



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISCELLANEOUS CIVIL APPLICATION NO. E498 OF 2020

SAMUEL GITHINJI MUIRURI.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK LTD.....DEFENDANT

RULING

The application dated 20th November 2020 seeks the following orders:-

- 1. THAT this Application be certified urgent and heard *ex-parte* in the first instance and service of the same be dispensed with.**
- 2. THAT the firm of GITAU MURAI & CO ADVOCATES be allowed to come on record for the applicant herein and the annexed Notice of Change of Advocates herein be deemed as duly filed.**
- 3. THAT this Honourable Court be pleased to grant the Applicant leave to lodge an appeal out of time against the Ruling of the Chief Magistrate's Court sitting in Milimani delivered on 18th February, 2020 by the Hon. Obura (SPM) and the annexed memorandum and record of appeal be deemed as duly filed.**
- 4. THAT this Honourable Court be pleased to issue any other or further orders and/or directions as this Honourable Court deems just and expedient.**
- 5. THAT the costs of this application be provided for."**

The application is supported by the applicant's affidavit sworn on the same date. The respondent filed grounds of opposition dated 14th January, 2020. The application was determined by way of written submissions.

Counsel for the applicant submit that the applicant has met the threshold for the granting of the orders being sought. The applicant was not responsible for the failure to file the appeal within time. Counsel relies on the proviso to Section 79G of the Civil Procedure Act which states that an appeal may be admitted out of time if there are good and sufficient reasons for the delay. Counsel also referred to the case of **PAUL MUSILI WAMBUA –V- ATTORNEY GENERAL & 2 OTHERS (2015) eKLR** where the Court quoted with approval the case of **KINYUNJURI MUGUTA –V- WOTUKU MUGUTA [2018]eKLR** where the Court of Appeal stated:-

....it is now well settled by a long line of authorities by this Court that the decision of whether or not to extend the time for filing an appeal the Judge exercises unfettered discretion. However, in the exercise of such discretion, the court must act upon reason(s) not based on whims or caprice. In general the matters which a court takes into account in deciding whether to grant an extension of time are; the length of the delay, the reason for the delay, the chances of the appeal succeeding if the application is granted, the degree of prejudice to the respondent if the application is granted."

It is further submitted that upon delivery of the impugned ruling, the applicant gave express instructions to his former advocates to mount an appeal against the entire ruling but that was not done. Counsel referred to the case of **LUCY BOSIRE –V- KEHANCHA DIV LAND TRIBUNAL & 2 OTHERS [2013]eKLR** where it was held:-

"It is true that where the justice of the case mandates, mistakes of advocates even if blunders should not be visited on the clients when the situation can be remedied by costs. It must be recognised that blunders will continue to be made from time to time and it does not follow that because a mistake has been made a party should suffer the penalty of not having his case determined in its merits."

Counsel for the applicant also contend that the appeal raises serious issues of law and fact which should be considered by the court. Counsel referred to the case of **EDWARD KAMAU & ANOTHER –V- HANNAH MUKUI GICHUKI & ANOTHER (2015)eKLR** where it was held:-

“In my view, it has not been shown that the intended appeal is frivolous or a sham and therefore it is only fair and just that the applicants be accorded an opportunity to ventilate their grievances where they are aggrieved by a decision of the lower court, to challenge it before a superior court.”

Lastly, the applicant maintain that no prejudice will be suffered by the respondent. Any prejudice that will be suffered can be compensated by an award of costs. Counsel referred to the case of **EDWARD KAMAU & ANOTHER & HANNAH MUKUI GICHUKI & ANOTHER (supra)** where it was held:-

“That being the case, this court can still exercise its discretion in the interest of justice, and where it is clear like in this case that no prejudice that cannot be compensated by an award of costs is likely to be suffered by the respondent if such leave is granted allowing the applicant to file an appeal out of time, then such leave should not be denied.”

It is submitted by Counsel for the respondent that the application is incompetent, unmeritorious and abuse of the court process. Granting the application will offend the provisions of Section 7 of the Civil Procedure Act. The applicant filed Civil Appeal No. E161 of 2020 which has not been determined or withdrawn. There is no evidence adduced to the effect that the filed appeal cannot be heard.

Counsel for the respondent maintain that there is an unexplained and inordinate delay in filing the current application. The application was filed more than nine (9) months from the date of delivery of the ruling in Milimani CMCC No. 4058 of 2019. There is no evidence that the applicant had instructed his previous advocates to appeal. It is not enough for the applicant to heap blame on his previous advocates. He must demonstrate that he took tangible steps and exercised due diligence in following up the case. Counsel referred to the case of **MWOYO –V- AFRICAN HIGHLANDS & PRODUCE CO LTD (2002) 1 KLR** where it was held:-

“Time has come for legal practitioners to shoulder the consequences of their negligent acts or omissions like other professionals do in their fields of endeavour. The plaintiff should not be made to shoulder the consequences of the negligence of the Defendant’s advocates. This is a proper case where the Defendants remedy is against its erstwhile advocates for professional negligence and not setting aside the judgment.”

