



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI

CIVIL APPEAL NO. 45 OF 1999

KARATINA MUNICIPAL COUNCIL.....1ST APPELLANT

THOMAS THINWA KAROKI.....2ND APPELLANT

VERSUS

KANYI KAROKI.....RESPONDENT

RULING

The respondent/applicant moved this Court by way of a Notice of Motion dated 18th July, 2014 seeking the following orders:

1. That the motion be certified urgent and be heard on priority basis;
2. That the appeal filed on 7th May, 1999 be struck out with costs because it is frivolous, vexatious, scandalous and an abuse of the process of this honourable court;
3. That the whole decretal amount be released to the respondent/applicant's counsel for onward transmission (apparently to his client);
4. That in the alternative to prayers 2 and 3 above, this Honourable Court be pleased to stay all proceedings in this matter pending the hearing and final determination of the intended appeal to the Supreme Court;
5. That the appellant/respondent be condemned to pay costs of this application.

The motion was initiated under **sections 79B, 79G of the Civil Procedure Act and Orders 2 (a)(b) and (d) and 51 rule 1 of the Civil Procedure Rules**; it was based on the grounds that there was an application pending in the Court of Appeal for leave to appeal to the Supreme Court against the Court of Appeal's judgment upholding the High Court's decision reinstating the appellant's appeal and dismissing the applicant's application seeking the release of the decretal sum apparently deposited in the parties' counsel's joint bank account; that the appeal was filed out of time; that there are no sufficient grounds in the appeal to overturn the lower court's decision; and in any event, the record of appeal is incomplete.

Counsel for the applicant, Mr Gacheche wa Miano swore the affidavit in support of the motion in which he basically reiterated the grounds upon which the motion is based.

The appellant/respondent's counsel, Mr Arphaxad Johnstone Kariuki, swore two affidavits in reply to the applicant's counsel's affidavit denying the applicant's counsel's allegations. In particular, counsel insisted

that his client's appeal was filed in time and that in any event the grievances raised by the counsel for the applicant have been heard and determined before.

When the motion came up for hearing on 17th November, 2014, Mr Gacheche informed the court that he was abandoning prayer 4 on the motion because it had been overtaken by events. Although counsel he did not state it, it was apparent from the appellant/respondent's counsel's further affidavit that indeed that prayer had been overtaken by events because the application that was pending in the Court of Appeal had since been dismissed.

In his submissions counsel for respondent/applicant did not say anything more than what was contained in his client's motion save to cite the decisions in **Supreme Court Petition No. 7 of 2014, Mary Wambui Munene versus Peter Gichuki King'ara & 2 Others and Iga versus Makerere University (1972)EA 65** in support of his case.

Counsel for the appellant/respondent submitted that the issues being raised by the respondent/applicant's counsel had been raised and resolved not only in this court but also in the Court of Appeal as well. He urged that the appeal had been timeously filed and admitted pursuant to the relevant rules of the Civil Procedure and that it was also meritorious. He added that the order admitting the appeal had never been challenged.

While responding to counsel for the appellant/respondent's submissions, counsel for the respondent/applicant argued that the only issue that had been taken up at the Court of Appeal and which that court determined was the readmission of an appeal that had been dismissed and nothing more. He insisted that the appeal had been filed out of time.

The respective counsel's submissions have been duly considered by this court.

Under **section 79B** of the **Civil Procedure Act (Chapter 21)**, cited by the applicant, a judge of the High Court exercising his appellate jurisdiction may reject an appeal if he considers that there is no sufficient ground for interfering with the decree. This implies that if the judge does not reject the appeal, or as **Order 42 Rule 8A** puts it, if he refuses to reject the appeal, and consequently admits it for hearing, it is deemed, in the least, that the appeal is arguable and, therefore, it is neither vexatious, frivolous, scandalous or an abuse of the process of the court. I suppose it is for this reason that, in his ruling delivered on 30th January, 2014 the learned judge directed, as he was obliged to do under **Order 42 rule 8(B)** of the Civil Procedure Rules, that the appeal be set down for hearing and determination within sixty days of the date of that ruling.

Taking about the ruling in which the learned judge gave directions on the disposal of the appeal, it was in respect of two applications filed by either parties; on the one hand the appellants sought to have their appeal reinstated after it had been dismissed apparently for non-attendance and on the other hand, the respondent's counsel sought to have the decretal sum deposited in court released to him. The appeal was eventually reinstated while the application for release of the decretal sum was rejected. The learned judge's decision was upheld by the Court of Appeal when the respondent/applicant appealed against it.

One of the arguments raised by the learned counsel for the respondent/applicant during the hearing of the appeal and which was aptly captured by the learned judges of the Court of Appeal was on the competence of the appellant's appeal. At paragraph 10 of their judgment the learned judges said:

Counsel for the appellant (the applicant in this application) elaborated on the grounds of appeal emphasizing that the issue was whether there was a competent appeal before the High Court that could be reinstated by the learned judge.

