



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC APPEAL NO 8 OF 2020

SERAH WANJIRU KUNG'U.....APPELLANT

=VERSUS=

PETER MUNYUA KIMANI.....RESPONDENT

RULING

1. Judgment in this appeal was rendered by Gacheru J on 29/7/2021. She made a finding in favour of the appellant, Serah Wanjiru Kung'u. Subsequently, the respondent, Peter Munyua Kimani, brought an application dated 6/8/2021, seeking orders of stay of execution pending the hearing and determination of an intended appeal in the Court of Appeal. On 16/8/2021, Gacheru J disposed the application by granting the respondent a stay for 30 days. Further, she directed the respondent to file a "substantive application for stay of execution at the Court of Appeal."

2. Subsequently, the respondent brought a notice of motion dated 21/9/2021 seeking an order enlarging the period of stay of execution for a further period of 30 days. This court (Eboso J) considered the application and in a ruling rendered on 18/10/2021, the court upheld the appellant's objection to the application, without venturing into the merits of the application, on the ground that the application had been filed by a law firm that was not properly on record. The court rendered itself thus:

"6. It does therefore emerge that the respondent elected to take a casual approach to the issue of change of advocates post-judgment, notwithstanding the fact that the application he was initiating focused on the diligence of his legal representatives. It does also emerge that the respondent did not and has not up to this point, bothered to comply with the mandatory requirements of Order 9 rule 9 of the Civil Procedure Rules. The purpose of the above mandatory framework is to ensure orderly administration of justice. In the absence of prior leave or consent, the respondent's application dated 21/9/2021 was filed by a law firm that was not properly on record. The result is that the said application is incurably defective and stands to be struck out without venturing into its merits. Consequently, the appellant's objection is valid and is upheld without venturing into the merits of the application."

3. Consequently, the court struck out the respondent's application dated 21/9/2021 for having been filed by a law firm that was not properly on record.

4. Subsequent to that, the respondent brought an application dated **19/10/2021**, seeking: (i) an order adopting the consent dated 5/10/2021 and filed on or about 7/10/2021, in which the firm of *M. K. Chebii & Co Advocates* consented to the coming on record of the firm of *M/s Wokabi Mathenge & Co Advocates* as the respondents' advocates; (ii) an order of stay of execution of the judgment herein pending the hearing and determination of the intended appeal in the Court of Appeal; and (iii) an order enlarging the time for lodging and serving the notice of appeal. The said application dated 19/10/2021 is the subject of this ruling.

5. The application was supported by the respondent's affidavit sworn on 19/10/2021, in which he deposed that upon delivery of judgment in this appeal, he instructed the firm of *Nganga Nyaga & Co Advocates* to take over conduct of the matter from the firm of *M/s Chebii & Co Advocates* and lodge an appeal. The firm of *Nganga Nyaga & Co Advocates* lodged and served a notice of appeal as required by the law.

6. The respondent added that his subsequent efforts to trace the firm of *Nganga Nyaga & Co Advocates* were unsuccessful. As a result, he was constrained to engage the firm of *Wokabi Mathenge & Co Advocates* to take over conduct of the matter. In their effort to trace his previous advocates to hand over the relevant file, his new advocates learnt from the **Law Society of Kenya Secretariat** that **Mr Paul Nganga Nyaga**, the proprietor of *M/s Nganga Nyaga & Co Advocates*, had been struck off the Roll of Advocates.

7. The respondent further contended that in its ruling rendered on his earlier application on 18/10/2021, this court held that his application for stay was irregular because it had not been filed by a law firm that was properly on record. He deposed that the predicament he had found himself in was caused by the lawyer he had instructed without knowledge that the lawyer had been struck off the roll of advocates. It was his case that because the notice of appeal was filed by an advocate who had been struck off the Roll of Advocates, it was a nullity. He pleaded with the court to grant the orders sought in the application, contending that he had lived on the suit property with his family for over 25

years.

8. The appellant opposed the application through grounds of opposition dated 30/10/2021. Among the grounds, the appellant contended that this court lacked jurisdiction to grant orders of stay and enlargement of time as sought under prayers 4 and 5 of the notice of motion and that the said prayers could only be granted by the Court of Appeal. He contended that this court could only entertain an application for stay of execution prior to or up to the time of filing an appeal in the Court of Appeal, but not during the pendency of an appeal in the Court of Appeal. The appellant added that the respondent had not demonstrated sufficient cause for extension of the orders of stay of execution and had not satisfied the court on the principles upon which an order of stay is granted. The appellant added that because there was already a notice of appeal on record, its validity notwithstanding, it was wrong for the respondent to ask this court for extension of time within which to lodge and serve a notice of appeal. Further, the appellant contended that the jurisdiction granted to this court under **Section 7** of the **Appellate Jurisdiction Act** relates to a situation where an appellant has not filed any notice of appeal within the prescribed time. The appellant further opposed the application on the ground that the respondent having failed to comply with the conditions given by Gacheru J, this court lacked jurisdiction to entertain the application.

