



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 7 OF 2014

JAMAL ISAPAAPPELLANT

VERSUS

SWALEH MUHSIN SHIGOG..... RESPONDENT

RULING NO. 2

1. The applicant through an application dated 18th January, 2017 brought under the provisions of sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all enabling provisions of the law prays for the following orders:-

(i) That the appeal against the respondent herein be dismissed with costs for want of prosecution;

(ii) That the costs of this application and the entire suit be awarded to the respondent.

2. The application is grounded on the affidavit of Swaleh Muhsin Shigog the respondent/applicant sworn on 18th January, 2017 and on the grounds in support of the application. The appellant/respondent filed a replying affidavit on 17th March, 2017 to oppose the application. He also filed grounds of opposition on the same date.

3. Mr. Mohammed, Learned Counsel for the applicant submitted that on 5th October, 2016, the appellant was ordered to fix the appeal for mention within 30 days. On 10th October, 2016 the applicant's Counsel wrote to M/s Mogaka Omwenga Advocates asking them to fix the appeal for mention. The respondent did not comply thus the present application. Counsel informed the court that it is important for litigation to come to an end. He further stated that the appeal was lodged on 7th February, 2014 and the reason being given is that the Magistrate's handwriting is illegible hence they were unable to prepare the Record of Appeal. It was contended that the delay is inexcusable and is causing the applicant financial loss. He prayed for the appeal to be dismissed with costs.

4. Mr. Nyabicha, Learned Counsel for the respondent stated that in compliance with the orders of 5th October, 2016 they sought a mention date from the registry through a letter dated 7th October, 2016. The letter was received on 13th October, 2016. They followed up with the registry and were notified that the file was not available. Counsel further stated that no one at the registry could read the handwriting of Hon. Gacheru and at one time the two files were before the Deputy Registrar.

5. Mr. Nyabicha argued that neither the respondent nor his Advocate have contributed to the delay herein

and that the respondent should be given time to be heard. He added that the respondent has been running a series of businesses in the applicant's premises and rent is being paid in advance as required. He prayed for a mention in a month's time so that they could look at the lower court file and construct a Record of Appeal and proceed on with the appeal.

6. Mr. Mohammed's rejoinder was that nowhere in the affidavit has it been said that the respondent has stayed in the applicant's premises for 20 years. He further stated that the letters attached to the replying affidavit were never served on them and that the respondent had rushed to court to follow up on the proceedings when they wrote to them.

The issue for determination are if the appeal should be dismissed for want of prosecution and if not, what recourse is available to the parties hereto.

7. This court delivered a ruling on a similar application on 5th October, 2016. Section 7 of the Civil Procedure Act 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 litigation 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.”

8. In the case of **Henderson vs Henderson** [1843] 67 ER 313, the court stated:-

“.....where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward, as part of the contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applied, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence might have brought forward at the time.” See also Bernard Mugo Ndegwa Vs James Nderitu Githae and 2 Others (2010) eKLR.

9. The Court in **Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others** [1996] eKLR laid out the pre-requisites that have to be met for a matter to be deemed as res judicata.

These are:-

- (a) A previous suit in which the same matter was in issue;
- (b) The parties are the same or litigating under the same title;
- (c) A competent court heard the matter in issue and determined; and
- (d) The issue has been raised once again in a fresh suit.

10. The doctrine of *res judicata* guards against repetitive litigation over the same matter. Having made a ruling in a similar matter previously in this suit, I hold that the application dated 18th January, 2017 is *res judicata* and I decline to issue the orders sought therein.

11. I will delve into the issue of the handwriting of the Hon. Gacheru. One thing that has remained constant in the two applications that have been filed by the applicant is the illegibility of the handwriting of the said Magistrate which has rendered the typing of the proceedings of the lower court impossible.

The memorandum of appeal herein was filed on 3rd February, 2014 and since then, the Record of Appeal has not been filed and served. The state of the handwritten proceedings is unlikely to change. This means that the appeal herein will remain unheard in perpetuity. Parties that come to court expect litigation to come to an end at one point or the other. This does not seem to be the case here. The court will end up with one mention after another which will serve no useful purpose.

12. Illegible lower court proceedings also means that even the Judge who will hear the appeal, if at all the proceedings will ever be typed, will never be able to decipher the handwritten proceedings, or even make a reference to them. Therefore, there will be uncertainty on whether or not the typed proceedings will be a proper reflection of the handwritten proceedings.

13. This being a first appeal, this court is under duty by virtue of the provisions of section 78 of the Civil Procedure Act to:-

- (a) Determine a case finally;
- (b) Remand a case;
- (c) Frame issues and refer them to trial;
- (d) Take additional evidence or require evidence to be taken; or
- (e) Order a new trial.

Circumstances may arise at appeal stage which may lead the court to order for a retrial. One such instance is as in this case where the lower court proceedings are said to be illegible.

14. Section 3A of the Civil Procedure Act confers this court with inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. The Court of Appeal in **Kenya Power & Lighting Company Ltd. vs Benzene Holdings Limited t/a Wyco paints** [2016] eKLR, stated that inherent jurisdiction is a residual; intrinsic authority which the court may resort to in order to put right that which would otherwise be an injustice. The court cited with approval from Halsbury's Laws of England, 4th Edition, Vol. 37 paragraph 14 as follows:-

“The jurisdiction of the court which is comprised with the term “inherent” is that which enables it to fulfil itself properly and effectively, as a Court of Law. The overriding feature of inherent jurisdiction of the Court is that it is part of procedural law, both Civil and Criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process ... in sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and has been defined as being the reserve or fund of powers, which the court may draw as necessary whenever it is just or equitable to do so, in particular to ensure the observance of due process of the law, to prevent improper vexation or oppression to do justice between the parties and to secure a fair trial between them.”

15. In the circumstances of this case, the only recourse available is for this court to invoke the powers conferred upon it by section 78 of the Civil Procedure Act and to exercise its inherent jurisdiction in order to address the perennial problem of illegibility of the lower court proceedings. I therefore order for a retrial in Mombasa Chief Magistrates Civil Case No. 2177 of 2012 before another Magistrate of competent jurisdiction, save for Hon. Gacheru. The said case shall be accorded priority hearing in the lower court. Each party shall bear its own costs.

DELIVERED, DATED and SIGNED at MOMBASA on this 11th day of May, 2017.

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Mohammed for the applicant

No appearance for the respondent

Mr. Oliver Musundi - Court Assistant