Although the aspect of competency here related to the timing of when the appeal was filed, there was nothing, in my view, that could stop the respondent's/applicant's counsel from raising the issue whether the appeal sought to be reinstated was vexatious, frivolous, scandalous and an abuse of the process of the court and therefore its reinstatement would have been an exercise in futility. The point is that these issues

could possibly have been raised and, indeed, they ought to have been properly canvassed and determined, in the applications or at least in one of the two applications that were argued before the learned judge. When I look at the applicant's application from this perspective, I am bound to agree with the learned counsel for the appellant that these issues are *res judicata* and in this regard I would invoke the words of Sir James Wigram V.C. in **Henderson versus Henderson (1843) 3Hare 100** at 114 where he said:

*In trying this question I believe I state the rule of the court correctly when I say that, where a given matter becomes the subject of litigation in, and adjudication by, a court of competent jurisdiction, the court requires 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 subject in 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* applies, 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.*

But even assuming that the question of *res judicata* was not an issue, can it be said with any sense of conviction that the respondent/applicant has made out a case that the appellant's appeal is vexatious, frivolous, scandalous and an abuse of the due process? Before answering this question, it is necessary to interrogate what vexatious, frivolous scandalous pleadings entail or when they are taken to be an abuse of the process of the court. These concepts have been discussed in **Halsbury's Laws of England (Civil Procedure) (Volume 11 (2009) 5th Edition, Paras 1-1108**; At paragraph 534 the concept of 'abuse of process' is explained in the context of the court's inherent power to stay or strike out proceedings; it is explained in the following terms:

534. Abuse of process.

*The most important ground on which the court exercises its inherent jurisdiction to stay proceedings is that of abuse of process. This power will be exercised where the proceedings are shown to be frivolous, vexatious or harassing or to be manifestly groundless or in which there is clearly no cause of action in law or in equity (See *Dawkins v Prince Edward of Saxe Weimar (1876) 1 QBD 499*). The applicant for a stay on this ground must show not merely that the claimant might not, or probably would not, succeed, but that he could not possibly succeed on the basis of the pleadings and the facts of the case.*

*It is an abuse of process to raise in subsequent proceedings matters which could and should have been litigated in earlier proceedings. (See *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd [1975] AC 581, PC*).*

*A party may be guilty of an abuse of the process of the court even though he may comply with the strict literal terms of an applicable rule of law, where he does so for improper or ulterior motives or purposes. (see *Castanho v Brown and Root (UK) Ltd [1981] AC 557, [1981] 1 All ER 143, HL*).*

It has been said that this is a power which ought to be exercised sparingly and only in an exceptional case (See *Lawrance v Lord Norreys (1890) 15 App Cas 210, HL*; *Dyson v A-G [1911] 1 KB 410, CA*. And in exercising this power it has also been held that it is not the function of the court to enter into a minute and protracted examination of the facts and documents of the case in order to determine whether the claimant can show a *prima facie* cause of action. (See *Wenlock v Moloney [1965] 2 All ER 871, [1965] 1 WLR 1238, CA*).

From the explanation given in Halsbury's Laws of England and the decisions cited thereof, frivolous or vexatious proceedings are understood to be synonymous with or aspects of what is deemed to be an abuse of the process of the court and therefore these concepts may not necessarily be distinct from each other;

where one exists the other will certainly be lurking around. Thus in **Hunter versus Chief Constable of West Midlands Police (1982) AC 529**, relitigating on the same issues was held to be vexatious and therefore an abuse of the process. The two concepts are more often than not used interchangeably; in the **South African case of Farjas (Pty) Limited & Another versus Regional Land Claims Commissioner, Kwazulu Natal- (LCC21/96) (1998) ZALCC 1** the South African Land Claims Court made reference to the discussion of these terms in Claasen, **CJ's Dictionary of Legal Words and Phrases 1 ed (Buttherworths Durban) 1977 Vol. 2&4** where it is stated that:

The concept of 'frivolous and vexatious' has one established legal meaning. It refers to a claim or legal proceeding which is pursued where there is plainly no prospect of success and the motive of the claimant or plaintiff is to harass the defendant.

As for 'scandalous' matter, it is defined in **Black's Law Dictionary Standard, 9th Edition** as 'a matter that is both grossly disgraceful (or defamatory) and irrelevant to the action and defence'.

The applicant has not demonstrated in any manner whatsoever how the appellant's appeal is scandalous, frivolous and vexatious or is otherwise an abuse of the process of court. Looking at the appellant's grounds raised against the subordinate court's decision, I am unable to agree with the applicant that the appellant's appeal bears any of these characteristics. If anything, considering the history of this matter, it is the applicant's application that is more likely to be frivolous and vexatious.

The question of whether the decretal sum should be released to the applicant's counsel should not be arising at this stage for the simple reason that it was squarely addressed and resolved in the applicant's previous application that was dismissed by this court. As noted, the decision of this court was upheld by the Court of Appeal; regurgitating the same issue in the same court appears to me to be the best example a proceeding that is frivolous or vexatious and therefore an abuse of the process of the court; I would remind counsel for the applicant of the words of Lord Diplock in the case of **Saif Ali versus Sydney Mitchell & Co. (1980) AC 198 at 222 to 223** where he said:

Under the English system of administration for Justice, the appropriate method of correcting a wrong decision of a court of justice reached after a contested hearing is by appeal against the judgment to a superior court. This is not based solely on technical doctrines of res judicata but upon principles of public policy, which also discourage collateral attack on the correctness of subsisting judgment of a court of coordinate jurisdiction.

We are still heavily influenced by the English system of administration of Justice and therefore these words of the learned judge are relevant to our justice system as much as they are to the English justice system. Having raised the issue of release of the decretal sum in an application that was dismissed and having appealed against that decision in the Court of Appeal, I cannot find any plausible reason why the applicant should raise the same issue again in the High Court particularly after his appeal had been dismissed if it is not to vex the appellant/respondent. The application is not only misconceived but it is an abuse of the court's process. It is dismissed with costs.

Dated, signed and delivered in open court this 2nd February, 2015

Ngaah Jairus

JUDGE