



Ondiek v Deputy Registrar, High Court of Kenya at Eldoret & another (Miscellaneous Civil Application E113 of 2023) [2024] KEHC 5744 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5744 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
MISCELLANEOUS CIVIL APPLICATION E113 OF 2023
JRA WANANDA, J
MAY 15, 2024**

BETWEEN

THOMAS OWEN ONDIEK APPLICANT

AND

**DEPUTY REGISTRAR, HIGH COURT OF KENYA AT
ELDORET 1ST RESPONDENT**

NATIONAL BANK OF KENYA LIMITED 2ND RESPONDENT

RULING

1. This is yet another of the long series of actions filed by the same Applicant both in this Court and also in the Court of Appeal arising from the same facts and against the same party. Chronologically, the Applicant has to date filed the following successive actions:
 - i. Eldoret HCCC No. 115 of 1999 - Withdrawn.
 - ii. Eldoret HCCC No. 175 of 1999 - Dismissed.
 - iii. Court of Appeal Civil Appeal No. 182 of 2011 - Dismissed.
 - iv. Court of Appeal Civil Appeal No. 116 of 2012 - Dismissed.
 - v. Court of Appeal Civil Application No. 23 of 2016, - Dismissed.
 - vi. Court of Appeal Civil Application No. 23 of 2021 - Dismissed.
 - vii. Eldoret High Court Misc. Civil Application No. 113 of 2023 - Instant action.
2. On its part, the 2nd Respondent also successfully filed Court of Appeal Civil Appeal No. 116 of 2012 which overturned the Judgment entered in Eldoret HCCC No. 115 of 1999.



3. The Application now before Court is the Notice of Motion dated 9/06/2023 filed by the Applicant acting in person. Quoted verbatim, it seeks the following orders:
 - i. [.....] Spent.
 - ii. That the Court be pleased to make a finding whether a suspended Judge appearing before a tribunal still has any residual judicial power to draft, type, proofread and deliver his/her pending judgments.
 - iii. That this Court be pleased to make a finding on the validity or invalidity of the two 20 paged judgment papers by Lady Justice R. Nambuye and one of 25 pages of Lady Justice R.N. Nambuye.
 - iv. That this Court be pleased to issue an order directing the Deputy Registrar of the High Court of Kenya at Eldoret to supply the Applicant with a certified copy of the signed dated and delivered judgment by Hon. Justice R.N. Nambuye in Eldoret HCCC No. 115 of 1999.
 - v. There be no order on costs.
4. The Application is expressed to brought under the provisions of Section 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Article 159 of *the Constitution* and “all other enabling provisions of the law”. It is then based on the grounds set out on the face thereof and is supported by the Affidavit sworn by the Applicant, Thomas Owen Ondiek.
5. In the Affidavit, the Applicant deponed that he was the Plaintiff in Eldoret HCCC No. 115 of 1999 where the 2nd Respondent was the Defendant, that the matter was heard and Judgment delivered on 25/05/2004 by Hon. Justice Dulu on behalf of Hon. Lady Justice R.N. Nambuye (as she then was) whom on that very date, was appearing before a Tribunal in Nairobi investigating her judicial conduct, that it has come to the Applicant’s attention that there are three versions of the Judgment purporting to have been delivered on the same date, that one which is of 25 pages by Justice Nambuye certified on 14/05/2012 and the other two, of 20 pages each, certified on 17/06/2004 by the Deputy Registrar, that at the time of the purported certification (17/06/2004), the original Court file in Eldoret HCCC No. 115 of 1999 was in Nairobi and that Justice Nambuye was under suspension and prevented from executing any judicial function vide Kenya Gazette Notice No. 8829 of 11/12/2003.
6. The Applicant further deponed that the issue of Judgment in this matter was a subject of appeal in Eldoret Court of Appeal No. 116 of 2012 where the Court supplied the Defendant with the 25 page Judgment certified on 14/05/2012, that he has written letters to the Deputy Registrar seeking to be supplied with a copy of the true Judgment but to no avail, that it is not indicated in which open Court the two versions of the 20 page Judgment were read by Justice Dulu on 25/05/2004, that a Judge who is suspended for corruption, unethical practice and absence of integrity cannot draft a Judgment, have it dated, read and delivered even by any other Judge during the period of such suspension for such Judgment would be deemed to be tainted, that if by 14/05/2012 and if the Certificate of Delay by the Deputy Registrar handed over to the Defendant the 25 page Judgment was certified, then other versions are forgeries sneaked into the Court file by unscrupulous persons with interest in the matter.
7. He further deponed that on 17/06/2004 when the two versions of the 20 page Judgment were purported to have been certified, a letter of even date relating to the file in Eldoret HCCC No. 115 of 1999 created a skeleton file as the original file was required on 18/06/2004 in Nairobi by the Tribunal, however, the Judgment that Justice Nambuye found in the skeleton file while making a Ruling on 17/07/2004 pointed at a different version, that there is no evidence that one “Obiero” who is said to have held brief for one “Mbugua” requested for a copy of the Judgment or that the Court made such



