



**Muthuri v City Gas Limited (Civil Appeal E074 of 2020)
[2022] KEHC 65 (KLR) (Commercial and Tax) (31 January 2022) (Judgment)**

Neutral citation: [2022] KEHC 65 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E074 OF 2020
DAS MAJANJA, J
JANUARY 31, 2022**

BETWEEN

DAVID MURIUKI MUTHURI APPELLANT

AND

CITY GAS LIMITED RESPONDENT

*(Being an appeal from the Ruling and Order of Hon. E. Kagoni, PM dated
8th December 2020 at the Magistrates Court at Nairobi, Milimani in)*

JUDGMENT

Introduction and Background

1. The Appellant, through his Memorandum of Appeal dated 8th December 2020, has filed an appeal with the court seeking inter alia that the ruling of the lower court of the same date be varied, quashed and/or set aside and the ex parte interlocutory judgment entered on 1st August 2019 and all consequential orders in the lower court also be reviewed, varied and/or set aside and the draft Statement of Defence be ordered to be properly on record upon payment of requisite court fees.
2. The facts giving rise to the ruling of the Subordinate Court and this appeal are common ground and a matter of record. On 1st July 2019, the Respondent filed suit against the Appellant seeking judgment for KES 3,453,998.00, interest thereon and costs. The Appellant was duly served with summons to enter appearance but failed to file his defence on time. Upon application by the Respondent's advocate, the Subordinate Court entered an interlocutory judgment in favour of the Respondent on 1st August 2019 ("the interlocutory judgment").
3. The Appellant filed an application dated 29th August 2019 seeking to set aside the interlocutory judgment and be allowed to file its defence out of time. The trial court considered the application and



dismissed it on 22nd October 2019. The Appellant then filed another application dated 12th November 2019 seeking to stay the execution and review, vary and/or set aside the interlocutory judgment. It also sought that the draft Statement of Defence be ordered to be properly on record upon payment of the requisite court fees.

4. In the meantime, the Respondent began the process of execution and sought an arrest warrant against the Appellant which was issued by the court on 12th March 2020. This prompted the Appellant to file two further applications dated 12th March 2020 and 17th September 2020 seeking to stay execution of the interlocutory judgment and set aside the warrant of arrest issued against him.
5. The trial court considered the application dated 12th March 2020 and dismissed it on the ground that it was res judicata in view of the application dated 29th August 2019. The court also dismissed the application dated 17th September 2020 through the ruling dated 8th December 2020 which is the subject of this appeal.
6. The Appellant made written submissions while the Respondent's counsel made brief oral submissions.
7. The Appellant complains that his application to set aside the interlocutory judgment was dismissed solely on the basis that his counsel on record failed to attach a draft Statement of Defence to the application. He contends that this failure was an error for which he has paid a heavy price as he was denied an opportunity to ventilate his case in line with the rules of natural justice.
8. The Appellant submits that the trial court failed to appreciate that the application for review raised the following new issues; mistake on the part of his previous counsel in prosecuting his application dated 12th March 2020, lack of proper service of the pleadings, fundamental and triable issues raised in the draft Statement of Defence annexed to the said application and unlawful execution process since no Notice for Entry of Judgment was issued.
9. The Appellant submits that he established strong grounds for review and setting aside of the interlocutory judgment and prays that the ruling of the Subordinate be set aside to accord all the parties an opportunity to each have their day in court and ventilate the claim on merit.

Analysis and Determination

10. This is an appeal against the exercise of the discretion by the Subordinate court hence the court, in determining this appeal, is guided by known principles. In *Mbogo v Shah [1968] EA 93*, Newbold P., expressed the nature and extent of the appellate court's jurisdiction to interfere with the discretion of the lower court as follows;

A court of appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that the judge in exercising his discretion has misdirected himself in some matter and as a result has arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge has been clearly wrong in the exercise of his discretion and that as a result there has been misjustice.

11. With the above principle in hindsight, the main issue for determination is whether the lower court erred in dismissing the Appellant's application dated 12th March 2020 that sought to review, vary and or set aside the interlocutory judgment and have the draft Statement of Defence be deemed to be properly on record upon payment of the requisite fees.
12. As stated in the introductory part, the trial court's reason for refusing and dismissing the Appellant's application was that it was res judicata in view of the previous application dated 29th August 2019. I am in agreement with the trial court's decision that the Appellant's application dated 12th March 2020 was



indeed res judicata as the court had pronounced itself on the issue of setting aside in the application dated 29th August 2019. The Appellant's later application sought almost similar orders as those sought in its earlier application dated 29th August 2019 which was to set aside the interlocutory judgment and have its draft Statement of Defence be deemed to be properly on record and filed out of time.

13. For res judicata to apply, the following elements must all be satisfied; the issue was directly and substantially in issue in the former suit; the former suit was between the same parties or parties under whom they or any of them claim; the parties were litigating under the same title; the issue was heard and finally determined in the former suit; and the court that previously heard and determined the issue was competent to try the suit in which the issue is raised (see *Gichuki v Gichuki* [1982] KLR 285). The Court of Appeal further held in *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others NRB CA Civil Appeal No. 36 of 1996 [1996] eKLR*, that the principle of res judicata applies to applications as it does to suits (see also *Africa Management Communications Limited v Airtel Networks Kenya Limited ML HCCC No. 166 of 2014 [2021] eKLR*).
14. I find and hold that the Appellant's application dated 12th March 2020 was an attempt to re-litigate his earlier application dated 29th August 2019 which had been dismissed on 22nd October 2019. The additional ground that the he was never served with the Notice of Entry of Judgment cannot stand as this is a point that ought to have been raised in its earlier application dated 29th August 2019. In any case, that issue does not go to the validity or otherwise of the interlocutory judgment.

Disposition

15. For the reasons I stated above, I find that the Appellant's appeal lacks merit and it is accordingly dismissed with costs to the Respondent. The interim orders in force are hereby discharged.

DATED AND DELIVERED AT NAIROBI THIS 31ST DAY OF JANUARY 2022.

D. S. MAJANJA

JUDGE

Mr Masake instructed by Shabaan and Company Advocates for the Appellant.

Mr Okao instructed by Okao and Company Advocates for the Respondent.

