



REPUBLIC OF KENYA



KENYA LAW
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**Sagwe v Ondiga (Civil Appeal E005 of 2024)
[2024] KEHC 16275 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16275 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYAMIRA
CIVIL APPEAL E005 OF 2024
WA OKWANY, J
DECEMBER 19, 2024**

BETWEEN

ELLUSTONE J M SAGWE APPELLANT

AND

CHARLES AGWATA ONDIGA RESPONDENT

(From the Ruling delivered in the Chief Magistrate's Court at Nyamira in CMCC No. 73 of 2019, BY Hon. B.A. Jumar, Resident Magistrate on 12th February 2024)

RULING

Background

1. The Appellant herein, who was the Plaintiff before the trial court, sued the Respondent (Defendant) seeking orders for the payment of Kshs. 60,000/=being money that he (the Appellant) guaranteed the Respondent in respect of a loan. Interlocutory judgment was entered against the Respondent in default of appearance on 30th September 2019 after which the Appellant taxed his bill of costs before embarking on the execution of the decree.
2. The Respondent however filed an Application dated 6th December 2023 seeking to set aside the said default judgment on the basis that he was not served with the pleadings. The Appellant opposed the Application through a Notice of Preliminary Objection dated 4th January 2024 wherein he stated, inter alia, that the Respondent's aim was to obstruct and delay the execution of the decree; that the Application had been overtaken by events since the Respondent had, since the date of the decree, paid a substantial part of the judgment debt.
3. In a Ruling rendered on 12th February 2024, the trial court set aside the interlocutory judgment but on condition that the Respondent pays the Appellant thrown away costs of Ksh. 10,000/= and files his Statement of Defence within 14 days from the date of the Ruling.



The Appeal

4. Aggrieved by the trial court's decision to set aside the interlocutory judgment, the Plaintiff/Appellant filed the instant appeal and an Application dated 14th March 2024 which is the subject of this ruling. In the said Application, the Appellant seeks the following orders: -
 1. That the Honourable Court hears his Notice of Preliminary Objection dated 4th January 2024.
 2. That the Honourable Court strikes out the Respondent's Application dated 6th December 2023.
 3. That the Appellant be given leave to file the following documents as part of the records of appeal and upon being allowed to be deemed filed:
 - i. Perusal request notice dated 13th February 2024
 - ii. Protest Notice dated 13th February 2024
 - iii. The Defendant's payment proposal dated 14th January 2022
 - iv. Witness statement
 - v. Payment statement dated 15th February 2022
 4. Costs be provided for.
5. The Application is based on the grounds that; the trial court did not appreciate the Applicant's Preliminary Objection; the Respondent would not suffer any prejudice and that the Applicant had a constitutional right to be heard on the Preliminary Objection.
6. The Respondent filed Grounds of Opposition dated 17th July 2024 in response to the Application where he states, inter alia, that the Applicant is calling on the Court to hear and determine a Preliminary Objection that was not before it; that the Applicant had not served them with a Memorandum of Appeal or any other document in respect of the issue before the Court; that prayer (b) was res judicata as the trial court had dismissed the Application dated 6th December 2023 and that the Applicant seeks to initiate an appeal through a Notice of Motion which was irregular and therefore the present Application ought to be dismissed.
7. The Applicant later filed further Affidavit dated 19th August 2024 wherein he avers that he responded to the Application dated 6th December 2023 through the Notice of Preliminary Objection and that the same was never dealt with by the trial court which was the basis for his present Application. He also avers that the Respondent did not pay any thrown away costs as ordered by the trial court and that the Respondent's advocate was not properly on record.
8. The Application was canvassed by way of written submissions which I have considered.

Analysis and Determination

9. I find that the main issue for determination is whether the Application dated 14th March 2024 is merited. I have considered the prayers sought in the Application and I find that they are misconceived as the Applicant appears to be asking this court to hear a Notice of Preliminary Objection that is not before it since the same was filed before the lower court. The Applicant is similarly asking this court to strike out the Respondent's application dated 6th December 2023 which application was not only



filed before the trial court but was also determined by the said in its ruling delivered on 12th February 2024 that gave rise to the instant appeal.

10. It has not escaped the attention of this court that while the Applicant herein complains that the Respondent has not complied with the orders issued by the trial court for the setting aside of the default judgment, he has not explained why he did not proceed with the execution of the decree in default of such compliance. The court is of the view that the Applicant herein, who acts in person, is not conversant with the correct procedure that he should take in this matter thus leading to the filing of an appeal and an application yet he already has orders in his favour which he should move to execute.
11. I similarly find the prayer to be granted leave to file documents as part of the record of appeal to be completely unnecessary as the filing of documents in the record of appeal as an automatic right of every Appellant.
12. For the reasons that I have stated in this ruling, I find that the instant application is misconceived and I therefore strike it out with no orders as to costs.
13. It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NYAMIRA VIA MICROSOFT TEAMS THIS 19TH DAY OF DECEMBER 2024.

W. A. OKWANY

JUDGE

