



REPUBLIC OF KENYA



KENYA LAW

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Mwonya (Suing as a Personal Representative of the Estate of Joshua Mwonya) v Akoth (Environment and Land Miscellaneous Application E010 of 2022) [2023] KEELC 182 (KLR) (17 January 2023) (Ruling)

Neutral citation: [2023] KEELC 182 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MIGORI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E010 OF 2022
MN KULLOW, J
JANUARY 17, 2023

BETWEEN

ROSE AWUOR MWONYA (SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF JOSHUA MWONYA) APPLICANT

AND

PERES ACHIENG AKOTH RESPONDENT

RULING

1. By Notice of Motion dated 26th September, 2022, the Applicant sought for the following orders: -
 - a. Spent.
 - b. That pending the hearing and determination of this Application, the Honourable Court do grant leave to the firm of M/s Onyango Owaka & Associates Advocatesto act for the Applicant after Judgment in place of M/s G.s. Okoth & Company Advocates.
 - c. That pending the hearing and determination of this Application interpartes, the Honourable Court do grant leave to the Applicant to be substituted with her deceased husband Joshua Mwonya Mwonyafor the purpose of this Application and the intended Appeal.
 - d. That pending the hearing and determination of this Application interpartes, there be an Order of Stay of Execution of the judgment delivered on 6th August, 2019 by Hon. R.K. Langat in Rongo ELC No. 16 of 2018.
 - e. That pending the hearing and determination of the Intended Appeal, there be an Order of Stay of Execution of the judgment delivered on 6th August, 2019 by Hon. R.K. Langat in Rongo ELC No. 16 of 2018.



- f. That the Honourable Court be pleased to grant leave to the Applicant to Appeal the judgment in Rongo ELC No. 16 of 2018.
- g. That cost of this Application be in the cause.
2. The application is premised on the 14 grounds thereof and on the Supporting Affidavit sworn by the Applicant on even date. She avers that she only became aware of the land case in Rongo vide ELC No. 16 of 2018 between her deceased husband and the Respondent herein on the 24.08.2022; when the firm of G.S. Okoth & Co. Advocates sent her a letter, requiring her to pay Kshs. 332,560/= being the assessed costs in the suit. She however intends to substitute her deceased husband so as to Appeal the entire judgment.
 3. It is her claim that at the time of the delivery of the judgment on 6.08.2019 and whose effect was to dismiss the case with costs, her husband had suffered a severe paralysis and after a long period of illness, he died on the 07.02.2021.
 4. It was further her contention that the intended Appeal is arguable with high chances of success and she attached a draft Memorandum of Appeal to demonstrate her readiness to appeal against the entire judgment of the trial court.
 5. She maintained that she stands to suffer irreparable loss in the event that the orders for stay of execution orders sought are not granted since Kerati Auctioneers have already filed warrant of execution of the said decree and the Appeal may be rendered nugatory. She thus urged the court to allow the Application in the interest of justice.
 6. The application was opposed. The Respondent filed a Replying Affidavit dated 30.09.2022. She avers that the Applicant's suit vide Rongo MELC No. 16 of 2018 was heard on merit and dismissed vide the judgment delivered on 6.08.2019. It is her contention that the Applicant's prayer for substitution is unmerited and maintained that the court lacked the requisite jurisdiction to substitute a deceased party in a suit not before it.
 7. It was further her claim that the Applicant lacks capacity to agitate any proceedings affecting the suit in Rongo MELC No. 16 of 2018, in so far as the appeal is a continuation of the original proceedings. She thus maintained that the Appeal is incompetent, null and void and further that the courts lacked the jurisdiction to entertain the same.
 8. With regards to the Applicant's prayer for leave to file the Appeal out of time; it was her contention that the Applicant had not given any sufficient cause for the delay of over 3 years in filing the Appeal. Further, that the judgment and decree sought to be appealed against were made in the presence and during the lifetime of the deceased and he never appealed against the same.
 9. She further deposed that the order for stay of execution sought cannot issue since the orders sought to be stayed are negative orders incapable of execution arising from a dismissal of the Applicant's suit with costs. In addition, it was her claim that the Applicant did not meet the mandatory threshold for the grant of an order of stay of execution as outlined under Order 42 Rule 6(2) of the Civil Procedure Rules.
 10. It was also her position that the firm of M/S Onyango Owaka & Associates Advocates had never sought leave to replace the firm of G.S. Okoth & Company Advocates nor filed a Notice of Change of Advocates and thus they lacked the capacity to participate on the in the instant Application and Appeal. She urged the court to dismiss the Application *ex-debito justitiae*.
 11. The Application was canvassed by way of written submissions, both parties filed their rival submissions which I have read and taken into account in arriving at my decision.



