



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Kioko & another v Musyoki (Miscellaneous Application E004 of 2021)
[2021] KEHC 277 (KLR) (18 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MACHAKOS
MISCELLANEOUS APPLICATION E004 OF 2021**

MW MUIGAI, J

NOVEMBER 18, 2021

BETWEEN

PETER KIOKO 1ST APPLICANT

PETER GICHOVI 2ND APPLICANT

AND

ELIZABETH WANZA MUSYOKI RESPONDENT

RULING

1. The Plaintiff/Respondent filed suit against the Applicants in PMCC No 88 of 2019 at Kangundo Law Courts. The Trial Court entered judgment in favour of the Respondent against the Applicants for Kshs. 927,490/- with interest and costs.
2. By an application dated 18th January 2021 filed on 21st January 2021 it was heard and determined by this Court, Hon. D. K. Kemei J by the Ruling delivered on 2nd June 2021. The Applicants were allowed to file appeal outside the statutory period and the Court enlarged period for filing the appeal. The Applicants were to file and serve the memorandum of appeal within 14 days from the date thereof, but on the following conditions:
 - a. Stay of execution of judgment and decree in PMCC No 88 of 2019 is granted pending determination of the intended appeal on condition the Applicants pay half the decretal sums to the Respondent and the balance thereof to be deposited into an interest earning account in the joint names of advocates of the parties within 30 days from the date thereof failing which the stay shall lapse.

Application



3. The Applicants filed an application on 28th June 2021 and sought reinstatement of the orders granted by the Trial Judge Hon. D.K. Kemei on 2nd June 2021.
4. The grounds were that the Applicants complied with the conditions of stay of execution and filing appeal out of time but it was after the stated period of 30 days.
5. The applicants paid the Respondent's Counsel paid the ½ decretal amount of Kshs 544,310/- on 11th August 2021 and deposited other half of KShs. 544,310/- in an interest earning account in joint names of advocates for the parties on record.
6. The Applicants stated that the failure to comply with the said orders was not deliberate or inadvertent but due to financial constraints that were exacerbated by Corona Pandemic and lockdown [effects].
7. The Respondent filed Written Submissions on 6th October 2021 and opposed the application by Grounds of Opposition of 18th July 2021 and deposed that the Application was/is frivolous, incompetent and vexatious, bad in law, incurably defective and an abuse of the Court process, an afterthought and brought in bad faith and brought after inordinate delay. The Application is res judicata.

Submissions

8. The Applicants by Submissions filed, on Section 3A of CPA; inherent power of the Court to make such orders as maybe necessary for ends of justice.
9. The Applicants relied on Section 95 of CPA 2010 & Order 50 Rule 6 CPR 2010 on the Court's power to enlarge such time upon such terms as justice may require.
10. The Applicants relied on the following cases to fortify their position;
 - a. Board of Trustees of African Independent Pentecostal Church Of Africa Church vs Peter Mungai Kimani & 12 Others [2016]eKLR Aburili – J stated that it is trite that:-

“The power to enlarge or extend time for doing any act which time is fixed by the court can be exercised by the court in its discretion, even if that time has lapsed. The provisions of the law as cited above recognize that first, there must have original time fixed and which time has either expired or is about to expire. Being a matter of discretion for the court, in granting such enlargement of time, the court will consider the circumstances of each case, which vary from case to case. Some of factors to be considered include:-

 - i. Whether there has been indolence or unexplained delay on the part of the Applicant.
 - ii. Whether the applicant is guilty of abuse of the court process.
 - iii. Whether the enlargement will prejudice the defendant.
 - iv. Whether the denial of enlargement period will occasion prejudice to the applicant given the circumstances of the case.
 - v. Whether the enlargement is necessary for the effectual complete adjudication of the issues in controversy.
 - vi. Whether it is just and fair to enlarge time in the circumstances of the case”.



- b. Caltex Oil (K) Ltd vs Rono Civil Appeal/Application No 97/20089 (unreported) where the Court of Appeal said in part:

“However, the fact that a default clause has been imposed by a court does not necessarily deprive a court of its jurisdiction to extend time. As a general principle, where the court fixes time for doing a thing it retains the power to extend time for doing the act until it has made an order finally disposing of the proceedings before it. It seems that the main test is whether the court still remains in control of the order, notwithstanding that there has been default. That would necessarily depend on the true construction of the default clause”.

