



REPUBLIC OF KENYA



**Foods v Shamsher Limited (Civil Appeal E1342 of 2023)
[2024] KEHC 9762 (KLR) (Civ) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9762 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL E1342 OF 2023

CW MEOLI, J

JULY 31, 2024

BETWEEN

MERCY WANGECHI NYIKA T/A FRAMA FOODS APPELLANT

AND

SHAMSHER LIMITED RESPONDENT

RULING

1. Mercy Wangechi Nyika T/A Frama Foods (hereafter the Applicant) filed the Notice of Motion dated 29th January, 2024 (the Motion) which is supported by the grounds set out on its body and the affidavit of the Applicant. Seeking the review, varying and/or setting aside of the orders made on 5th December, 2023 and 19th January, 2024 respectively, consequential reinstatement of the appeal and stay of execution of the decree arising out of the judgment delivered by the trial court in Milimani CMCC No. 3280 of 2011, pending the hearing and determination of the appeal.
2. The Motion is expressed to be brought under Sections 1A, 3A, 75, 78 and 79G of the *Civil Procedure Act* (CPA); Orders 45, Rule 1 and 2, Order 42, Rule 6 and Order 51, Rule 1 of the Civil Procedure Rules (CPR); and Articles 10, 22, 57 and 159 of *the Constitution* of Kenya, 2010.
3. In her affidavit, the Applicant deposed that following delivery of judgment by the trial court, in favour of Shamsher Limited (hereafter the Respondent) against her in the sum of Kshs. 506,444/- with interest and costs assessed at the sum of Kshs. 105,586/-, the Respondent commenced the execution process. The Applicant deposed that she therefore moved the High Court vide an application seeking leave to file an appeal out of time, filed under High Court Miscellaneous Application No. E1185 of 2023 (the Miscellaneous Application). That the said application was placed before the late Majanja, J. on 1st December, 2023, who upon hearing the parties thereon, granted the Applicant's prayer for leave and directed that the appeal be filed within seven (7) days thereof.



4. The Applicant stated that in compliance with the said order and directions, her advocate proceeded to file the present appeal on 5th December, 2023 accompanied by an application seeking stay of execution. That when the said application came up before this court, it noted that the application was premised on an appeal which had been filed without evidence of prior leave being granted. On that basis, the court directed that the Applicant regularizes the status of the present appeal within seven (7) days, failing which it would be struck out. That subsequently, both the appeal and application were struck out.
5. It is the Applicant's averment that the above orders which resulted in striking out of the appeal were issued in error, since leave to file an appeal out of time had previously been sought and granted. That attempts to extract the order granting leave to appeal out of time proved futile and thus the leave order could not be availed before this court at the time of issuing its orders above, however, the Applicants had since been able to extract the relevant order, which is annexed to her affidavit as annexure marked MWN 2.
6. Regarding stay of execution, it is the Applicant's averment that the Respondent obtained warrants of arrest dated 22nd January, 2024 against her and that unless the stay order sought is granted, she is at risk of committal to civil jail. It is equally her averment that she is now a widow of advanced age and without any source of income whilst simultaneously battling health challenges. Hence should the warrants of arrest be executed, she is likely to suffer substantial loss, which would in turn render her appeal nugatory. For those reasons, the Applicant urged the court to consider the Motion favourably.
7. The Respondent resisted the Motion by filing the notice of preliminary objection dated 22nd March, 2024 containing the following grounds in challenging competency of the said Motion:
 1. That the honourable court has no jurisdiction to hear and determine this application and/or the entire appeal.
 2. That the instant Motion dated 29th January 2024 and orders sought therein are Res-judicata having already been dealt with by this court in similar applications.
 3. That the orders sought in the instant application are similar to the orders sought by the Applicant in an earlier application dated 29th November 2023 which was determined to finality by Hon. Justice D.S. Majanja, pursuant to Orders issued on 1st December 2024. Accordingly, the current application is Res-judicata.
 4. That the current application is again Res-judicata for similar issues having been determined to finality by Honourable Lady Justice C. Meoli, in the order issued on 6th December 2023, where similar orders dismissed the Applicant's Application dated 1st December 2023 as the appeal herein is incompetent.
 5. That current application has been filed in a non-existent appeal before this Court, is an abuse of the process of the Court, hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith.Accordingly, the Respondent prays that the Applicant's Application dated 29th January 2024 be dismissed with costs. "(sic)
8. The Respondent similarly filed a replying affidavit sworn by its Director, Rahim Samji, on 7th June, 2024. The deponent echoed the grounds raised in the preliminary objection to the effect that the Motion is res judicata. The deponent further stated the Applicant having failed to regularize the appeal as earlier ordered by this court, was not entitled to the orders sought in the instant Motion. That there is therefore no proper appeal in existence, which would warrant reinstatement. That in any event,



the Applicant has not demonstrated compliance with the orders made by the late Majanja, J. on 1st December, 2023 requiring her to pay costs to the tune of Kshs. 10,000/- as a condition for granting the order for leave to file appeal out of time. That consequently, the Motion ought to be dismissed with costs.

