



REPUBLIC OF KENYA



**Kisaka v Rubadiri & 8 others (Miscellaneous Civil Application
E589 of 2021) [2022] KEHC 11110 (KLR) (Civ) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEHC 11110 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

MISCELLANEOUS CIVIL APPLICATION E589 OF 2021

JK SERGON, J

MAY 31, 2022

BETWEEN

STEPHEN CHASE KISAKA APPLICANT

AND

JANETTE RUBADIRI 1ST RESPONDENT

AGNES SHIKUNGU 2ND RESPONDENT

AGNES WAIRIMU 3RD RESPONDENT

DUKE MAYAKA 4TH RESPONDENT

REMICK MUGA 5TH RESPONDENT

PATRICIA ONSANDO 6TH RESPONDENT

ALFRED MUSACHI 7TH RESPONDENT

FLORENCE OMBWEWA 8TH RESPONDENT

**CONCORD SAVINGS & CREDIT CO-OPERATIVE SOCIETY
LIMITED 9TH RESPONDENT**

(Co-operatives Tribunal)

RULING

1. This ruling is the product of the Notice of Motion dated 3rd December, 2021 taken out by the applicant and supported by the grounds set out on its body and the facts stated in the affidavit of the applicant. The orders being sought therein are for the extension of time to file an appeal and for leave to appeal out of time against the ruling delivered on 27th May, 2021 in Tribunal Case No. 754 of 2019 before the



- Co-operatives Tribunal (“the Tribunal”) and a further order for a stay of the aforementioned ruling and order, pending the hearing and determination of the appeal.
2. The 9th respondent resisted the Motion by putting in the notice of preliminary objection dated 25th February, 2022 raising the following grounds:
 - a. That this Honourable Court is functus officio.
 - b. That the said application is res judicata.
 3. The 9th respondent also put in the replying affidavit sworn by its Chief Executive Officer, James Odera, on like date, followed by the supplementary notice of preliminary objection dated 28th February, 2022 raising the following grounds:
 - a. That the said application offends the provisions of Section 6 of the Civil Procedure Act.
 - b. That the said application is an irritating insult or abuse of court processes.
 4. The 1st to 8th respondents did not participate at the hearing of the instant Motion.
 5. The Motion was dispensed with through the filing and exchange of written submissions.
 6. I have considered the grounds laid out on the body of the Motion; the facts deponed in the supporting and replying affidavits respectively; the preliminary objections raised; and the rival written submissions and authorities cited.
 7. A brief background of the matter is that the 9th respondent had lodged a claim against the 1st to 8th respondents before the Tribunal, arising out of a dispute in respect to the management of the 9th respondent. The applicant herein was enjoined in the proceedings as the intended interested party.
 8. Subsequently, the 1st to 8th respondents filed the application dated 5th August, 2020 before the Tribunal wherein they sought; inter alia; an order to the effect that the applicant be restrained from participating in the activities of the 9th respondent’s management committee.
 9. A separate application dated 10th December, 2019 and filed by the 9th respondent was also heard contemporaneously with the abovementioned application. Here, the 9th respondent sought for injunctive orders against the respondents to restrain them from interfering with its management pending the next Annual General Meeting.
 10. Upon hearing the parties on both applications, the Tribunal vide the ruling delivered on 27th May, 2021 allowed the first application and dismissed the second application.
 11. Returning to the instant Motion, before I consider its merits, I will first make a determination on the issues raised in the preliminary objections filed by the 9th respondent.
 12. The first preliminary issue concerns itself with whether the instant Motion is res judicata/sub judice.
 13. The 9th respondent on its part states and submits that a similar application had previously been filed before the High Court in HCCA E301 of 2021 involving the parties herein, and that a determination was made on the same by the court.



14. The 9th respondent is therefore of the view that the matter cannot be reopened for determination a second time and has cited the case of *A N M v P M N* [2016] eKLR where the court determined that:

“The Court in the English case of *Henderson vs Henderson* (1843-60) ALL E.R.378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

15. On his part, the applicant did not offer any response on the subject.

16. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR offered the following interpretation on the legal term ‘*res judicata*’ in the manner hereunder:

“*Res judicata* is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“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 the 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.”

Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all 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.”

17. Upon my study of the record, it is apparent that HCCA E301 of 2021 was lodged by the 9th respondent as against the applicant and the 1st to 8th respondents.



