REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BOMET

CIVIL APPEAL NO. E40 OF 2021

JAMES BOSIRE MACHOGU.....APPELLANT/APPLICANT

VERSUS

BRIAN KIPKEMBOI KIRUI .....RESPONDENT

RULING

1. The Applicant filed a Notice of Motion Application under Certificate of Urgency dated 26th January 2022 which sought the following Orders:

I. Spent.

II. Spent.

III. THAT pending the hearing and determination of this application *inter-partes* there be a stay of the Ruling and/or order of the Honourable Justice R.L Korir issued herein on 15th December 2021 pending the hearing and determination of this application.

IV. THAT the orders issued on 15th December 2021 be varied and that the stay conditions issued on 15th December 2021 requiring the applicant to release to the respondent Kshs 310,000 together with the lower court costs within 30 days and further provide a bank guarantee for a sum of Kshs 1,000,000 within 30 days be subjected to the 30% contribution to enable the applicant eventually prosecute and finalize the appeal.

V. THAT upon granting prayer (4) above, the appellant be granted 30 days to comply with the said order.

VI. THAT the Honourable Court do make any such further orders and issue any other relief it may deem just to grant in the interest of justice.

VII. THAT the costs of this application be in the cause.

2. The Application was brought under Order 50 Rule and Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B, 3A and 95 of the Civil Procedure Act.

3. The Applicant stated that he filed an application on 25th November 2021 that sought stay pending appeal against Judgment in **Sotik Civil Case No. 98 of 2019 – Brian Kipkemboi Kirui vs. James Bosire Machogu.**

4. In a Supporting Affidavit sworn by Everlyne Okwoyo the Applicant stated that there was an order by this Honourable Court dated 15th December 2021 that required him to pay the respondent Kshs 310,000 together with the lower court costs within 30 days and further deposit a bank guarantee for a sum of Kshs 1,000,000 within 30 days.

5. The applicant further stated that the counsel who held his brief forgot to address the court on the issue of the 30% liability that was to be shouldered by the Plaintiff in **Sotik Civil Case No. 98 of 2019 – Brian Kipkemboi Kirui vs. James Bosire Machogu.** It was the applicant's prayer that the Ruling be varied to reflect the 30% contribution.

6. It was the Applicant's case that this application would not prejudice the respondent. That any damage occasioned to the respondent could be compensated by way of costs.

7. The Respondent filed grounds of opposition dated 1st February 2022 where he stated that the application had been instituted under the wrong provisions of law thus depriving the court of the jurisdiction and mandate to determine the application.

8. The Respondent also stated that the application was *res judicata,* bad in law and therefore an abuse of the court process.

9. The application was brought under Order 50 Rule 6 of the Civil Procedure Rules and section 95 of the Civil Procedure Act which provided for enlargement of time and not varying of a court order or Ruling. The Applicant submitted that the courts have been reluctant to dismiss applications on the grounds that the application was brought under the wrong provisions of law. Article 159 (2) (d) of the Constitution of Kenya provides that:

> "In exercising judicial authority, the courts and tribunals shall be guided by the following principles-
>
> (d) justice shall be administered without undue regard to procedural technicalities"

10. In the case of **Zacharia Okoth Obado Vs Edward Akon'go Ayugi & 2 others (2014) eKLR, t**he Supreme Court of Kenya held that:

> "Be that as it may, the essence of Article 159(2) (d) is that a Court should not allow the prescriptions of procedure and form to overshadow the primary object of dispensing substantive justice to the parties".

This court's primary duty is to dispense substantive justice to parties before it and it is therefore improper to drive a party away from the seat of justice on account of a technical error. The technical error on the face of the application therefore did not interfere with the jurisdiction of this court to determine this application. Guided by Article 159 (2) (d), the wrong provisions stated on the face of the application did not void the application. I am persuaded by the case of **Gituma Kaumbi Kioga V Kenya Revenue Authority & Another (2020) eKLR** where Gikonyo J held that:

> "Accordingly, Article 159(2) (d) of the Constitutional is to be applied on a case to case basis. Here, tune to reality; litigants with varied claims and expectations will be aboard this vessel of justice. Some will attempt to invoke the principle to advance personal desires to obtain all manner of reliefs mainly to delay the case or to prejudice the other party. Here, it bears repeating that the law sub-serves legitimate interests of a litigant as opposed to individual desires, and its greater concern is to serve justice. Others, however, will invoke it for legitimate reasons in pursuit of justice. Yet, the court which is at the helm is expected to steer the vessel through these stormy waves of varied facts and circumstances of each case towards the ultimate destination prescribed by the Constitution; to serve substantive justice to the parties. This philosophy remains the significant navigational tool in the voyage of adjudication of cases".

11. The Respondent contended that the application was *res judicata. Res judicata* is anchored in Section 7 of the Civil Procedure Rules which states:

> "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".

