



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

MISC. ELC APPLICATION NO. 37 OF 2019

IN THE MATTER OF KAJIADO CMCC NO. 169 OF 2015

HILLTOP ENGINEERING & TECHNICAL SERVICES LTD.....1ST APPLICANT

STEPHEN NJUNGE KIHIL.....2ND APPLICANT

ZAAK HAPASHAW.....3RD APPLICANT

VERSUS

DISHON MWONGELA KILONZO.....1ST RESPONDENT

AGNES MUMBI MWONGELA.....2ND RESPONDENT

BENTA MUMBI MWONGELA.....3RD RESPONDENT

EMMY MWENDE MWONGELA.....4TH RESPONDENT

DIANA MWENDE MWONGELA.....5TH RESPONDENT

SHEEPERD MWONGELA.....6TH RESPONDENT

RULING

What is before Court for determination is the Applicants' Notice of Motion application dated the 26th April, 2019 brought pursuant to the Constitution of Kenya, Section 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules. The Applicants seeks the following orders:

1. The Court be pleased to grant leave to the Plaintiffs to appeal out of time against the ruling made by Hon. Shitubi CM on 5th April, 2018 in Kajiado CMCC No. 169 of 2015.
2. The said leave do operate as a stay of execution.
3. The costs of this application be provided for.

The application is premised on the summarized grounds that Hon. Shitubi CM delivered a ruling dismissing the suit on 5th April, 2018 in Kajiado CMCC No. 169 of 2015 in the absence of counsel for the Plaintiffs. The Plaintiffs became aware that their Advocate on record did not have a practicing certificate in November, 2018 and that is probably the reason why he failed to attend court. The Plaintiffs have also discovered that Kajiado ELC Misc Application No. 25 of 2017 which they filed seeking to transfer Kajiado CMCC No. 169 of 2015 to the ELC Court was dismissed on 21st September, 2018 for want of prosecution. The Plaintiff only became aware of the dismissal of Kajiado CMCC No. 169 of 2015 in November, 2018 and immediately instructed the present advocate on record to apply for setting aside of the orders and reinstatement of the suit. Further, by the time of hearing of the application on 29th February, 2019, the time for appeal had already run out. In any case the court could not reinstate a suit dismissed on account of being res judicata. The Plaintiffs claim the firm of G M Morara & Company Advocates which was representing them grossly mishandled their matter and they pray that they should not be punished for the mistakes of their former counsel. Further, the value of the subject matter is about Kshs. 50,000,000/= which is way above the pecuniary jurisdiction of the lower court, which lower court should not have deliberated on the matter in the first place. The dismissal of the Plaintiffs' suit means they have been deprived of their properties arbitrarily being title Nos Kajiado/ Kaputiei/ 2351,2352, 2353, 2362, 2363 & 2364, hereinafter referred to as the 'suit lands', which act is unconstitutional. It is in the interest of justice that the Plaintiffs be allowed to

appeal the ruling made on 5th April, 2018 by Hon. Shitubi CM in Kajiado CMCC No. 169 of 2015. Further, the Respondents will not be prejudiced in any way or at all if the said leave is granted as they are in occupation of the suit land.

The application is supported by the affidavit of PURITY WADEGU OUMA who is an advocate in conduct of the matter on behalf of the Applicants where she deposes that Kajiado CMCC No. 169 of 2015 was filed on 22nd April, 2015 wherein the Plaintiffs sought for an order directing the Defendants to vacate the suit lands. She explains that on 25th October, 2015, the Defendants filed a preliminary objection stating that the lower court lacked jurisdiction to hear and determine the said suit. She states that on 5th April, 2018 the Hon Shitubi dismissed the Plaintiffs suit for reason that it was res judicata, the same having been determined in Kajiado RM No. 24 of 2011. Further, the basis upon which the learned magistrate declared the matter as res judicata is puzzling to the Plaintiffs, as the Defendants never pleaded the same. She avers that it was not until 5th November, 2018 when the Plaintiffs became aware that their suit had been dismissed in April, 2018 whereupon they instructed the present advocates to apply for reinstatement. Further, on 28th February, 2019, the Court insisted it could not reinstate a suit which had been declared res judicata. She further states that as per a Search conducted at the Law Society of Kenya, the advocate George Morara Omariba did not take out practicing certificate for the year 2018 and 2019 and perhaps this is the reason why he did not attend court to represent the Plaintiffs. Further, the Plaintiffs believe they have been punished for the mistakes/indolence of their advocate. They reiterate that they have an arguable appeal and the Court has jurisdiction to enlarge time within which an appeal can be filed.

