Mahugu v Kipchumba & 37 others; Kipkosgei (Cross Appellant) (Environment and Land Appeal E022 of 2022) [2024] KEELC 6300 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6300 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ENVIRONMENT AND LAND APPEAL E022 OF 2022

JM ONYANGO, J

SEPTEMBER 25, 2024

BETWEEN

SAMUEL WAIGANJO MAHUGU ..... APPELLANT

AND

ELENA KIPCHUMBA ..... 1ST RESPONDENT

KENNEDY SHIKUKU T/A ESHIKONI AUCTIONEERS & 36 OTHERS & 36 OTHERS & 36 OTHERS & 36 OTHERS ..... 2ND RESPONDENT

AND

HILLARY KIBOINET KIPKOSGEI ..... CROSS APPELLANT

RULING

1. This ruling determines the Cross-Appellant/Applicant's Notice of Motion dated 7th May, 2024 where he asks for the following orders:-

    a. Spent

    b. That pending hearing and determination of the instant Application Inter-partes there be stay of execution of the judgment/decree of the Eldoret Chief Magistrate's Court dated 2nd August 2022 and any other consequential orders thereof.

    c. That the Honourable Court be pleased to stay and/or suspend the Notices of Sale issued on 29th April 2022 by Eshikoni Auctioneers and/or Eldoret Chief Magistrates' Court in respect of land parcel LR Eldoret/Municipality Block 12/758 pending hearing and determination of the instant Application inter partes.

    d. That the Cross-Appeal lodged by the Applicant, Hillary Kiboinet Kipkosgei vide the Memorandum of Cross-Appeal dated 30th January 2024 be deemed as duly filed.

e. That pending hearing and determination of the respective Appeals and Cross-Appeal lodged in this Honourable Court there be a stay of execution of the judgment of the Chief Magistrates' Court dated 2nd August 2022 and any other consequential orders thereof.

2. The Application supported by the grounds found on the face of the Motion and further grounds set out in the Supporting Affidavit of Hillary Kipkosgei Kiboinet (hereinafter referred to as the Cross-Appellant), sworn on the same date. In summary, the Cross-Appellant's case is that although he was defended in the lower court, he was not informed that the judgment had been delivered on 2nd August, 2022 and he failed to Appeal on time. That he was arrested and committed to civil jail and had to pay KShs.500,000/- and deposit the title to the parcel of land known as L.R. No. Eldoret Municipality Block 12/758 (the suit property herein) in court as security as a condition for his release therefrom. That the Appellant and the 2nd-37th Respondents (hereinafter referred to as the Respondents) filed Appeals against the said judgment, upon which the Applicant filed his Cross-Appeal.

3. The Applicant was candid that he filed an Application for stay of execution in the CM's Court which was declined on 22nd April, 2024 but that he had no knowledge of the delivery of the said ruling. He asked that a stay of execution be granted to allow the parties ventilate their Appeals and the Cross-Appeal. He indicated that the decretal sum is KShs.5,084,861/- which is a colossal amount. He averred that after his application for stay was denied, the Appellant obtained an attachment order and a prohibitory order ex-parte on the suit property. He deponed that the Appellant had since instructed the 38th Respondent, an Auctioneer, to sell the land.

4. The Applicant deponed that it is in the interest of justice that execution be stayed pending hearing and determination of the Cross-Appeal. He added that he was willing to abide by the conditions of stay that the court may issue and is willing to deposit the said title in this court. The Applicant averred that the suit property is valued at KShs.7,000,000/-, which amount is higher than the decretal sum of KShs.5,084,861/-. He added that the Application is made in good faith, and that unless the execution is stayed, he will suffer prejudice since his Cross-Appeal shall be rendered nugatory.

5. The Application was opposed by the Appellant through a lengthy Replying Affidavit sworn on 24th May, 2024 where he deponed that the instant Application is aimed at denying, delaying and frustrating him from realizing the fruits of his judgment in CMCC No. 742 of 2016. The Appellant explained the history of the dispute up to the delivery of the judgment on 2nd August, 2022. He deponed that he was partially aggrieved by the judgment and lodged a Memorandum of Appeal dated 8th August, 2022, being this Appeal, challenging the awards on interest and general damages. He added that the Respondents also lodged an Appeal contesting the award of damages being Appeal No. E024 of 2022, however the Applicant did not file an Appeal within the stipulated 30 days from the delivery of judgment. Both Appeals were settled by way of consents recorded between the Appellant and the Respondents.

6. The Appellant deponed that the court issued a Notice to Show Cause (NTSC) why the Appeal should not be dismissed which was served on the Advocates of the respective parties. That the NTSC was set down for hearing on 13th May, 2024 on which day the court marked the two Appeals as settled between him and the Respondents. The Appellant averred that he then proceeded with execution with execution against the Cross-Appellant upon which a Warrant of Arrest was issued. That the Cross-Appellant filed the first Application for stay of execution dated 15th May, 2023 which was dismissed with costs on 3rd October, 2023. The Cross-Appellant then filed another Application for stay of execution dated 11th October, 2023 in Eldoret ELC Misc. Applicati*on No. E019 of 2023* in which the court has declined to grant orders of stay.

