



**Karanja & another v Mwidadi & another (Suing as the administrators of the Estate of Zahra Umaz Iddi) (Civil Appeal E076 of 2021) [2023] KEHC 24877 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 24877 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MAKUENI  
CIVIL APPEAL E076 OF 2021  
TM MATHEKA, J  
OCTOBER 30, 2023**

**BETWEEN**

**JOSEPH KARANJA ..... 1<sup>ST</sup> APPLICANT**

**BUSCAR (EA) LIMITED ..... 2<sup>ND</sup> APPLICANT**

**AND**

**AFUA MWIDADI ..... 1<sup>ST</sup> RESPONDENT**

**IDDI KALIMBO NYUNDO ..... 2<sup>ND</sup> RESPONDENT**

**SUING AS THE ADMINISTRATORS OF THE ESTATE OF ZAHRA UMAZ IDDI**

**RULING**

1. On 27th September 2021 the Hon B N Ileri SPM delivered his judgment in Makindu MCCC 131 of 2018 against the applicants and for the respondents where he awarded liability at 100%, General and Special damages totaling Ksh 2,325, 525 composed of damages for pain and suffering, loss of expectation of life and loss of dependency.
2. The applicants were dissatisfied and they lodged this appeal via the filing of a memorandum of appeal.
3. They also filed through their counsel an application seeking stay of execution of the judgment and decree pending the hearing and determination of the appeal.
4. On the 2nd February 2023 the Hon Justice Dulu delivered a ruling with respect to that application in which conditional stay was granted. The condition was that applicants would pay the respondents the sum of Ksh 400,000 within 45 days from 2nd February 2023. In default the stay orders would lapse.
5. The application before me is dated 27th April 2023. It seeks orders that this court does grant interim orders of stay of execution of the Decree in Makindu PMCC no 131 of 2018 pending the hearing and determination of the appeal, stay of execution of the intended sale of M/V registration no. KCF 444Z



- and the warrants dated 20th April 2023 be set aside unconditionally, the attached m/v registration no KCF 444Z be released to the applicants pending the hearing of the application inter parties, and the court to enlarge time for the applicants to comply with the orders of 2nd February 2023.
6. The grounds for the application are set out on its face and the supporting affidavit of Mercy Waweru an advocate in the firm of Kimondo Gachoka & Co advocates who are seized of the matter on behalf of the applicants.
  7. The main ground is that the ruling by Dulu J of 2nd February 2023 was delivered in their absence and without notice to them and it is only on the 25th April 2023 when they were served with the warrants of attachment and proclamation that the applicants came to learn of the orders that were issued on the 2nd February 2023.
  8. Counsel depones that the applicants have an arguable appeal and that unless the orders sought are granted their appeal will be rendered nugatory.
  9. In response the respondents filed Notice of preliminary objection dated 28th April 2023 to the effect that the application dated 27th April 2023 was *res judicata* and offends the provisions of s. 7 of the [Civil Procedure Act](#) and hence, the court lacks jurisdiction to hear and determine the same.
  10. The Respondents also filed a replying affidavit sworn by Iddi Kalimbo Nyundo on 2nd June 2023. In the affidavit the applicant depones that the court indeed deferred its ruling but on the 25th January 2023 sent an email to all the parties through their advocates. A copy of the email is annexed as IKN-2. That this having been their application it was their duty to diligently follow up with the court to know when it would be delivered.
  11. Parties filed written submissions on the P.O
  12. The applicants submit; that on jurisdiction the court is empowered by Article 165(7) of [the Constitution](#) and [Butt v Rent Restriction Tribunal](#) (1982) KLR 417 where the court reiterated that unless there is an overwhelming hindrance a stay must be granted so that an appeal may not be rendered nugatory should the decision be reversed. It is submitted that the court has jurisdiction to give the orders sought in the application dated 27th April 2023.
  13. On *res judicata* it is submitted that the matter is not *res judicata* as the applicant is seeking an order to enable them satisfy the condition of the ruling dated 2nd February 2023. That this application has not been determined.
  14. On the application dated 27th April 2023, the respondents submit on two issues: whether the applicant was served with the ruling notice and whether the application is merited.
  15. The applicant argues that the Email sent is about HCCA E096 of 2021 yet the subject matter is E076 of 2021. That being a large law firm with over 20,000 active files it was too much to expect them to trace the file and follow up on the matter
  16. It is also argued that under Order 5 rule 22B on electronic mail service that other than the service by email and confirmation of delivery the officer duly authorized by court to effect service shall file an affidavit of service attaching the email service delivery receipt. They submitted that a sent email was not the same as a delivered email, and in any event it was not their intention not to comply.
  17. On extension of time the applicant relies on [Nicholas Kiptoo Arap Korir Salat vs The IEBC & 7 others](#) [2014] eKLR on the proposition that the court's discretion to extend time is unfettered.



