**Mahinda v Farah (Civil Appeal 182 of 2016)**
**[2023] KECA 116 (KLR) (3 February 2023) (Judgment)**

Neutral citation: [2023] KECA 116 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL 182 OF 2016**

**HA OMONDI, HM OKWENGU & S OLE KANTAI, JJA**

**FEBRUARY 3, 2023**

**BETWEEN**

**MUGURE MAHINDA ..... APPELLANT**

**AND**

**ALI MOHAMMED FARAH ..... RESPONDENT**

***(An appeal from the ruling of the High Court at Nakuru***
***(Emukule, J.) dated 6th May, 2011 in Civil Appeal No. 7 of 2003)***

**JUDGMENT**

1. This is an appeal against the ruling of the High Court at Nakuru (A. Emukule, J) dated and delivered on May 6, 2011 in High Court civil appeal No 7 of 2003 with regard to the appellant's notice of motion application dated February 24, 2010; which sought to review the order issued on June 29, 2009; dismissing this appeal with a view to having it set aside; and that costs be provided for.

2. The dismissed application was based on the grounds that; the appellant had done all that was expected of her to have the appeal prosecuted and had fulfilled other two conditions as ordered by this court.

3. The background to this appeal is that the respondent herein instituted Nakuru Magistrate's CMCC No 2536 of 1999 against the appellant seeking compensation for injuries he sustained as a result of road traffic accident caused by the appellant's motor vehicle. The matter proceeded for hearing and in a judgment delivered on December 13, 2002; the learned magistrate found that the respondent had proved his claim on a balance of probabilities as required by law held the appellant 100% liable for the injuries sustained by the respondent; and assessed the general damages for pain, loss suffered together with special damages in the amount of Kshs 252,000/= with costs and interest at court rates, to be paid by the appellant. The counterclaim by the appellant, was dismissed.

4. Aggrieved by the said judgment, the appellant filed an appeal at the High Court via a memorandum of appeal dated January 9, 2003. However, on November 5, 2007 the appeal was dismissed by Koome, J.

(as she then was), for want of prosecution. Afterwards, through a chamber summons dated February 5, 2008; the appellant sought orders of review in respect of the order of dismissal of the appeal made on November 5, 2007.

5. On May 12, 2009; by consent of counsel for both parties, the appeal was reinstated on condition that the appellant prosecutes the appeal within thirty (30) days thereof and pays the respondent throw away costs of Kshs 20,000/= plus the auctioneers' costs within twenty one (21) days, failure to which the appeal would stand dismissed with costs. In the same breath, the High Court (Maraga, J as he then was) stayed the execution of the lower court's decree pending the hearing and determination of the appeal. Later on June 29, 2009; when the matter came up for mention, the respondent's counsel informed the court that the appellant only paid their fees but not the auctioneers fees and he had also not prosecuted the case. The court thus dismissed the appeal on the ground of failure to comply with the court order of May 12, 2009. Thereafter, the appellant filed an application dated February 24, 2010; seeking review of the order dismissing the appeal with a view to having it set aside.

6. The respondent by a replying affidavit sworn on April 21, 2010; opposed the application and filed a notice of preliminary objection stating that the application was *res judicata* and an abuse of the court process.

7. Subsequently Emukule J, upon considering the pleadings and oral submissions, pointed out that the two issues raised had statutory underpinnings, namely prevention of abuse of court process (i.e wanting in bona fides and vexatious) under section 3A and *res judicata* (whose principle is that it is in the public interest that there should be some end to litigation) under section 7 of the *Civil Procedure Act*.

8. The learned Judge considered the history of the appeal, which was replete with non prosecution, and reinstatement of the matter, as well as the subsequent non compliance by the appellant. He also noted claims that counsel who held the brief on behalf of the appellant's counsel was unaware of the fact that the conditions for setting aside the order dismissing the appeal i.e non-prosecution, had been fulfilled, and in particular, the costs had been paid both to the respondent's counsel and to the auctioneer; that it was not possible to argue the appeal within the thirty (30) days given because no dates were available from the registry within the said period; and the proceedings from the lower court were not available until much later. In this regard, the learned judge held that the reasons given by the appellant for not setting down the appeal for hearing within the period ordered by the court were all valid. However, what was not explained was the delay in filing the application for review since the formal dismissal of the appeal on June 29, 2009 and appellant's application dated February 24, 2010 was a period of eight (8) months apart.

