REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT

AT NAIROBI

CAUSE NO. 2149 OF 2012

(Before Hon. Lady Justice Maureen Onyango)

HUDSON KIDAHA KISIGWA.....CLAIMANT

VERSUS

ROMAGEGO KENYA LIMITED...RESPONDENT

RULING

The Court on 10th August 2018 delivered Judgment in favour of the Claimant/Respondent and awarded him the sum of Kshs.4,707,945.38. At the time of the delivery of Judgment the Respondent was represented by the firm of Nyachoti and Company Advocates. On 25th September 2018 the Respondent/Applicant through the firm of Omwebu Associates filed a Notice of Motion seeking the following orders:

1. That this application be heard ex-parte in the first instance.

2. That leave be and is hereby granted for the firm of M/s Omwebu and Associates Advocates to come on record for the Respondent/ Intended Appellant/Applicant herein in place of the firm of M/s Nyachoti and Company Advocates.

3. That pending the hearing and determination of this application inter-partes, there be a stay execution of the Judgment and Decree dated and delivered on 20th July 2018 and 10th August 2018 respectively and all consequential Orders and proceedings arising therefrom.

4. That this application be heard inter-partes as a matter of urgency on such date and at such time as this honourable court may direct.

5. That time for the respondent/intended appellant/Applicant herein to lodge an appeal against the Judgment/Decree of the Respondent be allowed to lodge an appeal against the said Judgment within such time or period as the Court may direct.

6. That pending hearing and determination of the Intended Appeal hereof against the Judgment of this Court delivered on 10th August 2018 hereof, there be a stay of execution of the said Judgment and decree dated and delivered on 20th July 2018 and 10th August 2018 respectively and all consequential proceedings and orders arising therefrom.

7. That the costs of this application be in the cause.

The application is supported by the affidavit of Rob Collige, the Respondent's Chief Executive Officer and Managing Director and is premised on grounds that:

1. The Applicants previous advocates is unresponsive to the Applicant's request on the matter necessitating the change of advocates. Further, the failure to file an appeal within the requisite period was occasioned by the Applicant's previous advocate who failed to notify the Applicant about the judgment of the Court in time until 14th September 2018 when the statutory time to file an appeal had already lapsed.

2. The failure to file an appeal in time was a mistake of an advocate which should not be visited on the applicant/Judgement Debtor and that the intended appeal raises several arguable grounds of appeal with good chances of success.

3. If a stay of execution of the Judgment/decree pending the hearing and determination of the Intended Appeal is not granted, the

Applicant's application herein and the eventual intended appeal will be rendered nugatory

4. The Applicant will suffer substantial loss if stay of execution is not granted and that Respondent is a natural person whose assets and financial means are unknown hence the apprehension that the Decree holder/Claimant will not be able to refund the colossal decretal sum of over Kshs.4.707.945.38 in the event the applicant is successful in its application and intended appeal. Further the applicant is a going concern and ready to furnish an Insurance Guarantee as back-up security on the terms the court may deem fit.

In response to the application the Claimant/Respondent filed a

Replying Affidavit sworn the Geoffrey Eric Odongo the Claimant's Counsel on 4th October 2018. He avers that the firm of Omwebu Associates had already filed their Notice of change without the court's sanction and the applicant is merely seeking to ratify its action. He avers that the Applicant merely states its willing to furnish security to this court but it has not demonstrated by conduct their willingness to deposit the said security but the applicant has not made any propositions of the amount it is willing to deposit as security. He avers that it is not true that execution of the decree will render the appeal nugatory and that this being a money decree, the Respondent is capable and willing to refund the decretal sum in the event the Applicant's appeal is successful.

The Applicant thereafter filed a Further Affidavit sworn by the Rob Collinge on 16th October 2018 in which he avers that the law allows prayer for leave to come on record to be sought together with other prayers provided the former prayer must be determined first hence the Notice of Change is properly on record. He avers that the Applicant took all reasonable steps within reasonable time in the circumstances of the case to inquire on the judgment . He avers that the Respondent has not illustrated capacity to refund the colossal sum of the decretal amount .He avers that he was not aware that the previous advocates filed a Notice of Appeal in the matter on 6th September 2018 which was over 27 days from the judgment date and that it was filed without his instructions.

