



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KISII

CIVIL APPEAL NO 259 OF 2011

HEZRON OTOCHI NYAMBANE.....APPELLANT

VERSUS

JULIUS MOMANYI NDEGE.....1ST RESPONDENT

PATRICE MULEI ALUNGA.....2ND RESPONDENT

ALFRED MUDEIZY T/A PAVE AUCTIONEERS.....3RD RESPONDENT

AYIEMA MBICHA & CO ADVOCATES.....4TH RESPONDENT

EVANS ENKONGE ALUNGA.....5TH RESPONDENT

RULING

1. By way of Notice of Motion dated 10th May, 2020, **Evans Enkonge Alunga**, hereinafter referred to as the 5th respondent/ applicant, seeks the following orders:

1) *Spent*

2) *That the entire Appeal civil appeal 259 of 2011, be struck out as res judicata matter.*

3) *That the Honourable court be pleased to strike out the entire appeal herein as the Order being appealed against was filed out of time (30 days) without the appellant obtaining leave of the honourable court, further, the entire appeal was filed without leave of Honourable court being granted.*

4) *That in the alternative to prayer 2 & 3 above the honourable court is humbly urged to admit the proceedings, judgment of Civil Suit 238 of 2009 lower court Kisii, Kisii HCCA No. 1 of 2019 and Kisii HCCA 3 OF 2019 respectfully before hearing and determination of present appeal Kisii HCCA 259 OF 2011 is heard.*

5) *That the cost of this application be provided for.*

2. The motion is premised on grounds set out in the Motion and Supported by the 5th Respondent's Affidavit sworn on 10th May 2021. He avers that he purchased the Motor vehicle Reg. Number KAH 242L (*hereinafter referred to as the motor vehicle*) from the 2nd respondent herein who had purchased the same from a public auction conducted by the 3rd respondent herein on 5th June 2009. It is the Applicant's case that the present appeal by the appellant was triggered by the dismissal of the appellant's application dated 4th October 2010 in **Kisii CMCC No. 88 of 2009**, which sought to have the motor vehicle returned to him. However, on 30th November 2011, the trial court dismissed the Appellant's application and ordered the OCS Migori Police Station to release the Motor Vehicle to the bonafide owner.

3. It is the applicant's case that the Appellant herein successfully sued the 3rd respondent in **Kisii CMCC 238 of 2009** and he was awarded damages to the tune of Kshs 400,000/=. However, both the parties therein were dissatisfied by the judgment delivered on 7th December 2018 by Hon. Wamucii Nyotah. Consequently, **Appeal No. 1 of 2019** was filed by the appellant herein while **Appeal No. 3 of 2019** was filed by the 3rd Respondent herein. In both appeals, the subject matter was Motor vehicles KAA 041R & KAH 242L that belonged to the appellant herein before attachment. The appeals were heard on merit and **Civil Appeal No. 1 of 2019** was dismissed with costs to the 3rd Respondent

while **Civil Appeal No. 3 of 2019** was allowed and the judgment and the decree in **Kisii CMCC 238 of 2009** set-aside and substituted with an order dismissing the claims by the Respondents. Consequently, since the present appeal raises issues and is based on the subject matter in **Civil Appeal No. 1 of 2019** and **Civil Appeal No. 3 of 2019**, which have been determined by the court, then this court is barred from entertaining the same.

4. The deponent avers that the Memorandum of Appeal is dated 6th December 2011 and filed on 3rd November 2017, while the order being appealed against was made on 15th December 2016 and filed on the 3rd November 2017. Therefore, the present appeal has been filed out of time and without leave being obtained from the court he proceeded to file the appeal out of time, contrary to section 79G of the Civil Procedure Act.

5. The deponent also avers that leave of court to institute the present appeal was not granted, since Mr. Bosire who was for the appellant only sought a stay of execution of the judgment in **Kisii CMCC No. 88 of 2007** and abandoned the prayer that sought the grant of leave to appeal out of time. Consequently, the present appeal ought to be struck out for being incompetent.

The Response.

6. Respondent/Appellant opposed the motion vide Grounds of Opposition dated 21st May 2021 as follows:

- 1) *That the application is frivolous, vexatious, and utterly misconceived and is otherwise an abuse of the court process.*
- 2) *The appeal was filed within 30 days of the ruling appealed from.*
- 3) *The appeal is against the ruling arising from a question of execution, satisfaction, and discharge of the decree brought pursuant to section 34 of the Civil Procedure Act and directions given accordingly.*
- 4) *The alternative prayer sought for does not lie and/or lacks merit.*
- 5) *The application is merely intended to delay the fair hearing and determination of the instant appeal.*
- 6) *The issues raised in the application could be put forth by way of submissions and not derailing the hearing of this appeal on merit.*

7. In rejoinder and in response to the Appellant/Respondent's Grounds of Opposition, the applicant filed a supplementary affidavit sworn on 2nd June 2021. He reiterated the content of his Supporting Affidavit sworn on the 10th May 2021, and averred that the Memorandum of Appeal was filed on 1st December 2011, without the order the Appellant was appealing against, the said order was only issued on 15th December 2016 and filed together with the Record of appeal without leave of court. Nevertheless, the said order is defective and mischievous since it does not indicate the motor vehicle's registration number. The deponent avers that it is an abuse of the court process and contrary to **section 6 and 7 of the Civil Procedure Act** for the Appellant/respondent to litigate in **Civil Appeal No. 259 of 2011**, issues already litigated in **Civil Appeal no. 1 of 2019 and Civil Appeal no. 3 of 2019** since there is a risk of having contradictory orders which will bring ridicule to the administration of justice.