9. The application was canvassed orally in the virtual court on 4/11/2020. Mr Mathenge, counsel for the respondent, submitted that the respondent had, through the supporting affidavit, explained the reasons leading to the delay. Counsel added that this court had jurisdiction to grant the orders sought because the notice of appeal which was lodged was not lodged in the Court of Appeal, and in the circumstances, this court was still vested with jurisdiction to grant an extension under Section 7 of the Appellate Jurisdiction Act. Counsel added that the factual issues raised in the supporting affidavit had not been controverted because the appellant chose not to file a replying affidavit.

10. On his part, Mr Karanja, counsel for the appellant submitted that the plea for adoption of the consent by the two law firms was misplaced because under Order 9 rule 9, once consent is given, adoption of the consent by the court is unnecessary. Counsel argued that the respondent had not shown sufficient cause why the court should exercise discretion to grant a stay. Counsel added that Section 7 of the Appellate Jurisdiction Act applied only when there is no notice of appeal on record. Counsel further submitted that once a notice of appeal has been filed, it cannot be struck out by this court or by a single judge of the Court of Appeal. Counsel contended that this court had become *functus officio*.

11. I have considered the application, the grounds of opposition, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. The following issues fall for determination in the application: (i) Whether a formal order adopting a consent permitting change of advocates post-judgment is necessary for the purpose of effecting change of advocates: (ii) Whether this court has jurisdiction to enlarge time for filing a fresh notice of appeal when an already lodged and served notice of appeal is deemed defective though subsisting; and (iii) Whether this court has jurisdiction to grant or extend an order of stay after a notice of appeal has been lodged and served; and (iv) Whether the appellant has satisfied the criteria for grant of an order of stay by enlarging the period of stay earlier granted by this court under Order 42 rule 6(2) of the Civil Procedure Rules. I will make sequential pronouncements on the four issues in the above order.

12. The first issue is whether a formal order adopting a consent permitting change of advocates post-judgment is necessary. The regulatory legal framework on change of advocates post-judgment is contained in **Order 9 rule 9 of the Civil Procedure Rules** which provides as follows:

“9(9) 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.”

13. The above framework was introduced in the Civil Procedure Rules to deal with disruptive changes that litigants and advocates used to effect, often for the purpose of unfairly dislodging previous advocates without settling their costs. The provision on filing a consent between the outgoing and the incoming law firms was intended to ease the process of effecting change of advocates post-judgment. In my view, once the consent is executed and filed and a notice of change is filed, the new law firm is properly on record. The adoption of the consent as an order of the court is merely intended to make the court record clear for avoidance of doubt. Further, the formal adoption of the consent does not in any way prejudice the other parties to the case because a litigant is at liberty to change advocates. It is therefore my finding that the formal adoption of a consent relating to change of advocates is necessary for a proper court record but it does not affect the effective date of change of advocates which is the date when the parties execute the consent and present it to the court.

14. The second question is whether this court has jurisdiction to enlarge the time for lodging a fresh notice of appeal when an already lodged notice of appeal is deemed defective, though subsisting. The framework on this court's jurisdiction to enlarge time for lodging a notice of appeal is contained in Section 7 of the Appellate Jurisdiction Act which provides as follows:-

“7. 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.”

15. The above legal framework has been the subject of interpretation by the Court of Appeal and the third tier superior courts. The Court of Appeal in **Trimborn Agricultural Engineering Limited Vs David Njoroge Kabaiko & Another [2000]eKLR** rendered itself on this issue exhaustively. Shah JA stated thus:

“Section 7, above was not in my view intended to cover appellants whose appeals have been struck out for incompetence and who desire to file competent appeals. Once a litigant files a valid notice of appeal and had obtained the necessary leave to appeal, where necessary, the matter respecting which an appeal is intended, is thereby removed from the jurisdiction of the superior court, except for limited matters in which specific jurisdiction has been conferred on it to deal with. Section 7, above presupposes that an intending appellant has not taken any other steps in pursuance of that appeal. Besides, from a careful reading of the provisions of rules 74 and 81 of the Rules of this Court, it is clear that they are intended to deal with the filing of appeals for the first time. The jurisdiction to restart the appellate procedures is not donated by Section 7, above, but by rule 4 of the Rules. The rule, in effect empowers the court to reinstate the struck out appeal, while Section 7 above empowers the High Court to, in effect, assist a litigant in distress who otherwise would not seek help of either court for any interim relief before he lodges his appeal for the first time.”

16. Shah JA rendered himself further:

“The question that arises here is: what happens when a record of appeal is not yet lodged and the time to lodge the notice of appeal is extended by the High Court and whilst the first defective notice of appeal has not been struck out.

The answer to the question posed by me is that the first notice of appeal, until struck out by this court, on an application made to it, remains and the High Court has therefore no jurisdiction to extend the time to lodge a fresh notice of appeal.”

appeal.”

17. On his part, Gicheru JA rendered himself on this issue as follows:

“Although that notice of appeal was defective and could not be amended, it was a legitimate notice of appeal in regard to the appellant’s appeal and as long as it subsisted, any subsequent extension of time to lodge another notice of appeal and the lodging of such notice of appeal in the superior court in respect of the said appeal was null and void.”

18. It is therefore clear from the prevailing jurisprudence on the jurisdiction of this court under Section 7 of the Appellate Jurisdiction Act that once a notice of appeal has been lodged, served and subsists, this court is divested of the jurisdiction donated to it under Section 7 of the Appellate Jurisdiction Act. That is my finding on the second issue.

19. The third issue is whether this court has jurisdiction to grant or extend an order of stay of execution after a notice of appeal has been lodged and served. The jurisdiction of this court to grant an order of stay of execution or to extend an order of stay of execution is granted and regulated by **Order 42 rule 6(1)** and **(2)** of the Civil Procedure Rules which provides as follows:-

“42(6) (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.

(2) No order for stay of execution shall be made under subrule

(1) unless—

(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. My interpretation of the above framework is that this court (the court appealed from) has discretionary jurisdiction to grant a stay order so long as the criteria set out under subrule 2 is satisfied. Secondly, that discretionary jurisdiction obtains regardless of whether a notice of appeal has been lodged or not. Indeed, Order 42 rule 6(4) clearly provides that an appeal to the Court of Appeal shall be deemed to have been filed when under the rules of the Court of Appeal, a notice has been given. Thirdly, the jurisdiction to extend the stay order obtains regardless of whether a notice of appeal has been lodged or not. It is therefore my finding that this court has jurisdiction to grant or extend an order of stay of execution after a notice of appeal has been lodged and served.

21. The last issue is whether the appellant has satisfied the criteria for grant of an order of stay by enlarging the period of stay earlier granted by this court under Order 42 rule 6(2) of the Civil Procedure Rules. The criteria upon which jurisdiction to grant an order of stay of execution is exercised is set out under subrule 2. The court must be satisfied that: (i) substantial loss may result to the applicant unless the order of stay is made; (ii) the application should be made without unreasonable delay; and (iii) security should be given for the due performance of the decree.

22. In the present application, the respondent deponed that he lives on the suit property with his family. He has lived there for more than 25 years. He added that the appellant had put eviction process in motion and he stood to lose immensely if he was evicted from the property where he has lived for 25 years while the appeal mechanism is pending. He expressed regret that he had found himself in the present predicament because he instructed a lawyer who turned out to have been struck off the roll of advocates. Further, the record shows that he promptly moved this court for an order of stay of execution. He subsequently promptly brought the subsequent two applications. The court is therefore satisfied that the first and second requirements under Order 42 rule 6(2) are satisfied. It will be the duty of the court to make an appropriate order for security.

23. I have reflected on the respondent's plea for an unqualified stay order. On 16/8/2021, Gacheru J disposed the applicant's application for stay orders. The disposal orders made by the Judge were clear. Gacheru J ordered thus:

“(i) Notice of motion dated 6th August 2021 and the certificate of urgency to be heard during the vacation is considered.

(ii) Stay of execution is granted for 30 days.

(iii) Let the applicant file the substantive application for stay of execution at the Court of Appeal.”

24. There has been no application for review of the above orders. Secondly, at this point, the respondent has stated that although he lodged a notice of appeal, the said notice of appeal is incompetent because it was lodged by an advocate who had been struck off the Roll of Advocates. He intends to lodge a proper notice of appeal after the requisite leave is obtained. In the circumstances, this court can only extend the stay period granted by Gacheru, taking into account the current diary of the Court of Appeal and the approaching Christmas Recess. During the extended period of stay, the respondent will be expected to process relevant applications in the Court of Appeal, relating to notice of appeal and further stay of execution, as ordered by Gacheru J, if deemed necessary.

Disposal Orders

25. In light of the foregoing, the respondent's notice of motion dated 19/10/2021 is disposed in the following terms:

a) Pursuant to the consent dated 5/10/2021, the firm of Wokabi Mathenge & Co Advocates is deemed to be the respondent's advocates on record effective from the date when the consent was filed in court.

b) The order of stay of execution made by Gacheru J on 16/8/2021 is extended for a period of 90 days from today.

c) The respondent's plea to this court to extend the period for lodging and serving a notice of appeal is declined on the ground that the respondent having lodged a preceding notice of appeal dated 2/8/2021, this court no longer has jurisdiction under Section 7 of the Appellate Jurisdiction Act to grant the plea.

d) The respondent shall deposit in this court a sum of Kshs. 20,000 on or before the 5th day of every month as security during the stay period. In default, the above stay order will stand vacated.

e) The respondent shall pay the appellant costs of this application assessed at Kshs. 10,000 payable within 30 days from today.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF NOVEMBER 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Karanja for the Appellant

Mr Mabachi holding brief for the Respondent

