



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERICHO

CIVIL SUIT NO. 12 OF 2016

**THE EXECUTIVE COMMITTEE CHELIMO PLOT OWNERS WELFARE GROUP & 288
OTHERS.....PLAINTIFFS**

VERSUS

LANGAT JOEL.....1ST DEFENDANT

PATRICK LANGAT.....2ND DEFENDANT

FRANCIS MREFU.....3RD DEFENDANT

PETROLINER ROTICH.....4TH DEFENDANT

CHARLES RONO.....5TH DEFENDANT

SIMON CHEROROT.....6TH DEFENDANT

RULING

1. The application for determination before me now is a Motion on notice dated 4th April, 2019 and filed on the same date. It is expressed to be brought under Articles 22,25,48,50 (1) and 159 (2) of the Constitution of Kenya, 2010; Sections 1A, 1B, 3A and 63 (e) of the Civil Procedure Act (cap 21), Order 9 Rule 9(a), Order 42 Rule 6, Order 43 Rules 1(2) & (3) of Civil Procedure Rules, Section 7 of the Appellate Jurisdiction Act, and all other enabling provisions of Law.

2. The application has seven (7) prayers (prayers a, b,c,d,e,f and g) on the face of it but two prayers (prayers (a) and (b)) are now moot having been considered at an earlier stage. The prayers for consideration now are as follows:

Prayer (c): That the honourable court be pleased to grant leave to the plaintiff/applicant to appeal the entire ruling/decision of the court (Hon.Lady Justice J.M.Onyango) dated 13/3/2018.

Prayer (d): The honourable court be pleased to enlarge time for filing the Notice of appeal and any other relevant documents toward the intended appeal.

Prayer (e) The Notice of Appeal herein be deemed to have been properly filed.

Prayer (f) The honourable court be pleased to order a stay of execution and further proceedings and any consequential order/decreed in the matter, pending hearing and determination of the plaintiffs/applicants application herein and the intended appeal.

Prayer (g) Costs.

3. The application is premised on grounds, inter alia, that this court had earlier delivered a ruling that struck out the plaintiffs suit, with the two applicants being condemned to pay costs; that the applicants subsequently filed an application for review of the ruling; that vide a ruling delivered on 13th March, 2018, the application for review was also dismissed; that the applicants former advocate never informed them of the rulings; that the same advocate never advised on the need to appeal; and that they only got to know what had gone on when they got wind of a Notice to Show Cause against them, which prompted a reading of the court file.

4. Further, the applicants averred that taxation was done without their knowledge and they are supposed to pay the ensuing costs or risk being sent to civil jail. One applicant – Alhaji Abdullahi Kiptonui – is said to be aged and sickly and a jail term would only worsen his situation.

The applicants averred that they have an arguable appeal and refusal to allow the application would mean denial of justice to them.

5. The application came with a supporting affidavit that generally amplified and explicated the grounds. In the supporting affidavit, the applicants ultimately deposed that the “*application has been brought promptly; it is just and fair that it be heard expeditiously and orders sought granted to hold the scales of justice fairly between the parties.*”

6. The respondents responded to the application vide a replying affidavit dated 25th July, 2019 and filed in court on the same date. The response highlighted the background and the antecedents in the matter. The respondents accused the applicants of belated action, or delay if you like, and termed as unfounded the applicants blame on their former advocate. To them, it is also untrue to say that the applicants were never guided or advised regarding the need for appeal. The record was said to show that the applicants counsel was fully involved in all that happened. The applicants were even said to have committed to pay the decretal sum at some point. The application herein was said to be “*marred with malice and the same has been designed to defeat justice since the applicant has not indicated his willingness to deposit any security with respect to his intended appeal and/or of the taxed costs.*”

7. While averring that “*the application herein has no merit and is only fit for striking out with costs to the respondent*” (para 26 of the response) the respondents also expressed a wish (see para 24 of the response) “*that upon hearing and determining this application, this court does order that as a pre-condition for stay, the applicants do deposit the entire decretal sum of Kshs. 644,720 (Kenya Shillings Six hundred and Fourty Four Seven hundred and twenty) in a joint interest earning account within a reasonable period of time as the court would direct, in the names of counsel for the parties herein*”. I understand this to mean that the application should be dismissed or, if not, the applicants should deposit the decretal sum as proposed.

8. The respondents response elicited the filing of a further affidavit by the applicants. The affidavit was filed on 25th September, 2019. In the affidavit, the respondents response is faulted for containing “*wild allegations and deliberate falsehoods.*” The applicants reiterated that the rulings of the court were never communicated to them and that they never instructed their former advocate to “*Liquidate the costs*” as alleged. The record of the court was said to show that the applicants never made personal appearance in court. The applicants reiterated they were of advanced age and sickly while the frailties that come with such conditions could easily have made them less fleet footed.

