



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL CASE NO. 449 OF 2015

THE KIAMBU COUNTY PUBLIC SERVICE BOARD.....1ST PLAINTIFF/APPLICANT

JUSTINE NDUNG’U KIMANI.....2ND PLAINTIFF/APPLICANT

LUCY WANJIKU KIBIA KAMAU.....3RD PLAINTIFF APPLICANT

ERIC KELVIN MWAURA KIRIKO.....4TH PLAINTIFF/APPLICANT

DR. BARHAM DEV VASISHT.....5TH PLAINTIFF/APPLICANT

ALEXANDRIAH MUHANJI.....6TH PLAINTIFF/APPLICANT

VERSUS

KARUNG’O WA THANG’WA.....DEFENDANT/RESPONDENT

RULING

1. The undisputed chronology of key events in this matter is as follows. On 30th December, 2015, the Kiambu County Public Service Board and five members thereof, namely, **Justin Ndung’u Kimani, Lucy Wanjiku Kibia Kamau, Eric Kelvin Mwaura Kiriko, Dr Barham Dev Vasisht** and **Alexandria Muhanji** (hereafter the Plaintiffs) filed the instant suit against **Karung’o wa Thang’wa** (hereafter the Defendant), who at the time was an elected Member of County Assembly (MCA) **Ngewa Ward** Kiambu County, for defamation. They prayed for three key reliefs including general damages, punitive/exemplary damages and a permanent injunction to restrain the Defendant from making/uttering further defamatory statements concerning them.

2. The Defendant denied the Plaintiffs’ claim through a defence statement filed on 4th February 2016. An application seeking a temporary injunction against the Defendant was subsequently filed in June 2016. The said motion was heard by **Njuguna J**, and dismissed *vide* the ruling delivered on 24th November, 2016. No further steps were taken in the matter until the 3rd October, 2019 when the Defendants filed a motion under Order 17 Rule 2(1) and (2) of the Civil Procedure Rules (hereafter CPR) seeking to have the suit dismissed for want of prosecution.

According to the affidavit of service sworn by the process server and filed on 4th December, 2019, the motion was served upon the Plaintiffs’ advocate on 21st November, 2019.

3. The motion was set down for hearing on 5/12/2019, and when the parties appeared before **Githua J**, she granted the Plaintiffs’ request for time to file a response to the motion within 14 days, and further directed those fresh dates be taken in the registry. On the subsequent hearing date (17/02/2020) counsel for the Defendants informed the court that no response had been served upon her. She sought to have the dismissal motion allowed as unopposed. The Plaintiffs’ advocate stated in response that:

“We have not been able to get instructions from all the clients making it hard on our part. We ask the court to grant us more time so that we can get instructions from all clients to enable us respond accordingly.”

4. Counsel for the Defendants opposed the request citing previous proceedings accusing the Plaintiffs of laxity. The court (**Kamau J**), noting the Plaintiffs’ delay in complying with the orders of **Githua J** of 5/12/2019 nevertheless granted the Plaintiffs one more chance to file their response by 9/03/2020 and gave directions for parties to file their respective written submissions to the motion. The matter was set for mention on 5/05/2020 to confirm compliance and for further orders. On the 5th May, 2020, only the Defendant was represented, his counsel informing the court that no response had been filed by the Plaintiffs. She sought to have the Defendant’s motion allowed as unopposed. The court recounted previous directions in the matter upon the Plaintiffs’ requests before stating that:

“To date, they (Plaintiffs) have not filed their response to the said application despite being required to file and serve their response before courts closed on 15/03/2020 due to the Covid – 19 pandemic. They were also notified of today’s proceedings... but they are not online. In the absence of any response to the said application dated ... supported by the affidavit of Karungo wa Thangwa.... I hereby direct that the said application be listed for interpartes hearing on 7/05/2020 as I cannot grant substantive orders on a mention date.

Hearing notice to issue to the Plaintiffs’ advocates for the said date... “

5. On 7th May, 2020, the Defendant’s counsel notified the court that no response had been served and once more prayed that their application be allowed. The advocate for the Plaintiffs stated that they had not secured the signature of the deponent to the intended replying affidavit and pledged to file the same by the next day. Predictably, the Defendant’s counsel objected. The court (**Kamau J.**) in a brief ruling reiterated her earlier directions and observed that no steps had been taken to prosecute the suit since filing and further that no proper explanation had been proffered for the failure by the Plaintiffs to file their response by 9/03/2020 as earlier directed. Declining the request to grant more time to the Plaintiffs to respond to the motion, the court allowed as unopposed the Defendant’s motion to dismiss the suit for want of prosecution.

