



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MERU

Civil Case 188 of 1996

BETWEEN

RAPHAEL WANJOHI 1ST PLAINTIFF/APPLICANT

PAUL MWANGI 2ND PLAINTIFF/APPLICANT

AND

PETER KIMONYE DEFENDANT/RESPONDENTS

RULING OF THE COURT

The application before me is the Chamber Summons dated 17.12.2004 brought under Order IXB Rules 4 and 8 of the Civil Procedure Rules (CPR) section 3A of the Civil Procedure Act the inherent jurisdiction of the court and all enabling provisions of the law for the following orders:-

1. That this Honourable Court be pleased to set aside the order dated 2nd December 2004 dismissing the application dated 17.9.2004 herein.
2. That the plaintiff be at liberty to set down this application for hearing on priority basis.
3. That costs of this application be in the cause.

The application is premised on four (4) grounds on the face thereof. There is also an affidavit sworn by Martin Machira Ngati advocate on 17.12.2004 in support of the application. Mr. Ngati depones that his failure to attend court on 2.12.2004 when the application dated 17.9.2004 came up for hearing was not deliberate. That he did not travel to Meru from Nairobi on the said date after he had confirmed with the deputy Registrar that 2.12.2004 was reserved for the hearing of criminal matters. He also deponed that this application was filed without undue delay and that the consequence of the advocate's failure to attend court on 2.12.2004 should not be visited upon the applicant herein.

A further supporting affidavit was made and sworn by one Stephen Njuguna, a process server in the firm of Njoroge Nyaga and Company Advocates who have the conduct of this matter on behalf of the plaintiffs/applicants. He deponed that he telephoned the Meru High Court Registry on 1.12.2004 when he was informed that civil matters would not be listed on 2.12.2004 when the plaintiff's application came up for hearing and that Mr. Ng'ati advocate acted on this same information when he did not turn up on 2.12.2004 to prosecute the application that was eventually dismissed for nonappearance. The application is opposed. A replying affidavit made and sworn by James Rimui advocate was filed on 18.1.2005. He has deponed that having fixed their application dated 17.9.2004 and served the respondents with a hearing notice for 2.12.2004, the applicants are not entitled to the orders sought mainly on the grounds that there was no good reason for the non-appearance by the applicant's advocates. Secondly that the main affidavit in support of the application is fatally defective and thirdly that the application dated 17.9.2004 was res

judicata in any event.

The brief facts giving rise to this application go back to the application dated 17.9.2004 and duly filed in court on 18.10.2004, brought under order 23 rules 3(1) and 8(2), Order 49 Rule 5 of the Civil Procedure Rules, Sections 3A and 95 of the Civil Procedure Act. The applicants sought the following orders:-

1. That this honourable court be pleased to revive the suit in favour of the 1st plaintiff/applicant herein.
2. That this honoroube court be pleased to enlarge time within which to substitute the deceased 1st plaintiff with the applicants herein FAITH WANGUI GATIMU and MARGARET WANJIKU MACHIRA.
3. That the costs of this application be in the cause.

The said application was premised on three grounds on the face thereof, the main one being that the suit by the 1st plaintiff/applicant has abated and that the substitution has not inadvertently been done within the stipulated time. When the application came up for hearing on 2.12.2004, neither the applicants nor their counsel were present in court and on the application of Mr. Rimui for the 2nd defendant/respondent, the application dated 17.9.2004 was dismissed for non-attendance. Costs were awarded to the 2nd defendant/respondent.

In an earlier application dated 2.10.2003, and filed in court on 7.10.2003, the applicants sought from the court an order to substitute FAITH WANGUI GATIMU as the 1st plaintiff herein for the benefit of the estate of Raphael Wanjohi Nyagah alias Nyaga Raphael Wanjohi (deceased) out of time. That application was canvassed on 11.12.2003 before my brother Hon Justice D.A. Onyancha and by the ruling dated 14.7.2004, the application was dismissed with costs to the respondents. I note that from the record, the applicants have not appealed against that ruling dismissing the application dated 2.10.2003.

The applicant's application is opposed. The main grounds of opposition as contained in the Replying Affidavit by one JAMES RIMUI, advocate made and sworn on 14.1.2005 are that the applicant's conduct is undeserving of the orders sought; that the application sought to be revived is res judicata and finally that the application is frivolous and vexatious and ought to be dismissed with costs to the 2nd respondent.

Mr. Rimui for the 2nd respondent argued that there is no good reason advanced by the applicants for their non-attendance at court on 2.12.2004 especially when it was the applicants who fixed the application for hearing and served a hearing notice upon the 2nd respondents, a copy of which was annexed to Mr. Rimui's affidavit and marked "JRI". Mr. Rimui submitted further that the applicants did not act with diligence.

Further, it was submitted on behalf of the 2nd respondent that the affidavit of Stephen Njuguna in support of the application was defective in that it offends the provisions of sections 9 and 10 of the Oaths and Statutory Declarations Act, Cap 15 Laws of Kenya, for there is no form of jurat marking the said affidavit as an exhibit. That the said affidavit of Stephen Njuguna is a mere piece of paper which should be expunged from the record. It was also Mr. Rimui's contention that even if the court were to reinstate the application dated 17.9.2004, such an order would be made in futility because the application is res judicata:- the same issues of substitution having been delivered by a court of competent jurisdiction on 14.7.2004.

Mr. Rimui also submitted that the applicant's application is an abuse of the process of court for the reason that having had their application dated 2.10.2003 dismissed, the applicants should have appealed against the ruling of 14.7.2004 instead of filing another application for similar orders. That the applicants should have either appealed or sought a review. Mr. Rimui also submitted that since the applicant's application lacks merit the court should not exercise its discretion in favour of the applicants out of sympathy.

Mr. Machira maintained throughout his submissions that the applicant's application is meritorious and that the applicants can come to the court on as many occasions and with as many applications as they

choose.

The issues for my determination are first whether the applicants have made out a case for reinstatement of their application dated 17.12.2004 and secondly whether the said application is res judicata. The learned counsels cited a total of twelve authorities between them in support of their respective positions in the matter. I commend each one of them for their valour.

I have carefully considered all the material that has been placed before me. I have also carefully considered submissions by counsel for both sides and considered the authorities cited by them. On the first point for determination, I do not think that the applicants have made out a case to persuade me to exercise my discretion in their favour.

I am aware that this court has wide and unfettered discretion but the same must be exercised judiciously. Under section 3A of the Civil Procedure Act, this court has also got unfettered discretion to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

In this case, the applicants fixed their application for hearing and proceeded to serve the respondents with the hearing notice. The 2nd respondent attended court on 2.12.2004 as required by the hearing notice served upon him by the applicants. It was the duty of the applicants to be present in court on 2.12.2004 to prosecute their application but instead of making arrangements to attend court, the applicants' advocates purported to excuse themselves by ringing the court registry to confirm whether or not their application would be listed for hearing on 2.12.2004. They allege they did not attend court on 2.12.2004 because the registry staff informed them that no civil matters would appear on the cause list for 2.12.2004. I have carefully read the affidavit made and sworn by Martin Machira Ngati advocate but have not come across any paragraph suggesting that he attempted to reach the 2nd respondent's advocates to inform him that the application would not be listed for hearing on 2.12.2004 nor have I found any paragraph suggesting that Mr. Machira or their office attempted to reach the civil registry on the morning of 2.12.2004 to confirm whether the position as allegedly explained to them on 1.12.2004 still obtained. It is my view that the conduct of the applicants and their advocates was wanting in every respect. They were not diligent. Litigants must be vigilant. The court would therefore not come to the aid of an indolent party.

Mr. Rimui for the 2nd respondent has attacked the affidavit of Stephen Njuguna for contravening the provisions of sections 9 and 10 of the Oaths and Statutory Declaration Act (Cap 15 Laws of Kenya). I have considered the said affidavit and find that the same is properly on record and marked as "NMNI". I find Mr. Rimui's submissions on this issue unsupported by the record.

The next issue is whether the application dated 17.9.2004 is res judicata. I have already alluded to the applicant's application dated 2.10.2003 in which the applicants sought an order of substitution of the deceased 1st plaintiff, Raphael Wanjohi. Mr. Rimui has submitted that the application of 2.10.2003, which was dismissed on 14.7.2004 finally decided the issue of substitution and that the applicant cannot and should not sneak back a similar application in the form of the application dated 17.9.2004.

Section 7 of the Civil Procedure Act provides as follows:-

"7. No court shall try any suit or issue in which the matter directly or substantially in issue in a former suit between the same parties or between 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 issue has been substantially raised and has been heard and finally decided by such court."

