



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISC. APPLICATION NO. 222 OF 2020

JOHN L.A. OSIEMO.....APPLICANT

-VERSUS-

KENYA COMMERCIAL BANK LIMITED....RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated 18<sup>th</sup> June, 2020 taken out by the applicant herein, in which he sought an order for the extension of time within which to file the Motion and a further order for leave to file an appeal out of time against the ruling delivered by Hon. D.A. Ocharo (Mr.) (Senior Resident Magistrate) on 19<sup>th</sup> September, 2017 in Milimani CMCC NO. 3554 OF 2016.
2. The Motion is supported by the grounds set out on its body and the facts indicated in the affidavit of the applicant.
3. The respondent opposed the Motion by filing the replying affidavit sworn by its Director-Legal Services, **Bonnie Okumu**, on 15<sup>th</sup> September, 2020.
4. The Motion was dispensed with through written submissions.
5. I have considered the grounds laid out on the body of the Motion; the facts deponed in the affidavits supporting and opposing the Motion; and the rival submissions plus the authorities cited therein.
6. A summary of the background of the matter according to the record is that the applicant instituted a suit against the respondent in Milimani CMCC NO. 3554 OF 2016 by way of the plaint dated 26<sup>th</sup> May, 2016 and sought for general and special damages arising out of the cause of action of breach of contract.
7. Subsequently, the respondent raised a preliminary objection arguing that the suit is time barred and which preliminary objection was upheld by the trial court and the suit was struck out vide the ruling delivered on 19<sup>th</sup> September, 2017.
8. The applicant then lodged High Court Civil Appeal No. 552 of 2017 (“the appeal”) to challenge the aforesaid ruling, by filing the memorandum of appeal dated 13<sup>th</sup> October, 2017. The respondent subsequently filed an application seeking to strike out the appeal on the basis that the applicant had not sought for and obtained leave of the trial court prior to lodging the appeal. That the appeal was consequently struck out by this court on 4<sup>th</sup> April, 2018.
9. Before I address the merits of the Motion, I must first analyze and determine two (2) preliminary issues which were raised by the respondent.
10. The first issue concerns whether the Motion is *res judicata*. In her replying affidavit, Bonnie Okumu states that the instant Motion is *res judicata* for the reason that this court made a determination on the issues arising therein in the appeal and that no appeal has been preferred against that determination. In reply, the applicant argues that the *res judicata* doctrine does not apply since the appeal was not heard or determined on merit.
11. The Court of Appeal in the case of **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR** offered the following interpretation on the legal term ‘*res judicata*’ in the manner hereunder:

“**Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it**

constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the Civil Procedure Act, 2010;

**“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of the claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”**

Thus, for the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;

(a) The suit or issue was directly and substantially in issue in the former suit.

(b) That former suit was between the same parties or parties under whom they or any of them claim.

(c) Those parties were litigating under the same title.

(d) The issue was heard and finally determined in the former suit.

(e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

12. From my study of the record, I have not come across anything to indicate that the issues arising in the present instance were raised and/or determined in the appeal and I do not therefore find the Motion to be *res judicata*.

13. The second preliminary issue has to do with whether this court had jurisdiction to hear and determine the instant Motion. The respondent is of the view that the applicant ought to have sought leave of the lower court in order to invoke the appellate jurisdiction of this court and hence the Motion is incompetent and fatally defective. On his part, the applicant states and submits that the denial of leave to appeal by the lower court does not bar him from seeking similar orders from this court.

14. It is clear that the Motion was brought under *inter alia*, Section 75 of the Civil Procedure Act, Cap. 21 Laws of Kenya (“the Act”) and Order 43, Rules 2 and 3 of the Civil Procedure Rules, 2010 (“the Rules”), which list instances where an appeal lies as of right and where a party ought to seek leave first.

15. Order 43, Rule 3 of the Rules in particular provides that applications for leave to appeal under section 75 of the Act shall in the first instance be made to the court whose order is being appealed against, while Section 75 (1) of the Act stipulates that leave may be sought from the court whose decision is being appealed against or the court to which the appeal is being lodged.

16. From my study of the material placed before me and the record, it is not in dispute that the applicant’s suit having been dismissed for being time barred, the applicant had no automatic right of appeal by law and was therefore required to seek leave of the court prior lodging any appeal against the decision of the trial court.

17. The record shows that upon lodging the appeal, the applicant filed the application dated 12<sup>th</sup> February, 2018 before the lower court and sought for leave to file an appeal out of time. It is the indication of the parties that the said application was dismissed by the lower court.

18. Following such dismissal and going by the provisions of Section 75(1) above, the applicant was therefore at liberty to invoke the jurisdiction of this court and to seek leave to appeal against the impugned ruling. In so finding, I am persuaded by the court’s rendition in the case of **Francis Mwanza Mulwa v Kanji Vagjani & 2 others [2019] eKLR** cited in the submissions by the applicant, thus:

**“It therefore follows that an application for leave to appeal to this Court from a decision of a Magistrate’s Court against which there is no automatic right of appeal ought to be made to the Magistrate’s Court either orally or within 14 days of the decision and where the application is disallowed the applicant is at liberty to make the same application before this Court. The second application, in my view is not an appeal and this Court in deciding such an application exercises an original jurisdiction. Therefore the applicant cannot be accused of forum shopping when he was merely complying with the law.”**

19. In the premises, I am satisfied that this court has jurisdiction to entertain the instant Motion.

20. On the merits thereof, specifically the order for extension of time to file the Motion, I will invoke the provisions of **Section 95** of the **Civil Procedure Act** and **Order 50, Rule 5** of the **Civil Procedure Rules**, which grant the courts powers to enlarge the time required for the performance of any act under the Rules even where such time has expired. Upon considering the circumstances and the explanation given by the applicant for the delay in bringing the Motion, I am satisfied that it would be in the interest of justice to extend the time for filing the Motion.

21. Concerning the second facet of the Motion, it is noteworthy that the appropriate prayer for consideration is that of leave to appeal and not for the extension of time within which to lodge an appeal, as indicated in the Motion.

22. The applicant is of the view that his appeal raises arguable grounds and has high chances of success. In reply, Bonnie Okumu states on

behalf of the respondent that the applicant has failed to demonstrate that he has an arguable appeal. These sentiments were echoed in the submissions of the respondent.

23. Upon my perusal of the memorandum of appeal filed in the appeal, I observed that the applicant is arguing that the trial court did not correctly consider his evidence and submissions and hence arrived at a wrong finding that the applicant's suit was statute barred. I am convinced that the issues raised in the appeal are arguable and it would be in the interest of justice for me to grant the applicant an opportunity to challenge the ruling accordingly. In any event, there is nothing on the record to indicate the prejudice that the respondent in the circumstances.

24. Consequently, I will allow the Motion dated 18<sup>th</sup> June, 2020 as prayed, thus giving rise to a grant of the following orders:

**a. High Court Civil Appeal No. 552 of 2017 is hereby reinstated.**

**b. Costs of the Motion shall abide the outcome of the appeal.**

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6<sup>TH</sup> DAY OF MAY, 2021**

**A. MBOGHOLI MSAGHA**

**JUDGE**

In the presence of:

No appearance for the Applicant

Mr. Sakiampa for the Respondent