9. The application was canvassed by way of written submissions. The applicants submissions were filed on 25th September, 2019. The issues for determination were delineated thus:

(i) *Whether the court should enlarge time for filing of the Notice of Appeal.*

(ii) *Whether there should be stay of execution; and*

(iii) *Who should bear costs.*

10. Enlargement of time was then said to be necessary because the law – Section 7 of the Appellate Jurisdiction Act (Cap 9) – allows it, while judicial pronouncements – such as **Nganga & Another Vs. Damaris Wanjiku Kamau & Another: (2016)eKLR** – are clear that the court has jurisdiction to do it. The only qualification is that the court has to approach the issue on settled principles. Such principles would include considerations such as length of delay; the reason for the delay; the likelihood of success of the intended appeal; and the degree of prejudice that is likely to be occasioned to the respondents if enlargement or extension is allowed. The decided cases of **JOAN JELAGAT BIWOTT & 2 OTHERS VS REGIONAL REACH LIMITED & ANOTHER (2016) eklr** were cited as good authorities for this. The latter case in particular is clear that the reasons or principles are not exhaustive. Each case therefore needs to be considered in light of its own facts and circumstances.

11. In this matter itself, justification for enlargement or extension was said to consist in the fact of the applicants advanced age, sickly status and conduct of their former counsel. The applicants were also said to be likely to be prejudiced as not allowing the application would amount to condemning them unheard, while committing them to civil jail as intended by the respondents would jeopardize their health. The applicants urged that their appeal is meritorious; they have a right to be heard; and that the mistake of their counsel should not be visited on them. They also submitted that the overriding objective of the court should be to obviate hardship on a party. It is in light of all these too that they felt that they are entitled to an order of stay of execution. In their view also, they should be awarded costs. They however didn't expound much on this.

12. The respondents submissions were filed on 7th October, 2017. According to the respondents, the enlargement or extension of time is discretionary. It was submitted that the discretion has to be exercised “*judiciously and in accordance with sound and reasonable judicial principles.*” The onus then was said to be on the applicants to lay a basis for a favourable exercise of discretion. The cases of **PATRIOTIC GUARDS LTD VS JAMES KIPCHIRCHIR SAMBU: CA NO 20 OF 2016, NAIROBI, 2018 eKLR**, **NICHOLAS KIPTOO ARAP KORIR SALAT VS THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 7 OTHERS (2014) eKLR** and **THUITA MWANGI VS KENYA AIRWAYS LTD (2003) eKLR** were said to be good authorities for this position.

13. Noting that the reason for delay given by the applicants related to their former advocate's failure to communicate the two rulings of the court to them, the respondents cited the case of **NEETA GOHIL VS FIDELITY COMMERCIAL BANK LIMITED (2019) eKLR** to show that the applicants were duty bound to actively pursue their case instead of laying blame on their former advocate. It is a case in which another case – **SAVINGS & LOANS LIMITED VS SUSAN WANJITU MURITU: HCC NO. 397 of 2002, NAIROBI (MILIMANI)** – was cited with approval for the same position. In this particular case itself, the applicants were said not to have shown “*what proactive steps they took in following up of their matter.*”

14. On the chances of the intended appeal succeeding, the respondents cited the case of **HEZEKIAH W. GICHOHI VS UHURU HIGHWAY DEVELOPMENT LTD & 2 OTHERS: (2018) eKLR** where an application similar to this one was dismissed on the ground, inter alia, that “*Arguability of a matter is not a ground alone for extension of time*”. The respondents also submitted that is them, not the

applicants, who will be prejudiced. According to them, it is one and a quarter years since the rulings were delivered. The applicants had committed to pay the decretal sum. Implicitly therefore, they had waived their right of appeal. The instant application is therefore seen as an attempt to derail or defeat justice.

15. As regards the issue of stay of execution, the respondents submitted, inter alia, that the applicants should show the substantial loss they are likely to suffer; that the application has been made without undue delay; and that security for costs should be provided for. The case of **MASISI MWITA VS DAMARIS WANJIKU NJERI: (2016) eKLR** was cited to reinforce this position. The applicants were said not to have demonstrated this. More specifically, they were said not to have demonstrated substantial loss, or justified the delay in filing the application, or even offered a proposal for security for costs. The concluding remarks were forceful and unsparring, with the application being termed as “*bad in law, incompetent, non-starter, frivolous, vexatious, and malicious and a gross abuse of the court process.*” It was seen as “*fit for nothing but dismissal with costs to the respondents.*”

16. I have considered the application, the response made, and the rival submissions. I have had a look into the proceedings of the entire case generally. The case herein was filed on 15th March, 2016. On 25th November, 2016 the case was struck out. The ruling that struck out the ruling is one which the applicants say they were not aware of, their former counsel having not communicated it to them. It is also the same for the second ruling on review. If the applicants are to be believed, it would appear that their former counsel instructed himself to file an application to review that ruling, proceeded to file and pay for it, steered it in court to its conclusion, and again failed to communicate its outcome to the applicant.