9. The learned judge referred to order xliv rule 1 which lays down the conditions for review, to hold that although those set grounds were not argued before him, as the application before him was purely on the preliminary objection, it became inevitable to refer to the said provision with regard to the issue on abuse of the court process. The judge concluded that the appellant's application ought to have been brought without unreasonable delay, and there was no explanation for the delay of eight (8) months; that the delay also offended the principle of res judicata to the effect that there ought to be a finality to litigation in the following manner;

> "To resuscitate matters which have been determined eight (8) months later is clearly an afterthought and can only be regarded as pure abuse of the court process. For these reasons, I uphold the respondent's preliminary objection and dismiss the .... notice of motion application..."

10. The appellant being aggrieved by the said ruling of the High Court filed this appeal raising five (5) grounds which are that;

    a. The learned judge misdirected himself on both law and fact when he proceeded to dismiss the application on grounds other than what was argued before him.

    b. The learned judge was wrong for not calling upon the appellant to explain the delay in filing the application for review.

    c. The learned judge misdirected himself on the application of the principles of *res judicata*.

    d. The learned judge failed to consider the application of the procedure of preliminary objection in relation to the issues before him.

    e. In all circumstances of the case, the decision was wrong.

11. The appeal was canvassed through written submissions filed by the respective parties. The appellant argued that her application which was for review was opposed *vide* the respondent's replying affidavit sworn on April 21, 2010; which did not deal with the matters that were raised in the application, rather, it dealt with opinions and arguments. Further, that in the course of hearing the application, the respondent introduced the question of the matter being res judicata through a notice of preliminary objection and it is upon this ground that the learned judge dismissed her application. In this regard, the appellant contends that the reason for the delay and the issue of *res judicata* was explained and as such, according to her, the dismissal of the application was based on wrong interpretation of the law and facts adduced during the hearing of the same.

12. In opposing the appeal, the respondent submitted that the application sought to reinstate the appeal which had been dismissed twice before by the High Court, thus rendering it *res judicata* as it sought similar orders as the previous application dated February 5, 2008; in addition, the said application had similar parties appearing in the same capacity (reference was made to the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR and *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR wherein in the latter case, the court held thus;

> "The respondent, by bringing application after application on the same issue at different times one after another is hell bent to frustrate the appellant from realizing the judgment as awarded by the lower court and unless something is done, the appellant will forever be left babysitting his barren decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of article 48 of the *Constitution* which enjoins the state to ensure access to justice for all persons.
>
> On the basis that pursuant to section 7 of the *Civil Procedure Act* cap 21 Laws of Kenya the lower court lacked jurisdiction to deal with a matter which had already been decided by the same court earlier, the latter application was therefore not only *res judicata* but also an abuse of the court process."

13. In this regard, the respondent submitted that the learned judge did not err in law and fact by upholding the preliminary objection on the ground that the appellant's application dated February 24, 2010; was *res judicata*.

14. This being a first appeal, the position in law is that this court is entitled to re- evaluate and re-analyze the record and come to its own conclusion, bearing in mind that the trial judge had the advantage of seeing and assessing the demeanor of witnesses. See *Selle & Another v Associated Motor Board Co Ltd*

(1968) EA 123. In undertaking this exercise, I am guided by the principle that a court of appeal will not normally interfere with a finding of fact of the trial court unless it is based on no evidence or on misapprehension of the evidence or that the judge is shown demonstrably to have acted on a wrong principle in reaching the finding he did. See *Jabane v Olenja* (1968) KLR 661.