The subject matter of the application dated 2.10.2003 was for substituting Faith Wangui Gatimu as the 1st plaintiff for the benefit of the estate of Raphael Wanjohi Nyagah alias Nyagah Raphael Wanjohi (deceased) out of time. After the said application was dismissed by the court on 14.7.2004, the applicant neither appealed nor sought to have the dismissal order reviewed perhaps because of the comments made by the learned judge on the inadequacy of the applicant's application before him.

The principle of res judicata was dealt with at length in **MBURU KINYUA V GACHUNI TUTI (1975)**

KLR 69. At page 73 thereof, Madan J. in his dissenting judgment followed the dictum of Wigram V C in *Henderson v Henderson* (1843) 67 ER 313, 319. The dictum followed by Madan J was described by the privy council as the locus classicus on the aspect of res judicata in ***Yat Tung Investment Co. Ltd v Dao Heng Bank Ltd* (1975) A.C. 581**, at page 590 where the privy council expressed itself as thus:-

“.....where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction the court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence or even accident omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence might have brought forward at the time.”

After carefully considering all the facts surrounding this case and the ruling by Hon. Justice D.A. Onyancha on 14.7.2004, I am satisfied that the applicant's application dated 17.9.2004 is res judicata. A reading of the learned judge's ruling of 14.7.2004 shows clearly that if the applicants had exercised reasonable diligence at the time of filing of the application dated 2.10.2003 the issues that are the subject matter of the application dated 17.9.2004 would have been brought forward at that time. The following portion of the ruling is relevant for my purposes here:-

“..... The applicant herein did not specifically seek for such enlargement if I understand his prayers in this application. He sought only for substitution out of time. It can only be said that since he sought the substitution out of time by implication wanted the court to extend or enlarge the time. This is a poor way of pleading for a remedy where it is now trite in our law and practice that a court cannot give a remedy where the same is not pleaded and canvassed or urged. Assuming therefore that the applicant did not so boldly seek for such enlargement but nevertheless sought it, this court would point out that the same Order 23 Rule 8 canvassed above takes care of the situation.....”

One of the issues determined by the court in its ruling of 14.7.2004 was enlargement of time within which to substitute the deceased 1st plaintiff, Raphael Wanjohi. This is also an issue for determination in the application dated 17.9.2004 which the applicants are seeking to have reinstated for hearing. As submitted by Mr. Rimui for the 2nd respondent and rightly so in my view, it would be worthless for this court to order a reinstatement of the application dated 17.9.2004 as the same is indeed res judicata. I find no special circumstances in this case that would place the application of 17.9.2004 outside the plea of res judicata raised by Mr. Rimui for the 2nd respondent.

In ***Mburu Kinyua v Gacheni Tuti* (above)** at page 81, Law JA expressed himself as follows:-

“To sum up my view of this aspect of the case, an applicant whose application to set aside an ex-parte judgment has been rejected has a right of appeal. Alternatively he may apply for a review of the decision under section 80 of the Civil procedure Act. He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata as happened here. The position otherwise would be intolerable. A decree holder could be deprived of the benefits of his judgment by a succession of applications to set aside the judgment and judges would in effect be asked to sit on appeal over their previous decisions or those of other judges.....”

Although the facts in the ***Mburu Kinyua case* (above)** were somewhat different the applicable principles of the plea for res judicata set out therein are applicable in this case.

By the time the applicants filed their application dated 2.10.2003, they were fully aware of the fact that the suit by the deceased 1st plaintiff had abated and that to be able to move forward, they had to seek an order of the court to revive the same. Secondly it was abundantly clear then to the applicants that there was need to ask the court for enlargement of time within which to file substitution proceedings. These are the two issues that are the subject matter of the applicant's application dated 17.9.2004. In relying on the position as stated by law JA and on the decision in **Yat Tung Investment Co. Ltd Heng Bank Ltd (above)** the plea of res judicata applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment on, but to every point which properly belonged to the subject and which the parties exercising reasonable diligence might have brought forward at the time.

In the result, the application by the applicants also fails on that ground. Even if I were to order reinstatement of the application dated 17.9./2004, the said application is res judicata by reason of the ruling of the court dated 14.7.2004. I dismiss the applicants' application in its entirety and award costs to the 2nd respondent.

It is so ordered.

Dated and delivered at Meru this 10th day of April 2005.

RUTH N. SITATI

Ag JUDGE