



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 227 OF 2019

BURHANI PAINTS & HARDWARE.....APPELLANT

VERSUS

1. MOHAMED IQBAL ABDULAZIZ

2. MOHAMED KASSIM ABDULAZIZ

3. MOHAMED EBRAHIM ABDULAZIZ.....RESPONDENTS

R U L I N G

1. I am called upon to extend time for filing an appeal and to grant stay pending appeal. On extension of time, it is said that there was a desire to change advocates and that it took time for the current advocates and the advocate who acted at trial to agree on the takeover. That to me is not a valid reason because no leave was necessary for Otieno B.N Advocates before they could file the Appeal.

2. I have seen the correspondence and noted that they received instructions to take over from Mogaka Omwenga and company Advocates on the 15/10/2019 or some days before that date. That was within time of lodging the Memorandum of Appeal the judgment having been delivered on 20.09.2019. To this court it was wholly unnecessary to go the long route of taking over the conduct of the lower court file before filing the appeal. This to me was grounded on the misapprehension of the requirements of **Order 9 Rule 9 Civil Procedure Rules**. I have held before and I continue to hold the very firm view that there is no need for leave for an advocate instructed to file an appeal to come on record in the lower court file before filing an appeal in the High Court. *Jonathan Wepukhuli t/a Gati Cleaning Agency Limited vs Julius Odhiambo Oduor in Civil Appeal No. 82 of 2019 (Unreported)* the court said:-

7: “Giving the words of the Rule their ordinary and natural meaning, there ought to be a judgment in the file before the rule can be invited. I understand the position to be that an appeal file is an independent file from the file in which the judgment giving rise to the appeal was passed. The two must be treated as separate in that both are instituted differently. An appeal when instituted by a Memorandum of Appeal starts its new life and journey and is only determined when dealt with as by law provided. In the appeal file the judgment at trial is the dispute and cannot be treated as a judgment determining the appeal. As known to law, a judgment is a final adjudication of a court dispute and cannot in reality be deemed to exist before the dispute is heard and adjudged. In this file the appeal has not been heard and a decision made or as the Rule says, judgment passed, to require any court orders for a Notice of Change of advocate.

8: To me to hold that a Notice of change is required in this matter is to stretch the law to extreme, ridiculous and very anomalous levels. I ask change from who? The memorandum of appeal instituting the appeal is drawn by the same advocate seeking to be granted leave to come on record. When did he cease to be on record after filing that document? I hold that the interpretation given to Order 9 Rule 9 by the two counsel in this matter is wholly erroneous and ought not be the case.

In coming to this conclusion I am not questioning the decision by my sister Kemei J. in Muranga ELC No. 219 of 2017. That decision is clear that an advocate walked into the ELC file after judgment and purported to file a Notice of Appeal and an application without first seeking and obtaining leave in that regard. In that decision the invitation of Order 9 Rule 9 was apt and unquestionable”

3. However, that misapprehension of the law by counsel, even if it amounts to blunder leading to delay, should not be the only reason to deny the appellant its constitutional right to access the court by an appeal. It is an infraction that I consider visits no prejudice upon the respondent. I am prepared to overlook it for the end of justice to be met.

4. On the question of length of delay, I do consider that when the appeal was lodged on that 14/11/2019, the delay was only some 14 or 13 days which I do not consider inordinate. For the reason that I need to protect and promote the appellants right to access the court and be heard and there being no inordinate delay I do grant leave to appeal out of time and deem the Memorandum Of Appeal date and filed in court on the 14/11/2019 duly filed.

5. On the request for stay pending appeal, even though no substantial loss has been alluded to nor proved, and it being said that the decree is yet to be extracted in accordance with the law and costs yet to be ascertained, I do consider that these processes will come to pass and in order that I do not invite another application and delay the hearing of the appeal, I do grant stay but on terms that the full decretal sum of Kshs.2,760,472.73, excluding costs, be deposited in an interest bearing account in the joint names of the advocates for the parties within 30 days from today.

6. Having so said, the appeal is now a part of the workload of the court to be managed towards expeditious disposal. I direct as follows:-

- **The Appellant files and serves a record of appeal within 60 days from today.**
- **Upon filling of the record of appeal, the file be placed before a Judge for perusal under the Civil Procedure Act.**
- **Parties be at liberty to file and exchange submissions not later than 90 days from today.**
- **If the appellant shall fail to effect the deposit or file a Record of Appeal as ordered, the stay hereby granted shall lapse and stand discharged.**

7. On costs, even though the appellant/Applicant has succeeded, the application was necessitated by its default hence it shall pay the costs of the application in all events.

Dated and delivered at Mombasa this 3rd day of December 2019.

P.J.O. OTIENO

JUDGE