6. Although I cannot trace the court copy on the record, it turns out that on 30th June, 2020 the Plaintiffs’ advocate served a Notice of Appeal dated 28th May, 2020 upon the Defendant’s advocate. The said copy of Notice of Appeal is attached and marked as annexure” **KT1**” to the replying affidavit of the Defendant filed in opposition to the subsequent Plaintiffs’ application filed herein and dated 21st September, 2020. The said motion was filed on 23/09/2020 based on the accompanying official receipt, and seeks among other prayers that the court does *“review and set aside the order issued on 7th May, 2020 dismissing the suit for want of prosecution and reinstate the suit for hearing”*. In the alternative, that the court does reopen the *“application (for dismissal) for canvassing interpartes”* and deems as duly filed the grounds of opposition and submissions attached to the motion.

7. The motion is expressed to be brought under Sections 1A, 1B, 3A and 80 of the Civil Procedure Act (CPA) and Order 45 Rule 1 CPR, inter alia, and is supported by the affidavit of the Plaintiffs’ advocate **George Kithi**. The gist of the affidavit is that due to the onset of the Covid -19 pandemic, it had proved difficult to contact and obtain from his clients’ due instructions to enable the making of a response to the dismissal motion; that the Plaintiffs were not accorded the opportunity to canvass their alleged *“good response”* to the dismissal motion; that they are aggrieved with the ruling of 7th May 2020 hence their application for review; that the Defendant had already filed the party and party bill of costs for taxation; that it would be unjust to close the door on the Plaintiffs when they have a good case ; and that the Plaintiffs will suffer irreparable harm or loss if the motion is disallowed as they will have lost the avenue for pursuing justice.

8. The motion was opposed by the affidavit sworn by the Defendant, earlier adverted to. Taking issue with the simultaneous filing of the instant motion and the notice of appeal, the deponent asserts that the motion is incompetent and misconceived; that besides, the motion does not fall within the threshold prescribed in Order 45 Rule 1 CPR; that the motion has been brought after the inordinate delay of 4 months and without any explanation, was brought in bad faith and without disclosing material facts to wit, that the Plaintiffs had already filed a Notice of Appeal from the ruling of 7th May, 2020; that the excuse that the COVID–19 Pandemic was to blame for the Plaintiffs’ failure to respond to the dismissal motion contradicts the reasons given by their counsel to the court during attendances; that the history of this matter discloses indolence on the part of the Plaintiffs and that if allowed, the present motion will only serve to delay the course of justice and that it ought to be dismissed instead.

9. Although the Duty Court (**Mboghli J**) had earlier certified the application urgent had granted interim orders to the Plaintiffs on 23/09/2020 and directed that a hearing date be filed in the registry, it was not until 18/11/2020 that the Plaintiffs set down the matter for hearing on 18/01/2021, and this in the part due to pressure from the taxing master before whom the party and party bill of costs was pending. However, by the next hearing date (24/02/2021) the Plaintiffs had taken the liberty to file written submissions which the court directed be served upon the Defendant who would also equally file his submissions for highlighting on 23/03/2021. On that date parties opted not to highlight their respective submissions and a ruling date was set.

10. The respective submissions of the parties primarily deal with the competence of the motion and merits. Starting with the Plaintiffs, they submit briefly that although the Notice of Appeal was not filed, it was indeed served upon the Defendant and should not be considered. On the merits, it was argued that they have presented material to found sufficient reason or ground under Order 45 Rule 1 of the CPR to justify the review of the dismissal order. They relied on **Civil Appeal No. 2111 of 1996 National Bank of Kenya V. Ndung’u Njau (1997) eKLR** and further reiterating material in the affidavit supporting the motion, assert that there was an error on the face of the record in that the court failed to accommodate the Plaintiffs despite the handicap encountered by their counsel due to the COVID -19 pandemic, in attempts to obtain instructions and that have moved swiftly in bringing the instant motion.