The Court of Appeal held in **The Independent Electoral and Boundaries Commission V Maina Kiai and 5 Others, (2017) eKLR** that:

> "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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice".

12. There are two applications herein are dated 18th December 2021 and 26th January 2022. The parties were similar and they litigated under the same title but the orders sought in the two applications were different. By Consent, the application dated 18th December 2021 was allowed as prayed. The key prayer in the application dated 26th January 2022 was for this court to review its Order dated 15th December 2021. This prayer was not contained in the application dated 18th December 2021 and therefore it has not been determined.

13. It is my finding therefore that the Notice of Motion Application dated 26th January 2022 was not *res judicata* and was properly before this court.

14. The parties herein have not attached the Judgment in **Sotik Civil Case No. 98 of 2019 – Brian Kipkemboi Kirui vs. James Bosire Machogu** where 30% of the liability was apportioned to the Plaintiff. The Respondent filed Grounds of Opposition and did not deny that he was apportioned the 30% liability.

15. The applicant sought review of this court's order of 15th December 2021. By consent of the parties, this court ordered that Kshs 310,000 be released to the decree holder and the balance of Kshs 1,000,000 be guaranteed by a bank guarantee within 30 days of 15th December 2021. The applicant sought to subject the aforementioned amounts to 30% contribution as was apportioned by the trial court.

16. Section 80 of the Civil Procedure Act states that:

> "Any person who considers himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is allowed by this Act,may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit".

Section 63 (e) of the Civil Procedure Act states that:

> "In order to prevent the ends of justice from being defeated, the court may, if it is so prescribed make such other interlocutory orders as may appear to the court to be just and convenient".

Order 45 of the Civil Procedure Rules provides for Review and it states as follows:

> "(1) any person considering himself aggrieved—
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> (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
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> (b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.
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> (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review"

17. In the case of **Francis Njoroge V Stephen Maina Kamore (2018) eKLR,** Njuguna J held that:

> "Therefore, Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist:-
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> (a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or
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> (b) There was a mistake or error apparent on the face of the record; or
>
> (c) There were other sufficient reasons; and
>
> (d) The application must have been made without undue delay".

Similarly, in the case of **Sanitam Services (E.A.) Limited V Rentokil (K) Limited & Another (2019) eKLR,** the Court of Appeal held that:

> "Jurisdiction to review a judgment or order of a court is donated by Section 80 of the Civil Procedure Act and Order 45 Civil Procedure Rules. By those provisions of law any person considering himself aggrieved by a decree or order from which an appeal is allowed but from which no appeal has been preferred or is aggrieved by a decree or order by which no appeal is allowed and who from the discovery of new and important matter or evidence which after the exercise of due diligence was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake or error apparent on the face of the record or for any other sufficient reason – a person who fits within those categories may apply for a review of judgment or to the court which passed the decree or made the order and this should be done without unreasonable delay".

18. What is up for determination is whether the applicant has satisfied any of the conditions set out in Order 45 of the Civil Procedure Rules. The Applicant stated that the counsel who held his brief on 15th December 2021 forgot to address the court on the issue of the 30% liability apportioned on the Plaintiff. In filing his grounds of opposition, the Respondent did not address or deny the existence of the 30% liability apportioned to him by the trial court. To my mind, there is no dispute regarding the 30 % liability. I find that this is a fair and sufficient reason to review this court's order of 15th December 2021. In the case of **Alpha Fine Foods Limited V Horeca Kenya Limited & 4 Others (2021) eKLR,** Mativo J stated:

> "The power of review can be exercised by the court in the event discovery of new and important matter or evidence which despite exercise of due diligence was not within the knowledge of the applicant or could not be produced by him at the time when the order was made. As the Supreme Court of India [15] stated: -

> "the power can be exercised on the application of a person on the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the order was made. The power can also be exercised on account of some mistake or error apparent on the face of the record or for any other sufficient reason. A review cannot be claimed or asked for merely for a fresh hearing or arguments or correction of an erroneous view taken earlier, that is to say, the power of review can be exercised only for correction of a patent error of law or fact which stares in the face without any elaborate argument being needed for stabling it. It may be pointed out that the expression "any other sufficient reason"..... Means a reason sufficiently analogous to those specified in the rule"

19. It is also my finding that this application was brought in a timely manner. The consent order was made on 15th December 2021 and this Application was filed on 27th January 2022. The difference of one month in the circumstances of this case is reasonable.

20. In the final analysis, I grant prayer 4 and 5 of the Notice of Motion dated 26th January 2022. The Applicant shall comply with the stay conditions within 30 days of today and file the Appeal within 45 days from today. I make no order on costs in this application.

21. Orders accordingly.

RULING DELIVERED, DATED AND SIGNED AT BOMET THIS 28TH DAY OF FEBRUARY, 2022

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R. LAGAT-KORIR

JUDGE

Ruling delivered virtually in the presence of Mr. Ndolo for the Appellant Ms. Gogi for the Respondent and Kiprotich (Court Assistant)