Tawai v Makete (Miscellaneous Civil Application 89 of 2019)
[2022] KEHC 16680 (KLR) (21 December 2022) (Ruling)

Neutral citation: [2022] KEHC 16680 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

MISCELLANEOUS CIVIL APPLICATION 89 OF 2019

DK KEMEI, J

DECEMBER 21, 2022

BETWEEN

SAULO WECHULI TAWAI ..... APPLICANT

AND

ROBERT WAFULA MAKETE ..... RESPONDENT

RULING

1. This ruling is on the notice of motion application dated August 8, 2022 filed by the applicant seeking the following orders;

   i. Spent

   ii. Spent

   iii. This Honourable Court be pleased to review and/or set aside its orders issued on March 23, 2022 and June 7, 2022 through a judgement entered against the applicant;

   iv. Spent

   v. The costs of this application be provided for.

2. The grounds for the application are contained in the body of the notice of motion and the supporting affidavit of Saulo Wechuli Tawai sworn on even date where it was deponed inter alia; that he appealed the lower court's decision but due to unforeseen circumstances he was not able to get through to his advocate; that he was not aware of the hearing dates of the appeal and through the judgement of the court dated June 7, 2022 is appeal was dismissed. A warrant of arrest was issued in efforts to realize the decretal sum of Kshs 87, 725/=; that a survey was conducted on his land and which found him not liable in any way for cutting the tree as the same was in his property; that he is seeking a review of the trial court orders subject to the new discovered evidence.

3. In opposition to the application, the respondent filed a replying affidavit sworn on August 22, 2022 averring that he had been awarded a decretal sum of Kshs 87, 725/= before the subordinate court and consequently the applicant instructed his advocate to file an appeal against the judgment dated March 23, 2022. *Vide* a judgement dated June 7, 2022 the appeal was dismissed by this court for want of prosecution.

4. The application was canvassed by way of written submissions. The applicant submitted that section 80 of *Civil Procedure Act* gives the court inherent power to reconsider review applications on grounds that new and important matters have been discovered and which were not within the knowledge of a party. In this case, the applicant has acquired new and important evidence, the survey report annexed to the notice of motion application, that indicated that the subject tree in dispute in the lower court lay on the applicant's piece of land and thus the order for compensation was made in error.

5. The respondent submitted that the provisions of section 80 of *Civil Procedure Act* expressly prohibit seeking a review of a decree or order from which an appeal has already been filed. The applicant in this instant application had filed an appeal which was dismissed for want of prosecution and yet he still wants to seek review of this court's order as well as that of the lower court. It was submitted that such a move by the applicant is impossible as it amounts to having a second bite at the cherry.

6. It is now settled that for courts to review their decision they must do so in compliance with section 80 of the *Civil Procedure Act* and Order 45 Rule 1 of the *Civil Procedure Rules*. Mativo J in *Nasibwa Wakenya Moses v University of Nairobi & Another* [2019] eKLR observed that;

> "Section 80 gives the power of review while Order 45 sets out the rules. The rules restrict the grounds for review. Put differently, the rules lay down the jurisdiction and scope of review. They limit it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.
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> .....
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> A review is permissible on the grounds of discovery by the applicant of some new and important matter or evidence which, after exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree or order was passed. The underlying object of this provision is neither to enable the court to write a second Judgment nor to give a second innings to the party who has lost the case because of his negligence or indifference. Therefore, a party seeking a review must show that there was no remiss on his part in adducing all possible evidence at the trial."

7. In my view, a proper reading of section 80 of the *Act* and Order 45 Rules 1 and 2 makes it abundantly clear that a party cannot apply for review and appeal from the same decree or order. In the present case, the applicant exhausted the process of appeal and now wishes to go back to the same order he sought review of and failed and to try her luck with an appeal.

