



**REPUBLIC OF KENYA**

**IN THE ELC COURT OF KENYA AT MIGORI**

**ELC CASE NO. 525 OF 2017**

**(Formerly Kisii HCC No. 303 of 2020 (O.S))**

**JOSHUA JAOKO OKETCH .....PLAINTIFF**

**versus**

**ERASTUS OPIYO OTIENO .....DEFENDANT**

**RULING**

1. At the outset, it is noted that the Deputy Registrar of this Honourable Court issued a notice by way of email on 23<sup>rd</sup> June 2021 at 3:28p.m to the parties concerning the present ruling.

2. The Ruling is in regard to an application by way of Notice of Motion dated 3<sup>rd</sup> October 2020 and filed in this court on 9<sup>th</sup> October 2020 pursuant to Order 50 Rules 3, 4 and 6 of the Civil Procedure Rules, 2010 and Articles 22(1), 23, 27(1), 48, 50(1) 159 and 165 of the Constitution of Kenya, 2010, among other provisions of the law. The plaintiff, **Joshua Jaoko Oketch (the applicant herein)** through the firm of Oguttu Mboya, Ochwal and partners, Advocates formerly, M/s Oguttu, Ochwangi, Ochwal and company Advocates, is seeking orders infra:

- a) The honourable court be pleased to extend and/or enlarge time within which the plaintiff/applicant herein can proceed to file and/or lodge a notice of appeal against the judgment and decree of the honourable court rendered on the 8<sup>th</sup> day of July 2020.**
- b) Consequent to prayer 1 hereinabove being granted, the plaintiff/applicant be granted liberty to file the intended notice of appeal within 7 days of the granting of leave or such shorter time as the honourable court, may deem fit, just and expedient.**
- c) The honourable court be pleased to grant and/or issue such further and/or other directions, as may be necessary, just and/or otherwise expedient, to facilitate the realization of the intended appeal to the honourable court of appeal.**
- d) Costs of this application be provided for and/or otherwise do abide the intended appeal.**
- e) Such further and/or other orders be made as the court may deem fit and expedient.**

3. The application is anchored on a 21 paragraphed supporting affidavit of the applicant sworn on even date and documents namely a copy of Deputy Registrar's Notice and a copy of Notice of Appeal marked as "JOO1" and "JOO2" respectively annexed thereto. Further, the same is based on grounds (a) to (bb) set out on its face and which I find superfluous to reproduce in this application.

4. In brief, the applicant complains, inter alia, that the Honourable Court failed to issue and serve notice for the delivery of Judgment which was rendered on 8<sup>th</sup> July 2020. That timelines for the filing of a Notice of Appeal from the impugned judgment has lapsed, hence requests to be afforded the requisite latitude to file and pursue the intended appeal.

5. The Defendant, **Erastus Opiyo Otieno (The respondent herein)** through M/S Omonde Kisera and Company Advocates, opposed the application by way of his two (2) paged replying affidavit sworn on 10<sup>th</sup> March, 2021 and duly filed in court on even date. He termed the application incompetent, falls out of the requisite threshold and amounts to an abuse of the process of this Honourable Court as a similar one has been filed before the Court of Appeal and heard on 11<sup>th</sup> March 2021.

6. That therefore, the applicant is in forum shopping. The Respondent also deposed that the applicant did not seek leave of this court to appeal against the judgment pursuant to Orders 43 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. That the Judiciary may be brought to an harassment, if this Honourable court proceeds to disposed of the instant application. He relied on copies of similar application and

notice filed before the Court of Appeal and marked as “OK-1” and “OK -2” respectively accompanying the affidavit.

7. On 11<sup>th</sup> February 2021, this Court ordered and directed that the application be argued by way of written submissions pursuant to **Order 5, Rule 16 of the Civil Procedure Rules, 2010 and Practice Direction Number 33 of this Court’s Practice Directions, 2014.** Accordingly, learned counsel for the applicant filed submissions dated 24<sup>th</sup> February, 2021 on 2<sup>nd</sup> March 2021 whilst learned counsel for the respondent filed submissions dated 10<sup>th</sup> March 2021 on even date.

