Chebii v Lagat (Civil Appeal E117 of 2024) [2024] KEHC 9994 (KLR) (12 August 2024) (Ruling)

Neutral citation: [2024] KEHC 9994 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E117 OF 2024

RN NYAKUNDI, J

AUGUST 12, 2024

BETWEEN

JEREMIAH KIPRONO CHEBII ..... APPLICANT

AND

HOSEA KIPKOSGEI LAGAT ..... RESPONDENT

(Coram: Before Justice R. Nyakundi ,M/s Rioba Omboto & Company Advocates, M/s Kipkorir Rono & Company Advocates)

RULING

1. Before me for determination is a notice of motion dated July 8, 2024 brought under the provisions of Section 1, 1A, 3 and 3A and 63 (e) of the *Civil Procedure Act*, Order 42 Rule 6 of the *Civil Procedure Rules*. The applicant seeks orders as follows:

    a. Spent.

    b. That this honorable court be pleased to stay execution of the judgment delivered by this Honorable court on the 9th May, 2024 pending the hearing and determination of this application inter-parties.

    c. That this honorable court be pleased to stay execution of the judgment delivered by this honorable court on the 9th May, 2024 pending the hearing and determination of Eldoret HCC Civil Appeal No. E117 of 2024.

    d. That costs of this application be in the cause.

2. The application is supported by an affidavit sworn by Jeremiah Kiprono Chebii and grounds tabulated as hereunder;

    That the Respondent obtained judgment herein in his favor on the 5th May, 2024 against the Appellant for the payment of the sum of Kshs. 958,100/=.

That the Appellant/Applicant being aggrieved and dissatisfied with the said decision filed an appeal therefrom being Eldoret HCC Appeal No. E117 of 2024.

That the Appeal is meritorious with high chances of success.

That execution of the decree obtained by the Respondent is eminent against the Applicant.

That unless this application is given priority and an order of stay granted the Respondent may execute against the Appellant/Applicant.

3. The Respondent in turn filed a replying affidavit in which he deposed that the applicant had made a similar application at the trial court and stay orders were issued with a rider that the applicant would deposit the entire decretal sum with the court within 21 days from 4th July, 2024. He averred that the applicant has since not complied with the said directions. Instead he has chosen to file numerous application with the intention of not bring the matter to a close. He stated that the application is only meant to delay his enjoyment of the fruits of judgment. That the judgment of the trial court was well reasoned. The applicant merely states that the appeal has high chances of success without elaboration is not enough. For the said reasons, the Respondent concluded that the application is frivolous and vexatious and should be dismissed.

Decision

4. Traditionally, applications for stay are brought under the provisions of Order 42 Rule 6 of the *Civil Procedure Rules*. As rightly highlighted by the Respondent, the applicant filed a similar application at the trial court and stay orders were issued on 4th July, 2024 with a rider that the applicant would deposit the entire decretal sum of Kshs. 1,042,194/= in court within 21 days.

5. The principles upon which the court may stay the execution of orders appealed from are well settled. Order 42 Rule 6 of the *Civil Procedure Rules* stipulates: -

> "No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but the court appealed from may for sufficient cause order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from the court to which such appeal is preferred shall be at liberty on application being made to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the Appeal is preferred may apply to the appellate court to have such orders set aside.
>
> No order for stay of execution shall be made under sub rule 1 unless:-
>
> a. The Court is satisfied that substantial loss may result to the 1st Applicant unless the order is made and that the application has been made without unreasonable delay; and
>
> b. Such security as the Court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the Applicant.

6. Therefore, under Order 42 Rule 6(2) of the *Civil Procedure Rules*, an Applicant should satisfy the court that:

   a. Substantial loss may result to him unless the order is made;

   b. That the application has been made without unreasonable delay; and

c. The applicant has given such security as the court orders for the due performance of such decree or order as may ultimately be binding on him.

7. These principles were enunciated in *Butt v Rent Restriction Tribunal* [1979] the Court of Appeal stated what ought to be considered in determining whether to grant or refuse stay of execution pending appeal. The court said that: -

a. The power of the court to grant or refuse an application for a stay of execution is discretionary; and the discretion should be exercised in such a way as not to prevent an appeal.

b. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion.

c. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings.

d. Finally, the Court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances and its unique requirements. The court in exercising its powers under Order XLI Rule 4(2) (b) of the *Civil Procedure Rules*, can order security upon application by either party or on its own motion. Failure to put security of costs as ordered will cause the order for stay of execution to lapse.