7. The Appellant averred that the warrants of arrest were re-issued and the Cross-Appellant was arrested and committed to civil jail, he was released on paying KShs.500,000/- and depositing the title in court. That the Cross-Appellant then filed an Application dated 13th February, 2023 seeking stay of execution among other prayers which was also dismissed on 30th January, 2024. The Appellant deponed that instead of Appealing the ruling, the Cross-Appellant filed another Application for stay of execution dated 6th February, 2024 which was dismissed on 22nd April, 2024 with costs. He added that after the dismissal, he proceeded with the process of execution, where through his advocates, he instructed auctioneers to levy execution, with the relevant documents thereto duly served on the Applicant and a date was scheduled for the public auction.

8. The Appellant deponed that the Cross-Appellant again did not Appeal the Ruling but has instead filed the instant Application. The Appellant deponed that the Applicant is guilty of concealment and non-disclosure and gross abuse of the court process. That the issues raised in the instant Motion are res judicata in view of the rulings delivered in the earlier applications.

9. On the Cross-Appeal, the Appellant deponed that it was filed by a law firm that lacks standing to represent the Applicants, and it was filed outside the statutory time limit of 30 days from the date of delivery of judgment without an order enlarging time. The Appellant accused the Cross-Appellant of laches, inaction and indolence. He further stated that the Application offends the overriding objectives.

10. The Appellant averred that the Cross-Appellant's conduct is untenable and unconscionable. That he will be greatly prejudiced and suffer immense loss and injury if the application is allowed. That he is entitled to enjoy the fruits of the judgment. He deponed that the current Application is inter alia a waste of judicial time, lacks merit and has been overtaken by events. Further, that allowing it would defeat and undermine the course of justice.

11. The 2nd-37th Respondents also opposed the Application vide an Affidavit sworn on their behalf by Elkana Kipchumba and Simon Cherop on 19th July, 2024. They deponed that in the judgement delivered in CMCC No. 742 of 2016, the court awarded the Appellant KShs.6,000,000/- which was to be paid by the Cross-Appellant and the 2nd to 27th Respondents. They deponed that they and the Appellant both appealed against the judgment through this Appeal and through Appeal No. E024 of 2022. That the Respondents negotiated and settled the two Appeals by paying the Appellant a sum of KShs.9,500,000/-, pursuant to which they have been in possession and occupation of their respective parcels and undertaken developments thereon.

12. The Respondents contended that the Cross-Appellant has never appealed against the Ruling dismissing his Application for leave to file an Appeal out of time. They are of the view that the same prayer in the instant Application lacks merit because it has not satisfied the conditions for grant of leave, and if granted will result in endless litigation. Further, that the Cross-Applicant is re-litigating issues addressed in the ruling of 3rd October, 2023 instead of appealing against that decision. He averred that the Application is thus an abuse of the court process since the Appellant has already commenced execution. The Respondents added that the Application is defective having been filed by a firm that never sought leave to come on record contrary to order 9 Rule 9 of the Civil Procedure Rules.

13. On the prayer for stay of execution, the Respondents averred that the same is defective as the Cross-Appellant had not satisfied the conditions for grant of stay, and the application is only meant to frustrate execution. They deponed that the Cross-Appellant is guilty of material non-disclosure for not informing the court that a similar application was dismissed by the lower court. That the Cross-Appeal lacks merit and has been overtaken by events, as the consents compromised the Appeals pursuant to which the Respondents paid the decretal sum. They urged that allowing the Application would

occasion them substantial loss and damage since they had already paid the decretal sum despite having paid KShs.38,000,000/- to the Cross-Appellant herein prior to the suit. Further, that the Application is also defective for introducing a new party in the person of the 38th Respondent who was not a party to the initial proceedings.

Appellant's Submissions

14. The Application was canvassed by way of written submissions. The Appellant's submissions are dated 2nd July, 2024 and his Advocate went to great length to recall the background of the suit from the trial court to the filing of the instant Application. Counsel then submitted that under Order 9 Rule 9 of the Civil procedure Rules which requires leave to be obtained before a party can file a change of advocates after judgment has been entered. He submitted that the argument that the representation by the previous advocate ceased upon delivery of judgment is untenable. He submitted that the Cross-Appellant is guilty of gross abuse of the court process by filing multiple applications.

15. Counsel contended that the issues raised in the instant motion are res judicata in view of the Rulings delivered on 3rd October 2023, 30th January 2024 and 22 April, 2024 thus it contradicts Section 7 of the *Civil procedure Act*.

