



THE REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT THIKA

ELC MISC APPEAL SUIT NO. 19 OF 2021

ELIJAH NGUGI NJOROGE.....1ST APPELLANT
ELIZABETH WAITHERA2ND APPELLANT
STEPHEN THUO GITAU.....3RD APPELLANT
MARSTEP AGENCIES 4TH APPELLANT
FRANCIS KARANJA NJOROGE.....5TH APPELLANT

-VERSUS-

DAMARACI WAMAITHA KIHONGE.....RESPONDENT

-AND-

ANDERSON GITONGA KIRAITHE.....1ST INTERESTED PARTY
GLADYS WAMBUI MUHURI.....2ND INTERESTED PARTY
SAMUEL HAHANYU NDERI & TERESIA NJAMBI HAHANYU.....3RD INTERESTED PARTY
JESEE WAGENDO MARARO.....4TH INTERESTED PARTY
FRANCIS KAMAU MUGURO.....5TH INTERESTED PARTY
DOMINIC KARIUKI MWANGI & ALICE MWIHAKI KARIUKI6TH INTERESTED PARTY
BENSON MAINA NJUGUNA7TH INTERESTED PARTY
TITUS GICHIA MWAURA8TH INTERESTED PARTY
ELIZABETH MUGURE MBURU.....9TH INTERESTED PARTY
SIMON MUGI KABUGU.....10TH INTERESTED PARTY
THE PRINCIPAL REGISTRAR OF TITLES11TH INTERESTED PARTY
COMMISSIONER OF LANDS.....12TH INTERESTED PARTY

RULING

1. The subject of this ruling is the notice of motion dated 17/5/2021 brought by: (i) Elijah Ngugi Njoroge; (ii) Elizabeth Waitthera; (iii) Stephen Thuo Gitau; (iv) Marstep Agencies; and (v) Francis Karanja Njoroge. The first limb of the application is a plea for leave to effect change of advocates post-judgment. The second limb is a plea for an order enlarging the time within which to file and serve a notice of appeal. The said application is supported by an affidavit sworn on 17/5/2021 by the applicants' advocate. The application was canvassed

through written submissions dated 12/7/2021, filed through the firm of *Robi Kerato Partners*.

2. The case of the applicants is that on 11/2/2021, Hon M W Wanjala rendered a judgment in **Thika MCL & E Case No 214 of 2018**. Aggrieved by the said judgment, they filed and served a memorandum of appeal within the prescribed time. In addition, they filed an application for stay of execution. While their then advocate was prosecuting the said application, it turned out that he (their advocate) did not have a valid practicing certificate for the year 2021, hence he was not properly on record. At that point, the time prescribed by the law for lodging an appeal had lapsed.

3. Canvassing the application, counsel for the applicants cited the provisions of **Articles 24 and 48** of the Constitution and **Order 9** of the Civil Procedure Rules. Further, counsel cited the Court of Appeal decisions in: **(i) Belinda Murui & 6 others v Amos Wainaina (1978) KLR**; and **(ii) Philip Chemwolo & another v Augustine Kubede (1982 -88) KLR**.

4. Counsel submitted that the applicants did not know that their advocate did not have a valid practicing certificate. Counsel added that the applicants did not anticipate that the unlicensed advocate would be compelled to withdraw the memorandum of appeal in its entirety. Counsel added that an appeal was a matter of right and denying the applicants the opportunity to ventilate their appeal would be tantamount to limiting their right to access justice.

5. The respondent opposed the application through grounds of opposition dated 26/5/2021 and written submissions dated 22/7/2021, filed through the firm of *Kingori Kariuki & Co Advocates*. The respondent contended that the memorandum of appeal filed by the firm of *M/s Mukami Nyaga & Co Advocates* was a nullity because it was drawn, signed, and filed by an unqualified person. The respondent added that there had been inordinate delay in bringing the present application. Further, the respondent contended that there was no evidence that counsel was instructed to lodge an appeal against the judgment. The respondent contended that the application was brought in bad faith and smacked of dishonesty on part of the applicants because the applicants had failed to make full disclosure of material facts. The respondent's written submissions focused on the plea for stay of execution, although the application under consideration did not contain the plea. The interested parties did not respond to the application.

6. I have considered the application, the response to the application, and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence. Two questions fall for determination in this application. The first question is whether leave should be granted to the applicants to effect a change of advocates post-judgment. The second question is whether the applicants have satisfied the criteria upon which our courts exercise discretion to enlarge the time for lodging an appeal. I will make brief sequential pronouncements on the two questions in the above order.

7. The reason advanced by the applicants for seeking leave to effect a change of advocates is that, judgment in the matter has been rendered and it has transpired that the advocate who drew the preceding memorandum of appeal did not have a valid practicing certificate. No good reason has been presented by the respondent to demonstrate why the applicants should not be granted leave to effect a change of advocates in the circumstances. Consequently, I will grant that plea.

8. On the plea for an order for enlargement of time, the Supreme Court of Kenya in **Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [2014] eKLR** laid down the following criteria that guide our superior courts whenever they are invited to exercise jurisdiction to enlarge time:

- 1. 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;**
- 2. A party who seeks extension of time has the burden of laying a basis to the satisfaction of the court**
- 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;**
- 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the court;**
- 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;**
- 6. Whether the application has been brought without undue delay; and**
- 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.**

9. In the present application, there is common ground that a memorandum of appeal was filed within the prescribed time, and that it subsequently transpired that the advocate who drew, signed, and filed the memorandum of appeal was not licensed. The applicants have explained that they did not know that their then advocate did not have a valid practicing certificate at the time they instructed him to lodge an appeal. They promptly brought this application the moment it became apparent that their advocate did not have a practicing certificate. In the circumstances, I would grant the applicants an order enlarging the time within which to file and serve a fresh memorandum of appeal in a fresh cause. The applicants will, however, bear the respondent's costs of this application, assessed at Kshs 30,000, payable within 10 days.

10. In the end, the application dated 17/5/2021 is disposed in the following terms:

- a. The applicants/intended appellants are granted leave to effect change of advocates and the firm of Robi Kerato Partners is deemed to be duly appointed to act for the applicants/intended appellants in the intended appeal.**
- b. The applicants/intended appellants shall pay counsel for the respondent Kshs 30,000 being throwaway costs of the**

application within 10 days.

c. Upon paying the above throwaway costs of Kshs 30,000, the applicants/intended appellants shall have leave to file and serve a fresh memorandum of appeal in a fresh appeal cause relating to the judgment rendered on 11/2/2021 in Thika MCL & E Case No. 214 of 2018 within 10 days from today.

d. In default of (b) or (c), above, the leave granted herein shall stand vacated and any memorandum of appeal filed shall stand struck out.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 6TH DAY OF

DECEMBER, 2021

B M EBOSO

JUDGE

In the presence of: -

Mr Muriithi for the Respondent

Court Assistant: Lucy Muthoni