8. As duly highlighted by the respondent, the applicant wants to have a second bite at the cherry and he cannot be permitted to do so. His instant application constitutes an abuse of the process of the court and wishes to subject this court with jurisdiction not clothed by it under the *Constitution* of Kenya by purporting it to review a decision of another subordinate court and that must surely fail. The applicant

had his day in court when he chose to prefer an appeal against the judgement of the trial court, he failed to prosecute the same appeal as duly required under the law prompting this court to dismiss the same for want of prosecution. He is now before this court wishing to review the orders of the trial court. Litigation somehow must come to an end and for the applicant, the end came when he appealed the decision and later made a review application. Litigation cannot be conducted on the basis of trial and error. That is why there are provisions of the law and the procedure to be adhered to. The applicant invoked the provisions of the law and the procedure thereto and the court rendered itself on the basis of the law and the evidence.

9. I have observed that despite a recorded consent granting the applicant leave to appeal out of time, there was laxity on his part regarding the prosecution of the appeal despite service of the requisite notices by the Deputy Registrar High Court prompting the dismissal of the same. In the circumstance, it can only be concluded that the applicant is using this instant application to deliberately delay the respondent's enjoyment of the fruits of his judgement. He has also not offered an explanation as to why he had not prosecuted his appeal which led to its dismissal for want of prosecution. Instead of the applicant explaining the reasons for delay leading to the dismissal of his appeal, he has purported to claim that he has now discovered new evidence which had not come to his attention before the lower court. If that is so then the right forum should be the trial court and not this court. He is clearly abusing the process of the court.

10. The Court of Appeal in *Cecilia Wanja Waweru v Jackson Wainaina Muiruri & another* [2014] eKLR observed as follows;

> " 9. We have to ask ourselves whether the failure by the appellant to prosecute the appeal in the High Court and/or the delay in filing the application for reinstatement constituted an excusable mistake or was it meant to deliberately delay the cause of justice. The appeal in the High Court was filed on June 18, 1999 and dismissed for want of prosecution on 13th February, 2009, 10 years after. We note that no explanation was adduced by the appellant as to the steps, if any, she took to prosecute the appeal within the said period. The application seeking reinstatement of the appeal was filed on May 13, 2013, four years after the dismissal. The reason advanced by the appellant for the delay in filing the application was that her advocates were never served with the notice of the court's intention to dismiss the appeal. The appellant only discovered the dismissal on April 2, 2013. Be as it may, why didn't the appellant peruse the court record earlier or follow up on the appeal? Why didn't she set the appeal down for hearing for almost 14 years? The reasonable explanation would be that the appellant had been indolent and had slept on her rights. She was only awakened from her slumber by the dismissal of the appeal.

11. In *Richard Ncharpi Leiyagu vs IEBC & 2 Others* CA 18/2013 where the Court of Appeal was categorical that:

> " The right to a hearing has always been a well-protected right in our Constitution and is also the cornerstone of the rule of law. This is why even if the courts have inherent jurisdiction to dismiss suits, this should be done in circumstances that protect the integrity of the court process from abuse that would amount to injustice and at the end of the day there should be proportionality."

12. The key stakeholders in the Judiciary are the parties, advocates and the bench. In efforts to curb the backlog of cases in the Judiciary, the Chief Justice Martha Koome, developed a vision Social Transformation through Access to Justice (STAJ) to guide the relevant stakeholders in adhering to

their duties and set targets. As earlier noted, the applicant preferred an appeal out of time and through consent the same was allowed only for him to pull a Houdini and abandon the same. Despite various service of notices, he failed to communicate through his advocate and when the court finally dismissed the same for want of prosecution, he now miraculously appears with a review application. He has not given an iota of reasons for the delay in prosecuting the appeal so as to warrant the court to consider setting aside and reinstating his appeal. The only issue he has brought out is that he has since discovered some new evidence warranting review. However, the review contemplated should be presented before the trial court and not this court. I find the applicant seems to be trying to play lottery with the court with a view to trying his luck. Iam afraid to point out that he has indeed run out of his luck. The application has not met the threshold for review of the orders made on the June 7, 2022.

13. I take cognizance of the fact that the applicant was for all the time represented by counsel and must therefore have exercised his options consciously. In the end, the notice of motion dated 8th August, 2022 is found to be without merit. The same is dismissed with costs to the respondent.

Orders accordingly.

DATED AND DELIVERED AT BUNGOMA THIS 21ST DAY OF DECEMBER, 2022

D.Kemei

Judge

In the presence of:

Miss Machuma for Applicant

No appearance Were for Respondent

Kizito Court Assistant