an order, that the typist who typed the Judgment purported to create a non-existent request by the said “Obiero” and inserted a “court order” by Justice Dulu directing supply of a certified copy of the Judgment, and that a suspended Judge cannot continue to perform his/her judicial duties through a proxy in the name a fellow Judge as it happened in the reading of the Judgment herein.

8. It was the Applicant’s further contention that on 22/03/2004, the Applicant wrote a letter to the Editor of the Daily Nation giving reasons why Justice Nambuye needed to be given working leave to clear her cases and that the Tribunal route was unfair to her, that the Editor could not however publish the letter because the Tribunal was already sitting and it would be sub judice, that the Editor forwarded the letter to Justice Nambuye who not only relied on it at the Tribunal but also used the reasons given by the Applicant to conclude the Judgment, that therefore Justice Nambuye indeed drafted the Judgment after 22/03/2004 thus making it invalid, that the Judgment by the Tribunal dated 28/06/2004 shows that the Tribunal started the hearing of the case of Justice Nambuye on 30/01/2004 and therefore she had no legal authority to release the Judgment.
9. He added that the three versions of the Judgment bear a lot of fundamental differences in terms of word content, structure and layout, that the failure to sign the Judgment by Justice Nambuye was not an oversight but was because she knew that signing would invalidate it, that the Applicant believes that the Court stamp used in the certification of the Judgment was obtained irregularly and through corruption, that the Deputy Registrar gave the 2nd Respondent the Judgment certified on 14/05/2012 which they used to obtain an Appeal Judgment in its favour, that the two Judges, namely Justice Nambuye and Justice Dulu are available and this Court must independently reach them to elucidate on the mystery herein and that the Applicant stands to suffer irreparable loss and damage in the event that the orders sought are not granted.

Replying Affidavit

10. In opposing the Application, the 2nd Respondent, through Messrs Oraro & Co. Advocates, relied on the Replying Affidavit filed on 23/10/2023 and sworn by one Chrispus Maithya who described himself as the Ag. Head Commercial Transactions & Litigation at the 2nd Respondent. He termed the Application as being vexatious, frivolous and scandalous, and which ought to be summarily struck out for being an abuse of the Court process, that this Court has no authority or power to entertain the Application as it is functus officio for the reasons that this Court and the Court of Appeal have issued their determination on merits in respect of the matters raised, and that the Application seeks to re-open matters upon which final and conclusive decisions have been rendered by this Court and the Court of Appeal.
11. He gave a history of the case as being that as regards, Eldoret High Court Civil Suit No. 115 of 1999 (“the First Suit”), on 7/06/1999, the Applicant commenced proceedings for unlawful termination of employment, that the Court in an undated and unsigned Judgment delivered in the year 2004, made a finding that the 1st Respondent’s employment had been unlawfully terminated as a consequence whereof he was entitled to the terminal benefits under the contract of employment, that dissatisfied with the decision, the 2nd Respondent preferred an appeal, namely, Court of Appeal Civil Appeal No. 116 of 2012, which Appeal was allowed vide the Judgment delivered on 5/02/2016 on the basis that the Judgment delivered in the suit was neither dated nor signed, consequently, the Court of Appeal directed that the suit be remitted back to the High Court for retrial, that however, on 25/07/2016, the Applicant withdrew Eldoret Civil Suit No. 115 of 1999, and that in view thereof, the Orders sought in the instant Application are incompetent and cannot be issued.
12. In respect to prayers 2 and 3 of the Application, he deponed that that this Court cannot sit in review of its own Judgment (delivered in the year 2004) outside the confines of Section 80 of the [Civil Procedure](#)