SUBMISSIONS

8. The applicant's/Respondent submissions were filed on 10th June 2021, the Appellant/Respondent submissions were filed on 9th July 2021, while the 2nd Respondents submissions were filed on 14th July 2021. I have read and considered all the said submissions.

THE DETERMINATION

9. From the Application, Grounds of Opposition, Affidavits, and submissions filed before this Court by the parties, in my view, the issues for the determination are:

- 1) *Whether the instant appeal is res-judicata*
- 2) *Whether leave of the trial court was sought before the instant appeal was made.*
- 3) *Whether the appeal was filed out of time.*

10. From the identified issues for determination, it can be discerned that the central issue in this instant appeal is whether this Court has jurisdiction. Jurisdiction is everything and without it, the court must down its tools.

- 1) *Whether the instant appeal is res-judicata*

11. The Applicant reiterated the contents of his affidavits and submitted that the instant appeal should be treated as *res judicata* and the same be struck out having been previously heard and determined in consolidated **Civil Appeal No. 1 of 2019 and Civil Appeal No. 3 of 2019**.

12. **Mr. Bosire** learned counsel for the Appellant submitted that the instant appeal emanates from the execution of the decree in **Civil Suit**

No. 88 of 2007 and does not in any way relate to **Civil suit 238 of 2009** from which **Civil Appeal No. 1 of 2019** and **Civil Appeal No. 3 of 2019** emanated. Further, counsel submitted that there is a distinction between **Civil Appeal No. 1 of 2019** and **Civil Appeal No. 3 of 2019** and the instant appeal reason being that appeals are not themselves suits but arise from suits. Therefore, the Applicant's claim of *res judicata* is misplaced.

13. Mr. Godia learned counsel for the 2nd respondent submitted that the appellant is guilty of non-disclosure of material facts pertaining to the appeal herein since the issues raised in the instant appeal have already been dealt with finality in **Civil Appeal No. 1 of 2019** and **Civil Appeal No. 3 of 2019**, where the Appellant's appeal was dismissed and the court set aside the award of Kshs. 400,000/= for failure to plead and prove his claim.

14. The principle of *res judicata* is found in **Section 7 of the Civil Procedure Act Cap 21, Laws of Kenya** which provides that:

“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.”

15. The Court of Appeal in **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR** quoted with approval the case of **Henderson v Henderson [1843] 67 ER 313** as follows:-

“...where a given matter becomes the subject of litigation in and 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 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 cases, not only to points upon which the court was actually required by 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....”

In **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

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

16. In the instant case, the question is whether the Applicant has satisfied the conditions for the application of the principle of *res judicata* given the facts of this case.

17. I have taken time to read the ruling in **CMCC No. 88 of 2007** found at pg 490-496 of the Record of Appeal in the instant appeal, and it is noteworthy that the issue for determination was whether the sale of Motor vehicle KAH 242L Mitsubishi lorry was legal after the plaintiff had obtained orders of stay and release of the motor vehicle to the plaintiff/Appellant. I have also read the judgment in **CMCC No. 238 of 2009**, attached by the Applicant herein, and I find that the main issue was the return of Motor Vehicle KAA 041R or the value thereof since there was no explanation and/or evidence of how the said vehicle was sold. Consequently, it is evident that the issue and cause of action in **CMCC No. 88 of 2007** and **CMCC No. 238 of 2009** are not the same. Further, the amount of Kshs. 400,000/= awarded in **CMCC No. 238 of 2009** was in respect of motor vehicle KAA 041R and not motor vehicle KAH 242L Mitsubishi lorry.

18. In the premise, I find and hold that the plea of *res judicata* is not available to the applicant herein. Having found that the instant Appeal is not *re-judicata*, it would be superfluous to grant prayer 4 of the instant application which seeks admission of the proceeding, judgment of **Kisii CMCC No. 238 of 2009, Kisii HCCA No. 1 & 3 of 2019** reasons being that **Kisii CMCC No. 238 of 2009** deals with a different subject matter and cause of action.

2) Whether leave of the trial court was sought before the instant appeal was made.

19. It is noteworthy that the applicant herein had initially averred in his supporting affidavit sworn on 10th May 2021, that the Appellant herein had abandoned the prayer number (4) which was seeking the grant of leave to file an appeal against the ruling of the court in favour of prayer (3) of the application which sought a Stay of Execution of the court order dated 30th November 2011. However, the Applicant in his written submission conceded that indeed leave was granted by the trial court for the Appellant to appeal against the ruling in **CMCC No. 88**

of 2007.