9. The Applicant responded to the preliminary objection by way of her further affidavit sworn on 11th June, 2024. Therein, she essentially reiterated her earlier averments that the present appeal is regular and competently before this court, leave having previously been sought and granted, for filing of the appeal out of time. As pertains to the Motion, the Applicant stated that it was competent as the stay order sought therein was never conclusively litigated before any court previously.
10. When the parties attended court for hearing, directions were given for the Motion and the preliminary objection to be heard together, and the parties were to file and exchange written submissions thereon.
11. In respect of the preliminary objection, counsel for the Applicant anchored his submissions on Section 7 of the CPA and the decisions rendered in *John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015)* [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) on the principle of res judicata. In that regard, counsel contended that the principle does not apply to the present circumstances, given that the orders sought in the instant Motion were never previously adjudicated before or determined by any competent court. On those grounds, counsel urged this court to dismiss the Respondent's preliminary objection with costs.
12. To support the Motion, counsel for the Applicant majorly relied on Section 80 of the CPA as read with Order 45, Rule 1 of the CPR as well as the decision in *Alpha Fine Foods Limited v Horeca Kenya Limited & 4 Others* [2021] eKLR on the principles governing review, and urging the court to grant the prayer for review and setting aside of the orders subject to the Motion, and upon doing so, to reinstate the appeal. The key grounds for review relied upon herein are those of 'mistake/error apparent on the face of the record' and 'sufficient reasons.' As pertains to error apparent on the face of the record, it is counsel's submission that the same arose when an order was made dismissing the appeal, despite the fact of leave having previously been granted to enable filing of the appeal out of time. Counsel in turn cited the cases of *Singh t/a Trilok Construction v Sucham Investment Limited (Civil Appeal E070 of 2021)* [2024] KECA 568 (KLR) (24 May 2024) (Judgment) and *Nyamogo & Nyamogo v Kogo* (2001) EA 170 where the respective courts addressed the question what constitutes an error apparent on the face of the record.
13. Regarding the second prayer, namely, stay of execution pending appeal, the Applicant's counsel cited the decisions in *RWW v EKW* [2019] eKLR, *Ena Investment Limited v Benard Ochau Mose & 2 others* [2022] eKLR and *Vishram Ravji Halai v Thornton & Turpin Civil Application No. Nairobi 15 of 1990* [1990] KLR 365 on the applicable principles, also the conditions for stay as found in Order 42, Rule 6 of the CPR. Counsel therefore echoed the sentiments earlier made by the Applicant to demonstrate the way she stands to suffer substantial loss, if the order for a stay is denied. Counsel further invited this court to impose any conditions it would deem appropriate for provision of security for the decretal sum. For those reasons, the court was urged to allow the Motion as prayed.
14. In support of the preliminary objection, the Respondent through its counsel cited the decisions in *Kenya Commercial Bank Ltd v Muiri Coffee Estate Ltd & Another* [2016] eKLR and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR where the doctrine of res judicata was discussed. To buttress his argument that the Motion is res judicata, coming after similar applications previously filed and determined by the court.
15. On to the merits of the Motion, the Respondent's counsel maintained that the conditions for review set out under Order 45, Rule 1 of the CPR and Section 80 of the CPA have not been satisfied by the



Applicant. More specifically, counsel contended, with reference to the decisions in *National Bank of Kenya Ltd v Ndungu Njau* [1997] eKLR and *Nyamogo & Nyamogo Advocates v Kogo* [2001] 1 EA 173 that no apparent error exists on the face of the record, as purported. Furthermore, the Applicant has not brought any other sufficient reasons to warrant the orders sought for review and/or setting aside, with reliance placed on the case of *Paul Mwaniki v National Hospital Insurance Fund Board of Management* [2020] eKLR where the court explained what may be regarded as constituting ‘sufficient reasons.’

16. Further to the foregoing, counsel for the Respondent submitted that the conditions for granting stay of execution as set out under Order 42, Rule 6 (*supra*) have not been met here. Counsel citing the decisions in *Beatrice Mghamba Onyonka v Samwel Onsarigo Ooga* [2019] eKLR and *Equity Bank Ltd v Taiga Adams Company Ltd* [2006] eKLR where the respective courts echoed the legal position that the three (3) conditions for a stay ought to be collectively established, in order for an application in the nature of a stay of execution to succeed. On those grounds, the Respondent’s counsel urged that the Motion be dismissed with costs, and that the preliminary objection be upheld.
17. The court has considered the Motion, the affidavits supporting and opposing the Motion, the grounds in the preliminary objection and the rival submissions before it. The court will first address itself on the preliminary objection as the outcome will determine whether the merits of the instant Motion ought to be considered.
18. To begin with, the court in the renowned case of *Mukisa Biscuit Company v West End Distributors Limited* (1969) EA 696 defined what constitutes a preliminary objection in the manner hereunder:

