REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS APPLICATION NO. E509 OF 2019

DAVID KORES KASALE.....PROPOSED APPELLANT/APPLICANT

-VERSUS-

INDUSTRIAL WATER MANAGEMENT LIMITED.....RESPONDENT

RULING

1. This ruling in respect to the application dated 30th October 2019 wherein he applicant seeks orders that: -

i. Spent.

ii. The honourable court be pleased to stay execution of the decree in CMCC 2284 of 2016 pending the hearing and determination of the intended appeal.

iii. The honourable court be pleased to accept and order that the applicant's log book for the tractor registration number KTCB 738V valued at Kshs 1,700,000 be deposited in court as security for the grant of the stay of execution.

iv. The proposed appellant/applicant be granted leave to appeal out of time against the judgment of the Chief Magistrate's court at Nairobi Milimani Commercial courts delivered on 23rd November, 2018 in CMCC No. 2284 of 2016.

v. The court be pleased to give such other orders as may be in the interest of justice; and

vi. The costs of this application be provided for.

2. The application is supported by the applicant's affidavit and is premised in the grounds that as at the time judgment was entered against the applicant on 23rd November 2018, he was represented by the law firm of **Simiyu & Company Advocates** which advocates did not inform him of the judgment in good time so as to enable him file the Notice and Memorandum of Appeal.

3. He states that he is dissatisfied with the said judgment of the trial court and intends to appeal against it and that he therefore engaged the services of **M/S K. N. Mutai & Partners Advocates** to take over the case. He further states that unless the orders sought in the application are granted the 1st respondent may levy execution hereby subjecting him to double jeopardy as the tractor that is the subject matter of the suit has already been released to the 1st respondent according to the court's orders. He avers that the intended appeal has very high chances of success and will be rendered nugatory unless the application is allowed.

4. The respondent/plaintiff opposed the application through the replying affidavit of its Director **Thanky Jitu** who confirms that judgment and decree was on 23rd November 2018 issued against the applicant in Milimani CMCC 2284 of 2016 after which the respondent instructed the auctioneer to execute it but that no sooner had the auctioneers commenced the execution process than the applicant's advocates, then on record **MS Simiyu Wekesa & Company Advocates** reached out the respondent's advocates requesting for the suspension of the execution so as to enable parties engage in negotiations.

5. He states that while the said negotiations were on-going, the applicant rushed to court and filed a similar application being Miscellaneous Application No. 460 of 2019 (hereinafter "**the Earlier Application**") seeking stay of judgment and leave to appeal through the law firm of **K.N. Mutai Partners Advocates**.

6. He states that the earlier application was however withdrawn following the respondent's preliminary objection to it after which the court directed the applicant to sort out the issue of representation. He adds that the applicant's advocates thereafter engaged in further negotiations

but that the applicant eventually never responded to correspondence from the respondent thus prompting the respondent to move ahead with execution.

7. He further states that upon hearing of the respondent's intention to proceed with the execution, the applicant filed the present application through the law firm of **Muchiri Gathara & Company Advocates** seeking the same orders as those sought in the earlier application.

8. He avers that the applicant has not approached the court with clean hands and that the supporting affidavit is riddled with falsehoods geared towards misleading the court. It is the respondent's position that the applicant's advocate is not properly on record as he did not obtain the leave of the court to come on record. He further states that the delay in filing the application is inordinate and has not been explained.

9. Parties canvassed the application by way of written submissions which I have carefully considered.

10. The main issues for determination are firstly whether the applicant's advocates are properly on record and secondly, whether the applicant has made out a case for the granting of the orders sought in the application.

Applicant's representation.

11. The respondent submitted that the applicant's advocates on record **M/S Muchiri Gathara & Company Advocates** are not properly on record as they did not adhere to the provisions of **Order 9 Rules 9 of the Civil Procedure Rules** (CPR) which stipulates as follows: -

> "***Change to be effected by order of court or consent of parties.***
>
> ***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."***

12. The above provision speaks for itself on the steps to be taken by a party who has previously been represented by an advocate and decides to change advocates or act in person after judgment has been passed in a matter.

13. In the present case, it was not disputed that **M/s Simiyu & Company Advocates** represented the applicant before the Lower court and that he therefore needed to comply with **Order 9 Rule 9 of the CPR** in order to change advocates in respect to the present application. The court however notes, with dismay, that even though the issue of non-compliance with **Order 9 Rule 9 CPR** led to the collapse/withdrawal of the earlier application, the applicant still went ahead to file the instant application, through yet another new firm of advocates, without caring to conform with the requirements of the law. In ***S.K. Tarwadi v Veronica Muehlemann*** [2019] eKLR, the court held that: -

> ***"In my view, the essence of Order 9 Rule 9 CPR it to protect advocates from mischievous clients who will wait until a judgment has been delivered and then sack the advocate and either replace him with another advocate or act in person. The provision is therefore an important one and cannot be wished away. Indeed, Order 9 does not foresee how Rule 9 can be sidestepped hence the enactment of Rule 10 as follows:"***

14. My finding is that the present application, having been filed by an advocate who is not properly on record, is a non-starter, fatally defective, and is therefore a candidate for rejection through dismissal.

15. My finding on the issue of representation would have been sufficient to determine this application but I am still minded to determine the merits of the prayers for extension of time to appeal and for stay of execution.

16. It is trite law that in an application for extension of time, the whole period of delay should be declared and explained satisfactorily to the Court. The Court has settled the principles that are to guide it in the exercise of its discretion to extend time in the ***Nicholas Kiptoo Korir Arap Salat v Independent Electoral & Boundaries Commission & 7 others,*** [2014] eKLR case as follows: -

> ***"the under-lying principles that a Court should consider in exercise of such discretion:***
>
> ***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 for 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."

17. The applicant blamed his previous advocate on record for the delay in filing the appeal on the basis that he did not inform him of the judgment in time so as to enable him lodge the appeal. The respondent, on the other hand, argued that the applicant was all along aware of the judgment and intended execution as shown in his instructions to his lawyers to negotiate a settlement.

18. It was not disputed that the applicant was represented before the lower court by the firm of **M/S Simiyu Wekesa Advocates**. I note that it is the same law firm that wrote to the respondent's advocates on 28th June 2019 seeking a settlement as seen in the respondent's annexure marked **"TJ-1".**

19. I therefore find that the applicant's claim that he was aware of the judgment to be untrue and dishonest. I further find that in the circumstances of this case, the 10 months' delay in filing the instant application is both inordinate and inexcusable. I am guided by the decision by the Court of Appeal in ***Teresia Wangare Kinuthia v PAS Communication Limited*** [2019] eKLR where the court observed: -

"It should not take a litigant who intends to appeal a decision nearly two months to file the simple document that is a notice of appeal required under Rule 75(2) of the Court of Appeal Rules to be lodged within fourteen days of the impugned decision."

20. I further find that even though the length of the delay does not necessarily defeat an application for extension of time, such as the instant application, since it is open to an applicant to give reasons for such delays so as to enable the court exercise its discretion in his favour. I however note that the reason advanced by the applicant herein is quite unconvincing, more so, considering that the applicant does not explain why he withdrew the earlier application wherein he sought more or less similar orders.

21. In sum and considering the findings and observations that I have made in this ruling, I find that the instant application is not merited and I therefore dismiss it with costs to the respondent.

Dated, signed and delivered via Microsoft Teams at Nairobi this 3rd day of December 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Kendi for the Respondent.

No appearance for Applicant.

Court Assistant: Sylvia.