11. On the authority of **Benjoh Amalgamated Ltd V. Kenya Commercial Bank Limited [2014] eKLR**, the Plaintiffs argued that on the justice principle the court may invoke, applying due circumspection, its residual jurisdiction to reopen a decided matter. To bolster this submission counsel cited the decision of **Kasango J. in Kiti Lewa V Housing Finance Company of Kenya Ltd and Another [2015] eKLR** wherein the court cited a Ugandan case **Simba Telco V. Karuhanga & Another [2014] UGHC98** in which the Ugandan Court applied the Australian case of **Smith V. New South Wales [1992] HCA 36; [1992] 176 CCR 256** concerning the jurisdiction to reopen a closed case or where judgment has been delivered.

12. For his part, the Defendant argued that the Plaintiffs’ motion does not satisfy the requirements of order 45 Rule CPR, namely the discovery of a new and important matter of evidence which after the exercise of due diligence was not in their knowledge and could not be produced by them at the appropriate time; mistake or error apparent on the face of the record; or other sufficient reason and that the motion was made without delay. They contend that the fact that the Plaintiffs’ material was not on record at the time of dismissal is a ground for appeal and is not a mistake or error on the face of the record.

13. And besides that, an erroneous conclusion of law or fact cannot be the basis for review. Several authorities are cited on this point

including the decision of the Court of Appeal in **Origo & Another V. Mungala [2005]2 KLR 307** cited in **Jameny Mudaki Asava V. Brown Otengo Asava & Another [2015] eKLR**. As well, the Defendant cited the case of **Nyamogo and Nyamogo V. Kogo [2001] EA 170** as to what constitutes an error apparent on the face of the record. Citing the history of the matter, the Defendant emphasized that the Plaintiffs had adequate time before the onset of the COVID-19 pandemic to respond to the dismissal application but did not do so despite several opportunities granted by the court; that the instant motion was filed some four months after the dismissal, and the delay was in the absence of an explanation, inordinate as found in **Josiah Mwangi Mutero & Another V. Rachael Wagithi Mutero [2016] eKLR**. As regards the prayer to reopen the case, it was submitted that the court only allows reopening by discretion, which is to be exercised judicially and weighing the interests of all parties in order to do justice and not prejudice any party. The Defendant submitted that based on the Plaintiffs' past conduct, they are underserving of the court's discretion and citing the case of **London Distillers (K)Ltd v. Philip Kipchirchir & 2 Others [2007] eKLR** urged that the court ought not to entertain an indulgent litigant to the prejudice of the party dragged to court.

14. Regarding the competence of the motion, the Defendant argued that the Plaintiffs could not simultaneously pursue the remedy of appeal alongside the motion for review, asserting that the Notice of Appeal has not been withdrawn since being served upon the Defendant. Reliance was placed on the decision of **Aburili J. in Republic v Registrar of Companies, Interested party Githunguri Ranching Co. Ltd [2016] eKLR** where several decisions on the point were referred to. Moreover, the Defendant takes issue with the fact that contrary to proper practice, and established principle of law, the supporting affidavit to the instant motion is drawn and sworn by the Plaintiffs' advocate and is of no effect as held in **International Community of Women Living with HIV Registered Trustees V. Non-Governmental Organizations Co-ordination Board & 3 Other (2019) eKLR**.

15. The court has considered the history of this matter, the motion by the Plaintiffs, rival affidavits, and submissions. In my considered view, this motion turns on the issue of competency. The Defendant had by his replying affidavit brought to the notice of the court the fact that the Plaintiffs had prior to filing the instant motion filed a Notice of Appeal in respect of the decision now sought to be reviewed. The copy of the Notice of Appeal was admittedly served upon the Defendant's advocate by the Plaintiffs' counsel. The existence of the said notice dated 28th May, 2020 was not disclosed to this court by the Plaintiffs in their motion dated 21st September, 2020. Moreover, upon being served with the replying affidavit of the Defendant, the Plaintiffs elected not to controvert the depositions relating to the Notice of Appeal, but instead dealt with the matter briefly at paragraph 11 of their submissions. To the effect that though the Notice of Appeal had been served upon the Defendant's counsel, it had not been filed due to "*unclear filing procedures*". With respect this explanation belongs to an affidavit and cannot be casually submitted upon from the bar. There is no explanation given for the failure by the Plaintiffs to depose to this information in an affidavit.

16. Secondly, it is not plausible that the Plaintiff's advocate took the trouble to serve an unfiled document on the Defendant's advocates as alleged in the submissions. As for alleged unclear filing procedures, the record herein shows that in the material time, the Defendant's advocate was able to file the party and party bill of costs and to exchange emails with the registry and to take dates for taxation. The inescapable fact therefore is that the Plaintiffs had indeed filed a Notice of Appeal even though the court copy cannot be traced on the record.