Substantial loss

8. This limb requires the applicant to clearly state what loss, if any, they stand to suffer. This principle was enunciated in the case of *Shell Ltd v Kibiru and Another* [1986] KLR 410 Platt JA set out two different circumstances when substantial loss could arise as follows: -

> "The appeal is to be taken against a judgment in which it was held that the present respondents were entitled to claim damages....It is a money decree. An intended appeal does not operate as a stay. The application for stay made in the high Court failed because the gist of the conditions set out in Order XLI Rule 4 (now Order 42 Rule 6(2)) of the *Civil Procedure Rules* was not met. There was no evidence of substantial loss to the applicant, either in this matter of paying the damages awarded which would cause difficulty to the applicant itself, or because it would lose its money, if payment was made, since the Respondents would be unable to repay the decretal sum plus costs in two courts...."

9. As a general rule the only ground for such a stay of execution was an affidavit by the applicant showing that if the stay is not granted there was no reasonable probability of getting back the decretal sum in the event the appeal succeeds. I find it important to note that on conclusion of the proceedings before the trial court, final judgment was entered against the applicant dated 9th May, 2024. Thereafter, the Respondent Jeremiah Chebii who is the intended appellant filed a notice of motion before the same court dated 16th April, 2024 seeking stay of execution as against the Respondent. The trial court deciding as it did, exercised discretion to grant stay to the applicant on condition that he should deposit the decretal sum of Kshs. 1,042,194 in court within 21 days. This decision called for this court to look into the application rendered by the trial court dated 4th July, 2024 to establish whether the core of the application dated 8th July, 2024 is *res judicata*

10. Section 7 of the *Civil Procedure Act* endorses this doctrine by providing 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"

11. The *Black's law Dictionary 10th Edition* defines "*res judicata*" as

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

12. In *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was *res judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined it could not be resuscitated by another Application.

The Court of Appeal further stated that:

> "That is to say, there must be an end to Applications of similar nature, that is to further, under principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

13. Kuloba J., in the case of Njangu v Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:

> 'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*....."

i. what issues were really determined in the previous Application;

ii. whether they are the same in the subsequent Application and were covered by the Decision.

iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

14. The underlying rationale of this doctrine in our legal system is to give effect to finality of judgments and rulings. This means that where a cause of action has been litigated to finality like in the instant case between the same parties on a previous occasion as evidenced in the ruling on stay of execution dated 4th July, 2024. A subsequent attempt by the applicant to proceed against the respondent on the same cause of action is not permissible. The facts of this case needless to say do not belong to the exception of the doctrine of *res judicata* as defined in Section 7 of the *Civil Procedure Act* and the dicta in the

above case law. This court also points out that the ruling dated 4th July, 2024 is not in issue by way or review on any of the declarations made by the trial court, more specifically on the condition precedent for stay of execution to deposit the entire decretal sum in court within 21 days. A mere repetition by the applicant on an already decided application on the merits is obviously insufficient to empower an appellate court to revisit the cause of action. Therefore, in my view, there is a cause of action estoppel against the application filed by the applicant dated 4th July, 2024. The proceedings are identical to that in the earlier proceedings at the trial court before the same parties. The doctrine of

15. estoppel applies not only to points that have already been decided but also to points which properly belong to the subject of litigation and which the parties exercising reasonable diligence ought to have brought forward at the time of litigation before the court below.

16. Learned author Neil Andrews in his book *Principles of Procedure* 12th Edition, 1994 summed up the dominant rationale of *res judicata* in the following extract:

> " The principle of finality is rooted in several inter-related policies. If a decision were not treated as final, many inconveniences would result: the dispute would continue to drag on; greater legal expense and delay would result; scarce "judge-time" would be spent re-hearing the matter, inconsistent decisions might follow; litigation would cease to be a credible means of setting disputes; finally, it would be a hardship on the victorious party if the first case were to be re-opened; the victor is entitled to assume that at the first action he was not merely attending a dress rehearsal for further performances."

17. Therefore, as a result of these considerations, I dismiss the application dated 8th July, 2024 on the strength of the doctrine of *res judicata*. The only residual remedy exercisable by this court under Section 1(A) , 1(B) & 3(A) as read with order 50 & 51 of the *Civil Procedure Rules* together with Article 48 on Access to Justice, extension of time is hereby granted to the Applicant to comply with order of depositing of security as ordered by the trial court pending the hearing and determination of the Appeal. In the alternative to this order on deposit of security the Applicant is granted leave to provide a bank guarantee from a reputable financial institution of the same decretory sum ordered by the trial court to act as security pending the hearing of the intended appeal. The enlargement of time so granted shall subsist within 45 days from today's ruling. In default it shall be presumed that the Appeal is lost. The costs of this application to abide the outcome of the Appeal.

DATED AND SIGNED AT ELDORET THIS 12TH DAY OF AUGUST, 2024

In the presence of

Mr. Omboto Advocate for the Applicant

.....

R. NYAKUNDI

JUDGE