



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT EMBU**

**MISC. APPLICATION NO. 13 OF 2020**

**JOSEPH GACHECHE KAMAU.....APPELLANT/APPLICANT**

**VERSUS**

**NJUE KARURIE.....RESPONDENT**

**RULING**

1. Before this court is an application dated 2.03.2020 filed under certificate of urgency and wherein the appellant/ applicant basically seeks that he be granted leave to file an appeal out of time and further prayed for the costs of the application to be in the cause.
2. The application is founded on the grounds on its face and further supported by the affidavit sworn by the applicant. A synopsis of the said application is that after the judgment was entered in Embu Principal Magistrate's Court Civil Suit No. 11 of 1992, the applicant filed Embu Civil Appeal No. 96 of 2010 and which was dismissed for want of prosecution. That the same was dismissed due to his former advocates on record delay in prosecuting the said appeal and his application to review the said (dismissal) orders was dismissed on 9.12.2019. Further that he has an arguable appeal with overwhelming chances of success and thus he should be allowed to appeal out of time as he stands to suffer prejudice if the application is not allowed whereas the respondent does not stand to suffer any prejudice.
3. The application is opposed by way of a replying affidavit sworn by the respondent herein and wherein he basically deposed that the judgment in the trial court was delivered in his favour and despite the applicant herein having filed an appeal, he failed to prosecute the said appeal and he (respondent) applied for dismissal of the said appeal for want of prosecution. However, the said application was withdrawn by consent on 3.10.2016 subject to the orders that the applicant herein do pay throw away costs which he has never paid.
4. That the appellant went to a slumber after the application was withdrawn as a result of which, the respondent instructed his advocates on record to apply for the dismissal of the appeal for want of prosecution and which application was allowed by the orders of 8.10.2018. Further that an application for the review of the said dismissal orders was dismissed on 9.12.2019 and the applicant did not file an appeal against the said orders.
5. He deposed further that it is not clear from the instant application which decision of this court the applicant is seeking to appeal against and thus the application is vague. Further that the instant application is aimed at further frustrating him from enjoying the fruits of his judgment and the same ought to be dismissed so as to allow him enjoy the same. Further that the applicant did not attach a copy of the draft memorandum of appeal so as to enable this court determine the arguability of the intended appeal and that the applicant did not explain the reasons for the delay in filing the intended appeal and thus the instant application is an afterthought. He deposed that the instant application is not only frivolous but also scandalous, vexatious and an abuse of the court process and the same ought to be dismissed with costs
6. The application was canvassed by way of written submissions and wherein each of the parties submitted in support of their rival positions.
7. I have indeed considered and pondered over the application herein, the replying affidavit and the rival submissions filed in this matter. It is my view that the main issue for determination is whether the applicant has made out a case warranting the grant of leave to appeal out of time.
8. It is not in dispute that the appellant herein filed an appeal being Embu High Court Civil Appeal No. 96 of 2010 by way of a memorandum of appeal dated 14.09.2010 which was filed in court on 17.09.2010. I have perused the record in Embu High Court Civil Appeal No. 96 of 2010 and I note that the applicant herein filed a record of appeal dated 8.09.2011 and filed in court on the same date. The applicant's advocate on record sought leave to file a supplementary record of appeal and which leave he was granted. However, he did not do so until 12.08.2017. But before the supplementary record of appeal was filed, the respondent herein filed an application dated 22.08.2016 seeking dismissal of the appeal and which appeal was opposed vide a replying affidavit filed in court on 29.09.2016. The said application was however withdrawn by consent vide the orders of 3.10.2016 by Hon F. Muchemi J.
9. The respondent proceeded to file a second application dated 28.03.2018 seeking dismissal of the appeal herein and which application was

opposed by the applicant vide a replying affidavit sworn on 31.05.2018 and filed in court on the same date. A supplementary affidavit sworn by Mr. Joe Kathungu an advocate of the High Court of Kenya acting for the applicant therein was filed on 13.06.2018. The court (Hon. F. Muchemi J) considered the application and proceeded to allow the same in a ruling delivered on 8.10.2018 and the appeal was dismissed.

10. Fast forward, the appellant herein filed an application dated 18.04.2019 seeking stay of execution of the orders of 8.10.2018 (dismissing the appeal) and the review and/ or setting aside of the said orders. The application was opposed by the respondent vide a replying affidavit sworn on 14.05.2019. In a ruling delivered on 9.12.2019 Hon. F. Muchemi J dismissed the said application with costs.

11. The reasons I have analysed the record as above is because the respondent deposed to the effect that it is not clear as to what ruling the applicant seeks leave to appeal against. I have indeed perused the application herein and the submissions and I note that the applicant herein did not indicate what judgment, ruling, order or decree he is seeking leave to appeal against. In the certificate of urgency in support of the application, M.N. Oonge an advocate of the High Court deposed that the reason of the urgency is that the respondent is in the process of executing the judgment in the lower court thereby rendering the intended appeal nugatory. In the application, the substantive prayer is that the applicant be granted leave to file an appeal out of time. From the reading of the grounds in support of the application, there is no indication as to what orders the appellant seeks leave to appeal against. Despite the respondent having deposed as to the applicant having not annexed a draft memorandum of appeal, the applicant did not find it fit to file a further affidavit annexing the same. The said draft memorandum in my view would have guided the court as to what orders the applicant is seeking to appeal against.

12. It is trite law that parties are bound by their pleadings and further that a court can only determine issues raised in the pleadings and evidence. The issues are either framed by the parties or the court can frame them from the pleadings and evidence on record. However, in the instant case, the pleadings are not clear so as to enable the court frame the issues.

13. However, as I have indicated above, the applicant's application dated 18.04.2019 seeking stay of execution of the orders of 8.10.2018 by Muchemi J was dismissed on 9.12.2019. The appeal having been dismissed, he cannot file another appeal from the same judgment and thus seek leave in that respect.

14. In the view of the foregoing, the application is frivolous and an abuse of the court process. The same is hereby dismissed with costs to the respondent.

**DELIVERED, DATED AND SIGNED AT EMBU THIS 22ND DAY OF SEPTEMBER, 2021.**

**L. NJUGUNA**

**JUDGE**

.....for the Applicant

.....for the Respondents