11. The Applicants averred that the Respondent would not be prejudiced by the reinstatement of the orders of 2nd June 2021 and timeframe for compliance enlarged as it would expedite the conclusion of the hearing and determination of the appeal.
12. On 30th June 2021, the Applicants application of 28th June 2021 herein was admitted and status quo was maintained and extended on 6th July 2021. On 27th July 2021, the Court gave directions that the application was to be canvassed vide filing and exchanging written submissions each party within 21 days.
13. The Respondent submitted that the applicant disobeyed the Court Order and relied on the following authorities;
- a) *Hunker Trading Co Ltd vs Elf Oil Kenya Ltd HCCA No 6 of 2010* provides
- “Disobedience of a court order that was intended for the same purposes being pursued by the applicant in this Court is a clear violation of the “O2 principle” as demonstrated above and we hereby invoke the power vested in us under section 3A to dismiss the application”
- c. See also; *Nicholas Kiptoo Arap Salat vs Independent Electoral & Boundaries Commission & Others (2014) eKLR* that held that extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court.
- d. *Katolo vs Charles Kaloki Maingi & Ann Njogu Musyoki Chris & Muthama HCCA 243 of 2014.*

Determination

14. The Court considered the application, grounds of opposition and written submissions. The issue for determination is whether the Court may reinstate the Court’s earlier orders of 2nd June 2021 and enlarge the time for compliance or declare the application res judicata and that the application an abuse of the Court process.
15. The Applicant complied with the condition that an appeal maybe filed out of time by filing the appeal within 14 days upon complying with the condition of paying the Respondent ½ the Judgment decree and ½ to be deposited in a joint interest earning account of the parties’ advocates on record within 30 days.
16. The Applicant complied with the conditions but outside of the stipulated time. The Respondent is in receipt of the ½ decretal amount whilst the other ½ is held in trust by the parties’ respective advocate awaiting the outcome of the appeal.



17. The Applicant complied with the Court order albeit out of/after the stipulated timeframe. The Applicant explained that it took time to comply and avail funds as the Insurance Company that relies on Insurance premiums from public service motor vehicles suffered financial constraints due to Corona pandemic and lockdown/curfew adverse economic effects. This Court takes judicial notice under Section 60 of Evidence Act which provides;

“Facts of which court shall take judicial notice

- (1) The courts shall take judicial notice of the following facts:-
- (m) The ordinary course of nature;
- (o) All matters of general or local notoriety;

Therefore the court takes jurisdiction of the Corvid -19 pandemic that commenced countrywide w.e.f March 2020 and necessitated countrywide closure/scaled down activities and/or businesses through lockdowns/curfew until they were lifted later in 2021. Consequently, the pandemic had adverse effect in the political, economic and social aspects of the society /community. In the circumstances, the Applicant’s application is reasonable and the explanation is plausible in the circumstances.

18. After all, The Respondent has obtained and benefits in that ½ decretal amount is paid to him and/or his advocate and thus partly enjoys the fruits of the judgment. Secondly, the balance is secured and held in trust for the Respondent awaiting the hearing and determination of the appeal. Thirdly, the compliance with conditional leave to file appeal out of time expedites the appeal process so as to end litigation. All these factors are to the advantage of the Respondent and therefore grant of the instant application does not prejudice or cause injustice to the Respondent.

19. The law pertaining to the doctrine of res judicata is captured under the provision of Section 7 of the Civil Procedure Act which provides as follows-

“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 them 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.”

20. It would be appropriate to conclude the issue of res judicata or issue of estoppel are embodied under Section 7 of the Civil Procedure Act. The principle of res judicata applies to bar subsequent proceedings when there has been adjudication by a court of competent and concurrent jurisdiction which conclusively determined the rights of the parties with regard to all or any matters in controversy.

21. The test to determine whether a matter is *res judicata* was well laid in the case of *DSV Silo –vs- The Owners of Sennar [1985] 2 All ER 104* and repeated in the Kenyan case of *Bernard Mugo Ndegwa –v- James Nderitu Githae and 2 others [2010]eKLR*. The applicant, alleging res judicata, must show that;

- (a) The matter in issue is identical in both suits,
- (b) That the parties in the suit are substantially the same,
- (c) There is a concurrence of jurisdiction of the court
- (d) That the subject matter is the same and finally,



(e) That there is a final determination as far as the previous decision is concerned.

22. The instant application of 28th June 2021 is on reinstatement of Court orders of 2nd June 2021 and enlargement of time for compliance. The Application of 18th January 2021 filed on 21st January 2021 sought leave to file appeal out of time, the judgment of the Trial Court in PMCC 88 of 2019 Kangundo Law Courts. Therefore, applying the doctrine of res judicata raised by Respondent, although the parties are the same, the matter in issue is not identical and there is no final determination of the issue in the previous decision. Res judicata would not appropriately apply as bar to the hearing and determination of the instant application.

Disposition

1. The application of 28th June 2021 seeking to reinstate terms and orders of this Court by Hon D. Kemei J of 2nd June 2021 are hereby reinstated forthwith and enlargement of time to comply with Court orders enlarged accordingly.
2. The Appeal is deemed as filed and directions for hearing of the Appeal shall be obtained on a date to be taken by parties in the Registry.
3. Each party shall bear its own costs.

DELIVERED SIGNED & DATED IN OPEN COURT ON 18TH NOVEMBER 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

IN THE PRESENCE OF:

No appearance - for Applicant

Ms Kamande holding brief for Mutunga for Respondent

Geoffrey - Court Assistant