20. **Mr. Godia** submitted that the instant appeal was incompetent since counsel for the appellant only prayed for a Stay of execution pending appeal and that the trial court never granted the prayer (4) which sought leave to appeal. Further, counsel submitted that if indeed leave was granted then the said order was never filed in the present appeal which was contrary to **section 79G of the Civil Procedure Act**.

21. **Section 79G of the Civil Procedure Act** states:-

79G. 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 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.

22. Further, **Order 42 rule 2 of the Civil Procedure Rules** stipulates that:

Where no certified copy of the decree or order appealed against is filed with the memorandum of appeal, the appellant shall file such certified copy as soon as possible and in any event within such a time the court may order, and the court need not consider whether to reject appeal summarily under section 79B of Act until copy is filed.

23. **Order 42 Rule 13(4)(f) of the Civil Procedure Rules, 2010** provides as follows-

“(4) Before allowing the appeal to go for hearing the judge shall be satisfied that the following documents are on the court record, and that such of them as are not in the possession of either party have been served on that party, that is to say:

(a) the memorandum of appeal;

(b) the pleadings;

(c) the notes of the trial magistrate made at the hearing;

(d) the transcript of any official shorthand, typist notes electronic recording or palantypist notes made at the hearing;

(e) all affidavits, maps and other documents whatsoever put in evidence before the magistrate;

(f) the judgment, order or decree appealed from, and, where appropriate, the order (if any) giving leave to appeal.” (emphasis added).

24. It follows therefore that the above rules require the Judge to be satisfied that the documents outlined under the rule are in the court file and parties have been served. Under **Order 42 Rule 13(4) (f)** a copy of the judgment, order or decree appealed from should be on record. I note that a copy of the ruling and order has been attached on page 511 on the Record of Appeal and it is pursuant to the court being certified that all documents were on Record that the Appeal was fixed for hearing. Nevertheless, I have noticed that indeed a copy of the order giving leave to appeal has not been annexed in the Record of Appeal. What then is the position of the appeal when such a document is not on record?

25. **Section 3A Civil Procedure Act** provides:-

“Nothing in this Act shall limit or otherwise affect the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.”

26. It is noteworthy that in the proceedings on page 497 of the Record of Appeal, the trial magistrate stated as follows: “*I am satisfied there is no prejudice will be occasioned to the respondents if leave to appeal is granted.*” Consequently, from the proceeding in the Record of Appeal, it can be discerned that Leave to file the instant appeal had been discretionally granted by the trial court. The Court of Appeal in the case of **Emmanuel Ngade Nyoka -v- Kitheka Mutisya Ngata Civil Appeal No.63/2016 (2017) eKLR.** The court stated-

“According to the Judge, the record of Appeal before him had a certified copy of the Judgment of the court. Consequently, he reasoned, that the record of appeal was competent notwithstanding the fact that a formal decree had not been included in the record. We entirely agree with the reasoning of the learned Judge on this aspect. In any event, this was mere technicality that could not have sat well with the current constitutional dispensation that called upon courts to go to substantive justice as opposed to technicalities. Further holding otherwise would have run counter to the overriding objective as captured in Section 1A and 1B of the Civil Procedure Act.

Finally, one would ask what prejudice did the appellant suffer with the omission of the certified copy of the decree in the record of appeal. We do not discern any.”

27. In the end, I find that from the Record of Appeal on page 497, the Appellant herein was indeed granted leave to appeal against the ruling

of the trial court and therefore, the instant appeal. In any event, the Applicant herein has not demonstrated to this court what prejudice he will suffer if a certified copy of the order that granted the leave to appeal is not annexed in the Record of Appeal. Consequently, the instant Appeal is not incompetent.

3) Whether the appeal was filed out of time.

28. The applicant reiterated the contents of his affidavit and submitted that the appellant did not file the order appealed against within 30 days which was contrary to **section 79G of the Civil Procedure Act**, since the said order that was being appealed against was later on filed on 3rd November 2017, and without any explanation.

29. Mr. Bosire submitted that the instant appeal was filed on 8th December 2011 which was 8 days from the date the order was issued. Therefore, the appeal was filed within the statutory period.

30. I have examined the Record of Appeal and the proceedings of the trial court. I am satisfied that the ruling in **CMCC No. 88 of 2007** was delivered on 30th November 2011 and the Memorandum of Appeal in this instant appeal was filed on the 6th December 2011, which was about 6 days after the impugned ruling was delivered. Consequently, the instant appeal was filed within the period of 30 days in accordance with Section 79G of the Civil Procedure Act.

31. In light of the foregoing observations, it is my finding that the applicant's application dated 10th May 2021 lacks merit. The same is dismissed. Cost to abide by the outcome of the Appeal.

It is so ordered.

Dated, signed, and delivered at KISII this 29th day of October 2021.

R.E. OUGO

JUDGE

In the presence of;

Applicant Absent

Miss Nyandoro For the Appellant

Mr. Godia h/b Mr. Nyangancha For the 2nd Respondent

Mr. Mangi For the 3rd Respondent