Analysis and Determination

12. It is my considered opinion that the issues for determination arising therefrom include;
- i. Whether leave can be granted to the Applicant to substitute her late husband in the Application and intended Appeal.
 - ii. Whether leave can be granted to the firm of M/S Onyango Owaka & Company Advocates to come on record in place of M/S/ G.S. Okoth & Company Advocates.
 - iii. Whether this court can enlarge/extend time to lodge the Notice of Intention to Appeal.
 - iv. Whether an Order for Stay of Execution can issue against the decree and the judgment dated 9/06/2021.

I. Whether leave can be granted to the Applicant to substitute her late husband in the Application and intended Appeal.

13. It is the Respondent's assertion that this court lacks the requisite jurisdiction to substitute a deceased party in a suit not before it. She further contends that the Applicant lacks capacity to agitate any proceedings affecting the proceedings in Rongo MELC No. 16 of 2018, in so far as the appeal is a continuation of the original proceedings.
14. The Applicant on the other hand maintains that she is the personal representative of her late husband's estate and thus intends to appeal against the entire judgment and to further protect the estate of the deceased. It is therefore her position that she has the requisite capacity to substitute her deceased husband in the instant Application and the Intended Appeal.
15. The Applicant seeks to substitute her deceased husband in the instant Application and the intended Appeal. However, I must point out that the judgment sought to be appealed against was delivered during the lifetime of the deceased Joshua Mwonya, who despite being represented by an Advocate in the suit, neither lodged the Appeal within the prescribed timelines nor filed an Application seeking the extension of time within which to file an Appeal. As it stands therefore, there is no suit in the present court to which the Applicant can be substituted in accordance with the provisions of Order 24 of the [Civil Procedure Rules](#).
16. It is therefore my finding that the Orders for substitution sought herein are untenable in the circumstances and consequently prayer No. (c) in the Application fails.

II. Whether Leave can be granted to the firm of M/S Onyango Owaka & Co. Advocates to come on record in place of the firm of M/S G.S. Okoth & Company Advocates

17. Order 9 rule 9 of the [Civil Procedure Rules](#) provides as follows: -
- “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;
 - b. ...”
18. Prayer No. 2 seeks leave to have the firm of M/S Onyango Owaka to come on record after the delivery of judgment in place of the previous Advocates M/S G.S. Okoth & Company Advocates. It is the



Applicant's contention that the Application was served upon all the parties and the previous advocate and that no objection was filed from the previous Advocate. She thus urged the court to grant the prayer as sought.

19. On 28/09/2022, I issued directions that the instant Application be served upon the parties within 7 days. I have perused the court record and I do note that there is no Affidavit of Service on record to confirm the Applicant's assertions that she indeed effected service upon the previous advocates M/S G.S. Okoth & Company Advocates. It is therefore my considered view that the Applicant has not met the threshold set out in Order 9 Rule 9 of the Civil Procedure Rules to warrant the grant of leave as sought.
20. Be that as it may, I seek to rely on the provisions of Article 159 (2) of the Constitution of Kenya and on the dictum of Mutungi J. in Ngitimbe Hudson Nyanumba v Thomas Ongondo [2018] eKLR where he aptly stated that failure to fully comply with Order 9 Rule 9 of the Civil Procedure Rules is a mere technicality and I will therefore proceed to grant the Applicant the benefit of doubt by granting the Leave and proceed to the substantive issues of the Application.

III. Whether this court can enlarge time to file an Appeal against the judgment delivered on 6/8/2019

21. Section 79G of the Civil Procedure Act 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. (emphasis mine)

22. The Court of Appeal in the case of Thuita Mwangi v Kenya Airways Ltd [2003] eKLR outlined some of the factors to be considered in exercising the court's discretion on enlarging the time to file appeal. The court outlined the following factors: -
 - i) The period of delay;
 - ii) The reason for the delay;
 - iii) The arguability of the appeal;
 - iv) The degree of prejudice which could be suffered by the Respondent if the extension is granted;
 - v) The importance of compliance with time limits to the particular litigation or issue;
 - vi) The effect if any on the administration of justice or public interest if any is involved.
23. The Applicant contends that the delay in filing the Appeal within the prescribed statutory timelines was caused by the fact that she was no aware of the existence of the suit filed by her deceased husband and further that she only found out about the same when she received a letter from her husband's previous advocate dated 24/08/2022; requiring her to pay the assessed costs of the suit. It is her claim that she is desirous of appealing against the entire judgment of the trial court and urged the court to grant the leave to enable her file her appeal.
24. The Respondent on the other dismissed the assertions made by the Applicant of not being aware and maintained that the trial court judgment was delivered during the lifetime of the deceased plaintiff;



who in addition, was properly represented in the claim. She further stated that no sufficient reason had been given by the Applicant for the over 3 years' delay in filing the present Application.

