



REPUBLIC OF KENYA



Kitua v Syokimau Bright Homes Ltd; Munguti & another (Applicant) (Environment and Land Miscellaneous Application E055 of 2021) [2023] KEELC 19237 (KLR) (26 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19237 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E055 OF 2021
A NYUKURI, J
JULY 26, 2023**

BETWEEN

CONSTANCE NZISA KITUA PLAINTIFF

AND

SYOKIMAU BRIGHT HOMES LTD DEFENDANT

AND

WILSON MUNGUTI APPLICANT

CHARLES MBITHI APPLICANT

RULING

1. Before court is Notice of Motion dated 10th September 2021 filed by the Applicants and the Preliminary Objection dated 2nd November 2021 filed by the Respondent. In the application dated 10th September 2021, the Applicant sought the following orders;
 - a. Spent.
 - b. That the Applicants be granted leave to be heard on the application dated 10/09/2021 during the current court's vacation.
 - c. That this Honourable Court do grant the Applicants herein leave to appeal against the entire judgment of Machakos CMCC No. 744 of 2014 delivered on 09/11/2017 and all consequential orders thereto out of time.
 - d. That this Honourable Court be pleased to issue an order of stay of execution of the judgment in Machakos CMCC No. 744 of 2014 delivered on 09/11/2017 and all consequential orders thereto pending the hearing and determination of the proceedings herein.



- e. That this Honourable Court do review, vary and set aside the ruling of the lower court in Machakos CMCC No. 744 of 2014 delivered on 08/07/2021 and all consequential orders thereto.
 - f. That warrants of arrest issued on 05/08/2019 against the Applicants herein in execution of the judgment in Machakos CMCC No. 744 of 2014 delivered on 09/11/2017 be lifted.
2. The application is supported by the grounds on its face as well as the affidavit sworn by Benjamin Nzei, counsel for the Applicants. He deposed that there is judgment in Machakos CMCC No. 744 of 2014 entered against the Defendant company on 9th November 2017 and that that suit was a test suit in regard to other ten suits. He stated that the Applicants were directors of the Defendant company in Machakos CMCC No. 744 of 2014 before that suit was filed but that they instituted the process of change of directorship and that they ceased holding office of director during the pendency of Machakos CMCC No. 744 of 2014.
 3. Mr. Nzei further deposed that the Applicants communicated to their advocates previously on record of the fact that they had ceased from being directors of the Defendant company, but that their former advocates misadvised them and failed to take the necessary action to show that they were no longer directors of Syokimau Bright Homes Limited. Further that the Applicants' advocates failed to inform, update and appraise or advise the Applicants of the actual status of the proceedings in Machakos CMCC No. 744 of 2014 and that it is only around 30th August 2019 that they became aware that the corporate veil had been lifted and that execution had been issued against them.
 4. He averred that the Applicant instructed a new counsel who filed an incompetent application dated 30th August 2019 which application was dismissed on the basis of a procedural technicality. That the court lifted the corporate veil of Syokimau Bright Homes Limited without engaging in fact finding and that the court ignored a system generated search showing that the Applicants were not directors of Syokimau Bright Homes Limited. He complained that the court in Machakos CMCC No. 744 of 2014 overstepped its mandate and that it failed to appreciate that the Applicants lacked capacity for execution proceedings to be issued against them. That the Applicants should not suffer consequences of actions, mistakes and oversight of their former advocates.
 5. Constance Nzisa Kitua, the Plaintiff/Respondent filed a replying affidavit sworn on 2nd November 2021 in opposition of the application. He deposed that the judgment sought to be appealed against was a money decree and that the application does not meet the threshold in Section 79G of the [Civil Procedure Act](#) and Order 42 Rule 6 of the Civil Procedure Rules.
 6. He stated that the Applicants were at all material times aware of the existence of the judgment from the time it was delivered on 9th November 2012 and that therefore the application has been brought after inordinate delay. That the Applicants sought to review the judgment vide an application dated 30th September 2019 which application was dismissed for want of merit.
 7. He averred that the Applicants' accusation of mistakes, oversight and misdoings on the part of their former advocate is baseless and if that were the case, the Appellant ought to invoke the legal mechanism for complaint against negligence and mischief of their previous advocates. He stated that he is not privy to the relationship of the Applicants and his advocates and therefore the same cannot form a basis of denying him from enjoying fruits of his judgment.
 8. The position taken by the Respondent was that no sufficient explanation for delay of four years had been given and that therefore the Applicants were guilty of laches. Further that the allegations that the Applicants ceased to be directors of Syokimau Bright Homes Limited are untrue and misleading as the



Applicants have been filing suits as directors of the Defendant company long after alleging ceasing to be directors. That if orders are granted, the same be on condition that the Applicants deposit the entire amount in the Respondent's advocates account as security.

