



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC APPLICATION NO. E270 OF 2020

HANNAH WANJIRU.....APPLICANT

VERSUS

GEORGE KAMAU NGOTHO (Suing as a legal representative of the estate of

PAUL MAINA WANJIRU (deceased)).....RESPONDENT

RULING

1. The applicant filed the notice of motion dated 30/7/2020 brought pursuant to **Section 3A, 79G and 95 of the Civil Procedure Act (Cap 21), Order 22, rule 22, Order 42 Rule 6 Order 50 rule 6 and Order 51 rules 1&3 of the Civil Procedure Rules, 2010** seeking the following orders;

a) Spent

b) That this honorable court be pleased to extend time and grant leave to the applicant to lodge their memorandum of appeal out of time against the judgement delivered by Hon. D.O Mbeja, learned Senior Resident Magistrate in Milimani Civil Suit No. 6331 of 2013 of 26/4/2019.

c) Spent

d) That this honorable court be pleased to order for a stay of execution of the Judgement delivered by the trial court on 26/4/2019 pending the hearing and determination of the appeal.

e) That the draft Memorandum of appeal be deemed to be dully filed upon payment of requisite fees.

f) Spent

g) That the costs of the application abide the outcome of the appeal.

2. The application is based on the grounds stated on the face of the motion and the facts deponed in the supporting affidavit of Mandela Chege who deponed that he received instructions from Direct line Assurance Company Ltd, the insurer of motor vehicle registration 288L.

3. The applicant had appointed the firm of Kairu & Mccourt Advocates to deal with the matter but the said firm never appealed against the lower court judgement and therefore did not proceed diligently as instructed.

4. She further added that on investigation he found that judgement was delivered on 26/4/2019 by Honourable Mbeja SRM in the absence of both parties. She stated that she only came to be aware of the judgement after the period required to appeal had lapsed.

5. The applicant further stated that she has a viable appeal with high chances of success and unless an order for stay of execution is granted the appeal will be rendered nugatory. The applicant averred that she is ready and willing to furnish reasonable security. She also argued mistake of counsel should not be visited upon an

innocent litigant.

6. The motion is opposed by the respondents who filed the replying affidavit of Faraday Nyangoro who contended that the application was a total abuse of court process. He claimed that the application is purely aimed at prejudicing and delaying the execution process.

7. The respondents also stated that the applicant intentionally misled the court as on 7/2/2019 when the parties recorded consent liability at 80:20 in favour of the plaintiff.

8. The respondents further filed a notice of preliminary objection dated 14/9/2020 brought under section 6 of the Civil Procedure Act and Order 51 rule 14 (1) (a) of the Civil Procedure Rules setting out the following grounds:

a) That the notice of motion application is misconceived, vexatious and a total abuse of the court process.

b) That the application is Res Judicata having been decided in a similar application in HC MISC Application No. 447 of 2019 and the entire notice of motion falls on the face of mandatory provisions of section 7 of the Civil Procedure Act and therefore should be struck out with costs to the respondents

c) That the Notice of Motion is incurably and/or fatally defective and incompetent as the applicant had filed a similar application before this honourable court over the same subject matter being leave to appeal out of time against the judgement delivered on 26/4/2019 in Milimani Civil Suit No. 6331 of 2013 George Kamau Ngithi v. Hannah Wanjiru.

d) The applicant is abusing the court process in order to deny the respondent the fruits of his judgement in Milimani Civil Suit No. 6331 of 2013 delivered on the 26/4/2019

9. The applicant filed the replying affidavit of Mandela Chege to oppose the preliminary objection. The applicant claimed that **HC MISC Application No. 447 of 2019** was not determined on its merit but was however dismissed on a technicality. It was pointed out the main ground which was used to dismissed the aforesaid application is that the supporting affidavit had not been signed and therefore res judicata does not apply since the matter was not heard and determined on merit.

10. Having considered the rival submissions and the material placed before this court, the questions that need to be determined are;

a) Whether the motion dated 30/7/2020 is Res Judicata?

b) Whether to grant leave to appeal out of time?

c) Whether to grant an order of stay of execution?

