

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KAKAMEGA

MISCELLANEOUS CIVIL APPLICATION NO. 8 OF 2020

PATEL PRABHAKAR.....APPLICANT

VERSUS

RICHARD CHACHA IMBOSA.....RESPONDENT

RULING

1. On 29th January 2020, the applicant filed a Motion herein, dated 28th January 2020. He sought, in the main, extension of time to file appeal against a ruling delivered in Kakamega PMCCC No. 521 of 2012 and judgment delivered on 11th December 2019 in Kakamega HCCA No. 2013. The consequential orders sought were for stay of execution of the orders and decrees arising from the impugned determinations.
2. The principal complaint by the applicant is that he instructed an advocate to challenge the ruling or judgement in Kakamega PMCCC No. 521 of 2012, which was unfavourable to him, and Kakamega HCCA No. 2013 was filed. That appeal was never prosecuted, as his advocate filed several interlocutory applications, and in respect of a ruling from one of them, an appeal was filed in in Kakamega HCCA No. 2013, and when the advocate sought to dispose of the appeal within appeal, the court struck it out for incompetence, and the original appeal for having been abandoned. The court observed that the proceedings were characterized by a litany of errors. The advocate blamed his advocates for his predicament.
3. When the respondent was served, he raised a preliminary objection on a point of law, saying that the application was defective for it contravened Order 42 Rule 6 of the Civil Procedure Rules, and that similar applications had been made in Kakamega PMCCC No. 521 of 2012 and Kakamega HCCA No. 2013, and the courts had already pronounced themselves on the matter.
4. The preliminary objection was canvassed by way of written submissions. I have gone through the written submissions by the respondent, the persons raising the preliminary objection, and I note that the same does not raise pure points of law. It refers me to applications that were made and determined in Kakamega PMCCC No. 521 of 2012 and Kakamega HCCA No. 2013, to argue that the issues are now *res judicata*. The two files are not before me, and the respondent has not filed a replying affidavit to the instant application, where he would have attached evidence of those applications and determinations. I cannot, therefore, verify whatever the respondent claims.
5. Consequently, the preliminary objection, is clearly not a proper preliminary objection on a point of law, for I cannot determine it without looking at the facts, and even those relevant facts have not been made available.
6. On the second limb, of the application for stay being sought so late in the day, a year after the date of the delivery of the impugned judgment, again, that is a matter of evidence, the fact that judgement was delivered in December 2019, and the application was filed a year later. Clearly, the same is not a pure point of law. I cannot determine it without having to look at facts, and any explanations for delay, which must, of course, be founded on facts.
7. Overall, there is no point of law demonstrated, upon which I should dismiss the application dated 28th January 2020 summarily. The same shall go one to argument *inter partes*. The respondent has 14 days to file and serve a replying affidavit. It is so ordered.

DELIVERED, DATED AND SIGNED IN OPEN COURT AT KAKAMEGA THIS 29TH DAY OF OCTOBER 2021

W. MUSYOKA

JUDGE