Act and Order 45 of the Civil Procedure Rules, that in any event, the Judgment was overturned and as such cannot be the subject of review. With respect to prayer 4, he deponed that the Judgment, having been overturned by the Court of Appeal for being unsigned and undated, is of no effect, and for this reason, this Court cannot direct the 1st Respondent to issue a certified copy thereof as the issue of validity or otherwise of the Judgment is Res judicata, and that as such, this Court cannot adjudicate over this issue.

13. According to him, the Applicant is known for filing baseless proceedings both in the High Court and Court of Appeal regarding the same subject matter and between the same parties.
14. The deponent stated further that on 31/08/1991, less than 3 months after filing the first suit, the Applicant and one Eddah Amakobe Inguita (his wife) filed a fresh suit, namely, Eldoret High Court Civil Suit No. 175 of 1999 (“second suit”) wherein the 1st Respondent again made claim that his employment had been maliciously terminated, that vide the Judgment delivered on 2/06/2011, this second suit was dismissed upon the Court making a finding that the matter was Res Judicata as the claims relating to the termination of the Applicant’s employment were or were supposed to have been canvassed in the first suit.
15. The deponent further stated that dissatisfied with the aforementioned High Court decision, the Applicant and his wife preferred an appeal, namely, Court of Appeal Civil Appeal No. 182 of 2011 which was also dismissed vide the Judgment delivered on 29/10/2015 and wherein the Court affirmed the finding that the Applicant’s claims were indeed Res Judicata.
16. The deponent further contended that the Applicant and his wife then filed Court of Appeal Civil Application No. 23 of 2016 (“1st Review Application”) which was an application for review of the Judgment delivered in the second Appeal on 5/10/2017, which Application was again dismissed for the reason that the same was Res judicata.
17. He added that being dissatisfied with the outcome of the said 1st Review Application, the Applicant and his wife filed yet another Application, namely, Court of Appeal Civil Appeal No. 182 of 2011 (“2nd Review Application”) seeking to correct alleged errors in the Ruling in the 1st Review Application, and that in the Ruling delivered on 19/03/2021, the Court of Appeal again dismissed that 2nd Review Application.
18. He deponed further that as if that was not enough, the Applicant and his wife filed yet another Review application dated 8/10/2021 in Court of Appeal, Civil Application No. 23 of 2021 (“3rd Review Application”) which by the Ruling delivered on 16/12/2022, was also dismissed, that the Court of Appeal, noting with exasperation observed that this marked the 5th time that the Applicant and his wife were before it seeking relief in one form or another as against the same parties and regarding the same subject matter.
19. In view thereof, the deponent stated that it is clear that the Applicant and his wife have abused the Court process by instituting multiple suits on the same issue in several different Courts, that the instant Application is therefore a continuation of this behaviour which this Court should not countenance, that in every instance, the 2nd Respondent and the Central Bank of Kenya were forced to file responses, prepare submissions and make Court appearances to defend the same issues, which have already been determined several times both by the High Court and the Court of Appeal, that it is therefore evident from the foregoing that this Court is being invited to re-open a case that has been dealt with before with finality, and which invitation should firmly be rejected by this Court, that with regards to the allegations of judicial impropriety made by the Applicant in the Application and the Supporting Affidavit, this Court is not the forum in which such accusations are to be made as Parliament, in



its wisdom, established a separate body for purposes of ventilating such issues and that as such, this Court cannot entertain the Applicant's allegations, which are only designed to bring the Judiciary into disrepute.