11. On the first issue, the respondents filed a preliminary objection raising a point of law. The definition of a preliminary objection was well set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd (1969) EA 696**.

"So far as I'm aware, a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit."

12. The issue of Res Judicata is set out in **Section 7** of the **Civil Procedure Act** which provides as follows:

"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."

13. However, in **Tee Gee Electrics and Plastics Company Ltd vs. Kenya Industrial Estates Limited [2005] KLR 97** the court of appeal held inter alia that;

"Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res judicata bars a future suit only when the case is resolved based on the facts and evidence of

the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata.”

14. It is not in dispute that **Nairobi HC MISC Application No. 446 of 2019** which is between the same parties was instituted to deal with a similar issue. It was however, the applicant’s submission that the above mentioned matter was dismissed due to an unsigned supporting affidavit therefore the matter was not heard on its merit and therefore the doctrine of res judicata does not arise.

15. Having considered the rival submissions and authorities cited I find that the preliminary objection does not meet the ingredients since HC MISC Application No. 446 of 2019 was not determined on its merit but was dismissed due to a technicality. In light of this I find that the Preliminary Objection dated 14/9/2020 is without merit.

16. On the second issue, **Section 79G** of the **Civil Procedure Act** provides that:

Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

17. Section 95 of the said Act provides as follows :-

“Where any period is fixed or granted by the court for the doing of any act prescribed or allowed by this Act, the court may in its discretion, from time to time, enlarge such period, though the period originally fixed or granted may have expired.”

18. On this issue it is the respondent case that judgement was entered in the lower court on 26/4/2019 and the application herein was filed on 30/7/2020. He indicated that the applicant did not give sufficient reason or explanation for the delay. The applicant on the other hand indicated that the delay was due to the mistake by her erstwhile advocates and that she should not be denied an opportunity to prosecute her appeal for the mistake of counsel.

19. In **Murai vs. Wainaina (No.4) [1982] KLR 33** where Madan J. A held as follows;

“A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the Court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a person of experience who ought to have known better has made a mistake. The Court may not forgive or condone it but it ought to certainly do whatever is necessary to rectify it if the interest of justice so dictates. It is known that courts of justice themselves make mistakes which is politely referred to as erring, in their interpretation of law and adoption of a legal point of view which Courts of Appeal sometimes overrule. It is also not unknown for a final Court of Appeal to reverse itself when wisdom accumulated over the course of years since the decision was delivered so required. It is also done in the interests of justice.”

20. Having considered all of the above, I am satisfied that this is a proper case for the exercise of this courts discretion to grant an extension of time to the applicant within which to file an appeal put of time.

21. On the final issue, Order 42, rule 6 of the Civil Procedure Rules provides;

No order for stay of execution shall be made under subrule (1) unless—

a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

22. This court enjoys a wide discretion to grant an order for stay of execution of the decree pending appeal. In **JMM v PM [2018] eKLR** it was stated:

“As I said, I accept the proposition that if it is shown that execution or enforcement would render a proposed appeal nugatory, then a stay can properly be given. Parallel with that is the equally important proposition that a litigant, if successful, should not be deprived of the fruits of a judgment in his favour without just cause.”

23. Bearing the above in mind this court will exercise its discretion in favour of the applicant. The motion dated 30/7/2020 is allowed giving rise to the issuance of the following orders;

i. The time for filing an appeal out of time is extended by 15 days from the date of this ruling.

ii. There be an order for stay of execution of the judgement and or decree pending appeal on condition that the applicant should deposit the decretal sum in an interest earning account in the joint names of the advocates and or firms of the advocates within 30 days from today’s date. In default, the order for stay of execution shall automatically lapse and execution shall issue.

iii. Costs of the motion shall abide the outcome of the appeal.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 19TH DAY OF MARCH, 2021.

.....

J. K. SERGON

JUDGE

In the presence of:

..... for the Applicant

..... for the Respondent