



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KITUI

CIVIL MISC. APPLICATION NO. 90 OF 2018

PETER MUSILI NGIMA.....APPLICANT

VERSUS

MULYUNGI MUTIE.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

R U L I N G

1. **Peter Musili Ngima**, the Applicant approached this Court by way of Notice of Motion seeking orders as follows:

- i) That this Honourable Court be pleased to allow the firm of **Job N. Marasi Advocates** to come on record on behalf of the Applicant as having conduct of this intended Appeal from the firm of **C. K. Nzili & Company Advocates**.
- ii) That this Court be pleased to extend time to file an Appeal to this Court against the Order and Judgment of **Hon. K. Sambu** sitting at **Mwingi**, delivered on **26th September, 2018** in **Civil Suit No. 31 of 2015 – Mulyungi Mutie vs. Attorney General & Peter Musili Ngima**.
- iii) That as an alternative to prayer (2) above, this Court be pleased to grant the Applicant leave to file the proposed Appeal against the Order and Judgment of **Honourable K. Sambu** sitting at **Mwingi**, delivered on **26th September, 2018**.
- iv) That this Court be pleased to deem the proposed Appeal against the Judgment and consequential Orders of **Hon. K. Sambu** sitting at **Mwingi**, delivered on **26th September, 2018** as properly filed.
- v) That this Honourable Court be pleased to issue interim stay of execution (if any) and any other consequential Orders issued by **Hon. K. Sambu** sitting at **Mwingi**, delivered on **26th September, 2018**, pending inter parties hearing of this application.
- vi) That this Honourable Court be pleased to issue stay of execution of the Judgment, Decree (if any) and any other consequential Orders issued on **26th September, 2018** by the Honourable Court in **Civil Suit No. 31 of 2015, Mulyungi Mutie vs. Attorney General & Peter Musili Ngima** pending the hearing and determination of the intended Appeal.

2. The Application is premised on grounds that the Applicant was initially represented by the firm of **C. K. Nzili & Co. Advocates** and subsequently the firm of **Job N. Marasi Advocates** took over the conduct of the matter from the said Advocates; that the Applicant being dissatisfied with the Judgment applied for typed proceedings through the firm of **C. K. Nzili & Co. Advocates**; there was inadvertent delay due to administrative procedures as the matter was being moved from the Advocate who previously represented the Applicant, **C. K. Nzili & Co. Advocates** to the present firm, **Job N. Marasi Advocates**; the confusion caused by the change caused lapses that resulted into delay in acquiring proper instructions to facilitate filing of the Memorandum of Appeal; the Applicant is desirous of pursuing the Appeal which has an overwhelming chance of succeeding; it is necessary for leave to file the Appeal out of time to be granted; the Respondent does not stand to suffer prejudice if the order sought is granted; if stay of execution is not granted the intended Appeal, if successful, will be an academic exercise that lacks any effect and force of law; the Applicant will suffer substantial loss unless a stay of execution is granted as the Respondent will proceed with execution of the Judgment to the detriment of the Applicant and the application has been made without undue and unreasonable delay.

3. The application is supported by an affidavit deposed by **Job Marasi** an Advocate seeking leave to represent the Applicant where he avers that he is the one in conduct of the matter therefore he is seeking leave to file the Memorandum of Appeal. That the trial Court delivered Judgment on **26th September, 2018** in favour of the Respondent and granted a stay of execution for **45 days** which lapsed on **9th November, 2018**. That the delay was occasioned by administrative procedures as the matter was being moved from the Advocate who previously represented the Applicant; that the Respondent is a man of low financial ebb as he is a peasant farmer at **Katiliku Village** hence if execution is carried out and the Appeal succeeds the Applicant will not be in a position to reimburse the Applicant.

4. The 1st Respondent, **Mulyungi Mutie** filed a Replying Affidavit where he deposed that when Judgment was delivered the Applicant and his Advocate were present in Court therefore they had no reason for failing to file the Appeal within the stipulated time; That issues between the Applicant and his Advocate do not concern him and should not prejudice him from enjoying fruits of the Judgment. That the affidavit sworn in support of the application is full of hearsay and being newly appointed the Advocate is not in a position to attest to the averments he has deposed to and the affidavit offends basic rules of evidence and procedure.