8. In their submissions, learned counsel for the applicant provided the background of the case, identified twin issues for determination including whether the leave sought be granted and analysed the issues in favour of the applicant. To buttress the submissions, counsel referred to **Ngoso General Contractors Ltd =vs= Jacob Gichunge (2205) EKLR and Aviation Cargo Support Ltd =vs= St. Mark Freight Services Ltd (2014) EKLR,** among other authorities.

9. On his part, learned Counsel for the respondent submitted that the application is legally untenable, incompetent, bad in law and in curably defective. That the applicant is gambling with the Court of Appeal where a ruling on a similar application is awaited and this court in respect of the application. That the application be dismissed with costs to the respondent.

10. I have considered with care the entire application, the replying affidavit and the rival submission inclusive of all the authorities relied therein. So, is this application merited?

11. It is important to point out that on 8<sup>th</sup> July 2020 this court delivered judgment through email pursuant to Article 7(31(b) and 159 (2)(b) of the Constitution of Kenya, 2010, among other provisions of the Constitution and the law due to corona virus pandemic challenge as noted at the foot of the judgment. This followed the notice issued to the parties further to the orders and directions of this court given on 11<sup>th</sup> June, 2020 as discerned in court proceedings herein.

12. It is further noted that the applicant has filed and served a Notice of Appeal marked as “JOO2” attached to his affidavit in support of the application. Indeed, an appeal to the Court of Appeal is deemed to have been filed by dint of the said Notice.

13. Besides, the Respondent contends that the applicant filed a similar application namely Civil Application No. 147 of 2020 in the Court of Appeal at Kisumu seeking leave to file Notice of Appeal and Record of Appeal out of time against this court’s judgment in the matter. That the Court of Appeal will communicate the date of ruling on the same via email. The respondent fortified the contention by way of copies of an application and notice marked as “OK1” and “OK 2” respectively and annexed to his replying affidavit.

14. Articles 48 and 50(1) of the Constitution of Kenya, 2010 provide for the right to access to justice and fair hearing respectively. Both the applicant and the respondent are entitled to the said rights in this application and before the Court of Appeal.

15. Be that as it may, the Court of Appeal is currently seized of jurisdiction over this matter. Being aware of the definition of the term “jurisdiction” in the **Halsbury’s Laws of England 4<sup>th</sup> Edition Volume 9 at page 350,** this court cannot assume jurisdiction concerning the same matter as recognized in the case of **Desai v Warsama (1967)EA 351.**

16. In the case of **Samwel Kamau Macharia and another vs Kenya Commercial Bank Ltd and others (2012)eKLR,** the Supreme Court of the Republic of Kenya was emphatic:

**“...Thus, a court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.....”** (Emphasis added)

17. In **Judicial Commission of Inquiry into Goldenberg Affair and 3 others v Kilach (2003)KLR 249 at pages 265/266,** it was noted:

**“...The respondent filed this notice of motion in the High Court and the same is set for hearing.....It would not be right for the two matters to be heard simultaneously by the High Court and the Commission.....”**

18. As such, I subscribe to the celebrated case of **Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd (1989)KLR 1** where the late Nyarangi JA held in part:

**“...Jurisdiction is everything. Without it a court has no power to take one more step.....”**

19. In the foregone, I agree with the submissions of the respondent’s counsel. I cannot take one more step herein as this court is devoid of jurisdiction over the matter.

20. A fortiori, I decline to grant the applicant’s Notice of Motion dated 3<sup>rd</sup> October 2020 and filed in court on 9<sup>th</sup> October 2020. Costs of the application to abide the outcome of Civil Application number 147 of 2020 in the Court of Appeal at Kisumu.

Orders accordingly.

**DELIVERED, DATED AND SIGNED AT MIGORI THIS 28TH DAY OF JULY 2021**

**G.M.A. ONGONDO**

**JUDGE**

**In presence of :**

Non appearance for both parties

Tom Maurice – Court Assistant