15. Upon consideration of the record in light of the above mandate, the rival submissions and principles of law relied upon by both the appellant and respondent, clearly the issues that fall for determination are mainly two (2) namely;

    a. Whether the notice of motion sought similar orders as the previous application dated February 5, 2008; thus, *res judicata*.

    b. Whether the learned judge dismissed the appellant's notice of motion application based on wrong interpretation of the law and facts adduced during the hearing of the same.

16. On the first issue, the record shows that the appellant's previous application dated February 5, 2008 sought orders that;

    a. The appeal herein which was dismissed for want of prosecution be reinstated.

    b. The costs of this application be provided for.

17. The application was based on the grounds that;

    a. The appellant's advocate was not aware of the date fixed for notice to show cause why the appeal should not be dismissed for want of prosecution.

    b. There were good reasons why the appeal had not been made ready for hearing.

    c. Also as per the annexed affidavits of Duncan Mindo and Mugure Mahinda.

18. Taking into consideration the foregoing, I have no doubt that orders sought in the appellant's notice of motion (as enumerated) which is the subject matter of this appeal and those sought in the previous application dated February 5, 2008; are similar and in addition and had similar parties appearing in the same capacity. Section 7 of the *Civil Procedure Act* on *res judicata*, reads 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."

19. The provision is on the fundamental doctrine that there should be an end to litigation. The rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

20. In this regard, this court held in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR (supra) that;

> "[F] or the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.

b. That former suit was between the same parties or parties under whom they or any of them claim.

c. Those parties were litigating under the same title.

d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

21. The court went on to state on the role of the doctrine;

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

22. The application before the High Court sought review of the order issued by the court on June 29, 2009; dismissing the appellant's appeal with a view to having it set aside, while the appellant's previous application dated February 5, 2004; was with regard to the reinstating the appellant's appeal which had been dismissed for want of prosecution. In both applications, the parties were similar and appearing in the same capacity. It is clear that the one and only issue in both applications was to the effect of reinstating the appellant's appeal which had previously been dismissed by the court for want of prosecution.

23. With regard to the grounds/reasons given by the appellant in both applications, the only difference was that in the appellant's previous application dated February 5, 2008; the appellant's counsel stated that he was not aware of the date fixed for notice to show cause why the appeal should not be dismissed for want of prosecution, while in the notice of application subject to this appeal, the appellant's counsel stated that the appellant had done all that was expected of her to have the appeal prosecuted and had fulfilled other two conditions as ordered by the court. Be that as it may, both reasons are summarily to the effect that the issue of non-prosecution was not dealt with by the party concerned. In any case, even in the latter application, the appellant's counsel, in his supplementary affidavit dated September 7, 2010; alluded that the delay in filing the application was his fault and that the same should not be visited upon the appellant. This court has also taken note that appellant's counsel alluded that he was not aware, in the previous application dated February 5, 2004; of the date fixed for notice to show cause why the appeal should be dismissed for want of prosecution.

24. Based on this, it is my view if that were true, for lack of a better phrase, the appellant' counsel seemed to be slacking on his duty to his client to the detriment of his client, in which case courts ought not to entertain such kinds of excuses of not knowing or the delay in filing being his fault, on the ground that the same should not be visited upon the party to the suit, in this case, the appellant. Whatever the case, I agree with the learned judge that the reasons stated by the appellant were all valid for not setting down the appeal for hearing within the period ordered by the court but further to this, given the conditions to prosecute the appeal. It was incumbent upon the appellant to show the court that there were problems in obtaining dates at the registry, and she ought to have placed material such as

correspondences making such requests. On the material available, what is apparent is that the appellant just sat back and did nothing, then heaped all the blame on the registry, I am of the view that the registry was not at fault.

25. I also concur with the learned judge that the appellant did not explain the delay in filing the application for review since the formal dismissal of the appeal on June 29, 2009 and appellant's application dated February 24, 2010; which was a period of eight (8) months in between; other than just saying it was a fault on his part, the appellant's counsel did not say anything else.