25. I will now proceed to address the factors outlined in the above mentioned case. The period of the delay and the reason for the delay. The present Application was filed on the 26th September, 2022 while judgment was delivered on the 6th August, 2019 thus making the period of the delay over 3 years. It is trite law that anyone seeking this relief must satisfactorily explain the cause of the delay. The Applicant in an attempt to explain the over 3 years' delay in filing the instant Application stated that she was not aware of the existence of the suit filed by her deceased husband and only became aware of the same when she received a letter from the previous advocate asking her to pay the assessed amount.
26. At the time of the delivery of the judgment; the Applicant's deceased husband was still alive and his advocate was also aware of the same and that tis Application is an afterthought. The deceased plaintiff died on 02/02/2021 nearly 2 years after delivery of the judgment. And while the Applicant avers that her late husband suffered a severe paralysis, no medial report was filed as proof to ascertain the said averments.
27. In view of the foregoing, I find that no sufficient reason has been advanced by the Applicant for the 3 years' delay in filing the instant applicant. Having held that no satisfactory explanation was tendered for the delay in filing the Application or the intended Appeal, it is my view that discussing the others factors would be an academic exercise. Further, enlarging time for the filing of the intended appeal would be prejudicial to the Respondent.
28. In view of the foregoing, I find that the Applicant has not satisfactorily proved her claim to warrant the grant of the reliefs sought. I accordingly find that Prayer 5 on enlarging time to lodge the Appeal is not merited.

IV. Whether an Order for Stay of Execution can issue against the decree and the judgment dated 6/8/2019

29. Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 empowers the court to stay execution, either of its judgment or that of a court whose decision is being appealed from, pending appeal. Order 42 Rule 6(2) sets out the grounds to be considered and provides as follows: -
 - (2) No order for stay of execution shall be made under sub- rule (1) unless—
 - (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
 - (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.
30. Before delving into the prerequisite conditions to be met in an Application for stay of execution, it is important to first determine whether the judgment and the decree in question is capable of execution. The Respondent has urged the court to dismiss the Applicants prayer for stay of execution for the reason that the orders sought to be stayed are negative orders incapable of execution.
31. I have looked at the judgment delivered by Hon. R.K. Langat in MELC No. 16 of 2018 whose effect was to dismiss the Plaintiff's suit with costs, no party was ordered and/or directed to do anything or refrain from doing anything; the said dismissal order is thus a negative order, save for the issue of costs which is also incapable of being stayed. To this end, I agree with the position taken by the Respondent that the order in question is incapable of execution and hence the orders for stay of execution cannot issue.



32. The Court of Appeal in *Kenya Commercial Bank Limited v Tamarind Meadows Limited & 7 Others* [2016] eKLR stated as follows:

“ 16. In *Kanwal Sarjit Singh Dhimažl v. Keshavji Juvraj Shah* 2008 eKLR, the Court of Appeal, while dealing with a similar application for stay of a negative order, held as follows:

“The 2nd prayer in the application is for stay (of execution) of the order of the superior Court made on 18^h December, 2006. The order of 18th December, 2006 merely dismissed the application for setting aside the judgment with costs. By the order, the superior Court did not order any of the parties to do anything or refrain from doing anything or to pay any sum. It was thus, a negative order which is incapable of execution save in respect of costs only (see *Western College of Arts & Applied Sciences v Oranga & Others* [1976] KLR 63 at page 66 paragraph C)”.

17. The same reasoning was applied in the case of *Raymond M. Omboga v. Austine Pyan Maranga (supra)*, that a negative order is one that is incapable of execution, and thus, incapable of being stayed. This is what the Court had to say on the matter:

“The Order dismissing the application is in the nature of a negative order and is incapable of execution save, perhaps, for costs and such order is incapable of stay. Where there is no positive order made in favour of the Respondent which is capable of execution, there can be no stay of execution of such an order. The Applicant seeks to appeal against the order dismissing his application. This is not an order capable of being stayed because there is nothing that the Applicant has lost. The refusal simply means that the Applicant stays in the situation he was in before coming to Court and therefore the issues of substantial loss that he is likely to suffer and or the appeal being rendered nugatory does not arise...”

33. In view of the foregoing, I find that the prayer for Stay of Execution sought is not merited. However, I have also noted with concern that there is a Proclamation from Kerati Auctioneers, attaching some of the properties of the deceased. The Applicant has stated that the attached goods are worth more than Kshs. 3Million to offset the assessed costs of Kshs. 332,562/=. From a perusal of the court record and the Affidavits by both parties, it is not clear whether the provisions of Section 37(1) of the *Civil Procedure Act* were fully complied with.

34. In the upshot, I accordingly find that the application dated 15th September, 2021 is not merited and I hereby struck it out with costs to the Respondent. It is so ordered!

DATED, SIGNED AND DELIVERED VIRTUALLY AT MIGORI ON 17TH DAY OF JANUARY, 2023.

MOHAMMED N. KULLOW

JUDGE



Ruling delivered in the presence of: -

Non-Appearance for the Applicant

Non-Appearance for the Respondent

Court Assistants - Tom Maurice/ Victor