17. But is this the case? The application to review the ruling that struck out the case was dated 2nd February, 2017. The supporting affidavit to that application is shown to be by one Richard Kipkoech Langat. Richard Kipkoech and Abdulhaji Abdulahi are the applicants in the application now under consideration. At paragraph 4 of the supporting affidavit that came with the application for review, Richard expressly mentions the ruling dated 25th November, 2016 which is the one that ordered the striking out of the suit. Whether one is talking of this or the other two past applications, both Richard and Abdulhaji were/are in them together. Let us not forget that the premise of this application is that counsel on record then never informed the applicants of the rulings that ensued in the past applications. The supporting affidavit to the application for review tells a different story.

18. The substance of the supporting affidavit to the earlier application for review shows the applicants in the application to be less than honest. That affidavit is duly sworn and signed by Richard. It becomes clear then that the applicants are lying when they say that their advocate acted without their instructions or didn't inform them of what was going on. The substance of the affidavit shows that he did. But the applicants' beef with their former counsel does not end there. They also alleged that the taxation of costs and the subsequent undertaking to pay were all done without their consent. Again here, their allegations are unconvincing. In my view only a very unprofessional counsel, an extremely careless and rogue one in fact, would commit a client to payment of costs amounting to hundreds of thousands of shillings without proper and firm instructions. I do not know much about the counsel then on record. I am bit new in this station now but the counsel has appeared before me several times. He appears to me to be thoroughly professional and level-headed. Besides, have the applicants complained elsewhere about his conduct? His alleged behaviour, if true, is not just a question of mistake. It is conduct unbecoming of an advocate.

19. I think the applicants failed to reckon with the fact that the record will speak and expose the falsehoods that they may try to peddle. They have portrayed their former counsel as one prone to making blunder upon blunder. But what they allege is not only an issue of blunder or mistake. It is something that touches on the professional conduct or competence of counsel. They only make it out to be a mistake so that they can bring it within the purview of the legal position that stipulates that mistake of counsel should not be visited upon a litigant. They want to benefit from that but they have done so in a manner that portrays the counsel as incompetent and/or dishonest. But records show that they themselves are the dishonest ones here.

20. There is a maxim in law that goes thus: **FAISUS IN UNO, FALSUS IN OMNIBUS**. Literally, it translates as follows: False in one thing, false in everything. The applicants herein have lied about their former counsel. I doubt that they are not lying in everything else. Justice is always founded on truth. Justice and falsehoods cannot co-exist. I am persuaded that it is the respondents, not the applicants, who have made true representations in this matter. The basic premise of the applicants' application is that their former counsel failed them. He acted without their instructions and never informed them of the outcomes of the various processes in court. It is this premise that the court has found to be untrue. The other premise is that they are old and of ill-health. They were still old when they filed the case. But I am not sure about their health at that time. Even then however, this application itself was filed when their health has apparently not been optimal. It has been prosecuted reasonably expeditiously. Why couldn't they act with equal alertness in the past? It would appear to me that the applicants were jolted to wakefulness by the imminent threat of execution. They were otherwise in slumber.

21. I would need to point out however that had the basic premise of the applicants' application been correct, the law as cited by their learned counsel is generally sound. But law arises from a fact – **EX FACTIS JUS ORITUR** – and in all instances the fact must be a true one, not a false one. Here the facts are false.

22. But to say that the law as cited is generally sound is not to mean that all has been said by the applicants about the applicable law. For instance, while it is true that the mistake of counsel should not be visited on a litigant, the general legal position is that actions of counsel while on record for a litigant are binding on the litigant. The position about mistake of counsel is only an exception to this legal position. It is also true to say that an applicant needs to demonstrate arguability of an appeal in order to get an order of stay of execution. But such arguability alone is not enough. The respondents pointed out this well by citing the **Hezekiah W. Gichohi's** case (*supra*). Additionally, the law – see Order 42, rule 6 (2) (b) of Civil Procedure Rules, 2010 – requires that security for costs has to be provided. The applicants have passed over this requirement in silence.

23. The outcome of this application however hinges not on the law as articulated by both learned counsel, but on facts as discerned by the court from the court records and the manifest misrepresentation of the same by the applicants. In light of what I have said therefore, I am constrained to make a finding, and I hereby do, that the application herein is not meritorious. I hereby dismiss it with costs.

Dated and signed at Kericho this 6th day of December, 2019.

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A. K. KANIARU

JUDGE