16. On the Cross-Appeal, counsel reiterated that the same was filed by a firm with no authority to represent the Applicant under Order 9 Rule 9 or without filing a Notice of Change of Advocates. Counsel contended that it was also filed outside the statutory time limit of 30 days which is a requirement under Section 79G of the *Civil Procedure Act*. That there is no order enlarging time to file the Cross-Appeal under Order 51 Rule 6. Counsel referred the court to the case of *Adie vs Jims Fresh Vegetable Growers and Exporters Limited (Appeal 221 of 2022)* (2024) KEELRC 1145 (KLR).

17. Counsel termed the Applicant's conduct of filing numerous applications untenable and unconscionable. He added that allowing the Application would occasion the Appellant immense injury and loss as he is an ailing senior citizen who requires the decretal sums to cater for his medical expenses and daily upkeep. That the Appellant has been in court for the last 12 years and emerged the successful litigant thus he is entitled to the fruits of his judgment as the Cross-appellant is obligated to pay the decretal sum among other sums arising therefrom.

18. The Appellant's Advocate contended that the instant application lacks merit, is a waste of court's time and has been overtaken by events. He urged that litigation must come to an end and that the interest of justice will be served by dismissing the application with costs as it lacks merit.

2nd-37th Respondents' Submissions

19. The 2nd to 37th Respondents' Submissions are dated 19th July, 2024. Counsel started by placing reliance on Nicholas Kiptoo Arap Korir Salat vs IEBC & 7 Others (2014) eKLR and Leo Sila Mutiso vs Rose Hellen Wangari Mwangi (1999) 2 EA 231 for the factors that a court must consider when faced with an application for extension of time. Counsel submitted that the current application was brought after an unreasonable delay, adding that the excuse given was not satisfactory as the Cross-Appellant ought to have been vigilant and as such should suffer for his indolence.

20. The court was referred to the cases of Nginyaga Kavole vs Mailu Gideon (Misc. Application No. 41 of 2018), *County Executive of Kisumu vs County Government of Kisumu & 8 Others, Civil Application No. 3 of 2016* as well as Union Insurance Co. of Kenya Ltd vs Ramzan Abdul Dhanji, Civil Application No. 179 of 1998. Counsel submitted that the Cross-Appellant had failed to show that his Appeal has high chances of success. He added that the Appellant would be prejudiced if the application was allowed.

21. On stay of execution, Counsel cited Order 42 Rule 6 of the Civil Procedure Rules as the law providing for stay of execution. He relied on the case of Hamisi Juma Mbaya vs Amkecho Mbaya (2018) eKLR which sums up the principles of stay of execution. It was his contention that the Cross-Appellant had not demonstrated that he would suffer substantial loss if execution was allowed (James Wangalwa & Another vs Agnes Naliaka Cheseto (2012) eKLR and Kenya Shell vs Kibiru (1986) KLR 410). That the Cross-Appellant also made the application after a long and unreasonable delay of 426 days. He relied on Jaber Mohsen Ali & Another vs Priscillah Boit & Another E&L No. 200 of 2012 (2014) eKLR where it was held that even one day after judgment could be unreasonable delay depending on the circumstances of the case. Further, counsel submitted that the Cross-Appellant had not demonstrated willingness to furnish security, which is a necessary condition for grant of stay (Gianfranco Monenthi & Another vs Africa Merchant Asurance Company Ltd (2019) eKLR).

22. Counsel submitted that the said relief is not a matter of right but an equitable one that is also discretionary. He cited the cases of Trust Bank Limited & Another vs Investech Bank Limited & 3 Others (2000) eKLR and Samvir Trustee Limited vs Guardian Bank Limited (Ur). It was Counsel's contention that the Cross-Appellant is not entitled to the reliefs sought herein owing to his conduct because he has neither come to court with clean hands nor has he done equity. Counsel asked the court to be guided by the case of Caliph Properties Limited vs Barbel Sharma & Another (2015) eKLR and *David Kamau vs National Industrial Credit Bank Ltd, Civil Appeal No. 84 of 2001*.

23. Counsel argued that litigation must come to an end and the successful litigant allowed to enjoy the fruits of his judgment as was held in Kenya Railway Corporation vs Quicklubes E.A. Limited (2015) eKLR, which cited M/S Portreitz Maternity vs James Karanga Kabia, Civil Appeal No. 63 of 1997. He concluded that the Cross-Appellant had not given adequate reasons for grant of stay. He urged the Court to consider the fact that the 2nd to 37th Respondents had already paid their share of the decretal amount and carried out developments on the suit property and therefore that they would be greatly prejudiced if the Application is allowed. Counsel asked the court to strike a balance between the parties herein as was held in the case of Machira T/A Machira & co. Advocates vs East Africa Standard (No. 2) (2002) KLR 63. He prayed that the application be dismissed with coasts to the Respondents.

