



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 7 OF 2003

MUGURE MAHINDA.....APPELLANT
VERSUS
ALI MOHAMED FARAH.....RESPONDENT

RULING

By a Notice of Motion dated 24th February 2010 (*the application*) expressed to be brought under Order XLIV rule 1 and Order L rule 1 of the former Civil Procedure Rules, the Applicant sought the following orders -

- (1) that the order issued herein on 29th June 2009 dismissing the appeal be reviewed with a view to having it set aside,
- (2) that the costs of the application be provided for.

The application was expressed to be supported by the Affidavit of the Applicant sworn on 24th February 2010, and the Supplementary Affidavit of Duncan Mindo, the Applicant's counsel on record sworn on 7th February 2010, and the Supplementary Affidavit of the Applicant sworn and filed in February 2010.

In his Replying Affidavit sworn on 21st April 2010, and filed on the same day, the Respondent avers in paragraphs 3, 4, 8, 9, 10 and 11 that -

- (1) the application is bad in law, malicious, inept, ambiguous, scandalous and amounts to abuse of the court process (para 3),
- (2) the application is tailor made to frustrate the finalization of this matter and obstruct me from enjoying the fruits of my judgment (para 4),
- (3) the appeal herein was dismissed on 5th November 2007 for want of prosecution and that it was reinstated via a court order dated 12th May 2009 subject to specified conditions (para 8),
- (4) the applicant failed to comply with the specified conditions in the said court order and as a result the appeal was dismissed in compliance with the court order (para 9),
- (5) the Respondent stands to suffer prejudice if the applicants application is allowed as this suit was filed way back in 1999 and 11 years down the line the Respondent is yet to realize the fruits of the said litigation; (para 10), and
- (6) in the circumstances, the instant application lacks merit and should be dismissed with costs.

Following the Respondent's Replying Affidavit, the Respondent's counsel, filed a Notice of Preliminary Objection on the basis that the application herein is RES JUDICATA and an abuse of the process of court.

When this application was urged before me on 17th November 2010, Mr. Gekong'a learned counsel for the Applicant argued that the application was an abuse of the process of court and that the

issues raised had been determined.

The appeal was dismissed on 5th November 2007. The appellant moved the court to set aside the orders of dismissal, and on 12th May 2010, the orders of dismissal were set aside on condition that the appeal be prosecuted within 21 days. These orders were not complied with. The application for extension of time was dismissed on 29th June 2009 and that therefore, that aspect of the matter was spent. Thereafter the applicant went to sleep. The application for review was dismissed. This is a similar application to the one dismissed.

For those reasons Mr. Gekong'a urged the court to dismiss the application as it is an abuse of the process of court. It is an old matter of 1999, and urged the court to uphold the Preliminary Objection.

On the part of the applicant, Mr. Mindo, counsel for the applicant argued that an appeal does not preclude a review, and that this is what the applicant applied for review. Counsel urged that the Preliminary Objection does not lie, and that what has been urged had been argued was the main Motion, and urged that the main motion be argued on its merits.

The **locus classicus** case on Preliminary Objection, in East Africa is the case of **MUKISA BISCUIT MANUFACTURERS LTD vs. WESTEND DISTRIBUTORS [1969] E.A. 696**, where Sir Charles Newbold, the President of that court likened a Preliminary Objection to the old Anglo-French pleading called a "**demurrer**" - which while admitting the facts as stated in the opponent's pleading, denies that he is legally entitled to relief, and thus stops the action until the point is determined. In the words of the learned President of that court, at p. 701 -

"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 the 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."

I have considered the rival arguments set out above. The Preliminary Objection herein is premised upon two grounds, namely (i) *res judicata* and (ii) *abuse of process of court*. Both of these grounds are statutory in nature or have statutory underpinning.

Firstly, under Section 3A of the Civil Procedure Act, (*Cap. 21, Laws of Kenya*) the court's inherent jurisdiction may be invoked to make such orders as may either be necessary for the ends of justice, or to prevent abuse of the process of court.

Secondly section 7 of the said Act expressly prohibits any court to try any suit or issue in which the matter directly in issue has been directly and substantially in issue in a former suit between the same parties, or between the parties under whom, they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such suit has been subsequently raised and has been heard and finally determined by such court.

