



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
CIVIL APPEAL NO. 125 OF 1998

MICHEAL KIOKO NDUMBI.....APPLICANT

VERSUS

DANIEL MUTUNGA KATETA.....1ST RESPONDENT

MASAKU COUNTY COUNCIL.....2ND RESPONDENT

RULING

Introduction

The Appellant herein filed an appeal by way of a Memorandum of Appeal dated 29th October 1998 against a ruling delivered on 30th September 1998 by NN Njagi RM in Machakos SPMCC No. 752 of 1997. The Respondents subsequently filed an application in this Court by way of Chamber Summons dated 10th June 2005, seeking dismissal of the appeal by way for want of prosecution.

The said application was granted by this Court (Onyancha J.) in a ruling dated and delivered 14th February 2007. The learned Judge ordered as follows in the said ruling:

“For the above reasons this Court finds merit in the application to dismiss the appeal for want of prosecution. This application is accordingly allowed. The appeal is dismissed with costs to the Applicant/Defendant. The Court further orders that if the Lower Court suit No. 752 of 1997 is not heard and finally determined, on merit within 6 months, it shall as well stand dismissed with costs to the Defendant.”

I have found it necessary to give the above background for an understanding of the context in which the present application before this Court is brought.

The Application

The Appellant has now filed an application by way of a Notice of Motion dated 20th May 2013 in which he is seeking orders that the period of six (6) months given to the Appellant by this Court on 14/2/2007 to prosecute Machakos CMCC No. 752 of 1997 be enlarged by eighteen (18) months as from the date of such enlargement. The said application is supported by an affidavit sworn on 20th May 2013 by the Appellant.

The grounds for the application are that the lower court file, which had been forwarded to this Court for purposes of the appeal was not returned to the lower court's registry until after the expiry of the 6 months period given to prosecute the suit in the lower court, and that even after its return, the said file kept on disappearing for unknown reasons. Further, that the Respondent has filed an application in the lower court seeking an order to implementing this Court's orders dated 14/2/2007, and that the suit property, therein, which is plot No. 42 situated in Muumandu market, belongs to the Appellant and has been encroached on by the Respondent.

The Appellant in his relying affidavit further explained that he was unable to prosecute the appeal as a result of financial difficulties, and stated that he had finalized arrangements to demolish the old structures on the suit property and to put up new modern ones, and have obtained appropriate building plans in that respect. He attached a copy of letter from the 2nd Respondent as to his ownership of the plot and the approved building plans.

The Response

The application was opposed by the 1st Respondent in Grounds of Opposition filed in Court on 7th October 2013 of even date. The Respondent stated that this Court lacks the necessary jurisdiction to entertain the Appellant's application which is intended to re-open CMCC No. 752 of 1997, which stood dismissed as at 14th August 2007 pursuant to this Court's order given on 14th February 2007.

Further, that the said application is bad in law and incompetent as time may not be extended for proceedings with a non-existent suit and in any event the grounds for the extension sought are not valid. Lastly, it was stated that the failure to comply with this Court's order given on 14th February 2007 is not excusable, and the prayers sought by the Appellant are not in the interest of justice and are an abuse of the process of the court.

The 2nd Respondent did not file any response or participate at the hearing of the application.

The Issues and Determination

I have read and carefully considered the pleadings and submissions made by the parties herein. The issues for determination are firstly, whether this Court has jurisdiction to entertain the Appellant's application, and secondly if so, whether it should exercise its discretion to enlarge time in favour of the Appellant.

The Appellant's advocates, Nzei & Company Advocates, filed written submission dated 19th November 2013 on the application, wherein it was contended that the application was properly before this Court which has jurisdiction, as the order to fix the hearing in the lower Court was made by this Court, and the orders sought by the Appellant can therefore only be granted by this Court. Further, that it would be fair and in the interest of justice if the Appellant is afforded an opportunity to prosecute his suit before the lower Court. Reliance was placed in this regard on section 3A of the Civil Procedure Act and the decision in **Ngibuini vs Waithaka & 3 Others, (2004) e KLR.**

The 1st Respondent's Advocates F.M Mulwa did not file any submissions, although they indicated in the course of hearing of the application that the 1st Respondent had since died, and that they had not got any instructions for his substitution.

On the first issue, the question that needs to be answered is whether this Court can revisit its own concluded matter and make further orders thereon. This issue was the subject of the decision by the Court of Appeal in **Telkom Kenya Limited v John Ochanda (Suing On His Own Behalf and on Behalf Of 996 Former Employees of Telkom Kenya Limited), (2014) eKLR** where the said Court held as follows where orders were given for filing of further affidavits after judgment had been delivered in a case:

“It is apparent from the record that in ordering that certain materials be placed before him by way of affidavit long after judgment had been entered; the learned judge had the noblest

and best of intentions in trying to give effect to the judgment of Mwera J. In doing so, however, he effectively re-opened the trial with the result of attempting to amend the judgment, which was not available to him. He had himself earlier acknowledged that his hands were tied and also noted that he could not amend the judgment as had been sought. The court's only recourse would have been to review the judgment and having refused to do so, it was rendered *functus officio*.”

Functus officio is the principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon. This rule applies after a formal judgment and/or order has been drawn up, issued and entered, and for the High Court is only subject to three exceptions:

1. Where a judgment is set aside or varied pursuant to the provisions of Order 10 Rule 11 of the Civil Procedure Rules when it has been entered as a result of non-appearance, default of defence or failure of service.
2. Where the threshold for review of a judgment and/or order has been met under section 80 of the Civil Procedure Act and Order 45 Rule 1 of the Civil Procedure Rules.
3. Where a judgment and/or order is corrected or amended pursuant to the slip rule provided in section 99 of the Civil Procedure Act with respect to clerical or arithmetical mistakes in judgments or errors arising therein from any accidental slip or omission.

In the present application, a closer scrutiny of the prayers sought reveals that indeed what is sought is a re-writing and/or amendment of the judgment and/or order of Onyancha J. that was delivered on 14th February 2007, so as to replace the time within which the lower court case is to be decided. The Appellant did not seek to set aside, review or correct the said judgment and/or order of Onyancha J., which is therefore still on record. It was in this respect also held in **Ngugi vs Kinyanjui, [1989] KLR 146**, that the law will not allow any dispute between the same parties to be reopened while the judgment still remains on record.

This Court accordingly has no jurisdiction in the circumstances to interfere with the said judgment and/or order given by Onyancha J. on 14th February 2007 for the reasons given in the foregoing. The second issue for determination is consequently moot in light of this finding.

The upshot of the foregoing is that the application by the Appellant in the Notice of Motion dated 20th May 2013 is denied. The Appellant shall meet the costs of the said application.

Orders accordingly.

Dated, signed and delivered in open court at Machakos this 21st day of January 2016.

P. NYAMWEYA

JUDGE