Cross-Appellant's Submissions

24. Lastly, the Cross-Appellant filed his submissions dated 22nd July, 2024 in support of his application. His counsel submitted that Section 79G only applies to appeals but does not cross-appeals. That unlike appeals to the Court of Appeal where cross-appeals are filed 30 days prior to the hearing of the Appeal, there are no specific provisions for cross-appeals arising from the subordinate courts. That in the absence of express provisions, courts have issued directions on cross-appeals. He relied on Bash Hauliers Limited vs Peter Mulwa Ngulu (2020) eKLR, where the court held that a Cross Appeal can be filed at any time as long as the Appeal is pending. Counsel submitted that the Cross Appeal was filed on 1st February, 2024 during the pendency of the instant Appeal and is thus properly before this court.

25. Counsel submitted that the Cross-Appellant was not involved in the two consents that allegedly compromised the matters between the Appellant and the 2nd to 37th Respondents. He submitted that the Cross-Appellant herein was the Defendant in the trial and thus a party to both Appeals yet he was not aware that the two appeals were compromised. Counsel added that since the consents were entered into after the Cross-Appeal was filed, and were adopted on 13th May, 2024 then the settlement of the Appeal does not in any way affect the pending Cross-Appeal between the Appellant and the 38 Respondents. Counsel relied on the Bash Hauliers Case (Supra) where the court held that the settlement of the decretal sum did not preclude the Cross-Appeal from proceeding or hinder a party from pursuing their constitutional rights.

26. Counsel pointed out that the Application sought to have the Cross-Appeal to be deemed as duly filed and asked that in the interest of justice the same be found to be properly on record (Abdi Osman vs Kamau C. Njuguna (2015) eKLR).

27. Counsel submitted that the requirement that an advocate requires leave of court under Order 9 Rule 9 or a consent by the outgoing advocate only applies to the trial court that entered the judgment. That in a Cross-Appeal, the Cross-Appellant is at liberty to elect other advocates to represent him and leave or consent is not required.

28. As to the allegation that the application is res judicata, Counsel argued that the nature of the applications in the trial court was different from the instant application and it is thus not res judicata.

29. Counsel explained that the current application seeks prayers that were never raised in the trial court. He admitted that the Cross-Appellant did seek a stay of execution in his Application dated 6th February, 2024 but under Order 42 Rule 6(1) of the Civil Procedure Rules, the fact that the said application was denied, is not a bar to lodging a similar application in this appellate court.

30. Counsel argued that only two titles have been transferred to Wesley Cherus Misoi and David Kipkoros Barmen against 35 remaining Respondents. Further, that due to the interim orders of stay granted by this court, the public auction that had been scheduled for 27th June, 2024 could not take place. That as it is, execution is still in progress thus the Appeal has not been overtaken by events.

31. Counsel argued that there is a pending Cross-Appeal, whose validation the Applicant is seeking, hence there is need to grant a stay of execution so as not to render the Cross Appeal nugatory (Agenga vs Alango (2024) eKLR).

32. Counsel submitted that under Order 42 Rule 6(2) the court has discretion and power to grant a stay of execution. He submitted that the Cross-Appellant is willing to deposit the title with respect to the suit property which is valued at KShs.7,000,000/- in court as security. That unless a stay is granted, the Applicant will suffer substantial loss since the Appellant intends to sell the suit property. Counsel urged the court that it is in the interest of justice that the stay of execution be granted pending hearing and determination of the Cross-Appeal.

Analysis and determination

33. Having considered all the Application, the responses and submissions of the parties, I am of the view that the issues that arise for determination are:

    i. Whether the Application is res judicata;

    ii. Whether the firm of Kutto & Kaira Nabasenge is properly on record

    iii. Whether the prayer for extension of time is merited and whether this court can validate a Cross-Appeal which was filed out of time

    iv. What is the status of the Appeal herein

a. Whether the Application is res judicata

34. The Black's law Dictionary 10th Edition defines "res judicata" as:-

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

35. The law on res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

> " No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court"

36. As to whether the doctrine of res judicata applies to an application heard and determined in the same suit, the court in Uhuru Highway Development Limited V.Central Bank of Kenya & 2 Others (1986|)eKLR observed as follows;

> " What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit? We would like to refer to the decision in the case of Ram Kirpal vs Rup Kuari reported in I.L.R. Vol. VI 1883 Allahabad series. The Privy Council sitting on appeal from a decision of the full bench of Allahabad High Court said:
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> > 'The questions, if the term "res judicata" was intended, as it doubtless was, and was understood by the full Bench, to refer to a matter decided by a court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case (emphasis ours). The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgement in a suit is binding upon the parties in every proceeding in that suit, or as a final judgement in a suit is binding upon them in carrying the judgement into execution. The binding force of such a judgement depends not upon S.13, Act X, of 1877 but upon general principles of law. If it were not binding, there would be no end to litigation'."

37. The Court of Appeal in the above suit held that there must be an end to applications of a similar nature. It further held that the doctrine of res judicata applies to matters/applications decided within the same suit, explaining that:-

> " There is no doubt at all that provisions of section 7 of our *Civil Procedure Act* relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also that these provisions are governed by principles analogous to those of res judicata."