5. Further, that the Decree sought to be appealed from is a money Decree and it has not been demonstrated what irreparable loss, if any will be suffered if execution issues. That he is a property owner and he is in a position to readily repay the decretal sums should the intended Appeal succeed; the Applicant has offered no security for the performance of the Decree that may eventually become binding upon him.

6. The Application was canvassed by way of written submissions. It was urged by **Mr. Marasi** intending to come on record for the Applicant/intended Appellant that when the matter came up for hearing on the **4th December, 2015**, the Court raised two (2) issues:

i) That the Application and Notice of Change of Advocate had not been served upon the firm of **C. K. Nzili & Company Advocates**.

ii) The 1st Respondent made an oral application to strike out the Further Affidavit on the ground that a different deponent from the one who signed the Supporting Affidavit in the application signed it.

7. In that respect it was argued that Rules of Procedure are the handmaidens of justice and play an important role in administration of justice, therefore they should not impede the administration of substantial justice. That **Article 159(2)(d)** of the **Constitution of Kenya (2010)** requires that "Justice shall be administered without undue regard to procedural technicalities."

8. Regarding Notice of Change of Advocate he alluded to what is provided by **Order 9 Rule 9; Order 9 Rule 6** of the **Civil Procedure Rules** and opined that service of a Notice of Change of Advocates should be understood in the strength of its purpose. That its purpose is simply to notify a party of the change of advocate, it does not validate the Memorandum for Change of Advocate. In that respect he cited the case of **Romane Agencies LTD vs. Tanathi Water Services Board Civil Appeal No. 159 of 2013** where **Muriithi, J.** stated thus:

"The requirement for service of a Notice of Change must when understood in the context of its purpose and object be taken to require notification rather than validation of the change of advocate. The parties in the suit and previous counsel are notified of the change of advocates by service upon them as required by the rule. Service of the notice of change does not validate the change of advocate. The object of change of advocates is to promote the right of counsel, with the freedom of a litigant to appoint an advocate of his own choice. To hold otherwise would be to subjugate a party's right of counsel to a notification requirement."

9. That the authority notwithstanding they had taken the liberty to serve the endorsed Notice of Change of Advocates upon the former Advocate which was attached to the submissions.

10. Regarding the issue of a Further Affidavit, he argued that the oral objection raised seeking the Court to strike out the Further Affidavit on grounds that the deponent who signed the Supporting Affidavit and a Further Affidavit are different, should be disregarded as rules should not be allowed to impede substantial justice as Counsel for the 1st Respondent did not reveal how this is an offence and the root or contents of the affidavit sworn.

11. That **Order 19 Rule 6** of the **Civil Procedure Rules** empowers the Court to strike out a matter from an affidavit on the grounds that it is scandalous, irrelevant or oppressive. That Counsel did not show how want of form, any was scandalous, irrelevant or oppressive. That pursuant to **Order 19 Rule 7** of the **Civil Procedure Rules** the Court may receive any affidavit sworn for purposes of being used in any suit notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularity in the form thereof or on any technicality.

12. On the actual issues before Court as set out in the application, it was urged that the inadvertent mistake of failure to serve the former Advocate was validated by service of Notice of Change of Advocates. Therefore Rules of Service were not violated.

13. As to whether the Applicant should be allowed to appeal out of time that the Application was filed within a week after time ran out, a period that is not inordinate therefore excusable. The reason for the delay was administrative in nature. That the draft Memorandum of Appeal was filed within the shortest time possible.

14. Regarding granting of stay of execution he urged that the Applicant will suffer substantial loss in view of damages awarded by the trial Court. That the Application was made without undue delay and the Applicant has demonstrated the willingness to furnish security for due performance of the Decree in the sum of **Kshs. 50,000/=** to be deposited in a joint account by both Advocates for the Applicant and 1st Respondent.

