



REPUBLIC OF KENYA



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Mulji v Kiminza t/a Autoland Auctioneer (Environment and Land Appeal 19 of 2019) [2023] KEELC 21491 (KLR) (15 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21491 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 19 OF 2019
SM KIBUNJA, J
NOVEMBER 15, 2023

BETWEEN

MISTRY VALJI NARAN MULJI APPELLANT

AND

EZEKIEL KIMINZA T/A AUTOLAND AUCTIONEER RESPONDENT

(Being an appeal arising from the Taxing Master's decision delivered on 9th December 2016 in High Court Misc. Civil Appl. No. 21 of 2016)

JUDGMENT

[On the Appeal and Respondent's Notice of Motion dated 19th February 2023]

1. The appellant, being dissatisfied by the decision of the Taxing Master of 6th December 2016 filed this appeal through the Memorandum of Appeal dated 16th February 2022 raising six (6) grounds that:
 - a. The learned Deputy Registrar erred in law in assessing the fees at Kshs.4,103,445.95.
 - b. The learned Deputy Registrar erred in law in assessing item 4 at Kshs.1,315,375.91 yet the item was the aggregate of items 1 and 4 of the Bill of Costs which had already been assessed.
 - c. The learned Deputy Registrar erred in law in assessing items which had not been supported by any evidence.
 - d. The learned Deputy Registrar erred in law in considering irrelevant matters which occasioned miscarriage of justice. The Taxing Master did not apply the principles of law in assessment of cost and thereby arrived at a wrong conclusion.
 - e. That the taxed costs were excessively high which amount xto unjust enrichment and violates the law.



The appellant therefore prays for the appeal to be allowed, taxing master's decision of 6th December 2016 in High Court Misc. Civil Appl. No. 21 of 2016 be set aside, the Bill of Costs thereof be taxed afresh by another Taxing Master and costs of the appeal be awarded to the appellant.

2. The appellant filed the Record of Appeal and Supplementary Record of Appeal dated the 3rd June 2022 and 19th July 2022 respectively. On the 26th September 2022, the court admitted the appeal and directed that it be canvassed through written submissions to be filed and exchanged within the given timelines.
3. The respondent filed the notice of motion dated the 19th February 2023 seeking for among others:
 - a. The ruling and order of the court made on the 10th February 2022 an all consequential orders and directions thereto be reviewed and or set aside.
 - b. The appeal herein be struck out and dismissed.
 - c. Costs of the application be provided for.
 - d. Any other order the court may deem fit to grant.

The application is premised on the four grounds on its face and supported by the affidavits of Thomas K'Bahati advocate sworn on the 19th February 2023 and 27th June 2023 inter alia deposing that the Appellant herein had earlier sought for leave to appeal out of time vide the chamber summons dated the 15th November 2017, but the application was dismissed with costs in the ruling of 1st February 2018; that the appellant filed the notice of motion dated 23rd September 2019 seeking for enlargement of time to file and serve the appeal that was granted vide the ruling delivered on 10th February 2022; that the ruling of 10th February 2022 should be reviewed and or set aside as there was an error and or mistake and or oversight on the part of the court in granting the leave when it had already denied the Appellant an earlier similar application in its ruling of 1st February 2018; that the application dated 23rd September 2019 under which the appellant was granted leave was *res judicata* as a similar one dated the 15th November 2017 seeking for similar order had been dismissed; that there was clear error or mistake on the part of the court in making the ruling of 10th February 2022 that was meant for the application dated the 6th June 2019, but incorporated the application dated the 23rd November 2019 that had not been set down for hearing, and that counsel did not realise the mistake during the taking of directions on the appeal until when preparing the submissions; that the Court of Appeal had merely stated in obiter dictum that the appellant was to pursue for leave from this court, which decision had already been made declining leave to appeal out of time.