20. In conclusion, he stated that the Application is repetitive, burdensome and unwarranted in a matter that is patently a cause of action that is conclusively devoid of merit and a waste of precious judicial time.

Hearing of the Application & Submissions filed

21. It was then agreed, and I directed, that the Application be canvassed by way of written Submissions. Pursuant thereto, the Applicant filed his Submissions on 13/10/2023 and the 2nd Respondent filed on 6/11/2023. The Applicant then, with leave of the Court, filed Supplementary Submissions on 20/11/2023.
22. I have perused the respective Submissions and observe that they basically reiterate the matters deponed in the respective Affidavits and already set out. I therefore "see" no necessity to again recount the same.

Determination

23. The issue for determination is "whether this Court should determine the validity or lack thereof of the Judgment delivered in Eldoret HCCC No. 115 of 1999 and whether therefore the consequential prayers made in the Application should be granted".
24. Having considered the current Application, the first matter that attracts my attention is the fact that the instant Application invites this Court to determine the validity of a Judgment delivered in Eldoret HCCC No. 115 of 1999 yet the instant Application has been filed in this different Cause, namely, Eldoret High Court Misc. Civil Application No. 113 of 2023. No explanation has been given by the Applicant for this obvious irregularity.
25. I however note that the 2nd Respondent has submitted that the Applicant withdrew the said Eldoret HCCC No. 115 of 1999 on 25/07/2016 in favour of a subsequent action, namely, Eldoret HCCC No. 175 of 1999 which was dismissed on the ground that it was Res Judicata. I also note that this fact has been confirmed in the several Court of Appeal decisions exhibited and which all arise from the same litigation as the present one. The Applicant has also not denied this fact. His withdrawal of Eldoret HCCC No. 115 of 1999 may therefore explain why he has filed this new Miscellaneous Cause.
26. From what I gather, and this is also confirmed in the Court of Appeal decisions exhibited, the finding of Res Judicata in Eldoret HCCC No. 175 of 1999 was on the basis that the claims raised therein ought to have been canvassed in the previously instituted but later withdrawn Eldoret HCCC No. 115 of 1999.
27. If therefore the Applicant withdrew Eldoret HCCC No. 115 of 1999, clearly that suit is now non-existent, it died a natural death and the Applicant cannot resuscitate it by moving this Court to make determinations on it. That suit, having been withdrawn, the file was closed and it does not exist anymore. This is a basic concept of law and although I am alive to the fact that the Applicant, being a lay person, may not appreciate the position in law, it is also the position that ignorance of the law is no defence. This Court cannot therefore bend the law to accommodate the Applicant simply because he is a lay person.
28. Regarding Eldoret High Court Civil Suit No. 115 of 1999 in which the Applicant sought reliefs against the 2nd Respondent's for the termination of his employment, the Court in an undated and unsigned Judgment delivered in the year 2004, partially allowed the suit and entered Judgment in favour of the Applicant. Aggrieved with that Judgment, the 2nd Respondent filed an appeal, namely,