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised in any fact that has to be ascertained or if what is sought is the exercise of judicial discretion.”
19. The above definition was advanced by the Supreme Court in *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR when it rendered itself thus:

“It is quite clear that a preliminary objection should be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with that point of law.”
20. The preliminary objection (PO) is premised on two (2) key grounds, the first being that the instant Motion is *res judicata*. On the one part, the Respondent argued that applications seeking similar orders for a stay of execution as those set out in the instant Motion were filed and conclusively determined, rendering the present Motion *res judicata*. On the other part, it was the Applicant’s argument that the applications previously filed and cited by the Respondent were not conclusively adjudicated upon.
21. The doctrine of *res judicata* features is encapsulated in Section 7 of the CPA, which stipulates 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.”



22. The Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR similarly offered the following interpretation on the term, thus:

“Res judicata is a matter properly to be addressed in limine as it does possess jurisdictional consequence because it constitutes a statutory peremptory preclusion of a certain category of suits. That much is clear from Section 7 of the *Civil Procedure Act*, 2010;

“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 the 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.”

Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all 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.”

23. Upon reviewing the record, apparent that the application dated 29th November, 2023 cited in the preliminary objection was not made available for the court’s perusal . Be that as it may, the court took the liberty of perusing the records on the Case Tracking System (CTS) in respect of the Miscellaneous Application cited. The court observed that the Applicant had previously filed separate applications each dated 1st December, 2023 in the respective matters, both seeking similar orders for a stay of execution of the judgment of the lower court, pending hearing and determination of the appeal.

24. As pertains to the Miscellaneous Application, the CTS records show that when the relevant application dated 1st December, 2023 came up before the late Majanja, J. on 6th December, 2023 neither the Applicant nor her advocate was present in court. Consequently, the judge proceeded to dismiss the said application for non-attendance.

25. Concerning the present appeal, the record shows that when a similar application was placed before this court on 6th December, 2023 the following order was made:

“The motion dated 1.12.2023 is premised on an appeal filed on 5.12.2023 concerning a judgment delivered on 4.08.2016. No evidence has been furnished to demonstrate the granting of leave to the Appellant to file the appeal out of time.

The Court cannot act on an evidently incompetent appeal, which if not regularized within seven days, shall be struck out.”

26. From the foregoing, it is evident that in both instances, the respective applications were not heard and/or determined on merit. Consequently, the court is not persuaded that the plea of res judicata has been



properly raised here. Be that as it may, it appears that the Applicant has filed multiple applications seeking similar orders for a stay of execution, but which applications were ultimately not determined on merit, due to lapses on the part of the Applicant. In the court's view, this trend constitutes a clear abuse of the court process, which this court cannot and will not countenance.

27. The second preliminary issue which was raised in ground 5) of the preliminary objection, touches on the competency of the Motion on the grounds that it is founded on a non-existent appeal. Whilst the parties did not necessarily ventilate this particular ground in their written submissions, the court will nonetheless proceed to consider it.
28. From a study of the record, it is apparent that the Applicant previously filed an application dated 22nd November, 2023 vide the Miscellaneous Application, where she sought leave of the court to enable her file an appeal out of time. This fact was not brought to the attention of the court previously. That notwithstanding, both the Applicant and the Respondent annexed copies of the order arising from the abovementioned application to their respective affidavits, as annexure MWN 2 and annexure RS 1 respectively. The said order was made by the late Majanja, J. on 1st December, 2023. Upon hearing the application before him, the learned judge granted inter alia, leave to file an appeal out of time within seven (7) days, on the condition that the Applicant pays costs in the sum of Kshs. 10,000/- within a similar period of seven (7) days.
29. Reviewing the material on record, it appears that the memorandum of appeal in the present appeal was filed sometime on or around the 5th day of December, 2023. However, there is no proof of compliance on the part of the Applicant, with the condition which was clearly set out in the order made on 1st December, 2023 as to payment of costs. The memorandum of appeal is irregular and incompetent. The record shows that even after having been granted an opportunity to regularize the appeal on 6th December, 2023, the Applicant did not comply, thus the appeal stood as struck out, as per the order of 19th January, 2024.
30. Whilst it may be true that at the time of making the order of 6th December, 2023, this court had not been informed of the existence of the order earlier made on 1st December, 2023, the Applicant has not shown that she complied with the conditions attached to the late filing the appeal by the late Majanja J. In the absence of such compliance, no competent appeal exists here. Consequently, there is no basis upon which to consider the merits of the Motion, anchored as it is on an incompetent appeal, which has since been struck out.
31. In the result, the preliminary objection dated 22nd March, 2024 partially succeeds. Consequently, the Notice of Motion dated 29th January 2024 is hereby dismissed with costs to the Respondent.

DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31ST DAY OF JULY 2024.

C.MEOLI

JUDGE

In the presence of:

For the Applicant: Ms. Waithira

For Respondent: Ms. Aluoch

C/A: Erick