9. In addition to the replying affidavit, the Plaintiff filed a Notice of Preliminary Objection dated 2nd November 2021 which stated as follows;

The Respondent will raise a preliminary objection at the hearing of the application herein on the grounds that this court lacks the jurisdiction to hear and determine this matter.

10. The application was canvassed by way of written submissions. On record are the Applicants' submissions dated 10th May 2022 and the Respondent's submissions dated 4th May 2022, both of which this court has considered.

Analysis and Determination

11. I have carefully considered the application, the replying affidavit as well as the preliminary objection and submissions. In my considered view, the issues that arise for determination are;

- a. Whether the preliminary objection is a proper preliminary objection.
- b. Whether the preliminary objection is merited.
- c. Whether the Applicants deserve the orders sought.

12. A preliminary objection is a pure point of law raised in regard to the pleadings filed, without recourse to evidence. The basis being that a preliminary objection is based on undisputed facts. In the case of *Mukisa Biscuits Manufacturing Co. Ltd v. West End Distributors* [1969] EA 696, the court described a preliminary objection as follows;

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 off the suit. Example are an objection to the jurisdiction of the court or a plea for limitation or a submission that the parties are bound by a contract giving rise to the suit to refer the dispute to arbitration.

In the same case, Sir Charles Newbold P. stated as follows;

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of Preliminary Objections does nothing but unnecessarily increase costs and on occasion confuse the issue, and this improper practice should stop.

13. Therefore a preliminary objection ought to be a pure point of law on the presumption that the facts upon which the objection is raised are not in dispute. A preliminary objection must be specific in respect of the point of law raised and the same ought not be vague.

14. I have considered the preliminary objection raised herein. All that the Respondent states is that this court lacks jurisdiction to determine this matter. The basis for challenge of jurisdiction is not disclosed in the preliminary objection and therefore the same is vague and in my view is not a proper preliminary objection for failure to disclose the pure point of law denoting want of jurisdiction. I therefore find and hold that the Respondent's preliminary objection is not a proper preliminary objection and the same is hereby dismissed.



15. As regards leave for the firm of Nzei & Company Advocates to be deemed to be properly on record representing the Applicants, I note that this suit was filed by the said firm. There is no law barring that firm from instituting suit on behalf of the Applicants and there is no basis for them to obtain leave to represent the Applicants. The prayer for leave for the firm of Nzei Advocates to come on record for the Applicants is superfluous. I say so because order 9 rule 9 of the Civil Procedure Rules upon which that prayer is based, requires that where a judgment has been entered where a party had an advocate but intends either to act in person or instruct a new advocate, he or she can only do so with leave of the court. In this suit, there is no judgment and therefore the requirement under order 9 rule 9 of the Civil Procedure Rules is not applicable in the circumstances. I am aware that there is a judgment in Machakos CMCC No. 744 of 2014, but that suit is not this suit and therefore it is in that suit that counsel may be required to obtain the court's leave if they intend to act for any of the parties who was previously represented. In the premises, I hold and find that the firm of Nzei & Company Advocates is properly on record for the Applicants in this matter and no leave of court is required for them to be deemed to be representing the Applicants.

16. On the question of leave to appeal out of time, Section 79G of the Civil Procedure Act provides for the jurisdiction of this court to extend time for filing appeal as follows;

Time for filing appeals from subordinate courts 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. In considering whether or not to extend time, the court would normally consider if there is a good and sufficient cause. The court therefore in finding out whether there exists good and sufficient cause, will consider the length of the delay, the explanation or reason for delay, the degree of prejudice that may be suffered by the opposite party and whether the matter has any public importance.

18. In the case of Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 Others [2015] eKLR, the Supreme Court of Kenya held as follows;

.....it is clear that the discretion to extend time is indeed unfettered. It is incumbent upon the applicant to explain the reasons for delay in making the application for extension and whether there are any extenuating circumstances that can enable the court to exercise its discretion in favour of the applicant we derive the following as the underlying principles that a court should consider in exercising such discretion: Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court; a party who seeks extension of time has the burden of laying a basis to the satisfaction of the court; whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis; where there is a reasonable [cause] for the delay, the same should be expressed to the satisfaction of the court; whether there would be any prejudice suffered by the respondent, if extension is granted; whether the application has been brought without undue delay; and whether in certain cases, like election petitions, public interest should be a consideration for extending time.

