuri and Mr Nyamweya, that Anyoka & Associates are not properly on record for the appellant, and therefore the appeal and the application are incompetent.”

15. Similarly, in *Joshua Nyamache T Omasire v Charles Kinanga Maena* [2008] eKLR, Hon Musinga, J (as he then was) held thus in respect of Order III of the *Civil Procedures Rules* (now Order 9):

“... Order III rule 1 of the Civil Procedure Rules permits advocates who are duly appointed by a party to file any application or take such action as by law authorized. Under Order III rule 6, a party is at liberty to change his advocate and when he so decides, an appropriate notice of change of advocates must be filed. An advocate who is not duly appointed to act for a party cannot be allowed to purport to file applications or documents on behalf of a party. An application filed by an advocate who is not duly appointed is an affront to the court process and is a nullity. The court can strike it out *ex debito justitiae*.

When an advocate who is on record in a matter realizes that there is a strange application in the file, filed by an advocate who is not duly appointed by his client, the right thing to do is to ask the court to expunge the strange document out of the record”

(16) In the result, the Notice of Motion dated July 18, 2022 is indeed incompetent and is hereby struck out with costs.

17. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 4TH DAY OF MAY 2023

OLGA SEWE

JUDGE