38. These principles that govern the application of the doctrine of res judicata are that:

i. There must be a previous decision made on merit in which the matter was in issue;

ii. The parties were the same or litigating under the same title.

iii. The decision was made by a court of competent jurisdiction;

iv. The issue has been raised once again in a fresh suit.

39. It is the Appellant's and the Respondents' case that the issues raised in the instant motion are res judicata in view of the Rulings delivered on 3rd October 2023, 30th January 2024 and 22 April, 2024 thus it contradicts Section 7 of the *Civil procedure Act*.

40. There is no dispute that the trial court rendered decisions to all the applications lodged by the Cross-Appellant and that it had jurisdiction to hear and render the said decisions. Since the applications were made in the same suit, there can also be no dispute that they were between the same parties herein. The prayers raised and determined in the previous applications have also been raised in this current application. Prayers (2), (3) and (5) of the instant Motion all relate to the grant of a stay of execution pending hearing and execution of the Cross-appeal.

41. It however must be noted that these previous applications were brought under very different legal provisions. The circumstances as well as facts surrounding the various applications as outlined above were different in every case. As a result, the issues arising therefrom and the considerations the court took into account in reaching its determinations thereon were different. More importantly, though, the Appeal herein was not the focal point in most of the previous applications.

42. Only the Cross-appellant's Application dated 6th February, 2024 sought a stay of execution pending hearing and determination of the Appeal herein. Among the numerous applications filed by the Cross-appellant, this is the only application that was brought under Order 42 Rule 6 of the Civil Procedure Rules. While ordinarily, the doctrine of res judicata would apply with regards to the prayer for stay of execution, I am of the considered view that the application herein is an exception. The exceptions to the application of the doctrine of res judicata have been discussed in numerous cases. The Supreme Court in a decision rendered in John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2021] eKLR, discussed two exceptions to the doctrine of res judicata. The Court stated as follows:

> "(84) Just as the Court of Appeal in its impugned decision noted that rights keep on evolving, mutating, and assuming multifaceted dimensions it may be difficult to specify what is rarest and clearest. We however propose to set some parameters that a party seeking to have a court give an exemption to the application of the doctrine of res judicata. The first is where there is potential for substantial injustice if a court does not hear a constitutional matter or issue on its merits. It is our considered opinion that before a court can arrive at such a conclusion, it must examine the entirety of the circumstances as well address the factors for and against exercise of such discretionary power.
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> (85) In the alternative a litigant must demonstrate special circumstances warranting the Court to make an exception."

43. Of the two, the exception that applies in the instant case is that there are special circumstances warranting the court to make an exception. This exception applies because the doctrine of res judicata is

expressly precluded by statute from application. More particularly, Order 42 Rule 6 expressly provides that:-

> "...whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just..."

44. From the above provision, it is clear that despite the fact that the application for stay pending appeal was determined by the trial court, the Cross-Appellant is entitled to bring a fresh application to this appellate court for grant of an order of stay of execution pending appeal. This is because under Order 42 Rule 6, the earlier application in the trial court is no bar to his bringing another application for stay in this court. That is what the Cross-Appellant has done by lodging this current application. If the Appellants and the Respondent were aggrieved by the repeated applications for stay of execution, they ought to have raised the issue of res judicata in the trial court. They however did not do so, and since the application has now been lodged on appeal, this court has the requisite jurisdiction under Order 42 Rule 6 to entertain the current application. For that reason, the instant motion is exempt from the doctrine of res judicata.

b. Whether the firm of Kutto & Kaira Nabasenge is properly on record

45. The Appellant's and the Respondents' contention is that the application herein violates the provisions of Order 9 Rule 9 of the Civil Procedure Rules 2010 as it was lodged by a firm which was not in law authorised to do so. They urged that the application be dismissed with costs. Order 9 Rule 9 of the Civil Procedure Rules which is at the middle of this argument provides that:-

> "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 without an order of the Court-
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> (a) upon an application with notice to all the parties; or
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> (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."

46. However, the instructions of an advocate in the trial court do not cease after delivery of judgment. Instead, the Advocate remains on record in the trial court matter unless leave is granted for another advocate to come on record in the court that entered judgment. The justification for this provision was given in S.K. Tarwadi vs Veronica Muehlemann (2019) eKLR, where Korir J. held that:-

> "18. In my view, the essence of Order 9 Rule 9 CPR is to protect advocates from mischievous clients who will wait until a judgement 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..."

