



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO. 38 OF 2020

NATIONAL BANK OF KENYA..... APPELLANT

VERSUS

PAMELA O. OGUTARESPONDENT

[Arising out of Ruling of P.N. Gesora dated 01/07/2020 in Kisumu Chief Magistrate's Civil Case No. 323 of 2018

[FORMERLY HIGH COURT CIVIL CASE NO. 10 of 1997]

RULING

This Ruling is on the Preliminary Objection which was raised by the Respondent against the appeal herein. The grounds of the Preliminary Objection are as follows;

“1. The ‘purported appeal’ herein is bad in law, in light of appeal rules and express court orders which state that the appellant had 14 days of appeal on the judgement delivered on 18th day of June 2019 and the said appellant never appealed almost one and a half year down the line. No reason has been tendered for this. Attached herewith is a copy of the said judgement and decree for consideration.

2. The appellant opted for a review in Kisumu CM’s Civil Case 323 of 2018 (formerly Kisumu High Court Civil Case No. 10 of 1997) vide a notice of motion dated 15th of October, 2019

(5 months after the judgement), to which the court declined to review the said judgement and on the 1st day of July, 2020, the court dismissed the said application for review sought by the purported appellant herein.

The ‘purported’ appeal therefore as per the appellant’s Memorandum of Appeal herein by the appellant (dated 10th July, 2020) pertains to the ruling declining review and NOT the judgement delivered on the 18th day of June 2019 and decree dated 1st August, 2019 which is the proper judgement on record. Attached herewith is a copy of the said application for review which was dismissed on 01/07/2020 and which now informs the basis of the purported appeal herein.

3. The “appellant” is cleverly seeking to have a second bite at the cherry! Whereupon the pronouncement of judgement and after sensing indolence on its own part, the appellant applies for review in the same court, and after failing, is now purporting to lodge an appeal using the said dismissed motion in the High Court. Is the appellant allowed to have a second bite at the cherry after almost one and a half years?

4. The law envisions and at times allows an appeal out of time, but upon seeking leave; if the appellant seeks an appeal on the judgement dated 18th June, 2019 all they ought to do is seek leave to appeal out of time. The same has NOT been sought and this honourable court should NOT entertain the appeal whatsoever. The appellant simply seeks to mislead the court and this appeal should be dismissed with costs to the respondent.

5. In the light of section 7 of the Civil Procedure Act and Order 42 of the Civil Procedure Rules, the purported appeal is an abuse of the Court process.

6. In support of expeditious disposal of cases, case management and justly bringing an end to litigation, the matter has been in court for twenty four (24) years and concluded, but the ‘purported appeal’ only seeks to continue delaying this matter and deny the respondent herein (Pamela ogalo Oguta) her right to the enjoyment of judgement dated 18th June 2019 in her favour and quiet enjoyment of her property Kisumu/Konya/2354 as ordered by court and as enshrined in the Constitution of Kenya. Sadly, the appellant herein is a contemnor who has refused to discharge thesaid title and release the same to the respondent.

This informed and necessitated the filing of ELC Constitutional Petition No. 4 of 2020, which is still pending before the Hon. Justice B. Olao, as the contemnor continues to disregard an express court order while infringing on the constitutional rights of the respondent, continuously.

7. The contemnor/applicant if allowed to continue with these ping' pong' games in a court of law for 24 years, shall offend Section 5 of the Judicature Act, and this court ought to act and stamp its authority as well as the authority of subordinate courts.

8. The purported 'appeal' MUST NOT BE ENTERTAINED as the law does not envision a perenial/serial litigant having both the right of appeal after failing on the review. You cannot eat your cake and still have it!

1. The Preliminary Objection was canvassed by way of written submissions.
2. The Respondent submitted that the Appellant has not made out a case to warrant a stay of execution.
3. In my considered view, the submissions regarding the merits or otherwise of the application which was filed within the appeal herein, cannot be construed as being in advancement of the Preliminary Objection.
4. The celebrated judgment in **MUKISA BISCUIT MANUFACTURING CO. LTD. Vs WEST END DISTRIBUTORS LTD.** provided us with the definition of a Preliminary Objection, as follows;

“A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which is argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by contract giving rise to the suit, to refer the suit to arbitration.

.....

A Preliminary Objection is in the nature of what used to be a demurer.

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 had to be ascertained or if what is sought is the exercise of judicial discretion.”

5. In this case the Respondent asserted that no proper appeal had been preferred within the set timelines: That is because the Respondent believes that an appeal could only arise from the judgment dated 18th June 2019.
6. But the Appellant has stated that the appeal arises from the Ruling dated 1st July 2020.
7. In the circumstances, the Preliminary Objection was founded upon facts which are not consistent with the facts pleaded by the Appellant.
8. It therefore follows that the issues sought to be canvassed in this Preliminary Objection are not based on the assumption that the facts pleaded by the Appellant are correct.
9. In the circumstances, the court would first need to verify which set of facts was accurate, before delving into the substance of the Preliminary Objection. Accordingly, the matters being urged by the Respondent fail to meet the first requirement about what constitutes a Preliminary Objection.
10. The Respondent submitted that the Appellant;

“..... has not made out a case to

warrant the Court's exercise of

discretion in its favour or grant

orders sought.”

11. Through that submission, the Respondent is effectively delving into the realm of judicial discretion as opposed to a pure point of law, about which the court would have no discretion. By delving into the realm of judicial discretion, the Respondent has breached one of the requirements of what constitutes a Preliminary Objection.
12. The Respondent appears to have decided to put forward arguments in opposition to the application for stay of execution, instead of making out her Preliminary Objection.
13. In conclusion, I find that the Respondent's Preliminary Objection is not sustainable. Therefore, it is hereby rejected.

14. The Respondent will pay the costs of the Preliminary Objection, to the Appellant.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 8TH DAY OF MARCH 2021

FRED A. OCHIENG

JUDGE