In law the principle of **res judicata** lies in the premise that it is in the public interest that there should be some end to litigation. In the words of Lord Guest in **CARL-ZEISS-STIFTUNG VS. RAYNER & KEELER, LTD** (No. 2) [1966]2 ALL E.R. 536, H. L. p. 564 -

"All adjudication like every piece of social engineering, is a compromise between a number of desiderata, not all of which are easily made consistent. There should, first, be the fullest and truest assessment of all relevant facts. There must, however, secondly be some protection of individual privacy and liberty. Thirdly and most relevant of all to this application, it is desirable that disputes within society should be brought to an end as soon as reasonably practical and should not be allowed to drag testeringly on for an indefinite period. That last principle finds expression in a maxim which English Law took over from Roman Law, it is in the public interest that there should be some end to litigation. The principle for example, applies in the doctrine which is known to lawyers as res judicata. In other words once there is a decision on a matter by a competent court, it is binding on all

courts of similar jurisdiction."

Similar sentiments were expressed in **EDWARDS VS. EDWARD** [1967]2 ALL E.R. 1032 per Sir Jocelyn Simon, P. at p 1033, and no doubt many times in our own courts.

An extended form of the same principle from Roman Law is expressed in the form of "**a thing adjudicated is received as the truth**" (*res judicata pro veritate accipitur*) a judicial decision is conclusive as between the parties, although other parties may not be bound.

On the other hand abuse of process of the court is a term generally applied to a proceeding which is wanting in **bona fides** and is frivolous, vexatious or oppressive, the ordinary remedy in such a case being to apply to strike out a pleading or stay proceedings, or to prevent further pleadings being taken without leave. Beyond this the court has jurisdiction to punish abuse of process by committal or attachment as contempt.

In this matter, the Preliminary Objection raises both questions of *res judicata* and abuse of the process of court. What are the facts?

The appeal herein was dismissed for non-prosecution on 5/11/2007. However by consent of the parties' counsel, the appeal was reinstated by order of court made on 12th May 2009. The order reinstating the appeal was however conditional upon the appeal being prosecuted within 30 days, and thrown away costs of Shs 20,000/= and auctioneers costs being paid within 21 days, and that failure to which the appeal would stand dismissed with costs, and that pending the hearing and determination of the appeal execution was stayed.

Those orders were not fully complied with and the appeal was formally dismissed on 29th June 2009. That is the order which the applicant seeks this court to review.

The applicant has in his affidavit in support of the application argued that counsel who held the brief on behalf of Mr. Mindo, counsel on record for the applicant, was unaware of the fact that the conditions for setting aside the order dismissing the appeal non-prosecution had been fulfilled, and in particular that the costs had been paid both to the Respondent's counsel and to the auctioneer. The applicant further argues that it was not possible to urge the appeal within the 30 days given because no dates were available from the registry within the said period. In addition, the applicant argued that the proceedings from the lower court were not available until much later.

I think that these are all valid reasons for not setting down the appeal for hearing within the period ordered by the court. What however is not explained, is the delay in filing the application for review since the formal dismissal of the appeal on 29th June 2009, and filing it, the application on 24th February 2010, that is to say some eight (8) months later. The conditions for review laid down in Order XLIV rule 1 are clear -

- (1) there is discovery of new and important matter or evidence which after the exercise of due diligence was not within the knowledge or would not be produced by the applicant (*aggrieved party*) when the decree was passed or order made, or
- (2) on account of some mistake or error apparent on the face of the record, or
- (3) for any other sufficient reason, and
- (4) the application must be made without unreasonable delay.

Although those grounds were not argued before me, as indeed the application before me was purely on the Preliminary Objection, reference to these grounds from the point of view of abuse of the court process is inevitable. To my mind therefore, the application herein ought to have been brought without unreasonable delay. There is no explanation for the delay of 8 months. This delay also offends the principle of **res judicata** that there ought to be a finality to litigation. To resuscitate matters which have been determined eight months later is clearly an afterthought and can only be regarded as pure abuse of the process of court.

For those reasons, I would uphold the Preliminary Objection herein, and dismiss with costs the applicant's Notice of Motion dated and filed on 29th February 2010.

There shall be orders accordingly.

Dated, signed and delivered at Nakuru this 6th day of May 2011

M. J. ANYARA EMUKULE
JUDGE