Counsel for the respondent also made reference to the case of **EDNEY ADAKA ISMAIL –V- EQUITY BANK LIMITED [2014] eKLR** where the court relied on the case of **SAVINGS AND LOANS LIMITED –V- SUSAN WANJIRU MURITU (Nairobi) Milimani HCCC No. 397 of 2002** where Kimaru J stated:-

“Whereas it would constitute a valid excuse for the Defendant to claim that she had been let down by her former Advocates failure to attend Court on the date the application was fixed for hearing, it is trite that a Case belongs to a litigant and not to her Advocate. A litigant has a duty to pursue the prosecution of his or her Case. The Court cannot set aside dismissal of a suit on the sole ground of a mistake by Counsel of the litigant on account of such Advocate’s failure to attend Court. It is the duty of the litigant to constantly check with her advocate the progress of her case. In the present Case, it is apparent that if the Defendant had been a diligent litigant, she would have been aware of the dismissal of her previous application for want of prosecution soon after the said dismissal. For the Defendant to be prompted to action by the Plaintiff’s determination to execute the decree issued in its favour, is an indictment of the Defendant. She had been indolent and taking into account her past conduct in the prosecution of the application to set aside the default judgment that was dismissed by the Court, it would be a travesty of justice for the Court to exercise its discretion in favour of such a litigant. (emphasis added)

It is also contended that the intended appeal has no possibility of success. The present claim is directly and substantially the issue in **Limuru SPMCC 54 of 2016 – SAMMUEL GITHINJI MWIRURI –V- KENYA COMMERCIAL BANK (Limuru Branch) and TOP LINK AUCTIONEERS**. The Memorandum of appeal does not raise a single question of merit. Litigation must come to an end.

The background to the dispute is that the applicant obtained loan facilities from the respondent which enabled him purchase motor vehicle registration number KCC 236Y, Isuzu truck. The applicant defaulted in repaying the loan and the vehicle was attached by Toplink Auctioneers on the instructions of the respondent. This attachment triggered the filing of a case before the **Limuru Senior Principal Magistrate’s Court vide SPMCC No 54 of 2016, Samuel Githinji Mururi –V- Kenya Commercial Bank & Toplink Auctioneers**. According to both parties, that case was not fully heard and determined. On its part, the respondent state that the suit was dismissed for want of prosecution. According to the applicant, upon filing the suit, parties entered into negotiations and agreed on payment of the loan. The attached motor vehicle was released to the applicant and he continued to service the loan. An application to dismiss the suit for want of prosecution was filed by the respondent and the same was not served on the applicant. It appears that the applicant defaulted for the second time and the vehicle was attached. This led to the filing of the second suit before the Nairobi Milimani Commercial Court. The respondent raised a preliminary objection on the ground that the suit before the Milimani Court was *Res Judicata*. The trial court delivered the following ruling:-

“I have considered the submissions by both parties with respect to the Preliminary Objection dated 9/10/19 and the court record. The Defendant seeks orders that the suit be struck out on the grounds that it is res judicata and that the issues and parties herein are directly and substantially the same in a former suit being Limuru SPMCC No. 54 of 2016. I have perused the pleadings in the Replying Affidavit of Tom Ogola. I find that the parties and the subject matter are the same. Section 7 of the Civil Procedure Act was not in vain. I find that this suit is an abuse of the court process as the case at Limuru was filed earlier. The Preliminary Objection is therefore upheld with costs to the Defendant. Orders accordingly”

The first issue involves the delay in filing the current application. It is submitted that the ruling was delivered on 18th February, 2020 yet the application was filed on 20th November, 2020, a period of nine months. The explanation for the delay is that the applicant instructed his previous advocates to file an appeal but the said advocates failed to carry out those instructions. A Memorandum of Appeal dated 31st March, 2020 by the previous Advocates was filed and this became Civil Appeal No. E161 of 2020. The appeal was definitely filed out of time as the ruling was delivered in February, 2020. It is evident from the timelines from the date of the ruling to the date of 31/3/2020 indicated on the memorandum of appeal that indeed the applicant had instructed his previous advocates to file the appeal. The applicant further states that he kept on visiting his previous advocates and found that the appeal had been filed before the Civil division instead of the Civil Appeals Division. It is public information that the courts stopped operating fully from march, 2020 due to the Corona – Virus pandemic. Although the Nine (9) months period taken to file the current application is inordinately long, I am satisfied that the circumstances were not conducive for efficient operation by either the applicant himself or his previous advocates. The courts were at a standstill during most part of the period after the delivery of the ruling. The delay is excusable.

The other issue is whether the intended appeal has any possibility of success. Counsel for the respondent contends that the Memorandum of appeal does not raise any triable issue and that the suit is res-judicata. Section 7 of the Civil Procedure Act 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.”

In my view as expressed in Section 7 of the Civil Procedure Act, Part of the ingredient of Res Judicata is that the former suit must have been fully heard and determined by the court or Tribunal where it was filled. If the earlier suit is pending, then the court can issue an order calling for the consolidation of the two suits. The term “heard and finally determined” calls for the extraction of a decree as per the explanations under Section 7 of Cap 21 Laws of Kenya. The position in relation to the Limuru suit is that it was dismissed for want of prosecution. It was not determined on merit. The applicant’s explanation as to why the suit was not prosecuted is that parties entered into negotiations and the attached vehicle was released to him. It can be noted that there is a time span of about three years from the time the first suit was filed in 2016 and the current suit which is the subject of the application. There is no denial from the respondent that the vehicle was not released to the applicant. If that was the case, which I am satisfied it was, that the vehicle was released to the applicant, then the non-prosecution of the previous suit can be understood. The respondent has not explained how the vehicle was released to the applicant. I do find that the former suit was not fully heard and determined and therefore the second suit was not *res-judicata*. Definitely the circumstances had changed by the time the second suit was filed. The applicant’s suit was not dismissed on its merit. Dismissal of a suit for want of prosecution is not tantamount to dismissal for lack of evidence after the case is fully heard. The trial court did not interrogate how the former suit was determined. Granting the application will not offend the provisions of Section 7 of the Civil Procedure Act.

I am therefore satisfied that the application herein is merited and the same is granted as prayed. The applicant to file his memorandum of appeal within fourteen (14) days hereof. Costs shall follow the outcome of the Appeal.

DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF FEBRUARY, 2021

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S. CHITEMBWE

JUDGE