4. The appellant opposed the application through the replying affidavit of Ketan Patel, a partner in the appellant's company, sworn on the 9th March 2023 in which he inter alia deposed that there are no grounds established for reviewing of the orders of 10th February 2022; that the leave granted was lawful, procedural and there was no error on the face of the record; that the application was in line with the earlier Court of Appeal direction, and the application is devoid of merit and should be dismissed with costs.
5. That when the application came up on the 23rd February 2023, the court directed that the application be canvassed together with the appeal. That further, the court gave directions on filing and exchanging replies and submissions within the prescribed timelines. The learned counsel for the appellant and respondent filed submissions on the appeal dated the 9th October 2022 and 19th April 2023 respectively. The learned counsel for the respondent and appellant also filed submissions on the application dated



the 29th June 2023 and 17th July 2023 respectively. The court has carefully considered the submissions detailed above that were filed by counsel, when preparing this judgement.

6. The following are the issues for the determinations by the court on both the application and the appeal:
 - a. Whether the respondent has established that there was an error in granting the appellant leave to file this appeal out of time
 - b. Whether the application dated 23rd September 2019 subject matter of the ruling of 10th February 2022 was *res judicata* the application dated the 15th November 2017 that was decided on the 1st February 2018.
 - c. Whether the appellant has established that the Taxing Master erred in law by allowing item 1 at Kshs.4,103,445.95 and whether the assessments were on the items complained of were based on evidence.
 - d. Whether the appellant has made a reasonable case for the Bill of Costs to be taxed afresh by another Taxing Master.
 - e. Who pays the costs in the application and appeal.
7. The court has carefully considered the grounds on the appeal, Record of Appeal and Supplementary Record of Appeal, the grounds and affidavit evidence in respect of the application, submissions by the learned counsel, superior courts decisions cited thereon and come to the following findings:
 - a. The ruling delivered on the 10th February 2022 that is at page 139 of the Record of Appeal shows clearly at paragraphs 1, 3, 6 to 9 that it was over the two applications dated the 6th June 2019 and 23rd September 2019. The application dated 6th June 2019 is at pages 62 to 90 of the Record of Appeal while that dated 23rd September 2019 is at pages 91 to 94 of the said Record of Appeal. The two applications were filed through Ms Khatib & Company Advocates for Mistry Valji Naran Mulji, the appellant herein. The ruling at paragraphs 6 and 8 is clear that the application dated the 6th June 2019 was without merit and was dismissed with costs. In respect of the application dated the 23rd September 2019, the court allowed it as seen at paragraphs 7 and 8 of the said ruling as follows:

“7. The application dated 23rd September is more in line with what the Court of Appeal prescribed for the applicant. This is now an application- to enlarge time for filing an appeal.it is said that there is an appeal filed on 7th June 2019 and the applicant wishes to have it deemed properly. I haven’t seen this memorandum of appeal for I cannot trace any in the file. Be that as it may, if indeed the applicant filed an appeal on 7th June 2019, I will enlarge time so that it is deemed to be filed within time. If nothing has been filed, then there is liberty to file and serve a memorandum of appeal within the next seven days. Costs of the application will nevertheless be to the respondent as the applicant ought to have filed his appeal in good time.

8. In summary the application dated the 6th June 2019 is dismissed with costs and the application dated 23rd September 2019 is allowed to the extent above.”



The respondent has through the notice of motion dated the 19th February 2023 sought for the ruling delivered on 10th February 2022 to be reviewed and or set aside for inter alia being granted in error, and or mistake or oversight as it dealt with the application dated the 23rd September 2019 that had not been set down for hearing or ruling and that the appellant's earlier application for similar prayers dated the 15th November 2017 had been dismissed vide the ruling of 1st February 2018. The respondent has annexed copies of the application dated the 15th November 2017 and the ruling delivered on the 1st February 2018 to the supporting affidavit sworn on the 19th February 2023.

- b. On the respondent's objection to the ruling dated the 10th February 2022 that it was only meant for the application dated the 6th June 2019 and not that dated the 23rd September 2019, I have perused the record and noted both parties were represented by counsel from the start. The record shows that the application dated the 6th June 2019 was coming up on the 24th September 2019, when counsel for the respondent informed the court that he had been served with another application dated the 23rd September 2023. The court then directed parties to negotiate and see whether they would come up with a settlement. There were subsequent mentions and on the 28th September 2020 the court directed the parties to file submissions after they failed to settle. I have perused the court file and noted the respondent had filed grounds of opposition dated the 20th September 2019 in respect of the chamber summons application dated 6th June 2019. There is no evidence of any reply having been filed by the respondent as required under Order 51 Rule 14 of Civil Procedure Rules in respect to the notice of motion dated the 23rd September 2019. For all intents and purposes, the application dated 23rd September 2019 was therefore unopposed and there was no error, mistake or oversight when the court addressed and determined it through the ruling of 10th February 2022. The decision of the court to pronounce itself on the unopposed application through the ruling of 10th February 2022 was in tandem with the duty of the court and overriding objective under Order 1A and 1B of the *Civil Procedure Act* chapter 21 of Laws of Kenya to facilitate the just, expeditious, proportionate and affordable resolution of the matter before the court. I therefore find no basis of reviewing and or setting aside the ruling of 10th February 2022 on that ground.
- c. On the ground of whether or not the application dated the 23rd September 2019 was *res judicata* that dated the 15th November 2017, and whether the ruling delivered on the 10th February 2022 granting leave should be reviewed in view of the earlier ruling declining leave dated the 1st February 2018, I have perused through the court file, the Record of Appeal and Supplementary Record of Appeal and I have not seen a copy of the application dated the 15th November 2017 or ruling delivered on the 1st February 2018. The only copies of the application dated 15th November 2017 and the ruling of 1st February 2018 in the court record are those attached to the supporting affidavit in respect to the notice of motion dated 19th February 2023. A look at the heading of these documents show clearly that they were in respect Mombasa ELC Misc. Appl. No. 21 of 2016 that was between the same parties in this appeal. There is however nothing on record to confirm that they were brought to the attention of this court when the hearing and determination of the applications dated the 6th June 2019 and 23rd September 2019 was taking place or when the appeal filed by the appellant herein, being Court of Appeal Civil Appeal No. 138 of 2018 was being heard and determined on the 28th May 2019. The ruling of



1st February 2018 has not been reviewed, set aside, varied or successfully appealed against and still remains a valid decision made by a court with jurisdiction on merit.

- d. That both parties herein had participated in the hearing of the application dated the 15th November 2017 in Mombasa ELC Misc. Appl. No. 21 of 2016 and could have easily brought the said application and ruling thereof to the attention of this court during the hearing of the applications dated the 6th June 2019 and 23rd September 2019, but none did. The respondent has indicated that the application dated the 15th November 2017 and the ruling of 1st February 2018 had escaped their notice until much later, and hence their application dated the 19th February 2023. The appellant's position is that their application dated the 23rd September 2019 was filed pursuant to the Court of Appeal direction that binds this court. I have perused the Court of Appeal judgment of 28th May 2019 in Civil Appeal No. 138 of 2018 that is attached to the affidavit sworn on the 12th March 2021 by the appellant and it is clear that it was about an appeal over this court's ruling delivered on the 6th November 2017 and did not make any finding in respect of the ruling of 1st February 2018 in Mombasa ELC Misc. Appl. No. 21 of 2016. That at paragraph 16 the Court of Appeal held as follows:

“ 16. For the foregoing reasons, this appeal succeeds in part to the extent that prayers 1 and 2 are allowed. The ruling and order made on 6th November 2018 is hereby set aside. The prayer for leave to appeal out of time (prayer No. 3) is not properly before the court and the same is hereby disallowed. The appellant is nonetheless at liberty to move the High Court for extension of time in the proper manner....”

My understanding of the foregoing edict of the Court of Appeal in relation to the issue of prayer for leave to file an appeal out of time is what was rejected for not being properly before the court. The court advised the appellant on proper forum to seek the prayer. That as the appellant had by then unsuccessfully sought such leave in Mombasa ELC Misc. Appl. No. 21 of 2016, his recourse was either to seek for review of the ruling dated 1st February 2018 under Order 45 Rule 1 of the Civil Procedure Rules before the court that made the ruling or file an appeal over the same to the Court of Appeal. The appellant instead filed the application dated the 23rd September 2019 that was determined through the ruling delivered on 10th February 2022 granting the leave.

- e. The respondent has raised objection to the application for leave to file appeal out of time dated 23rd September 2019 and the ruling granting the leave delivered on the 10th February 2022 on the grounds inter alia of being *res judicata* their previous application dated 15th November 2017 for similar orders that had been rejected through the ruling of 1st February 2018. Section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya provides as follows on *res judicata*:

“ 7. 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, litigating under the same title, in a court competent to try such suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”



There is no doubt that Mombasa ELC Misc. Appl. No. 21 of 2016 was between the same parties herein. It has not been disputed that the application dated 15th November 2017 filed therein was for leave to appeal the Deputy Registrar's decision of 8th December 2016, and that it was declined through the ruling delivered on the 1st February 2018 after hearing on merit. It is also apparent that prayers 2 and 3 of the notice of motion dated the 23rd September 2019 filed in the instant matter was for enlargement of time to file and serve appeal, and for the appeal filed on the 7th June 2019 to be deemed properly filed. This application was heard and allowed vide the ruling of 10th February 2022. I have perused the court record and noted that the respondent did not file a reply to that application and the parties did not disclose to the court about the related application and ruling in Mombasa ELC Misc. Appl. No. 21 of 2016.

- f. The undeniable fact is that had the court been informed when hearing the application dated 23rd September 2019 about the previous application dated the 15th November 2017 and the ruling of 1st February 2018 in Mombasa ELC Misc. Appl. No. 21 of 2016, that was between the same parties and over the same issue, I have no doubt the leave granted on the 10th February 2022 would not have been issued, as the matter was outrightly *res judicata*, and an abuse of the court process. Though the existence of the proceedings in Mombasa ELC Misc. Appl. No. 21 of 2016 have been brought to the attention of the court late, when the appeal herein has been filed, admitted, directions taken, and while the parties were in the process of filing and exchanging submissions, it is never late to do justice and or the right thing if for nothing else, for the sake of the court's integrity that would otherwise be exposed to ridicule through the existence of the two contradicting decisions of 1st February 2018 and 10th February 2022 that are on the same issue of leave to file appeal out of time. I therefore do find that the application dated the 23rd September 2019 was *res judicata* as a similar one on the same issue and between the same parties dated the 15th November 2017 had already been heard and decided on merit by a court of competent jurisdiction. It follows that the leave to file an appeal out of time that was given vide the ruling delivered on the 10th February 2022 was delivered in error, as the court had in its ruling delivered on 1st February 2018 in Mombasa ELC Misc. Appl. No. 21 of 2016 declined to grant leave. The respondent's application dated the 19th February 2023 therefore has merit.
 - g. That the upshot of the finding in (f) above is that the respondent has made a reasonable case for reviewing and setting aside the ruling delivered on the 10th February 2022, granting leave to file appeal out of time that had been applied for through the application dated the 23rd September 2019, that has been found to have been *res judicata* that dated the 15th November 2017 that had been decided vide the ruling of 1st February 2018. The setting aside of the ruling dated the 10th February 2022 through which the appeal rested, leads the court to the only one conclusion that the appeal herein has been filed outside the time prescribed by the law and without time having been enlarged or extended. The appeal is therefore for striking out.
 - h. That section 27 of the *Civil Procedure Act* prescribes that costs to follow the events unless otherwise for good cause directed by the judge. I find no good cause to deviate from the dictates of that provision of the statute.
8. From the foregoing conclusions, the court finds and orders as follows in respect of the application and appeal:



- a. That the respondent's notice of motion dated the 19th February 2023 and filed on the 21st February 2023 has merit and allowed in terms of prayers 3 and the ruling delivered on the 10th February 2022 is hereby reviewed and set aside.
- b. That the appeal herein having been filed outside the statutorily prescribed time and without leave to extend the time is hereby struck out with costs.

It is so ordered.

DATED AND VIRTUALLY DELIVERED THIS 15TH DAY OF NOVEMBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellant: No appearance

Respondent : Mr. K'Bahati

Wilson – Court Assistant.

S. M. KIBUNJA, J.

ELC Mombasa.