47. However, an Appeal is essentially a different suit and the advocate's instructions in the lower court are exhausted at the conclusion of a matter. Should the matter proceed on Appeal, a party is at liberty to proceed with the advocate who represented them in the trial court upon issuance of fresh instructions. The party may also choose to employ another advocate, and should they opt to do so, they need not first seek leave of court. By the same reasoning, a party need not file a Notice of Change of Advocates and

the Appellant's submissions on that front are erroneous. The Court of Appeal Tobias M. Wafubwa vs Ben Butali (2017) eKLR held thus:-

> " We are of the same view, and would adopt the same approach in its entirety in matters concerning appeal. Once a judgment is entered, save for matters such as applications for review or execution or stay of execution inter alia, an appeal to an appellate court is not a continuation of proceedings in the lower court, but a commencement of new proceedings in another court, where different rules may be applicable, for instance, the Court of Appeal Rules, 2010 or the Supreme Court Rules, 2010. Parties should therefore have the right to choose whether to remain with the same counsel or to engage other counsel on appeal without being required to file a Notice of Change of Advocates or to obtain leave from the concerned court to be placed on record in substitution of the previous advocate.
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> As this dispute concerned an appeal from the Principal Magistrate's Court to the High Court, it involved the commencement of new proceedings, and we are satisfied that the respondent's counsel was entitled to commence them without filing a Notice of Change of seeking the leave of the court to be placed on record."

48. Order 9 Rule 9 and 10 of the Civil Procedure Rules does not therefore apply in instances of an appeal. It follows therefore that the firm of Kutto & Kaira Nabasenge Advocates is properly on record in this suit, to hold otherwise would be tantamount to denying the Cross-Appellant the right to representation by counsel of his choice.

c. Whether the prayer for extension of time is merited and whether this court can validate a Cross-Appeal which was filed out of time

49. I now turn to the prayer for extension of time to file the Cross-Appeal and/or deem it as duly filed. The Appellant and the Respondents contended that the Cross Appeal had been filed out of time and without leave of court contrary to the provisions of Section 79G of the *Civil Procedure Act* Cap 21 Laws of Kenya. In response, the Cross-Appellant argued that while there was a provision stipulating the period within which an appeal could be filed in the Civil Procedure Rules, there is no such provision in respect of cross appeals. Section 79G of the *Civil Procedure Act* Cap 21 (Laws of Kenya) provides that:-

> " Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:
>
> Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time."

50. Courts have repeatedly held that although there is no fixed timeline for the filing of Cross-Appeals, it is incumbent that they be filed within a reasonable time. See the case of Kenya Power & Lighting Co Ltd v Peter Langi Mwasi [2018] eKLR, where the court had this to say on the issue:-

> " 13. The above provisions however do not address the timelines within which a cross-appeal should be filed. Going by the record herein, the memorandum of appeal was filed on 8th July, 2014. If the applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an

appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time."

51. This was reiterated in Kindest Auctioneers vs Orbit Chemicals Industries Limited (Miscellaneous Appeal E038 of 2023) (2023) KEELC 21782 (KLR), where Mogeni J. held that:

> " There being no such provisions in respect of cross-appeals, courts have held that cross appeals should be filed within a reasonable period. If an applicant was desirous of filing a cross-appeal, he should have done so within reasonable time after he was served with the memorandum of appeal. If he fell outside the said timelines given to an appellant to file an appeal, he should have moved the court without inordinate delay to allow him to file a cross-appeal out of time."

52. As to what would constitute reasonable period, in the mind of this court, this would depend on the circumstances of the case. Going by the Affidavit of Service sworn by Rotich Duncan on 2nd September, 2022 and filed on the same day, the Cross-Appellant was served with the Memorandum of Appeal herein on 2nd September, 2022. The Cross-Appeal was however filed on 1st February, 2024 approximately 1.5 years after filing and service of the Memorandum of Appeal. The Cross-appeal was not brought to the attention of the court on 13th May, 2024 when the suit herein was mentioned alongside ELC Appeal No. E024 of 2022 which had been listed for dismissal for want of prosecution, and the court was informed that the two Appeals had been withdrawn.

53. Admittedly, there is no Affidavit of Service on record evidencing service of the application herein, even though when it was first mentioned on 8th May, 2024 the court directed that it be served within 7 days. It was fixed for hearing on the 27th May, 2024 and when the Cross-Appellant's advocate appeared before this court o 14th May, 2024 a day after the adoption of the consents, Counsel informed this court that he had already served the Application on the Respondents. By 20th May, 2024 when the matter was again mentioned, Counsel for the Appellant informed the court that he became aware of the Cross-Appeal when he was served with this Application herein on 14th May, 2024 to which was annexed the Cross-appeal. Without proof of service, I am unable therefore to hold that the said Memorandum of Cross-appeal or even the instant Motion had been served on the parties at the date of adopting the consents. I cannot therefore lay the blame on the Respondents for not bringing it to the court's attention before the consents were adopted.

54. Be that as it may, the power of the court to extend time to file an appeal, or Cross-Appeal as the case may be, is found in Section 95 of the *Civil Procedure Act* which provides thus:-

> " 95. Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may, in its discretion, from time to time, enlarge such period, even though the period originally fixed or granted may have expired."