Applicant's Submissions

The applicant submitted that the Replying affidavits sworn by the Claimant/Respondent's advocate depones contentious matters and facts and there is no single affidavit sworn by the claimant in response to the Applicant's applications. Therefore, the Replying Affidavits offend Rule 9 of the Advocates Practice Rules, which prohibit advocates from swearing affidavits on contentious matters hence it is incompetent and should be struck out.

The applicant submitted that it became aware of the judgment after the expiry of 35 days from date of delivery and by that time, the time to lodge and prefer an appeal against the Judgment had already lapsed, as provided under Rule 75 of the Court of Appeal Rules. It submitted that the application for leave to file the appeal out of time was timeously made without inordinate date as it was made 10 days from the date of notice of Judgment.

The Applicant submitted that there is no prejudice that will be suffered by the Respondent which cannot be compensated by costs if the application is granted. However, the Applicant risks substantial loss as it risked loosing a colossal sum of over 4.7 million, miscarriage of justice and fettered right of appeal as a result of its previous advocates mistake. The Applicant submitted that the Respondent did not adduce evidence that a Notice of Appeal was filed and was served upon the Respondent in time as per the law. It submitted that it was not aware of the late notice of Appeal and it could not regularize the notice or enlarge the time for its service. It submitted that it is not fatal for the prayer to be granted so that a proper notice of appeal can be filed and served on the parties as per Order 50 Rule 6 of the Civil Procedure Rules, Section 66 of the Civil Procedure Act, Rule 4,75 and 77 of the Court of Appeal rules 2010.

The Applicant submitted that the application and the intended appeal will be rendered nugatory if the orders of 24th January 0291 are not extended and an order of stay of execution of the decree is not granted pending hearing and determination of the pending intended appeal.

The Applicant submitted that the Respondent has not otherwise illustrated means and financial capability to refund the decretal sum in the event the appeal is successful. Hence it is likely to suffer substantial and irreparable loss. It relied on the decision in ***Amal Hauliers Ltd v Sam-Con Ltd & 3 Otters [2012] eKLR*** and ***Stanley Karanja Wainaina & Another v Ridon Anyangu Mutubwa [2016] eKLR***. It submitted that it has provided such security as the Court ordered for the due performance of the decree and it is ready and willing to comply with the Orders for security.

Claimant/Respondent's Submissions

The Claimant/Respondent submitted that the Applicant has not pointed out the paragraphs of the affidavits that are contentious. He avers that the present application relates to matters of practice and procedure. He relied on the decision in ***Regina Waithira Mwangi Gitau v Boniface Nthenge [2015] eKLR***.

The Respondent submitted that in order to prove substantial loss the Applicant ought to show it is likely to suffer real loss in value which is not just monetary terms. He relied on the case of ***Andrew Kuria Njuguna v Rose Kuria Nairobi Civil Case 224 of 2001*** **(unreported).** He submitted that real and persuasive evidence must be placed before the court to show that the Claimant is not able to refund the decretal sum should the appeal succeed. He argued it is not enough for the Applicant to merely allege that the Claimant is a natural person whose assets are unknown. He relied on the decision in ***Antioine Ndiye v Africa Virtual University [2015] eKLR*** where the Court cited the case of ***Machira t/a Machira & CO. Advocates v East Africa Standard (2002) KLR 63*** in which it was stated:

"In this kind of applications for stay, it is not enough for the applicant to merely state that substantial loss will result. He must prove specific details and particulars…where no pecuniary or tangible loss is shown to the satisfaction of the court, the court will not grant a stay…"

The Respondent submitted that the threat of execution does not amount to substantial loss and that he is a holder of a valid judgment and is entitled to receive the sums awarded to him. He submitted that the common thread in the applicant's submissions is that the delay was occasioned by its former advocates and that mistakes of advocates should not be visited upon it. It submitted that the allegation of a mistake is neither here nor there as the Applicants advocates had filed a Notice of Appeal on 6th September 2018. Further that an advocate only acts upon the instructions of the client and the client has a duty to follow up on the progress of his case. He relied on the decision in ***Republic v Registrar of Societies & another Ex-parte Joseph Ndemi Wanjiri and Others [2016] eKLR***.

He argued that the appeal has no chances of success for the reason that it is mainly based on the assertion that the Respondent was unlawfully absent from work and that the finding that his employment was terminated during illness was unlawful and erroneous.

Determination

On the issue of whether the Affidavits were rightfully sworn by the claimant's advocate this Court finds that the said Replying affidavit is not incompetent for reason that the claimant's advocate's response was in respect of matters within his knowledge which occurred in the course of representing his client.

The main issues for determination in this application are: -

1. Whether the firm of M/s Omwebu and Company Associates Advocates should be granted leave to come on record for the Respondent.

2. Whether the applicant has demonstrated sufficient grounds for failure to file notice of appeal in time and whether the applicant has an arguable appeal.

3. Whether the Applicant has demonstrate sufficient ground for the grant of stay of judgment pending appeal

The Applicant was until the delivery of judgment represented by the firm of Nyachoti and Company Advocates. Thereafter, the firm of Omwebu and Company Associates Advocates filed the current application in which at prayer 2 the firm seeks to come on record for the Respondent in place of the firm of Nyachoti and Company Advocates. The Respondent in its Replying Affidavit avers that the firm of Omwebu and Company Associates is merely seeking to ratify its action as it filed a Notice of Change of Advocates on 25th September 2018.

The change of advocates after judgment has been delivered is provided for under Order 9 Rule 9 of the Civil Procedure Rule which provide:-

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—

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.

It is noted from the record that the firm of Nyachoti and Company Advocates signed a consent with the firm of Omwebu and Associates Advocates to come on record for the judgment debtor. Although the prayer by Omwebu and Associates seeking to come on record was combined with the main application before the determination whether the firm was properly on record, it is not fatal. Order 9 Rule 10 provides:

An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.

In ***S. K. Tarwadi V Veronica Muehlemann [2019] eKLR*** the Court in determining the importance of complying with Order 9 Rule

9 held:

"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 hence the enactment of Rule 10 as follows:…"

The Court therefore grants the firm of Omwebu and Associates to come on record for the applicant/judgment debtor.

Whether the applicant has demonstrated sufficient grounds for failure to file notice of appeal in time and whether the applicant has an arguable appeal

Section 7 of the Appellate Jurisdiction Act provides as follows:

The High Court may extend the time for giving notice of intention to appeal from a judgment of the High Court or for making an application for leave to appeal or for a certificate that the case is fit for appeal notwithstanding that the time of

giving such notice or making such appeal may have already expired.

The Court of Appeal in ***Peter Mutuku Nthuku v Perimeter Protection Limited [2018] eKLR*** set out the threshold for granting extension to file an appeal out of time thus:

> "1. In an application for leave to file and serve a Notice and Record of Appeal out of time, the Court is being asked to exercise its unfettered discretion which is intended to be exercised to avoid injustice or hardship resulting from accident, inadvertence or excusable mistake or error but it's not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.
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> 2. The decision whether or not to extend the time for appealing is essentially discretionary. In general, the matters which the Court takes into account in deciding whether to grant an extension of time are:
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> a. The length of the delay;
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> b. The reason for the delay;
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> c. The chances of the appeal succeeding if the application is granted; and
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> d. The degree of prejudice to the respondent if the application is granted."

Judgment was delivered on 10th August 2018. The application herein was filed on 25th September 2018 which is 45 days after the delivery of Judgment by the Court. The time to file a Notice of Appeal under Rule 75(2) of the Court of Appeal Rules being 14 days lapsed on 24 th August 2018. A Notice of Appeal was already filed by the previous applicant's advocates on 6th September 2018 which was out of time.

