



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MERU

HCCA NO. 126 OF 2009

LESIIT, J

MICHAEL KUNGU KIGIA.....APPELLANT

V E R S U S

KENYA NATIONAL UNION OF TEACHERS.....RESPONDENT

RULING

1. The Applicant has filed several applications. However, court directed that the application dated 26th July, 2013 be heard first.
2. The application dated 26th July, 2012 has been brought pursuant to Order 1 Rule 10(2), Order 9 rule (a), Order 43 Rule (1) (2) and (3) of the Civil Procedure Rules Section 63(i) and (e), section 3 and 3A of the Civil Procedure Act and Chapter 22 rule 4(4) of the Limitations of Actions Act. The Applicant seeks orders (a), (b), (c) and (d) which are:-
 - a. **That honourable court be pleased to hear this application exparte in the first instance.**
 - b. **That the honourable court be pleased to review the ruling issued on 13th July 2012 by S.R.M. In CMC 153 of 1997 as MERU TEACHERS HOUSE OR MERU TEACHERS HOUSE LTD is not parties in the suit and firm of Nyamu Nyaga & Co Advocates firm is improperly before court as there is no court record or order issued nor proper application made or filed.**
 - c. **That this honourable court do revoke the warrant issued on 29/7/2009 in Chief Magistrate Court in Civil 153/1997 as were erroneously issued, as there is Civil Appeal pending with interim order in force.**
3. The application is premised on the following ground on the face of the application.
 - a. **The claim is statute barred under Limitation Of Action Act, Cap 22 section 4 of Law of Kenya.**
 - b. **That no lawful application was filed to enjoin Meru Teachers House or Meru Teachers House Ltd Nor, firm of Nyamu Nyaga & Co Advocates Meru to come on record or issued order.**
 - c. **That no proper Application was filed in court before the warrants issued on 29.7.2011 as required by law.**
 - d. **There is no instruction letter from Kenya National Union of Teachers Meru Branch filed instructing firm of Nyamu Nyaga and Company Advocates to change the firm of Gatari Ringera & Co Advocates before defective file application on 14/11.2005 that is not**

- prosecuted.
- e. There is no Meru CMC No. 153 of 1997. Michael Kungu Kigia vs Meru Teachers House Ltd as alleged since summons issued on 16th January 2002 shows one defendant.
 - f. The Notice of change of Advocate and consents entered on is defective.
 - g. The Chief Magistrate lacks justification to issue the warrant issued on the 29/7/2011 as there is civil appeal pending with interim orders issued on 17th December, 2009 in force, varied and unchallenged as ruling issues is defective referred (unknown cases). The said claim of Ksh. 19625/= was settled by the advocated firm of B.S. Kenya & Co. Advocate on 8.12.2004 Gatari Ringera & Co. Advocates letter and letters dated 10.8.2006.
 - h. The Meru Teachers House Ltd owes Applicant Ksh.37,897.00 since judgment of tribunal case No. 7/2002 and further tribunal case No. 2/201 being enforced before Chief Magistrate Misc. No. 29.201 and hence B.G. Kariuki & Co Advocate letter Gatari Ringera & Co Advocate on 20.2.2004.
 - i. That Applicant owes no money to Meru Teachers House Ltd makes the issued warrants unlawful.
 - j. The salon Business of applicant is permanent destroyed due the irregular and unlawful procedures by Meru Teachers House Ltd and firm of Nyamu Nyaga & Co. Advocate after expiry of over 12 years.
 - k. It is only fair and just that the order sought be granted.
4. This Application has been made pursuant to the provisions of Order 43 of the CPR which stipulates as follows:

“1. (1) An appeal shall lie as of right from the following Orders and rules under the provisions of section 75 (1) (h) of the Act—

- (a) Order 1 (parties to suits);**
- (b) Order 2 (pleadings generally);**
- (c) Order 3 (frame and institution of suit);**
- (d) Order 4, rule 9 (return of plaint);**
- (e) Order 7, rule 12 (exclusion of counterclaim);**
- (f) Order 8 (amendment of pleadings);**
- (g) Order 10, rule 11 (setting aside judgment in default of appearance).**
- (h) Order 12, rule 7 (setting aside judgment or dismissal for nonattendance);**
- (i) Order 15, rules 10, 12 and 18 (sanctions against witnesses and parties in certain cases**
- (k) Order 22, rules 25, 57, 61 (3) and 73 (orders in execution);**
- (l) Order 23, rule 7 (trial of claim of third person in attachment of debts);**
- (m) Order 24, rules 5, 6 and 7 (legal representatives);**
- (n) Order 25, rule 5 (compromise of a suit);**
- (o) Order 26, rules 1 and 5(2) (security for costs);**
- (p) Order 27, rules 3 and 10 (payment into court and tender);**

(q) Order 28, rule 4 (orders in proceedings against the Government);

(r) Order 34 (interpleader);

(s) Order 36, rules 5, 7 and 10 (summary procedure);

(t) Order 39, rules 2, 4 and 6 (furnishing security);

(u) Order 40, rules 1, 2, 3,7 and 11 (temporary injunctions);

(v) Order 41, rules 1 and 4 (receivers);

(w) Order 42, rules 3, 14, 21, 23 and 35 (appeals);

(x) Order 45, rule 3 (application for review);

(y) Order 50, rule 6 (enlargement of time);

(z) Order 52, rules 4, 5, 6 and 7 (advocates);

(aa) Order 53 (judicial review orders).

(2) An appeal shall lie with the leave of the court from any other order made under these Rules.

(3) An applications for leave to appeal under section 75 of the Act shall from, either orally at the time when the order is made, or within fourteen days from the date of such order. both an order granting the relief applied for and an order refusing such relief.

2. The rules of Order 42 shall apply, so far as may be, to appeals from orders.

5. Order 43 is a general provision which gives a party the right to Appeal from orders made by the court pursuant to the various orders of the Civil Procedure Rules as listed under Rule 1. That order is not helpful to the Applicant because the matter under consideration is not the Appeal filed herein but an application for a review.
6. The instant Application is considered. There are many reasons why the application is defective and cannot lie. The Application is incompetent for the reasons that I will demonstrate in the ruling as set out herein below.
7. The Applicant is seeking a review of the ruling of the subordinate court in CMCC No. 153 of 1997 which was delivered on the 13th July 2012. It is trite law that review of either an order or a ruling or judgment or decree can only be reviewed by the court which made the order sought to be reviewed. Order 45 Rule 2 of CPR stipulates as follows:

“2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the judge who passed the decree, or made the order sought to be reviewed.

(2) If the judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other judge who is attached to that court at the time the application comes for hearing.

(3) If the judge who passed the decree or made the order is still attached to the court but

is precluded by absence or other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other judge as the Chief Justice may designate.”

8. It is clear from Order 45 rule 2 above that a party who has been aggrieved by an order can apply for a review to the Judicial Officer who made that order. In the absence of the Judicial Officer under circumstances stated under rule 2 then that application should be heard by a Judicial Officer of parallel jurisdiction. The Applicant has sought a review of a ruling made by the Chief Magistrate’s court before this court. The Application is incompetent for that reason. This application has been made within an appeal file which was filed in court on 18th November 2009 by way of a Memorandum of Appeal dated 17th November, 2009. The Appeal had been filed to challenge a judgment of a Chief Magistrate’s Court that was delivered in CMCC No. 153 of 1990 on the 5th November, 2009. An Appellant cannot use a case filed as an appeal against a judgment or ruling of the lower court to file applications delivered subsequent to the judgment or ruling appealed from. More importantly the Appellant cannot use an Appeal case file challenging a decision made in a specific case to file Applications relating to matters that took place in a different case file. The Applicant has used the Appeal case filed in respect of a judgment in CMCC 153 of 1997 to file an application to review a ruling made in CMCC No. 153 of 1990. The Application is incompetent since the Appellant should have filed a different Appeal altogether to challenge the decision of the lower court made in the different lower case. Even if the ruling sought to be reviewed in this application were made in the same lower court file the subject of this appeal, the applicant cannot file an application to review an order made on a date subsequent to the date of judgment in respect of which the appeal was filed.
9. It is trite law that in an application for review, the order ruling or judgment sought to be reviewed must be annexed to the application. This is settled law and practice and any one seeking a review of a decree or order of the court should attach a copy of that decree or order sought to be reviewed to enable the court be certain of what the Applicant was aggrieved with. The Applicant in this case did not attach the ruling sought to be reviewed to his application and is therefore cannot demonstrate to this court what it is which has aggrieved him and what it is that the court is expected to review.
10. The Applicant is seeking to review an order of a lower court within an appeal file lodged to challenge a judgment of the lower court which was passed long before the ruling sought to be reviewed. It is trite law that an application for review can only be made in the circumstances set out under order 45 rule 1 of the CPR which stipulates as follows:

“1. (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 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.”

11. It is clear from the above rule that an application for review can only be made where no appeal has been preferred. The Applicant made this application within an appeal file which contradicts the provisions of Order 45 Rule 1 cited above. That renders the Application incompetent.

12. Before I conclude this ruling I wish to point a most disturbing fact. This Appeal was filed on 18th November, 2009 challenging a decision of CM's court Meru made in a Civil Case No. 153 of 1990. The judgment challenged in this case was delivered on 5th November, 2009 that is over three years ago. Instead of the Applicant setting down his appeal for hearing he has filed no less than three applications. He has also filed numerous affidavits and other documents for instance grounds of opposition. All these applications have immensely contributed to the delay of hearing and disposal of this appeal and they border on an abuse of the process of the Court.
13. **I now direct that the Applicant/Appellant shall not file any other document in this case without the leave of the court.**
14. **For the reasons that are contained in this ruling the Applicant's Application dated 26th July, 2012 be and is hereby dismissed with costs.**
15. **No other application in this file will be heard, I direct that this Appeal should be set down for hearing within 60 days of today's date.**

DATED SIGNED AND DELIVERED AT MERU THIS 1st DAY OF AUGUST 2013.

J. LESIIT

JUDGE