



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Motrex Limited v Julius & another (Civil Suit 84 of 2020)
[2023] KEHC 27590 (KLR) (30 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 27590 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 84 OF 2020
F WANGARI, J
OCTOBER 30, 2023**

BETWEEN

MOTREX LIMITED APPLICANT

AND

NDURUHU JULIUS 1ST DEFENDANT

NYERI MOTORS SERVICE LIMITED 2ND DEFENDANT

RULING

1. This ruling relates to a Notice of Motion dated 6th September, 2022 which sought for the following orders: -
 - a. Spent;
 - b. That pending the hearing and determination of this application inter-partes, an order for stay of execution of the warrant of attachment and sale issued by the court on 31st August, 2022 be granted.
 - c. That the warrants of attachment and sale issued by the court hearing on 31st August, 2022 be set aside and any cost due to M/S Betabase Auctioneers, be paid by the Plaintiff to the said auctioneer.
 - d. That the cost of this application be in the cause.
2. The application was opposed by the Respondent via the Replying Affidavit dated 26/9/2022, stating inter alia that the application is res judicata, as the issue of stay of execution has already been determined via a consent recorded on 9/7/2019 and confirmed via a ruling dated 4/2/2020.
3. Directions were taken that the application be disposed of by way of written submissions. Both the Applicant and the Respondent complied.



Analysis and Determination

4. The background of this application is that judgment was entered in favour of the Plaintiff/ Respondent on 9/2/2018. The Defendants via their Notice of Motion dated 11/10/2019 sought for stay of execution of the said judgment and decree. The application was dismissed by Hon. Justice D.O Chepkwony via the ruling dated 11/10/2019.
5. Thereafter, the 1st Defendant filed another Notice of Motion dated 17/9/2020 seeking to review and set aside the judgment dated 9/2/2018. Stay of execution of the said judgment was also prayed for. Hon. Justice P.J. Otieno directed the application which had been filed under certificate of urgency, be heard inter partes before the trial court on 8/10/2020.
6. On 8/10/2020, the 1st Defendant appeared in court and the Plaintiff was absent. The trial judge deemed the application to have been unopposed and allowed the application including stay of execution orders.
7. The Plaintiff filed a Notice of Motion dated 17/11/2020 seeking to set aside the ex parte orders dated 8/10/2020, which had allowed the application dated 17/9/2020. The application was based on the grounds that stay orders had been granted by Justice D.O Chepkwony and not Justice P.J. Otieno as stated by the Defendants. Further, the Plaintiff stated that the orders sought for in the said application had already been dealt with in the application dated 11/10/2019, hence res judicata.
8. Through the ruling dated 7/7/2021, the application dated 17/11/2020 was allowed by setting aside the ex parte orders issued on 8/10/2020, and directed that the application dated 17/9/2020 be heard inter partes on priority basis.
9. I have considered the pleadings and the court proceedings as from the time the Notice of Motion dated 11/10/2019 was filed. The issues for determination are;
 - a. Whether the application dated 6/9/2022 has merits.
 - b. Whether the application dated 17/9/2020 is res judicata.
10. On the application dated 6/9/2022, the 1st Defendant sought for stay of execution of warrants of attachment and sale issued on 31/8/2022 resulting from the judgment delivered on 9/2/2018. The 1st Defendant stated that the application dated 17/9/2020 was still pending ruling, and if ruling had been delivered, it was delivered without notice. He also prayed that there also be a stay of the judgment dated 9/2/2018.
11. Upon perusing the pleadings, there is a notice from the High Court registry via email dated 5/7/2021 at 12.07pm to the parties giving notice that the ruling on the matter would be delivered on 7/7/2021. Assuming that the 1st Defendant did not receive the notice as alleged, that would not have changed the outcome of the ruling whose orders are now well within his knowledge.
12. The above application seeks for stay of execution of the judgment dated 9/2/2018. This is not the first time the 1st Defendant has made such an application. The first application for stay of execution of the judgment id dated 11/10/2019 and the same was dismissed.
13. The second application for stay of execution of judgment is dated 17/9/2020 which was allowed ex parte on 8/10/2020, but the orders set aside after the application by the Plaintiff dated 17/11/2020 was allowed via the ruling dated 7/7/2021.



14. The Plaintiff submitted that the application dated 6/9/2022 was *res judicata*. Section 7 of the [Civil Procedure Act](#) on *res judicata*, reads as follows:

“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.”

The rationale of the doctrine of *res judicata* is to ensure that every litigation must come to an end. In the case of The [Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), [2017] eKLR, the Court of Appeal enunciated the elements to be satisfied in proving a matter to be *res judicata* as follows;

[F] or the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must 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.
15. The application dated 6/9/2022 has without a doubt met the criteria of a matter being *res judicata*, as the application dated 11/10/19 as discussed herein above had been heard and determined on merits.
16. On whether the application dated 17/9/2020 was *res judicata*, even though the leaned judge in the *ex parte* ruling dated 8/10/2020 did not find it as *res judicata*, this may be explained by the fact that the matter was not heard and determined on merit but by default order. Further, the trial judge did not mention on the said application being *res judicata* in her ruling delivered on 7/7/2021. Instead, it was directed that the matter be fixed for inter partes hearing on priority basis.
17. It is a fact that the orders being sought for in the application dated 17/9/2020 are similar to the orders sought for in the application dated 11/10/2019, that is orders seeking for stay of execution of judgment and decree dated 9/2/2018. The application dated 11/10/2019 having been heard and dismissed on merits, the 1st Defendant cannot again come back to court seeking for the same orders.
18. Under the circumstances, the application dated 17/9/2020 is *res judicata* as it has met the elements as stated in the [I.E.B.C case](#) (*supra*). There is therefore no need to fix it for inter partes hearing as ordered by the court via the ruling dated 7/7/2021.
19. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
- a. The Notices of Motion dated 17th September, 2020 and 6th September, 2023 are found to be *res judicata* and are hereby dismissed.



- b. The status in the matter having reverted back to when the judgment was issued on 9/2/2018, the warrants of attachment and sale are hereby found to have properly been issued.
- c. Costs of the two applications awarded to the Plaintiff.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 30TH DAY OF OCTOBER, 2023.

.....

F. WANGARI

JUDGE

In the presence of;

K'Bahati Advocate for the Plaintiff

Gikandi Advocate for the Defendant

Barile, Court Assistant