17. The provisions of Sections 80 of the Civil Procedure Act and Order 45 Rule 1 Civil Procedure Rules are clear. Those latter provides that:

“(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(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”.

18. A Notice of Appeal is effectively an appeal, and a party cannot file such appeal and also seek review of the same decision appealed from. There is a long line of authorities on this point including **Republic V. Registrar of Companies** where the court cited the Court of Appeal decision in **Francis Origo & Others V. Jacob Kumali Mungala [2005] eKLR** to the effect that the option of review was closed to a party who had first filed an appeal in connection with the same decision sought to be reviewed. AS **Odunga J** stated in **Republic V Cabinet Secretary for Transport & Infrastructure & 76 others [2015] eKLR**, and cited by **Aburili J. in Republic V. Registrar of Companies**:

“To apply for a review with the intention of opening up fresh grounds for litigation on appeal against the order emanating from review and an appeal against the order sought to be reviewed (as is the case herein) is an abuse of the process of the court.”

19. **Aburili J** concluded in her decision that:

“From the above established principles and anchored in substantive and procedural law, it is clear that a party cannot file a Notice of Appeal and an application for review in the same cause, challenging the same judgment/decreed or order. He has only one option. In this case the applicant has gone both ways. Accordingly, I have no difficulty in finding the application for review highly incompetent and a gross abuse of the court process. I... dismiss it”.

20. In **Kisya Investments Ltd. V. Attorney General & Another Civil Application No. 31 of 1995** it was held that a party who had filed a Notice of Appeal cannot apply for review but if the application for review is filed just, the party is not prevented from filing an appeal subsequently even if a review is pending. However, as stated in the **Chairman Board of Governors Highway Secondary School V. William Mmosi Civil Application No. 277 of 2005**, once the review application is determined the appeal lapses as the two remedies cannot be pursued concurrently or sequentially. Therefore, the two remedies are mutually exclusive.

21. I think I have said enough to demonstrate that the motion dated 21st September, 2020 incompetent for the reason that there is in existence, for all intents an appeal filed by the Plaintiffs in respect of the same orders sought to be reviewed. But secondly, it is not properly supported based as it is, upon the advocate's affidavit containing contentious matters that ought ideally to be deposed to by the Plaintiffs themselves. The supporting affidavit is therefore incompetent. See **International Community of Women living with HIV case and Kisya Investments Ltd & Another V Kenya Finance Corporation Ltd. Hcc No. 3504 of 1993** where it was held that it was not competent for a party's advocate to depose to evidentiary facts at any state of the suit; and **Simon Isaac Ngugi V. Overseas Courier Services (K) Ltd [1998] eKLR**.

22. The above notwithstanding, it is patently evident that the motion dated 21st September, 2020 does rise up to the grounds envisaged in Order 45 Rule 1 of the Civil Procedure Rules and has no merit. No mistake or error on the face of the record as defined in **Nyamogo V. Nyamogo V Kogo** has been demonstrated by the Plaintiffs. Besides the record of the proceedings indicates that the Plaintiffs had adequate opportunity since 2019 to file a response to the dismissal motion but did not, their advocate ascribing the failure before the court not to the COVID- 19 pandemic, but to wanting instructions. Clearly the ground relating to the COVID-19 pandemic has been introduced to shore up the Plaintiffs' weak case. The fact that the Plaintiffs did not file a response despite being given several opportunities cannot be said to be a sufficient reason for setting aside the dismissal order and no explanation has been given for the delay of about 4 months in bringing the instant motion.

23. The suit herein had been pending dormant since pleadings closed in 2016 and the Plaintiffs were evidently not roused from their slumber even by the dismissal motion filed in late 2019. The fact that the Plaintiffs failed, without any plausible reason to file an affidavit to oppose the dismissal motion since being served in November 2019 until May, 2020 and have before this court also eschewed swearing an affidavit in support of the instant motion, taken together with their inaction for 3 years since 2016 to 2019, is enough demonstration of their lack of interest in the matter. The court cannot exercise its discretion in favour of such tardy and indolent litigants. In the result the motion dated 21st September, 2020 is hereby dismissed with costs.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 25TH DAY OF JUNE 2021.

C. MEOLI

JUDGE

In the Presence Of:

Miss Achola h/b for Mr. Kithi for the Plaintiff/Applicants

Mr. Kamau h/b for Miss Kori for the Defendant/Respondent

Carol: Court Assistant