



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO 87 OF 2019

CITY COUNCIL OF NAIROBI.....APPELLANT

VERSUS

IRENE WAIRIMU NJUGUNA.....RESPONDENT

RULING

1. The Respondent's Notice of Motion application dated and filed on 25th February 2019 sought the striking out of the Appeal herein. The said application was supported by an Affidavit that she swore on even date and the Supplementary Affidavit of her advocate, Michael Kamau Kinga, which was sworn on 21st June 2019 and filed on 25th June 2019.

2. She averred that the intention of the Appellant was to frustrate the payment of the decretal sum having successfully applied to have judgment in the lower court set aside whereafter the matter proceeded for full hearing and judgment entered again in her favour. It was her contention it never disclosed that it never filed an appearance in the lower court matter which was a liquidated claim and that it was at all material times aware of the delivery of judgment in her favour.

3. She added that it had also failed to respond and/or attend court for the hearing of an application for review of the judgment, which was allowed as it was unopposed and that it had also failed to comply with the timelines of filing a response to her present application which showed that it was not keen on prosecuting the Appeal herein. She thus urged this court to allow her application as prayed.

4. In opposition to the said application, on 10th June 2019, Francis Andrew Moriasi, the Appellant's advocate, swore a Replying Affidavit on behalf of the Appellant herein. The same was filed on even date.

5. The Appellant termed the Respondent's present application as frivolous, vexatious, bad in law and an abuse of the court process. It was emphatic that it was never notified of the delivery of the judgment and by the time it was served with the Respondent's application seeking a review of the said judgment, the time within which it ought to have appealed against the said judgment had expired. It added that it filed its Memorandum of Appeal on 18th February 2019 as the thirtieth (30th) day fell on a Saturday.

6. It stated that it participated in the lower court matter and raised pertinent issues but that the Trial Court failed to appreciate the same. It averred that the Trial Court could not have pronounced itself on a claim for general damages, the same having been withdrawn by the Respondent herein. It averred that she would not suffer any prejudice if it prosecuted its Appeal and thus urged this court to dismiss the present application.

7. Only the Respondent filed Written Submissions. She submitted that the Appeal herein had no merit and was filed out of time. She argued that it is trite law that litigation must come to an end and that a successful litigant must reap the fruits of her judgment. She relied on the cases of **In re Estate of Joseph Ololo Sewe [2019] eKLR** and **Patrick Kiruja Kithinji vs Victor Mugira Marete [2015] eKLR** in support of her application. However, she did not elucidate how the said cases were relevant to the circumstances of her case. The Appellant indicated that it would only rely on its aforesaid Replying Affidavit.

8. Section 79 G of the Civil Procedure Act Cap 21 (Laws of Kenya) provides as follows:-

“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 court of the decree or order:

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

9. The court noted that the Judgment the Appellant wished to appeal from was delivered on 15th January 2019. It had until 14th February

2019 to file its Memorandum of Appeal. That fell on a Thursday. It was therefore not correct that the thirty (30) days expired on 16th January 2019, a Saturday.

10. Without belabouring the point, this court was satisfied that the Memorandum of Appeal dated 15th February 2019, having been filed on 18th February 2019 was filed out of time and ought to be struck out. The Appellant is at liberty to make such appropriate application to safeguard its interests.

DISPOSITION

11. For the foregoing reasons, the upshot of this court's decision was that the Respondent's Notice of Motion application dated and filed on 25th February 2019 was merited and accordingly, the Appeal filed herein be and is hereby struck out for having been filed without leave of the court. The Respondent will have the costs of her application. As the Appeal has been dismissed *in limine*, each party will bear its own costs of the Appeal.

12. It is so ordered.

DATED and **DELIVERED** at **NAIROBI** this **30th** day of **June** 2020

J. KAMAU

JUDGE