The application is opposed by the Respondents who filed a replying affidavit sworn by DISHON MWONGELA KILONZO who deposes that the application is misconceived, incompetent and an abuse of the court process and ought to be struck out or dismissed. He contends that the Application has been filed by an Advocate who is not properly on record. Further, the affidavit in support of the application has failed to comply with Order 19 rule 3 of the Civil Procedure Rules. He contends that the Advocate swearing the Supporting Affidavit has not disclosed the source of her information and belief since she was not on record at the time in issue. Further, her allegations are hearsay and of no probative value at all. He insists there was no order by the Chief Magistrate's Court to have the matter transferred as deposed in paragraph 4 of the supporting affidavit. Further, that the application was marked as overtaken by events. He avers that res judicata was pleaded in the Defence and Counterclaim. Further, it is the Applicants' who withdrew its application on 28th February, 2019 as it was incompetent. He reiterates that the firm on record for the Applicants were served on the occasions when the matter was scheduled for hearing. Further, that the Applicants cannot lay the blame squarely on their advocate owing to their nonchalant attitude in this matter. He states that there is no claim by the Applicants that they were unaware of the hearing dates and their decision not to attend Court is unexplained. The Respondents further filed a Notice of Preliminary Objection in response to the Notice of Motion dated the 26th April, 2019 where it contended that this application has been filed by a firm of advocates not properly on record and the same is misconceived, incompetent and an abuse of court process.

Both the Applicants and Respondents filed their respective submissions.

Analysis and Determination

Upon consideration of the application dated the 26th April, 2019 including the parties' affidavits, notice of preliminary objection and submissions, the following are the issues for determination:

- Whether the Applicants advocates' are properly on record or not.
- Whether the Applicants should be granted leave to file an Appeal out of time against the ruling made by Hon. Shitubi CM on 5th April, 2018 in Kajiado CMCC No. 169 of 2015, and if the said leave should operate as a stay of execution.

As to whether the Applicants advocates are properly on record or not.

The Respondents have contended that the Applicants counsels are not properly on record as they failed to seek leave to act for them. They have relied on Order 9 Rule 9 of the Civil Procedure Rules as well as the following cases: **John Langat V Kipkemoi Terer & 2 others (2013) eKLR; Florence Hare Mkaha V Pwani Tawakal Mini Coach & Another (2014) eKLR; S K Tarwadi V veronica Muehlemann (2019) eKLR; Churchill Omollo Bodo V Lukio Otieno & Another (2017) eKLR and Stephen Mwangi Kimote V Murata Sacco Society (2018)** to buttress their argument. The Applicants in their submissions while opposing this line of argument relied on Article 159 (2) (d) of the Constitution as well as section 19 (2) of the Environment and Land Court Act.

Order 9 Rule 9 of the Civil Procedure Rules provides that: '**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 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 intending to act in person as the case may be.

The Civil Procedure Act describes a suit to mean all civil proceedings commenced in any manner prescribed. In the current scenario, the Applicant has instituted a miscellaneous application seeking leave to file an appeal out of time from the judgment of Hon Shitubi CM in Kajiado CMCC No. 169 of 2015. I note in the proceedings from the Kajiado CMCC No. 169 of 2015 which were annexed in the parties affidavits' herein, the Applicants' Counsel already filed a Notice of Change of Advocate. The Respondents have not indicated to Court whether they opposed the said Notice of Change of Advocate in the CM's Court and if the Court proceeded to strike the same out.

Further, both parties admitted the advocate who was acting for the Applicants did not take out his license, which in essence means he was actually an unqualified person as defined in section 34 (1) of the Advocates Act. To my mind this means the Applicants were actually

unrepresented as an unqualified person cannot represent a party in Court. Which brings in the question that if indeed he was an unqualified person then how was the current Applicants' advocate expected to seek leave to replace him. From the authorities cited by the Respondents, it is clear the Courts were striking out the Notice of Change of Advocates filed after judgement without leave of Court in the same suit and not a different one. In this instant case, the Miscellaneous Cause although related to the Kajiado CMCC No. 169 of 2015 is actually a different suit and I hence opine that the provisions of Order 9 Rule 9 of the Civil Procedure Rules do not apply. It is against the foregoing that I find that the Applicants' Counsel are properly on record in this miscellaneous cause.

As to whether the Applicants should be granted leave to file an Appeal out of time against the ruling made by Hon. Shitubi CM on 5th April, 2018 in Kajiado CMCC No. 169 of 2015, and if the said leave should operate as a stay of execution. The Applicants have explained that they were not aware the suit in the lower court had been dismissed in April 2018 until November, 2018 after which they instructed the current advocates to represent them. They further explained that they even appeared before the Chief Magistrate on 28th February, 2019. Further, that their Advocate on record did not represent them well and mistake to Counsel should not be visited upon them. The Respondents opposed the prayer and insisted the Applicants were not vigilant enough in their matter hence the leave sought is not justified. They contend that the Applicants have not given proper reasons to explain the delay. They relied on the cases of **Gerphas Alphonse Odhiambo V Felix Adiego (2006) eKLR** and **Alice Mumbi Nganga V Danson Chege and Another (2006) eKLR** to buttress their arguments.