55. The Court is also empowered under Order 50 Rule 6 to enlarge time upon such terms as the justice of the case may require. It provides that:

> " 6. Power to enlarge time [Order 50, rule 6]
>
> Where a limited time has been fixed for doing any act or taking any proceedings under these Rules, or by summary notice or by order of the court, the court shall have power to enlarge such time upon such terms (if any) as the justice of the case may require, and such enlargement may be ordered although the

application for the same is not made until after the expiration of the time appointed or allowed:

> Provided that the costs of any application to extend such time and of any order made thereon shall be borne by the parties making such application, unless the court orders otherwise."

56. The factors to be considered when determining an application for extension of time are found in various judicial pronouncements. In Paul Musili Wambua v Attorney General & 2 others [2015] eKLR the Court of Appeal discussed those factors as follows:-

> " ...it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general, the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

57. 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. There has been a delay of about one and a half years now from the date of the filing and service of the Memorandum of Appeal, to the filing of the Cross-Appeal. It has already been established that the Cross-Appellant was served with the Memorandum of Appeal herein on 2nd September, 2022. Instead of filing the Cross-Appeal at that time, he resorted to filing a myriad of applications in the lower court. The Court's attention was also drawn to ELC Misc. Applicati*on No. E019 of 2023* filed by the Cross-Appellant herein seeking leave to file an appeal out of time. However, instead of pursuing that application, the Cross-Appellant filed the Cross-Appeal herein and thereafter lodged this current Application. ELC Misc. Applicati*on No. E019 of 2023* seems to have been abandoned vide a Notice of Withdrawal dated 27th May, 2024.

58. Indeed, courts have found that in some cases, a delay of even one day can be deemed unreasonable, as was held in the case of Jaber Mohsen Ali & another vs Priscillah Boit& another E & L NO. 200 OF 2012 (2014) eKLR where it was stated:

> " ...The question that arises is whether this application has been filed after unreasonable delay. What is unreasonable delay is dependent on the surrounding circumstances of each case. Even one day after judgment could be unreasonable delay depending on the judgment of the court and any order given thereafter..."

59. The Cross-Appellant lay the blame for delay in filing the Cross-Appeal on the Advocates who represented him at the trial. He explained that he was not aware of the delivery of the judgment as his erstwhile advocates did not inform him. But while the mistake of counsel might not be held against the litigant, if it is accompanied by a litigant's indolence and inactivity, then the court may refuse to exercise discretion in favour of such a party. This court is not blind to the concept that a suit belongs to the litigant and thus the Cross-Appellant ought to have kept abreast of the progress of his suit. His failure to follow up on his case is what led to his lack of notice of the delivery of the judgment.

60. The Cross-Appellant deponed that he filed an application for stay which was declined on 22nd April, 2024 but again he was unaware of the delivery of the ruling dismissing it. This paints a picture of a litigant who is not vigilant in prosecuting his case, because even if his advocates did not inform him of the delivery of the judgment and the ruling, as a party to the suit, he had the duty to follow up on the

progress of the suit. The Court of Appeal in Tana & Athi Rivers Development Authority vs Jeremiah Kimigho Mwakio & 3 Others (2015) eKLR held:-

> "It appears that the appellant fell short of this expectation. It bears repeating that no explanation was ever given as to why the particulars to the defence failed to be filed. Yet it is common ground that the appellant was aware of the order to that effect. While mere negligent mistake by counsel may be excusable, the situation is vastly different in cases where a litigant knowingly and wittingly condones such negligence or where the litigant himself exhibits a careless attitude (in Mwangi vs Kariuki (1999) LLR 2632 (CAK)) Shah, JA. ruled that "mere inaction by counsel should only support a refusal to exercise discretion if coupled with a litigant's careless attitude." The import of this is that while the mistake of counsel is excusable, if it is accompanied by a litigant's carelessness and inactivity, then the refusal by court to exercise discretion in favour of such a party cannot be impugned."

61. The excuse given by the Cross-Appellant is therefore not plausible. There is no reasonable excuse given why the Cross-Appellant did not file his Cross-Appeal in good time or the stay of execution alongside it. The outcome is that he is guilty of inordinate delay in this case which delay has not been explained. In the circumstances, I find that the delay of 1.5 years was not only unjustified but was unreasonable.

62. As to whether the intended Cross-Appeal has high chances of success, the Cross-Appellant attached the Memorandum of Cross-Appeal indicating the Grounds of Appeal. From the Memorandum of Cross-Appeal, it is clear that the Cross-appellant is not challenging the reasoning of the judgement of the subordinate court. Instead, the Cross-Appellant's is aggrieved by the sums awarded as damages and interest.

63. Although the Cross-appeal is not one that must necessarily succeed, it must be one that raises arguable points. Having looked at the judgement of the trial court and even without going into the merits of the appeal or evidence adduced, this court is not convinced that the Cross-appeal is arguable.