15. The 1st Respondent's Counsel, argued that the Application is a non-starter and can therefore not see the light of the day having been filed by a firm of Advocates who are not properly on record. That in the proceedings before the trial Court that culminated in the Judgment sought to be appealed, the Applicant was represented by **M/s C. K. Nzili & Company Advocate**. That the firm of **Job N. Marasi Advocates** filed a Notice of Change of Advocates simultaneously with the application herein; That the firm of **C. K. Nzili & Co. Advocates** were taken to be on record for the Applicant, the representation by dint of **Order 9 Rule 13** extend to the proceedings herein as the Applicant needed to obtain either a consent from them or order of the Court. None of them having been obtained the application is irregular and cannot be salvaged. In that regard he cited the case of **Loise Wambui Karigu & Another vs. Joel Gatungo Kiragu & Another (2016)**.

16. Further it was urged that should the Court consider the merits of the Application, the Application must fail as the Applicant is neither able or willing to give security for due performance of the Decree. That the offer of **Kshs. 50,000/=** for a Decree of **Kshs. 400,000/=** costs and interest means that the Applicant is not willing to furnish adequate security.

17. The first limb of the Application herein is for an order of this Court to allow the firm of **Job N. Marasi Advocates** to come on record on behalf of the Applicant instead of **C. K. Nzili and Company Advocates**.

18. **Order 9 Rule 9** of the **Criminal Procedure Rules** provides thus:

“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.”

19. This is a matter where Judgment was passed in the Lower Court while the Applicant had engaged **C. K. Nzili and Company Advocates**. That particular firm of Advocates was considered to be on record as at the **7th November, 2018** as it had not filed a notice to cease acting for the Applicant. The Applicant having decided to instruct the firm of **Job N. Marasi Advocates** to come on record was either supposed to file a consent signed between the firm of **C. K. Nzili & Co. Advocates** and **Job N. Marasi Advocates** or to seek the Courts leave to be on record. He opted to seek the Court’s leave by filing an Application to that effect. The Application per the requirement of **Order 9 Rule 9(a)** was to be brought to the notice of all parties. The Application filed herein as drawn and the Notice of Change of Advocates was to be served upon:

“(i) Musyoki & Muigai Advocates.

(ii) Mulyungi Mutie.

(iii) Attorney General.”

The firm of **C. K. Nzili & Company** is excluded.

As correctly submitted by the Applicant’s intended Counsel **Order 9 Rule 6** provides thus:

“The party giving the notice shall serve on every other party to the cause or matter (not being a party in default as to entry of appearance) and on the former advocate a copy of the notice endorsed with a memorandum stating that the notice has been duly filed in the appropriate court (naming it).”

It was a requirement to serve the notice to the former Advocate.

20. It is further argued that the inadvertence exhibited does not invalidate the notice. And as stated after the Court pointed out the inadvertence in an attempt to rectify the error a copy of Notice of Change of Advocates bearing a stamp impression purporting to be of **C. K. Nzili & Co. Advocates** dated **10th December, 2018** was annexed to the submissions. Proof of service is ordinarily by way of filing an Affidavit of Service that was not done.

21. The application for leave to change the firm of Advocates was not served upon the former Advocate. The question to be answered is whether it was necessary? Learned Counsel **Mr. Marasi** argues that the purpose of the notice is simply to notify a party of change of Advocates.

22. Looking at that particular provision of law it is expressed in mandatory terms. It is a requirement of the law therefore it cannot be dismissed as a mere technicality. The intention of **Order 9 Rule 9** of the **Civil Procedure Rules** was to safeguard the former Advocate’s rights by ensuring there is sanity and order in litigation. Therefore failure to comply with the law was a substantive issue that cannot be trivialized.

23. In the premises I find the Application irregular and as a result I strike it out with costs to the 1st Respondent.

24. It is so ordered.

Dated, Signed and Delivered at Kitui this 21st day of January, 2019.

L. N. MUTENDE

JUDGE