Kenyariri and Associates Advocates v Kenyariri (Miscellaneous Application E002 of 2021) [2024] KEHC 10535 (KLR) (Commercial and Tax) (27 August 2024) (Ruling)

Neutral citation: [2024] KEHC 10535 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

MISCELLANEOUS APPLICATION E002 OF 2021

A MABEYA, J

AUGUST 27, 2024

BETWEEN

KENYARIRI AND ASSOCIATES ADVOCATES ..... ADVOCATE

AND

JAMES BICHANGE KENYARIRI ..... CLIENT

RULING

1. This ruling determines the application dated 21/11/2023. The same was brought under Article 159 of the *Constitution*, sections 3, 3A and 3B of the *Civil Procedure Act*, sections 7 of the *Appellate Jurisdiction Act* and Order 42 Rule 6 of the *Civil Procedure Rules* and the inherent jurisdiction of the court.

2. The application sought leave to appeal to appeal out of time and for the extension of time for filing a notice of appeal. That the annexed Notice of Appeal be deemed as properly filed upon payment of the requisite fees.

3. The application was supported by the grounds set out on the face of it and the affidavit of Client/ Applicant sworn on 22/11/2023. The applicant stated that the impugned ruling was delivered on notice and therefore the applicant was not aware of it up until he was proclaimed by the auctioneers vide warrants of attachment. That he applied for proceedings and they were delayed but later supplied to him on 6/11/2023. That he has the intention to pursue the appeal and the respondent has commenced execution of the orders.

4. The application was contested by the respondent vide his replying affidavit sworn on 28/11/2023. He argued that the applicant had been dishonest with the Court as was present and received the ruling in person, indicating awareness of the decision and deadlines. Additionally, that the Court of Appeal had previously struck out the applicant's application for incompetence. That the application was *res judicata* as the issue had already been adjudicated and decided in prior proceedings.

5. Alongside the affidavit, the respondent filed a preliminary objection on 28/11/2023. It was based on two grounds: first, that the Court was *functus officio* and second, that the application was *res judicata*.

6. Parties canvassed the application by way of written submissions. The applicant submitted that the delay in filing the notice of appeal was not intentional and he was not of the ruling. He urged the Court to take judicial notice of the fact that litigants in person find challenges in accessing the Court registry. Finally, that the respondent would not be highly prejudiced if the orders sought are granted.

7. The respondent submitted that on 5/5/2023, the Court had dismissed a similar application. That respondent relied wholly on his replying affidavit and preliminary objection.

8. I have considered the application, the responses and the submissions on record. The first issue to address is whether the preliminary objection raised by the respondent on 28/11/2023 is merited. The preliminary objection challenged the court's jurisdiction on the grounds that the Court was *functus officio* and that the application was *res judicata*.

9. In *Mukisa Biscuit Manufacturing Company v West End Distributors Limited* [1969] EA, it was held that a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. It is what used to be a demurrer and is argued on the basis that the facts are settled and/or are correct as asserted by the parties.

10. *Black's Law Dictionary*, 10th Edition defines a preliminary objection in the following terms: -

> "... in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary."

11. In *Telcom Kenya Ltd v John Ochanda* [2014] eKLR, the Court of Appeal held as follows: -

> "*functus officio* is an enduring principle of law that prevents the re-opening of a matter before a Court that rendered the final decision thereon-
>
> The general rule that final decision of a Court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazarire Co, (1879), 12 Ch. D88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the appellate division."

12. Similarly, in *Raila Odinga v IEBC & 3 others* Petition No 5 of 2013, the Supreme Court of Kenya cited with approval the following passage from "*The Origins of the functus officio Doctrine with Specific Reference to its Application in Administrative Law*" by Daniel Malan Pretorious:-

> "... The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker."

13. From the foregoing, it is clear that a court is considered to be *functus officio* only if it has fully resolved a matter based on merits. If the court has not yet fully examined and decided a matter on the substance of the case, it can-not be said to be *functus officio*. It can still address or change its decisions.

14. In the present case, the application seeks leave to appeal out of time and an extension of time within which to lodge a notice of appeal. I note that these are just post-judgment orders which the Court has jurisdiction to entertain. The Court retains jurisdiction to address procedural aspects post-judgment and is therefore not precluded from considering the application for leave to appeal out of time.

15. On resjudicata, the respondent contended that the Court had previously determined an application of a similar nature. Section 7 of the *Civil Procedure Act*, 2010 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."

16. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* (2017), eKLR the Court of Appeal held that: -

> " ... the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a) The suit or issue was directly and substantially in issue in the former suit.
>
> b) That former suit was between the same parties or parties under whom they or any of them claim.
>
> c) Those parties were litigating under the same title.
>
> d) The issue was heard and finally determined in the former suit.
>
> e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.
>
> ...
>
> The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice."

17. I have reviewed the record in its entirety. I note that the applicant had previously filed an application for stay of execution dated 20/2/2022 and a ruling thereon delivered on 5/5/2023. The issue of stay pending appeal against the decree of this Court has already been determined. The application, in so far as the issue of stay of execution is concerned, is res-judicata. The prayer for stay is therefore res – judicata and therefore fails.

18. The second issue is whether the prayer for extension of time to file an appeal is justified. In *Edith Gichungu Koine v Stephen Njagi Thoithi* [2014] eKLR, the Court of Appeal stated that: -

> "Nevertheless, it ought to be guided by consideration of factors stated in many previous decisions of this court including, but no limited to, the period of delay, the reasons for the delay, the degree of prejudice to Respondent if the application is granted, and whether the matter raises issues of public importance, amongst others."

19. The first question to be answered is whether the applicant has given a satisfactory explanation for the delay in filing the notice of appeal. With respect to the delay, the applicant stated that he was not aware of the ruling of the Court and that therefore, the delay was not intentional. The respondent on the other hand stated that the applicant was in Court when the ruling was read.

20. I have perused the Court proceedings for 5/5/2023. The record shows that the ruling was read in the presence of all the parties where the applicant appeared in person. The applicant was therefore dishonest in his allegation that he was not aware of the ruling. That alone justifies the dismissal of the application. This lack of honesty undermines the credibility of the applicant's request for an extension of time. The granting of leave to extend time is undeniably a discretionary remedy which is based on the circumstances of each case.

21. The record indicates that the applicant filed this application only after his previous application had been dismissed. In my view, the applicant does not merit the orders sought.

22. In this regard, I find no merit in the application and the same is dismissed with costs.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF AUGUST, 2024.

A. MABEYA, FCI Arb

JUDGE