



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
MISC. APPLICATION NO. 14 OF 2017

MUGATHI MUTHITHI.....APPLICANT

- V E R S U S -

DAVID MWAI NDAMBURI.....1ST RESPONDENT

GEORGE KIBATA alias

GEORGE WERU TITUS KINYUA.....2ND RESPONDENT

J. B. MACHARIA.....3RD RESPONDENT

R U L I N G

Before me is the application dated 18/3/2017 brought under section 75(G) of the Civil Procedure Act.

The applicant seeks an order of leave to file his appeal out of time.

The application is supported by the grounds in his affidavit sworn on the same day.

He depones that there was a ruling that was entered against him on 15/2/17 and being dissatisfied has decided to lodge an appeal. He does not state the case from which he is appealing but has annexed copies of proceedings the draft memorandum of appeal. The proceedings are for **Karatina PMCC 114/2013. MUGATHI MUGITHI versus DAVID MWAI NDAMBURI, GEORGE KIBATA alias GEORGE WERU TITUS KINYUA and J.B MACAHARIA.**

The respondents through the 1st Respondent have filed a replying affidavit opposing the application pointing out that the applicant has filed more than 5 cases against them. They have annexed the complaints –

1. **Nyeri 343/2008 MUGATHI MUGITHI versus DAVID MWAI NDAMBURI, J.B MACHARIA, and GEORGE KIBATA sued as Chairman, Secretary and treasurer PLOT no. 8 GIAKAIBEI** which was marked as withdrawn on 8th June 2011

2. **Nyeri CMCC 192/2011 MUGATHI MUGITHI versus DAVID MWAI NDAMBURI, J.B MACAHIRA alias JOHN MACHARIA and GEORGE KIBATA alias GEORGE WERU TITUS KINYUA.**

3. **Nyeri CMCC 197/2011 MUGATHI MUGITHI versus DAVID MWAI NDAMBURI, J.B MACAHIRA alias JOHN MACHARIA and GEORGE KIBATA alias GEORGE WERU TITUS KINYUA;** which was dismissed with costs

4. Karatina PMCC 129/12 MUGATHI MUGITHI versus DAVID MWAI NDAMBURI, GEORGE KIBATA alias GEORGE WERU TITUS KINYUA and J.B MACHARIA alias JOHN MACHIRA.

5. Nyeri CMCC 133/12 MUGATHI MUGITHI versus DAVID MWAI NDAMBURI, GEORGE KIBATA alias GEORGE WERU TITUS KINYUA and J.B MACHARIA alias JOHN MACHIRA.

6. and now Karatina PMCC114/2013 MUGATHI MUGITHI versus DAVID MWAI NDAMBURI, GEORGE KIBATA alias GEORGE WERU TITUS KINYUA and J.B MACAHARIA.

In each of these suits the applicant who is the plaintiff and the respondents are the defendants. The cause of action in each is related to Plot no. 8 Giakaibei, and rents collected at Ksh 1500 from April 2007. He invariably seeks a permanent injunction against the respondents from collecting the rent, accounts of the rents and payment of the accrued rents up to the time of filing of each plaint.

Except for the suit that was withdrawn and the ones that was struck out, the applicant has never prosecuted any of all those suits to their logical conclusion.

On 15/2/17 the E. Michieka P.M. ruled

I have carefully looked at the pleadings. I note that the plaintiff had filed previous suits in Nyeri and Karatina Law courts. The same were dismissed for want of prosecution. It is not clear why the plaintiff failed to have them reinstated and instead chose to file the present suit. I am inclined to find the suit is res judicata and do hereby dismiss it with costs to the defendants.

Section 7 of the CPA clearly provides for what amounts to res judicata 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. (emphasis added).**

Without going into the merits of the intended appeal the magistrate was obviously in error. The mere fact that there are other suits which had been dismissed for want of prosecution did not render the suit by the applicant res judicata. That was why he could tell the applicant that he ought to have reinstated the other suits instead of filing a fresh one. And that is clearly because a suit dismissed for want of prosecution has not **been heard and finally decided by such court.** The applicant's complaint is that he ought to have been heard is valid. Hence this application to file an appeal out of time. He depones rightly that he was only late by a few days.

Section 79G of the CPA Cap 75 provides that Every appeal from a subordinate court to the High Court shall be filed within a period of thirty days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order:

Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.

While I recognize that the applicant has a right to an appeal, I have been alarmed by the fact that the applicant is over burdened with the weight of a multiplicity of suits against the same parties, on the same issues, and has also burdened the court processed with the same. Three of these suits have been dismissed in the lower court. Two are still pending. That is a fact this court cannot overlook; the applicant's trend of filing suits and not pursuing them to their logical conclusions.

I have perused the supporting affidavit and the affidavit of the respondents. There is evidence that the applicant has filed a least to 5 suits against the respondent while seeking the same orders. Except for the one of 343/2008 the others have been in violation of Order 4, rule 1 (f) of the CPR which provides the plaintiff shall contain among other particulars an averment that there is no other suit pending, and that there have been no previous proceedings, in any court between the plaintiff and the defendant over the same subject matter and that the cause of action relates to the plaintiff named in the plaintiff.

The applicant has consistently averred in the plaintiffs that there are no other suits pending yet that has not been the whole truth.

Section 3A. of the CPA provides for the inherent powers of court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court.

The applicant may have a cause of action but it cannot be protected by the filing of a multiplicity of cases. He has a right to access justice by not only having his day in court, but having access to a court and being able to freely file his cases. He has an obligation to prosecute those cases and not to abuse the same process through which he expects his rights to be protected. The court must guard against abuse of its process through pleadings which are vexatious.

The applicant does not deny that there are other suits pending in the lower court on the same issue i.e. Nyeri CMCC 133/12 and Karatina PMCC 129/12. This Court cannot be seen to encourage or condone the flagrant abuse of the court process. The applicant ought to proceed and decide which of these two suits that are still alive he should proceed with, and then proceed to deal with it to its logical conclusion.

In my view this application is not merited for as long as those other suits are still pending in the lower courts, each containing the silent untruth of non-disclosure of the existence of the other. The applicant ought to proceed with speed and withdraw one of them and prosecute the other. Hence, leave is not granted.

This application in my view has no merit and is dismissed with costs.

Right of Appeal explained.

Dated, Signed and delivered this 15th Day of June 2017

Teresia Matheka

Judge

In the presence of;

The Parties

Court Assistant Harriet