



REPUBLIC OF KENYA



Mana Pharmacy Limited & another v Transwide Pharmaceuticals Ltd (Civil Appeal E003 of 2021) [2023] KEHC 2748 (KLR) (30 March 2023) (Ruling)

Neutral citation: [2023] KEHC 2748 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E003 OF 2021
RN NYAKUNDI, J
MARCH 30, 2023**

BETWEEN

MANA PHARMACY LIMITED 1ST APPELLANT

SAMUEL OULULA WANGUBA 2ND APPELLANT

AND

TRANSWIDE PHARMACEUTICALS LTD RESPONDENT

RULING

Coram: Before Hon. Justice R. Nyakundi

Nyamweya & Co. Advocates for the Respondent

Aloo Romanus & Company Advocates for the Applicant

1. The Applicants approached this court vide an application dated October 17, 2022 seeking the following orders;
 1. Spent.
 2. Spent.
 3. Spent.
 4. Spent
 5. That the Court be pleased to issue a stay of execution of the warrants of arrest issued on October 12, 2022 in Eldoret CMCC No E278 of 2020 Transwide Pharmaceuticals Limited Vs Mana Pharmacy Limited & Samuel Oulula Wanguba against Mana Pharmacy Limited and Samuel Wanguba Oulula pending the hearing and determination of the appeal.



6. That the Court be pleased to set aside unconditionally the warrant of arrest issued on July 7, 2022 against Mana Pharmacy Limited and Samuel Wanguba in Eldoret CMCC No E 278 Of 2020 Transwide Pharmaceuticals Limited Vs Mana Pharmacy Limited & Samuel Oulula Wanguba pending the hearing and determination of the appeal.
 7. That pending the hearing and determination of the main appeal the Honourable Court be pleased to stay any further proceedings in Eldoret CMCC No E278 Of 2020 Transwide Pharmaceuticals Limited Vs Mana Pharmacy Limited & Samuel Oulula Wanguba.
 8. That costs for the application be provided for.
 9. That costs for the application be provided for.
2. The application is premised on the grounds set out therein and the contents of the affidavit sworn by Samuel Oulula Wanguba.

Applicant's Case

3. The applicant contended that the matter in the trial court commenced in 2020 and he only came to know about it when he was arrested in 2021 in satisfaction of a decree before judgement for Kshs 5,388,192.00. Being aggrieved with the judgement and decree, he instituted the instant appeal vide a memorandum of appeal. He filed an application for stay in the high court vide an application dated March 19, 2021 but no interim orders were granted. The matter was slated for pre-trial on November 9, 2022 but the same was taken to court on October 5, 2022 and warrants of arrest issued. He urged that the warrants of arrest emanate from the ruling of the trial court delivered on March 4, 2022. He deposed that the ruling was issued despite the present appeal and he risks being condemned unheard.

Respondent's Case

4. The respondents opposed the application and stated that the applicant had made a similar application in the trial court which was allowed on condition that he deposit Kshs 3,000,000 within 90 days. The 90 days lapsed and the respondent was issued with fresh warrants. The applicant did not challenge the ruling in CMCC No 278 of 2022 in any way. Counsel urged that the application is *res judicata* and further, as the appellant failed to comply with the conditions of the ruling he does not deserve any right of audience. It was his submission that the present application is untenable in law under the provisions the applicant seeks to use and should be dismissed.

Analysis & Determination

5. Upon considering the pleadings, annexures thereto and submissions, the following issue arises for determination;

Whether the application is res judicata

6. The doctrine of res judicata is set out in Section 7 of the [Civil Procedure Act](#). The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
7. A close reading of Section 7 of the Act reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:
 - i. The suit or issue raised was directly and substantially in issue in the former suit.



- ii. That the former suit was between the same party or parties under whom they or any of them claim.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

8. Speaking proudly and from the litigation history between parties to this application one cannot rule out the application of the doctrine of *res judicata*. Why do I take this position, that a court of competent jurisdiction as determined on its merits a litigated cause on stay of execution, suspension of warrants and a condition precedent on deposit of security for due performance of the decree subject matter of the intended Appeal. Certain decisions by our courts well illustrate the effect of *res judicata* in the field of law and how it does affect the instant application. In this regard, I rely on the following case law to affirm that this Notice of Motion dated October 17, 2022 is in violation of section 7 of the [Civil Procedure Act](#). I have in mind the Court of Appeal decision in [Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd](#) (2017) eKLR, said, on the principle of *res judicata*:

“In its quest to escape liability or mitigate loss, Benjoh has pursued almost all possible legal avenues and has employed tremendous legal ingenuity and sophistry. Benjoh however seems to have ignored or failed to grasp the full tenor, extend and spirit of the doctrine of *res judicata*. The doctrine is grounded on public interest and thus transcends the parties interests in a suit. Public interest requires or demands that litigation must at some point come to an end. In the Maina Kiai case (supra), the court quoted with approval the Indian Supreme Court in the case of Lal Chand vs Radha Kisahn AIR 1977 SC 789 where it was stated

The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party has once succeeded on an issue should not permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it-not even by consent of the parties-because it is the court itself that is debarred by a jurisdiction adjunct, from entertaining such suit.” Again, in *Benjoh Amalgamated Limited and Another vs Kenya Commercial Bank Limited* (2014) eKLR this court in determining yet another application by Benjoh stated thus:

In *Management corporation stratta Tittle Plan No 301 V Lee Tat Development pte Ltd* (2009) SGHC 234, the court of Appeal (of Singapore) examined the doctrine of *res judicata* in relation to decided cases and observed that the policy reasons underlying the doctrine of *res judicata* as a substantive principle of law are first “ the interest of the community in the termination of disputes, and in the finality and conclusiveness of judicial decisions” and second “the right of the individual to be protected from vexatious multiplication of suit and prosecutions.”

9. Distinctive of any judicial decision is the rule that at some stage there ought to be finality to the proceedings. The court or tribunal which makes that decision becomes *functus officio*. The only



available avenue is either review or on Appeal. Otherwise, the general rule is that the decision is final and conclusive so far as that very court or tribunal is concerned. It cannot thereafter be a subject of litigation in another forum or in the same court with competent jurisdiction. If in any subsequent proceedings in the same court or any other judicial tribunal any issues of fact or law which was determined by the earlier judgement or ruling is called in question, the current court or tribunal must invoke the defence of *res judicata*. The trial court having exclusive jurisdiction on the same issues incidentally and on the merits ruled on the remedy of stay of execution pending the hearing and determination of the intended Appeal before the High Court. This same issue seems to have found its way to this court and as it is clear a substantive ruling was rendered any such subsequent questions are not justiciable. A brief summary herein under persuades me to invoke Section 7 of the [Civil Procedure Act](#) to bar any such proceedings.

10. The applicant(s) had filed an application in CMCC 278 of 2022 seeking stay of execution and proceedings pending the determination of the present appeal. Vide a ruling dated March 4, 2022, the trial court granted his prayer for stay of execution on condition that Kshs 3,000,000/- be deposited as security within 90 days, failure to which the stay would lapse. The applicant(s) failed to abide the conditions and did not deposit the same. It follows that the issue raised herein being stay of execution, the same was substantially in issue in the former court. Further, the parties were the same as in this suit and were litigating under the same title. By virtue of the ruling dated March 4, 2022, it is clear that the matter was heard and finally determined in the former suit and that the court that determined it was competent to try the issues raised.
11. Essentially the Applicant had moved the trial court for leave to file an Appeal before the High Court. This Application was heard and determined permitting an Appeal to be lodged within the provisions of Order 42 of the [Civil Procedure Rules](#). Notwithstanding that procedural position the Applicant once again invoked this court jurisdiction on stay of warrants of execution. I guess this was prompted by failure of the Applicant to satisfy the condition precedent on deposit of security of Ksh Three Million (3,000,000) within 30 days period. That condition if not fulfilled renders the Appeal moot.
12. In terms of obiter the committal warrant of arrest of the judgement debtor are governed by the provisions of Sections 38 (d) and 40 of the [Civil Procedure Act](#). As an emphasis a judgement debtor fundamental rights to dignity and liberty can only be limited upon strict adherence of the procedure laid down in the provisions of the Act. So in a nutshell this court will not be acting ultra-vires its jurisdiction if it infers that this application is an abuse of the court process. For it is evident that the applicant(s) sought stay in the trial court, was granted the same and failed to comply with the conditions. The stay was conditional pending the appeal only to come to this court and claim that the stay should not have been issued because the appeal was pending. This is clearly a case of an abuse of the court process with the purpose of denying the respondent the fruits of its judgement. Justice delayed is justice denied and this court shall not participate in the circus that the applicant seeks to orchestrate.
13. In the premises, the application is dismissed in its entirety with costs to the respondent.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 30TH DAY OF MARCH 2023

.....

R. NYAKUNDI

JUDGE

In the presence of;-

Munji for Nyamweya for the Respondent