26. In the circumstances, I find that the appellant's attempt to resuscitate a matter that had already been decided on; and delay in filing of the application for review, given the amount of time that has lapsed since the judgment of the trial court which is now almost twenty (20) years down the line, then this amounts to abuse of the court process, and this court cannot entertain a continuation of the same by giving the appellant more rope to extend an injustice upon the respondent who has had to wait many years for compensation of injuries and damages sustained when the road traffic accident occurred.

27. I hold the view that the learned judge's dismissal of the application was not based on wrong interpretation of the law and facts, indeed his decision was proper and sound in the circumstances. The upshot is that this appeal lacks merit and should be dismissed. I award costs of the appeal to the respondent.

**Concurring Judgment Of Hannah Okwengu Ja**

1. This appeal arises from a motion dated February 24, 2010 in which the appellant moved the High Court under order xliv rule 1 of the former *Civil Procedure Rules* (Revised) 1998 seeking to have an order made by the High Court on June 29, 2009 dismissing his appeal against the judgment of the Magistrate's Court reviewed and set aside.

2. The facts leading to the application have been well captured in the judgment of Omondi JA that I have the opportunity to read in draft. I am in agreement with Omondi JA that this appeal is for dismissal.

3. The appellant has lodged the appeal before us because he is aggrieved that the learned judge of the High Court upheld a preliminary objection to the motion that was raised by the respondent. In his memorandum of appeal, the appellant has raised four grounds which can be compressed into two, one ground being that the learned judge misdirected himself on both law and fact in dismissing the application on grounds other than what was argued before him, and secondly, that the learned judge erred in failing to consider the motion and giving the appellant the opportunity to explain the delay in filing the motion.

4. The record of appeal reveals that the respondent filed a preliminary objection to the hearing of the appellant's notice of motion in which he objected to the motion on two grounds. First, that the motion was *res judicata*, and secondly that the motion was an abuse of the court process. The respondent's counsel Mr Gekonge made submissions urging the High Court to uphold the preliminary objection while the appellant's counsel Mr Mindo countered by objecting to the preliminary objection contending that it cannot lie and that the motion ought to be heard on merit.

5. In his ruling, the learned judge having noted that the preliminary objection raised the issue of *res judicata* and abuse of the court process, addressed the law on the two principles including the statutory underpinning and case law. In addition, the judge reviewed the facts and found both factors satisfied. Res judicata because a previous application that had been made by the applicant for review had been dismissed by the court due to the appellant's failure to comply with the conditions given by the court for setting aside the order of dismissal, and abuse of court process because the appellant's motion was

brought after a delay of 8 months, which delay had not been explained. It is apparent that the learned Judge properly addressed the legal issues that were raised in the preliminary objection that was before him, and applied the law to the facts before him, and this was the basis upon which the learned Judge upheld the preliminary objection.

6. The appellant blames the learned judge for failing to call upon the appellant to explain the delay, but this was not the obligation of the learned judge as order xliv rule 1(4) of the *Civil Procedure Rules* requires that such an application for review be made without unreasonable delay, and therefore it was incumbent upon the appellant to explain the delay either on the face of the motion or on the supporting affidavit. In the affidavit sworn in support of the motion, the appellant's advocate simply took responsibility for the delay in filing the motion without giving any reason for the delay of 8 months and this was not a plausible explanation.

7. For the above reasons, I concur with Omondi JA. As Kantai JA is also in agreement, the final orders are that the appeal is dismissed with costs.

**Judgment Of Kantai, JA**

1. I have had the benefit of reading in draft the judgment of my learned sister Omondi, JA. I am in full agreement and I have nothing useful to add.

**DATED AND DELIVERED AT NAIROBI THIS 3RD DAY OF FEBRUARY, 2023.**

**H. A. OMONDI**

**.....**

**JUDGE OF APPEAL**

**HANNAH OKWENGU**

**.....**

**JUDGE OF APPEAL**

**S. ole KANTAI**

**.....**

**JUDGE OF APPEAL**

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

*Signed*

**DEPUTY REGISTRAR**