18. On the second issue it is submitted that under sections 1A, 1B, 3A and 95 of the [CPA](#) and Order 50 rule 6 of the [CPR](#) the court has unfettered discretion to allow the orders. That the application has been without undue delay that the applicants will suffer substantial loss and that the applicant is ready to deposit such security as the court may direct.
19. That in the ultimate design of things the main concern of the court should always be to do justice. See *Shah v Mbogo* (1974)EA
20. In opposing the application and in support of the PO the respondents submit on the issues whether the application has merit and whether the applicant is entitled to the reliefs sought.
21. On the first issue it is argued that the applicants have not made out a prima facie case as set out by the COA in *East African Development Bank v Hyundai Motors Kenya Limited* [2006] eKLR citing with approval *Giella v Cassman Brown & Co Limited* [1973] EA 358.on the award of an injunction. It is argued that the applicants have not established a prima facie case with a probability of success, for the reason that the application is *res judicata* having been heard and orders made by this court. On the second it is argued that equity aids the vigilant and not the indolent, and that he who comes to equity must come with clean hands. That the applicants filed the application dated 15th November 2021 and hence they had the duty to follow up the same.
22. On the PO s. 7 of the [CPA](#) is cited and relied on. And in *Dina Management Limited v County Government of Mombasa & 5 others* (petition 8(E10) of 2021 [2023] KESC 30 KLR for the proposition that “ it must be demonstrated that there was a former Judgment which was final. It was on merit and by a court having jurisdiction and have identical parties, subject and cause of action” It is argued that the remedies sought in the application are similar to those sought in the earlier application and allowed. That the ruling was final and conclusive with respect to the rights and duties of the parties with respect to the prayer for stay of execution. It was litigated under the same title, same parties, same subject matter and this hon court has no jurisdiction to and determine the application see *The Owners of the Motor Vessel Lilian ‘S’ v Caltex Oil Kenya Ltd* [1989] KLR 1

### **Analysis & Determination**

23. I have carefully considered the application, the record, the submissions by each party. The issues for determination are whether the application is *res judicata* and whether the reliefs sought are tenable.
24. I have perused the record. On 7th July 2022 Mr. Nyanje appeared for the respondent and Mr. Njuguna for the appellant. It shows that the ruling was slated for 27th October 2022. It was not ready and was deferred to 20th December 2022. Ms. Kemunto appeared holding brief for Mr. Njuguna for the appellant. There was no appearance for the respondent. The next mention date was 24th January 2023 but the parties were not present. The Court gave an order that the DR to issue a date for the ruling scheduled on 2nd February 2023. The DR issued the notice via email to the respective emails of each counsel. On that day parties were absent but the record shows that on the email sent by the DR the parties had been duly notified and the ruling was delivered
25. I have seen the notice. It is true it reads Makueni HCCA E96 PF 2021 *Joseph Karanu & Another Vs Iddi Kalimbo Nyundo & Anor*. Evidently there is a typo on the serial number of the case, but the email bears the correct names of the parties in large capital letters. The receipt of the email has not been denied. In fact, it is admitted. The question is whether it is a reasonable ground for counsel to simply state that because of this typo in the serial number their file could not be traced. What about the names of the parties? What did they do about the names of the parties as they appear in the email? This was communication from the Court. The fact that they were waiting for a ruling from the court



on this matter surely ought to have galvanized whoever saw the email to check it out and even to seek clarification from the Deputy Registrar. However, the same was received and ignored. It is not the norm for courts to write to Law Firms and any communication ought to be taken seriously and followed up for clarification. In my considered view that excuse about the email is not reasonable. This was the applicant's application, the number of active files in their law firm notwithstanding. They are the ones who ought to have been anxious about the Ruling and its date. They are the ones who had interim orders whose setting aside would have been to their prejudice. From 20th December 2022 to 27<sup>th</sup> April 2023 when the application was filed is four months. The applicants were not diligent in following up on their case.

26. The applicant submits that there is no affidavit of service by the respondents. This was a letter from the Deputy Registrar. The email was not from the respondents. They could not have been expected to file an affidavit of service yet they were not the ones who served.
27. In any event, the question that begs is since the applicants became aware of the order what effort have they made to comply?
28. Is the application *res judicata*? This application is not different from the application that the hon. Justice Dulu allowed vide the ruling of 2nd February 2023. It seeks the exact same orders that they sought in the application dated 15th November 2023, stay of execution pending appeal. I do not have to spend too much time on this because the record speaks for itself.
29. In the upshot I find that the application for stay of execution pending the hearing and determination of the appeal is *res judicata*. There is no reasonable explanation for the failure by the applicant to comply with the court orders made on the 2nd February 2023 by the Hon. Dulu J to warrant the orders sought.
30. The application is without merit and is dismissed with costs.

**DATED SIGNED AND DELIVERED THIS 30<sup>TH</sup> OCTOBER 2023.**

.....

**MUMBUA T MATHEKA**

**JUDGE**

CA Nelima

Kimondo Gachoka Advocates for Applicant-N/A

K. Lughanje & Company Advocates for Respondent – Nyanje for respondent present