Section 79G of the Civil Procedure Act provides that: ' **Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order: Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.**'

Section 95 of the Civil Procedure Act provides as follows: ' **Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired.**'

Order 50 Rule 6 of the Civil Procedure Rules stipulates that: ' **Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the application for the same is not made until after the expiration of the time appointed or allowed: Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise.**'

The Applicants in their supporting affidavit highlighted their reasons for the appeal and contended that it is arguable. The Respondents insist the Magistrates Court properly dealt with the issues in dispute, which was about ownership of land. They insist the Applicant's appeal is not only frivolous but also inarguable. They relied on the cases of **Manchar Singh Sagoo & Another V Caroline Njeri Mwicigi & 3 Others (2018) eKLR** and **Ahmed Musa Ismael V Kumba Ole Ntamorua & 4 Others (2014) eKLR** to support this argument. The Respondents challenged the affidavit of the Applicants and insisted the annexure from the Law Society of Kenya offended the provisions of section 106 B (4) of the Evidence Act. I however beg to differ with the Respondents and as a Court I take judicial notice of the fact that the information obtained from the Law Society of Kenya website on the current practicing status of an advocate is conclusive proof as the society is indeed the governing body mandated to manage advocates and it is the only institution that would know if an advocate had taken out a practicing certificate or not. In the case of **Samuel Mwaura Muthumbi v Josephine Wanjiru Ngugi & another [2018] eKLR**, the Learned Judge stated that: ' **Our case law has developed a number of factors which aid our Courts in exercising the discretion whether to extend time to file an appeal out of time. Some of these factors were suggested by the Court of Appeal in *Mwangi v Kenya Airways Ltd [2003] KLR*. They include the following:**

- a. The period of delay;
- b. The reason for the delay;
- c. The arguability of the appeal;
- d. The degree of prejudice which could be suffered by the Respondent if the extension is granted;
- e. The importance of compliance with time limits to the particular litigation or issue; and
- f. The effect if any on the administration of justice or public interest if any is involved.....

Of course, all the Applicants have to show at this stage is arguability – not high probability of success. At this point, the Applicant is *not* required to persuade the Appellate court that the intended or filed appeal has a high probability of success. All one is required to demonstrate is the arguability of the appeal: a demonstration that the Appellant has plausible and conceivably persuasive grounds of either facts or law to overturn the original verdict. The Applicants have easily met that standard. I believe that the Applicant has discharged this burden.'

In associating myself with this decision and applying it to the instant application, I note that the reasons explained by the Applicant on the failure of their Advocate to inform them of the outcome of the suit as well as the fact that he did not have a practicing certificate is valid. In the case of **National Bank of Kenya Limited v Anaj Warehousing Limited [2015] eKLR**, the Supreme Court held as follows: ' **In these circumstances, how does the citizen's position rest? If he or she were to walk into an advocate's office, for a conveyancing service at a fee, would there be an initial obligation resting on him or her to demand the advocate's practising certificate? Would he or she be in breach of the law if after the service, it turned out that the advocate lacked a certificate? The transgressor, in our view, is the advocate, and not the client. The illegality is the assumption of the task of preparing the conveyancing document,**

by the advocate, and not the seeking and receiving of services from that advocate. Likewise, a financial institution that calls upon any advocate from among its established panel to execute a conveyance, commits no offence if it turns out that the advocate did not possess a current practicing certificate at the time he or she prepared the conveyance documents. The spectre of illegality lies squarely upon the advocate, and ought not to be apportioned to the client.'.....

The Court's obligation coincides with the constitutional guarantee of access to justice (Constitution of Kenya, 2010, Article 48),The guiding principle is to be found in Article 159(2)(d) of the Constitution: "justice shall be administered without undue regard to procedural technicalities".

In relying on this decision, I find that the mistake of the Applicants' Counsel on failing to inform them of the outcome of the suit as well as not taking out a practicing Certificate cannot be visited upon the Applicants. From the grounds of appeal highlighted in the supporting affidavit, I find that the intended Appeal is indeed arguable. Further, I find that since the Respondents are already in occupation of the suit land, there is no prejudice they will suffer if time was enlarged to file the Appeal. It is against the foregoing that I proceed to enlarge time to enable the Applicants lodge the intended Appeal. I however decline to grant a stay of execution pending appeal.

It is against the foregoing that I find the instant application merited and I will proceed to direct the Applicants to file and serve their Appeal within 21 days from the date hereof. The Costs of the Application are awarded to the Respondents.

Dated signed and delivered in open court at Kajiado this 29th day of January, 2020.

CHRISTINE OCHIENG

JUDGE