- Court of Appeal Civil Appeal No. 116 of 2012. That Appeal was allowed vide the Judgment delivered on 5/02/2016 on the basis that the Judgment delivered in the said Eldoret Civil Suit No. 115 of 1999, having not been dated or signed, was a nullity. Consequently, the Court of Appeal remitted the suit back to the High Court for retrial. As aforesaid however, the Applicant withdrew the suit.
29. The Court of Appeal having therefore declared the unsigned and undated Judgment delivered in the said Eldoret Civil Suit No. 115 of 1999 a nullity, like the withdrawn suit, that Judgment also does not exist. It, too, is “as dead as a dodo”. In the circumstances, the prayer that this Court determines the validity or invalidity of that nullified Judgment does not and cannot arise. For the above reasons, this Court cannot also, as further prayed by the Applicant, direct the 1st Respondent (Deputy Registrar) to issue a certified copy of the nullified Judgment delivered in Eldoret Civil Suit No. 115 of 1999 when the Court of Appeal has already declared that Judgment invalid. This Court cannot therefore purport to adjudicate over or re-open that same issue.
 30. A Court of law cannot issue orders or make determinations in a vacuum. A Court is not an academic forum to mete out assumptive, theoretical or abstract verdicts. A Court of law only deals with live disputes based on actual facts. The moment the substratum of a suit ceases to exist (withdrawal of this suit in this case), there and then the Court ceases to continue being seized of the matter or to have any mandate thereon. Under such circumstances, the Court has nothing more to adjudicate.
 31. In any case, the Judgment (later declared a nullity) was delivered in the year 2004, 20 years ago. Regarding that Judgment, the Applicant now wants this Court to determine whether Hon. Lady Justice Nambuye (as she then was) who was said to have, at the material time, been suspended, during the so-called “judiciary radical surgery” process, could during such time, still write or deliver the Judgment or have it delivered by her brother, Justice Dulu, as she did. The Applicant does not offer any explanation on why it has taken him a whole 20 years to seek that determination. In the absence of any explanation given for the delay and no good reasons given on merits, even if that Judgment was still available for scrutiny, would it really serve justice to interfere with it after almost two decades? Definitely not.
 32. In the circumstances, and in view of such inordinate delay, even if the Judgment had not been declared a nullity, I would still have declined to entertain the Application. In any event, the Judgment having been declared a nullity, of what use or benefit would it to be make a determination of such nature? Of what assistance would it be to the Applicant? None.
 33. Before I pen off, I wish to draw the Applicant’s attention to Section 2(1) of the *Vexatious Proceedings Act*. That provision empowers the Court, if satisfied that a person has habitually and persistently and without reasonable grounds instituted what the Act terms “vexatious proceedings”, to make an order declaring that person to be such “vexatious litigant”. Section 3 thereof then provides as follows:

“No suit shall, except with leave of the High Court or of a judge thereof, be instituted by or on behalf of a vexatious litigant in any Court, and such leave shall not be given unless the Court or the judge is satisfied that the suit is not an abuse of the process of the court and that there is a prima facie ground for the suit.”
 34. From the background, history and chronology of events in these matters, it is evident that despite both the Court of Appeal and also this Court having repeatedly declared the Applicant’s successive actions as breaching the Res Judicata rule, undeterred, the Applicant continues to insist on returning to this same Court with fresh actions every other time arising from or touching on the same matters, time and time again. I must caution the Applicant that he is now treading on dangerous grounds and should he persist with filing such unmeritorious actions based on the same facts and against the same parties as he



has habitually been doing, both before this Court and before the Court the Court of Appeal, he may soon find himself attracting the above provisions of the law against him.

35. The Applicant commenced his series of actions relating to the matters herein in the year 1999. Despite all the actions having failed, 25 years later, he is still attempting to re-open the same matters for determination. Litigation must come to an end and the Applicant should now find it in his heart to realize and accept that the litigation herein long came to an end the moment the said Eldoret HCCC No. 175 of 1999 was dismissed on the ground of being Res Judicata and which dismissal was upheld by the Court of Appeal, then the highest Court in Kenya. He should now let the matter rest, once and for all, and move on with his life.
36. In light of the above findings, it is clear that the Application cannot succeed. Accordingly, the Notice of Motion dated 9/06/2023 filed by the Applicant, is hereby dismissed with costs to the 2nd Respondent.

DELIVERED, DATED AND SIGNED AT ELDORET THIS 15TH DAY OF MAY 2024

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WANANDA J.R. ANURO

JUDGE

Delivered in the Presence of:

Applicant in person

N/A for Respondents