In line with the foregoing case, it is this court's opinion that the question that must then be answered is whether the applicants have explained the reason for the delay to the satisfaction of this court.



19. Having considered the period of delay herein, I note that the judgment sought to be appealed against was delivered on 9th November 2017 while the application herein was filed on 10th September 2021 which is a period of two months shy of four years. The explanation given for this delay is that the Applicants' previous advocate failed to inform the Applicants of what the status of the matter was. They stated that they became aware of the judgment on 30th August 2019, which is two years before the application herein was filed.
20. While advocates may commit mistakes in the course of proceedings, the case belongs to a litigant and not the advocate. If the advocate failed to appraise the Applicants of the judgment in 2017, the Applicants have not explained or placed material before court to show their effort in obtaining information either from their advocate or the court on the status and progress of the case, in the period of three years and ten months. In that regard therefore, I am not satisfied with the reasons given by the Applicants for the inordinate delay herein. In the premises, the Applicants do not deserve the orders sought and therefore, their prayer for leave to appeal out of time lacks merit and is rejected.
21. The Applicants' prayer for stay of execution was sought pending hearing and determination of the proceedings herein. As this ruling puts an end to the proceedings herein, in my view the prayer for stay is spent.
22. The applicants sought for orders of review, varying and setting aside of the ruling of the lower court in Machakos CMCC No. 744 of 2014 delivered on 8th July 2021, and all consequential orders thereto. The jurisdiction of this court to grant orders of review is provided for in Section 80 of the [Civil Procedure Act](#) and order 45 rule 1 of the Civil Procedure Rules.

Section 80 of the [Civil Procedure Act](#) provides as follows;

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit

Order 45 rule 1 of the [Civil Procedure Rules](#) provides as follows;

Application for review of decree or order.

- (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.
- (2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such



appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the

Review.

23. From the wording of the above legal provisions, it is clear that an Applicant for review can only seek for orders of review to the court that passed the decree or order sought to be reviewed. In the instant matter, what the Applicants seeks is for this court to review the ruling of the lower court delivered on 8th July 2021. That ruling was not delivered by this court and therefore, I find and hold that this court lacks the jurisdiction to review the orders of the lower court.
24. On whether this court should grant orders to set aside the ruling of the lower court made on 8th July 2021, the basis for that prayer is that the lower court lifted the corporate veil without fact finding; that the court ignored a search showing the directors of Syokimau Bright Homes Limited and that the court failed to appreciate that the Applicants lacked capacity for execution proceedings to issue against them. In essence, the Applicants are challenging the decision of the lower court before this court by way of an application.
25. Can a party who is dissatisfied with the decision of a lower court on merit move this court by way of Miscellaneous Application and seek to set aside or vary such order? I do not think so. The issues raised by the Applicants are a challenge on the merits of the decision of the lower court. The decision sought to be set aside or varied was made pursuant to an application for review or setting aside. In my view, a party can only challenge an order made under Order 45 (for review) by way of appeal and not file an application by way of miscellaneous application. Therefore I find and hold that this court lacks jurisdiction to set aside orders of the lower court made on 8th July 2021, through a miscellaneous application as the only avenue to challenge those orders is through appeal as provided for in order 43 rule 1(x) which provision states that an appeal shall lie as of right from an order made under Order 45 (application for review).
26. On the question of whether the warrant of arrest issued against the Applicants should be lifted, I note that there is judgment entered by the lower court on 9th November 2017 against the Defendant's company and the corporate veil was lifted exposing the Applicants to execution. There is no allegation or evidence that the judgment and orders lifting the veil in Machakos CMCC No. 744 of 2014 were set aside. This therefore means that the execution process against the Applicants is a lawful process commenced pursuant to the judgment and orders lifting the corporate veil against the Applicants. That being the case, there is no justification or good cause given for lifting a lawful process.
27. For the above reasons, I find and hold that the application dated 10th September 2021 lacks merit and the same is hereby dismissed with costs to the Respondents.
28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 26TH DAY OF JULY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of:

Ms Kwamboka holding brief for Mr. Nzei for Applicant

No appearance for Respondent



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