18. It is also apparent that the appeal sought to challenge the ruling delivered on 27th May, 2021.
19. Upon my further study of the record, I observed that the 9th respondent annexed to the replying affidavit of James Odera a copy of the ruling delivered by the High Court on 9th August, 2021.
20. A reading of the contents thereof shows that the 9th respondent had filed an application in which it sought for an order of a stay of execution of the ruling delivered on 27th May, 2021 pending the appeal.
21. From my further reading of the contents of the ruling of 9th August, 2021, I note that the applicant supported the aforementioned application and filed an affidavit to that effect.
22. The record shows that upon hearing the aforesaid application, the High Court dismissed it for want of merit.
23. From the foregoing, it is clear that the order for a stay of execution presently sought in the instant Motion is essentially similar to the order sought in HCCA E301 of 2021.
24. It is also clear that the applicant and respondents herein are also parties to HCCA E301 of 2021 and even though the applicant was a respondent in the earlier appeal, as earlier noted, he was in support of the application seeking an order for a stay of execution.
25. From my reading of the ruling by the High Court, I note that the court; upon considering the sentiments raised by the applicant concerning his removal; reasoned that those were best left for the appeal.
26. For all the foregoing reasons, I am of the view that the instant Motion is res judicata only to the extent of the order for a stay of execution, since that order was sought in both instances.
27. Concerning the subject of the appeal, it is apparent from the contents of the replying affidavit of James Odera that the 9th respondent is no longer interested in pursuing HCCA E301 of 2021 since it now has a new Board of Management.
28. In the circumstances, I am of the view that it would be in the interest of substantive justice to consider the applicant's prayer for leave to appeal out of time since he is still aggrieved by the ruling delivered by the Tribunal and this subject was not previously raised before the High Court.
29. The second preliminary issue relates to whether this court is functus officio, for the same reasons given above.
30. On this subject, I considered the case of *John Gilbert Ouma v Kenya Ferry Services Limited* [2021] eKLR in which the court held that:

“The doctrine of functus officio was considered by the Court of Appeal in *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the court held that -

“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.”
31. Upon my study of the record, it is noteworthy that the earlier application for a stay of execution was heard and determined by a different Judge and not by this court.
32. Consequently, I am not convinced that the doctrine of functus officio would apply in the present circumstances. That ground of the preliminary objection therefore fails.



33. This brings me to the merits of the instant Motion, specifically the order seeking for leave to appeal out of time against the impugned ruling.
34. The provisions of Section 79G of the *Civil Procedure Act* are clear that the timelines for lodging an appeal against the decision of a subordinate court are within 30 days from the date of the decree or the order being appealed against. Furthermore, under the provisions of Section 95 of the *Civil Procedure Act* and Order 50, Rule 6 of the Civil Procedure Rules, the courts have discretionary power to enlarge the time required for the performance of any act under the Rules even where such time has expired.
35. In the case of *Thuita Mwangi v Kenya Airways Ltd* [2003] eKLR the Court of Appeal developed various conditions to offer guidance in deciding whether to extend the period for filing an appeal out of time and which I will address hereunder.
36. The first condition concerns the length of delay. This condition was not addressed by the applicant in the Motion. In retort, the 9th respondent states that there has been an inordinate delay in filing the Motion.
37. Upon my perusal of the record, I note that the ruling by the Tribunal was delivered on 27th May, 2021 which is about seven (7) months before the filing of the instant Motion. In my view, while there has been a delay, I do not find the same to be inordinate.
38. Concerning the reason(s) for the delay, it is the applicant's assertion that the delay was occasioned by the existence of HCCA E301 of 2021 since the grounds of appeal raised therein are similar to those he would have raised at the onset and hence he associated himself with the afore-cited appeal.
39. In retort, the 9th respondent states and submits that the delay has not been reasonably explained.
40. Upon taking into account the aforementioned averments, I find the explanation offered by the applicants to be reasonable in the circumstances.
41. On the condition touching on whether an arguable appeal exists, the applicant submits that his appeal essentially lies against the decision by the Tribunal to remove him from the management of the 9th respondent, among others.
42. The 9th respondent has replied by stating and submitting that no arguable appeal exists since the applicant is no longer a member of its management and that the matter has since been overtaken by events.
43. Upon my perusal of the record, I observed that the applicant has annexed a copy of the draft memorandum of appeal which he intends to file in HCCA E301 of 2021. It is apparent therefrom that the intended appeal essentially seeks to challenge the decision by the Tribunal in respect to the management of the 9th respondent. I am therefore satisfied that the applicant has raised arguable grounds for consideration on appeal, notwithstanding the fact that the management of the 9th respondent has since changed.
44. On the final condition touching on prejudice, the applicant states that unless the order sought is granted, the 9th respondent will continue to be run in an unwarranted and irregular manner and that its management will continue to withhold his dues.
45. On its part, the 9th respondent did not specifically touch on the subject of prejudice.
46. In the absence of any credible evidence or assertions to demonstrate the prejudice to be suffered by the 9th respondent or the remaining respondents, or to show that any prejudice cannot be adequately compensated by way of costs/damages, I am convinced that it would not be in the interest of justice



to deny the applicant an opportunity to pursue the Tribunal’s decision on appeal. I therefore find it reasonable in the circumstances to extend the time required for the applicant to lodge his appeal.

47. Consequently, the Notice of Motion dated 3rd December, 2021 is allowed as prayed, thereby giving rise to issuance of the following orders:

- i. The applicant is granted leave to file and serve his memorandum of appeal within 14 days from today’s date.
- ii. Costs of the application to abide the outcome of the intended appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the 1st to 8th Respondents

..... for the 9th Respondent