The Applicant's reason for failure to file an appeal within the requisite period was that the delay was occasioned by its previous advocates who failed to notify the applicant of the Judgment in time. The Applicant herein attached several emails showing correspondence between its representative Zebunissa Khan and its previous advocates. In the email dated 12th September 2018, Khan sought to be furnished with a copy of the judgement and on 14th September 2018, the firm of Nyachoti & Company Advocates forwarded the copy of the Judgment. From the correspondence the applicant has only stated that there was no communication with its advocates after judgment until the 3rd of September 2018 and that the last communication was on 20th September 2018 when its previous advocates advised it that the matter was scheduled for highlighting of submissions on 22nd November 2017.

In **Bi-Mach Engineers Limited V James Kahoro Mwangi [2011] eKLR** the Court of Appeal held:

> "The applicant had a duty to pursue his advocates to find out the position on the litigation but there is no disclosure that the applicant bothered to follow up the matter with his erstwhile advocates. It is not enough simply to accuse the advocate of failure to inform as if there is no duty on the client to pursue his matter. If the advocate was simply guilty of inaction, that is not an excusable mistake which the court may consider with some sympathy. The client has a remedy against such an advocate. It would also appear that there was unnecessary and unexplained delay after 30th December, 2010 and the filing of the motion on 2nd February, 2011. Without explanation, there would be no basis for the exercise of any discretion. The filing of a notice of appeal is a simple and mechanical task and could even have been done on 30th December, 2010 or soon after the applicant became aware of the judgment. Such conduct militates against the overriding objective and the principles stated above."

I am satisfied that the applicant/judgment debtor has demonstrated that delay in filing the notice of appeal was occasioned by the failure of its erstwhile counsel to inform it in time about delivery of the judgment. I am further satisfied that such delay should not be used to prevent the applicant/judgment debtor from exercising its constitutional right to appeal against the decision of this court as in my view the delay between 24th August 2018 when the notice of appeal should have been filed and 6th September when it was filed is not inordinate.

Whether the Applicant has demonstrate sufficient ground for the grant of stay of judgment pending appeal

The provisions governing stay pending appeal are found in Order 42(6)(2) of the Civil Procedure Rules which states :

> **(2) No order for stay of execution shall be made under sub rule (1) unless —**
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> **(a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and**
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> **(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.**

The Applicant herein avers that it will suffer loss of the amount of Kshs.4.7 million since the Respondent is an individual of unknown means and that the Respondent has not demonstrated means and financial capability to refund the decretal sum. The Applicant has illustrated that it is willing to deposit security for the due performance of this decree.

I have considered the rival submissions of each of the parties. I have to weigh the right of the Decree holder to the fruits of the valid

judgmental against the genuine fears of the judgment debtor that it may not be able to recover the decretal sum from the decree holder should the appeal succeed. Based on the foregoing I will allow the application to the following extent –

1. M/s Omwebu and Associates is granted leave to come on record for the applicant/judgment debtor in the place of Nyachoti and Company Advocates.

2. The applicant/judgment debtor is granted leave to file notice of appeal out of time and the notice of appeal filed on 6th September 2012 by Nyachoti and Company Advocates is hereby deemed to have been properly filed and admitted on record.

3. The applicant/judgment holder is granted stay of execution of decretal sum pending hearing and determination of appeal on the following conditions –

i. That items (ii), (iv) and (v) of the judgment being the sum of Kshs.147,725 together with interest as stated in item (vi) of the judgment be paid to the decree holder.

ii. That items (1) and (2) of the judgment together with interest as set out in item (vi) of the judgment be deposited into an interest earning account held in the joint names of claimant's and respondent's advocates (if this has not already been done) within 7 days from date of this ruling.

4. That applicant/judgment debtor pays the costs of this application in any event.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 21ST DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE