



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

MISCELLANEOUS SUIT NO. 12 OF 2014

AMUGA & CO. ADVOCATES.....APPLICANT

VERSUS

JOYCE NZISA.....1ST RESPONDENT

MONICA NDUNGE MWONGELA.....2ND RESPONDENT

CONNIE MBITHE MUIA.....3RD RESPONDENT

MARY MUSUKI MUDACHI.....4TH RESPONDENT

JOSEPH LOMBA MWONGELA.....5TH RESPONDENT

RULING NO.3

1. The clients, **MONICA NDUNGE MWONGELA; CONNIE MBITHE MUIA; MARY MUSUKI MUDACHI and JOSEPH LOMBA MWONGELA**, lodged an application dated 13th November 2017, seeking leave to appeal out of time.
2. They also prayed for an order that the leave, if granted, should operate as an order for stay of execution pending the filing of their intended appeal.
3. The decision which they seek to appeal against is dated 17th July 2017. On that date the court struck out the applicants Notice of Appeal together with the Reference from taxation.
4. According to the applicants, they had failed to seek an enlargement of time within which to file the Notice of Appeal; but that failure should, (*in their opinion*) not be blamed on the applicants. They have attributed the delay to the confusion which arose during the time when they were changing their advocates.
5. In effect, the applicants blamed their advocates for having not sought leave of the court before they lodged both the Notice of Appeal and the Reference, on 28th January 2017.
6. When canvassing the application, Mr. Mwaura, the learned advocate for the applicants, submitted that the failure to seek either leave of the court or an enlargement of time within which to file the Appeal should not be visited upon his clients.
7. He submitted that the intended appeal had high chances of success. He emphasized that the applicants deserve to be heard due to the over-arching issues which were visited upon them during taxation of the Advocate/Client Bill of Costs.
8. The applicants position was that the Advocates had included in their Bill of Costs, properties which were not a part of the Succession Cause No. 3467 of 2003.
9. Their argument is that the Bill of Costs included values of properties which were not a part of the Estate of the deceased. The result of the alleged inclusion of those extraneous properties was said to be an exaggeration of the value of the Estate.
10. At present, the Law Firm was holding a Title to one property which belonged to the Estate. Therefore, the applicants submitted that the Advocates would not be prejudiced if the applicants were granted leave to appeal out of time, and if such leave operated as an order for stay

of execution.

11. The property whose title was being held by the Advocates was identified as **L.R. No. 209/7190/113, Nairobi**.
12. On the other hand, the applicants reasoned that if they were denied the orders sought, they would suffer substantial loss.
13. The applicants pleaded with the court not to deny them their right to be heard both by this court and by the Court of Appeal.
14. In the applicants view, the Advocates could always be compensated by an award of costs.
15. In the final analysis, the applicants submitted that this court had the discretion to stay execution provided that the court was satisfied that nobody would be disadvantaged by the order for stay.
16. Ms. Joyce Nzisa Muthama supported the application. However, she added that her support was conditional upon her being excluded from the Bill of Costs which the advocates had raised.
17. She added that she was opposing the sale of the property which had been attached in the process of the execution of the judgement in this case. Her opposition to the sale of the attached property was pegged on the fact that she was a beneficiary of that property, whereas she had not been a client of the Law Firm at the material time.
18. Nonetheless, Ms. Joyce Nzisa Muthama was in agreement with the applicants on the fact that the attached property could be offered as a security for the due performance of the Decree herein.
19. Mr. Amuga advocate opposed the application dated 13th December 2017.
20. The Advocates pointed out that the applicants had not challenged the decision which the Deputy Registrar made when she settled the Terms and Conditions for the sale of the attached property.
21. The only challenge had been mounted by Joyce, but even that challenge had been struck out.
22. I have given anxious consideration to that aspect of the matter. I noted that when Joyce canvassed her application, the applicants herein confirmed that Joyce had withdrawn her instructions from the Law Firm of **AMUGA & COMPANY ADVOCATES**.
23. It therefore follows that when Joyce filed her Notice of Appeal as well as her Reference from taxation, it was only in relation to her own case. She did not file any such pleadings on behalf of these applicants.
24. Accordingly, when the applicants decided to bring this application dated 13th November 2017, seeking leave to appeal against the Ruling dated 17th July 2017, that does not make any sense, considering that the said Ruling was on an application that they were not a party to.
25. A reading of the record of the proceedings reveals that the last Ruling to which the applicants were a party is the Ruling which the Taxing Officer delivered on 15th January 2016.
26. As the Advocates have pointed out in this case, it was incumbent upon the applicants to explain the delay between 15th January 2016 and 13th November 2017, when they filed the present application.
27. In this case the applicants have offered no explanation for the prolonged delay before they brought the application to seek leave to appeal.
28. The fact that the applicants submitted that the Taxing Officer had erred by basing the process of taxation on the value of properties which did not belong to the Estate of the late **GEORGE ZAKAYO MWONGELA**, implies that the substantive decision against which the applicants wished to mount an appeal is the Ruling which the Deputy Registrar delivered on 15th January 2016.
29. Another noteworthy consideration is the fact that the order for the attachment of **L.R. No. 209/7190/113** was made on 21st September 2015. To the best of my knowledge, as can be discerned from the record of these proceedings, there is no challenge to the said attachment.
30. Following the attachment of the property, the sale thereof was scheduled for 29th June 2016. However, on the very date when the property had been scheduled for sale, the Hon. Lady Justice Sewe granted an Order which put-off the sale.
31. However, the applicants were not party to the application which resulted in the stoppage of the sale. The application which gave rise to the order stopping the sale, was brought by Joyce Nzisa Muthama.
32. Therefore, I believe that the Advocates are right to have expressed the view that these applicants appeared to be intent on riding on the back of Joyce.
33. In the circumstances, I find that the present application has been brought after an inordinate delay, which had not been explained by the

applicants. The application is thus an after-thought.

34. Furthermore, the record shows that the four (4) applicants together with Joyce Nzisa Muthama had filed an application dated 17th October 2014, seeking the setting aside of the decision made by the Taxing Officer.

35. By a Ruling dated 23rd February 2015, the Hon. Lady Justice J. Kamau held that the Advocates were awarded fees which was not “*manifestly excessive*”, to justify an interference with decision of the Taxing Officer.

36. Notwithstanding that express finding by the Court, it follows therefore that the applicants were not challenging the entry of judgement in favour of the Advocates.

37. For as long as the judgement granted by Lady Justice Kamau remained unchallenged, it stands firm, and remains a proper foundation upon which execution may be mounted by the Law Firm.

38. And the Jugement was against all the five (5) clients.

39. It thus follows that when an attachment was effected in respect to a property which all the clients have a legal interest in, the said process of execution (*by attachment of L.R. No. 209/7190/113*) was lawful in every sense.

40. In conclusion, I find no merit in the application dated 13th November 2017.

41. The applicants are ordered to pay to the Law Firm, the costs of the application dated 13th November 2017.

DATED, SIGNED and DELIVERED at NAIROBI this 6th day of March 2018.

FRED OCHIENG

JUDGE

Ruling read in open court in the presence of

No appearance for the Applicants

Amuga for the 1st Respondent/Advocate

Collins Odhiambo – Court clerk.