64. The last consideration is whether the Appellant and the Respondents will suffer prejudice, the Appellant has already indicated that he has waited for over 10 years to receive the balance of the purchase price, an amount the Cross-Appellant is captured by the Trial Magistrate as having admitted. This court has also noted the submission that he is ailing and the amount being the decretal sum, is to cater for his medical expenses. The Respondents on the other hand purchased the suit property from the Cross-Appellant and have been waiting to be registered as proprietors of the land they purchased from the Cross-Appellant from as early as 2013 to no avail. The Respondents have even gone the extra mile to settle the decretal sum, yet to date they still await said registration as owners thereof. The Appellant and the Respondents have clearly demonstrated that they will suffer prejudice and explained the exact prejudice they are likely to suffer if the application is allowed.

65. On the other hand, the Cross-Appellant has not demonstrated any prejudice he will suffer if the orders he seeks are not granted. He alleged that he will suffer prejudice since the Appellant is bent on selling the suit property, but nothing is further from the truth. It is in fact the Cross-appellant who already sold the suit property to the Respondents herein. The Appellant through the consents is only effectuating the decision of the subordinate court and the transactions between the Cross-Appellant and the Respondents. The allegation that the Appellant intends to sell the suit property is therefore unfounded.

66. It follows therefore that the Cross-Appellant has failed to meet the requirements for extension of time. This court finds that the Cross-Appellant is not entitled to grant of the order extending time for filing

of the Cross-Appeal out of time, or that the Cross-Appeal be deemed to have been duly filed. The Cross-Appeal is thus improperly before this court.

d. What is the status of the Appeal herein

67. The Cross-Appeal has been deemed improperly before the court. However, the Cross-Appellant alleged that since he was not involved in the Consents that compromised the Appeal yet he is a primary party to the suit, then the Appeal still stands. The court finds it necessary to determine the status of the instant appeal. Order 25 of the Civil Procedure Rules governs withdrawal of suits and at Rule 1 thereof provides:-

> " 1. Withdrawal by plaintiff [Order 25, rule 1]
>
> At any time before the setting down of the suit for hearing the plaintiff may by notice in writing, which shall be served on all parties, wholly discontinue his suit against all or any of the defendants or may withdraw any part of his claim, and such discontinuance or withdrawal shall not be a defence to any subsequent action."

68. There is the Consent dated 13th March, 2024 between the Appellant herein and the 2nd-37th Respondents herein that indicates that they had agreed to withdraw this appeal and Appeal No. E024 of 2022 on condition of payment of the decretal amount. There is another Consent dated 3rd May, 2024 which indicates that the 2nd-37th Respondents had completed payment of the decretal sum.

69. This instant Appeal was lodged by the Appellant herein whereas Appeal No. E024 of 2024 belonged to the Respondents. Even though the Cross-Appellant herein was not included in the consent that settled the Appeal, the law is clear that the action of withdrawal of an Appeal is well within an Appellant's unfettered right. The Appellant is at liberty to withdraw his Appeal without the prior authority or consent of anyone and such a right cannot be abridged. Courts recognise the rights of parties to agree to settle and/or withdraw matters. See Nicholas Kiptoo Arap Korir Salat vs Independent Electoral and Boundaries Commission & 7 others (2014) eKLR, where the Supreme Court held that:-

> " A party's right to withdraw a matter before the court cannot be taken way. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate. Recently, a single judge of this Court in John O. Ochanda vs Telkcom Kenya Limited, Moti*on No. 25 of 2014*, in granting an application for withdrawal of a Notice of Appeal, stated inter alia:
>
> > "I do hold the view that a prospective Appellant is at liberty to withdrawal a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any."

70. The Consent of 13th March, 2024 at Clause 2 states that the two appeals would be marked as withdrawn on the terms set out therein. The Appellant herein as the owner of the instant Appeal, agreed to withdraw it and his Advocate informed the court that he had agreed to the consent that withdrew it. Since the appeal belongs to the Appellant, the effect of the withdrawal of the Appeal by the Appellant

is that the Appeal was wholly terminated, at the point of adoption of the Consent. Once the Appeal herein was withdrawn, there were no issues left for this court to exercise its jurisdiction over.

71. Additionally, the instant Appeal had not been set down for directions or hearing before the withdrawal/settlement was done. The Appellant had not filed the Record of Appeal. Therefore, the Appellant did not need leave of court to withdraw his appeal. It is for this reason that the Court finds and holds that the Appeal was properly withdrawn as between not only the Appellant and the Respondents, but also with respect to the Cross-Appellant herein.

72. Regarding the prayer for stay of execution of the judgement pending appeal, this court has found that the application for extension of time for filing the Cross-Appeal is devoid of any merit, and has also found that the Appeal herein was withdrawn. It follows that the court cannot stay execution of the decree of the lower court since there is no appeal or Cross-appeal pending. Consequently, the Cross-Appellant's Notice of Motion is unmerited and is dismissed with costs to the Appellant and the Respondents.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 25TH DAY OF SEPTEMBER 2024.

.....

J.M ONYANGO

JUDGE

In the presence of;

1. Mr. Njuguna for the 1st Respondent

2. Mr. Nabasenge for the Applicant/Cross Appellant

3. No appearance for the 2nd – 37th Respondents

Court Assistant: Brian