

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT ELDORET**  
**MISC CIVIL APPLICATION NO E111 OF 2024**

**HARMO ENGINEERING.....**  
**APPLICANT**

**VERSUS**

**SAMUEL MAHONGA OMWELA.....**  
**RESPONDENT**

**Coram: Before Justice R. Nyakundi**

**M/s Anassi Momanyi & Co Advocates**

**M/s Mathai Maina & Co Advocates**

**RULING**

1. What is pending before this Court for determination is a Notice of Motion Application dated 15<sup>th</sup> March 2024 brought pursuant to section 3A and 79G of the Civil Procedure Act and Order 50 Rule 6 of the Civil Procedure Rules in which the Applicant is seeking the following orders:
  - a) Spent.
  - b) Pending hearing inter-parties and the determination of the application the execution of the decree in ELDORET CMCC No. 980 of 2019 be stayed.
  - c) The Applicant be granted leave by the Honourable Court to file an Appeal from the decision of the Honourable Court in Eldoret CMCC No. 980 of 2019 outside the requisite time.
  - d) Costs of the application be costs in the intended appeal.
2. The Application is made on the following grounds on the face of it among others;
  - a. The decision of the subordinate court was made on 31/08/2023.

- b. The Applicant on 22/9/2023 timeously filed an Appeal in Eldoret HCCA No. 183 of 2023.
  - c. The Appeal has been struck out for non-compliance with order 9 rule 9 of the Civil Procedure Rules.
  - d. The applicant's counsel has since been allowed to take over the conduct of the matter in the subordinate court.
  - e. The Applicant is not to blame for the circumstances in which it finds itself.
  - f. There is no prejudice the Respondent stands to suffer if the application for enlargement of time succeeds.
  - g. The Application is being pursued in the best interest of justice.
  - h. The application has been filed expeditiously upon the appeal being struck out.
3. The application is supported by the annexed affidavit hereto dated 15<sup>th</sup> March 2024 of ALISON ZEPHANIAH MOGEGE who deponed as follows: -
- a) That I am a director of the applicant in this matter and I am competent and sanctioned to swear this affidavit.*
  - b) That the matter in the subordinate court Eldoret CMCC No. 980 of 2019 was being handled by Nyairo & Co Advocates on the instructions of the insurance.*
  - c) That Nyairo & Co Advocates were instructed by Mayfair Insurance, the applicant's insurers.*
  - d) That upon conclusion of the matter, the insurance decided to pay Kshs. 3,000,000/= thereby abandoned the applicant.*
  - e) That the insurers also advised the applicant to instruct another counsel and possibly appeal.*
  - f) That the applicant then instructed our client to pursue the appeal and he promptly filed the appeal in Eldoret HCCA No. 183 of 2023.*
  - g) That the counsel also sought leave of the subordinate court to take over the conduct of the matter for and on behalf of the applicant.*

- h) That in the meantime Eldoret HCCA No. 183 of 2023 which was filed in time by the applicant has been struck out.*
  - i) The applicant is intent on pursuing an appeal against the judgement sum of a colossal about Kshs. 10,000,000/=.*
  - j) That the Respondent will not be prejudiced in anyway if the applicant is granted leave to file an appeal out of time.*
  - k) That failure to comply with Order 9 rule 9 of the Civil Procedure Rules is blame worth on counsel which has since been addressed.*
  - l) That the Applicant ought to be permitted to appeal outside the requisite time.*
4. The Application is opposed by the Respondent vide a Replying Affidavit dated 13<sup>th</sup> May 2024 sworn by the Respondent herein who avers as follows;
- a. That I am the Respondent herein hence competent to swear this affidavit.*
  - b. That I have been shown by my Counsel on record Mr. Mathai, the Applicant application dated 15<sup>th</sup> March, 2024 and filed in court on 8<sup>th</sup> May, 2024. Having read it and the same explained to me by my advocate on record, I have understood Its import, contents and tenor therein and I now wish to respond as hereunder: -*
  - c. That the Applicant's application is an abuse of the court process, misconceived, fatally defective, lacks merit and the same ought to be dismissed inline.*
  - d. That I am being informed by my advocate on record that the Applicant is trying to find his way at all costs in disregard of the law.*
  - e. That the Applicant has not met the required threshold for granting extension of time.*
  - f. That the firm of Nyairo in CMCC No. 980 of 2019 - Samwel Mahanga Omwela vs Harmo Engineering were on record on behalf of the Applicant herein.*

- g. That I have been made aware that the firm of M/s Anassi Momanyi and Company Advocates had filed an application dated 4<sup>th</sup> October, 2023 at the Lower Court seeking for orders of stay of execution.*
- h. That upon filing the said application for stay of execution my Counsel on record Mr. Mathai filed a notice of preliminary objection intending to have the notice of appointment be strike out.*
- i. That the firm of M/s Anassi proceeded to file an amended application dated 23<sup>rd</sup> October, 2023 without leave of the court.*
- j. That I am being informed by my Counsel onrecord that on 15<sup>th</sup> November, 2023 the firm of M/s Anassi Momanyi and Company Advocates withdrew the notice of appointment dated 20<sup>th</sup> September, 2023. The notice of motion dated 6<sup>th</sup> October, 2023 and application dated 23<sup>rd</sup> October, 2023.*
- k. That the Applicant herein yet again filed an application dated 22<sup>nd</sup> November, 2023 seeking orders of stay in which the court granted stay pending the determination of the said application.*
- l. That I am being informed by my advocate on record that this application is subjudice and ought to be stayed.*
- m. That there is nothing to be stayed since no execution process has been commenced, bills have not been taxed, and decree extracted hence nothing to be stayed.*
- n. That my advocate on record filed an application dated 21<sup>st</sup> November, 2023 seeking to have memorandum of appeal dated 21<sup>st</sup> September, 2023 filed by the firm of M/s Anassi Momanyi and Company Advocates struck out.*
- o. That the Honorable Court delivered ruling in allowing the application dated 21<sup>st</sup> November, 2023 on the 13<sup>th</sup> February, 2024.*
- p. That I am being informed by my advocate on record, that the Applicant did not appeal the said decision and it is inconceivable to ask for enlargement of time after earlier appeal been struck out.*

- q. *That I am being informed by my advocate on record under the provisions of Order 9 of the Civil Procedure Rules 2010, there is no provision for acting alongside.*
- r. *That it is only lead firms that can file pleadings and not every firm representing a party is allowed to file and in this circumstances are the firm of Nyairo who can only file pleadings on behalf of the Applicant.*
- s. *That the judgment delivered on 31<sup>st</sup> August, 2023 was compromised by consent.*
- t. *That I swear this affidavit in opposition to this application.*
- u. *That what is deponed to hereinabove is true to the best of my knowledge, information and belief.*

## **Decision**

5. In so far as this matter is concerned and considering its genesis, I invoke Section 7 of the Civil Procedure Act on the doctrine of *res judicata*, which expressly states that:

*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.*

6. The court has already pronounced itself on this matter and the subsequent issues now being raised should have been canvassed by the parties in the first instance without resorting to litigating in installments. The court in **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & Another** held as follows:

*“[52] Res Judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such*

*edict stands as a conclusive statement as to those rights .... [55] Res judicata entails more than procedural technicality and lies on the plane of a substantive legal concept...”*

7. This second issue being agitated by the applicant should not be allowed to see the light of the day. The same is dismissed with costs to the Respondent.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 11<sup>TH</sup> AUGUST  
2025**

.....  
**R. NYAKUNDI  
JUDGE**