Karuri v Housing Finance of Kenya & 2 others (Civil Application E578 of 2023) [2024] KECA 335 (KLR) (28 March 2024) (Ruling)

Neutral citation: [2024] KECA 335 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPLICATION E578 OF 2023

PO KIAGE, JA

MARCH 28, 2024

BETWEEN

RAPHAEL JOSEPH KARURI ..... APPELLANT

AND

HOUSING FINANCE OF KENYA ..... 1ST RESPONDENT

PAUL WAITHAKA MACHARIA ..... 2ND RESPONDENT

SALOME WANGUI KAMAU ..... 3RD RESPONDENT

(An application for the appellant to be granted leave to file his record of appeal out of time and the already filed record of appeal filed by the appellant on 14th June, 2023 be deemed as being properly filed and be admitted on record. in Civil Case No. 1565 of 2001)

RULING

1. The motion on notice dated 23rd November 2023 is an attempt by the applicant Raphael Joseph Karuri to regularize the record of appeal filed on 14th June 2023 by extending time for its filing and deeming it properly filed and admitted on the record. The said record of appeal is against a judgment of the High Court at Nairobi (C. Kariuki, J.) dated nearly eight (8) years previously, on 2nd December 2015.

2. In the grounds on the face of the motion as well as the supporting affidavit sworn by the applicant on 21st November 2023, it is explained that the applicant filed a notice of appeal in time on 8th December 2015 and applied for certified typed proceedings. A second notice of appeal, dated 6th May 2016 was however, erroneously prepared and placed in his file at his advocates' chambers. Even though Civil Appeal No. E253 of 2021 was instituted against the impugned judgment, the record of appeal contained the erroneous notice of appeal.

3. Upon realizing the error, a supplementary record of appeal was filed on 24th June 2021 containing the correct notice of appeal but this was outside the timelines set by the Court of Appeal Rules. The

applicant then filed Civil Application No. E289 of 20221 on 6th August 2021 seeking to have the supplementary record admitted. That motion was by a ruling dated 28th October 2022 dismissed, erroneously in the applicant's view.

4. Following that ruling, and on advice by counsel, the applicant withdrew Civil Appeal No. E253 of 2021 which was based on the erroneous notice of appeal and proceeded to file a record out of time on 14th June 2023. He now craves this Court's leave to have the same deemed to be duly filed. He believes his appeal raises issues of great public interest and the respondents would suffer no prejudice as a result of grant.

5. The 2nd and 3rd respondents opposed the motion by way of grounds of opposition filed on 2nd February 2024 in which they stated that the present application is res judicata given my learned brother Mativo, JA's ruling on 28th October 2022 on a similar application; there was inordinate delay of about 1 year since the dismissed application; there was also inordinate delay in filing the record of appeal in Civil Appeal No. E420 of 2023 six months after dismissal of application No. E289 of 2021; the applicant's conduct of deliberate delay disentitles him to the grant of the application; and it would be prejudicial to further lengthen this litigation.

6. Having given this application and the rival contentions due and careful consideration, I come to the conclusion that notwithstanding the attempt to cast and present it as an application seeking a somewhat different relief, this application is no more than an echo and a replica of the very plea that was made in Civil Application No. E289 of 2021 which sought leave to file a supplementary record of appeal out of time. In dismissing the said application, my learned brother Mativo, JA found that it had taken the appellant/applicant 6 years to attempt to correct the error which was evidence of indolence on his part, and there was no reasonable explanation for the delay.

7. Even though the applicant was later to withdraw the earlier Civil Appeal No. E253 of 2021 on 14th November 2023, he had earlier filed a second record of appeal, number E420 of 2023, the one sought to be regularized by the motion before me. This filing occurred without leave, and eight months after Mativo, JA's ruling aforesaid. This motion seeking time extension was filed some five (5) months after the said record of appeal was filed.

8. Given those facts, it seems to me that the 2nd and 3rd respondents' objection to this current application as being *res judicata* is clearly unanswerable. The principle, which is an expression of the public interest in finality of litigation and abuse of process through a multiplicity of suits and court processes over the same subject matter, finds statutory exclusionary expression in section 7 of the *Civil Procedure Act*;

> " No court shall try any suit or issue in which the matter directly and substantively in issue has been directly and substantially in issue in a former suit between the parties ..."

9. This jurisdictional bar extends beyond suits, qua suits, to cover applications as well, so that once a matter has been determined in an application, it cannot be relitigated in a subsequent application seeking essentially the same prayers, as that would indeed amount to an abuse of the process of the court. I need do no more than endorse what was stated in *Moyale Liner Bus Servcies v Gachu Ibrahim* [2021]eKLR in the context of applications for stay of execution but which would apply with equal force herein;

> " Although ... the Court already pronounced itself on the issue of stay of execution, this Court observes that the instant application is similarly one touching on stay of execution when a court has already pronounced itself on a matter, it is deemed to have performed all its duties in the case and it becomes *functus officio*. This Court would, therefore, not allow any

attempts to re-open the matter for stay of execution, which will have the court re-hear the application again. The essence of functus officio is to give finality to the adjudication of matters."

10. I come to the conclusion, with respect, that a single judge of this Court having already pronounced himself on the delay – long, inordinate and unexplained – herein, I would be doctrinally remiss, and jurisdictionally abrogative in terms most impermissible, were I to venture into a consideration of a matter so fully and thoroughly dealt with already. It is plain to see that the delay herein was long and unexplained. It was inexcusable. The intervening period after Mativo, JA's ruling has only served to compound, not ameliorate, the inordinate delay. And the application would again fail on the basis of well-settled principles.

11. For all those reasons I find this motion (which I might as well have stricken out), to be unmeritorious, and do dismiss it with costs.

Dated and delivered at Nairobi this 28th day of March, 2024.

P.O. KIAGE

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR