



**Simba Coach Limited v Republic (Miscellaneous Criminal Application
E022 of 2022) [2022] KEHC 394 (KLR) (27 April 2022) (Judgment)**

Neutral citation: [2022] KEHC 394 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
MISCELLANEOUS CRIMINAL APPLICATION E022 OF 2022**

FA OCHIENG, J

APRIL 27, 2022

BETWEEN

SIMBA COACH LIMITED APPLICANT

AND

REPUBLIC RESPONDENT

JUDGMENT

1. It is an application seeking a declaration, that the proceedings in Nyando Spmc Traffic Case No. E255 OF 2021 is Res judicata.
2. The Applicant asserted that there was already an ongoing case at the Busia Chief Magistrate’s Court, involving the Scania Bus Registration No. KBQ 613C. Whilst those proceedings were still pending, the prosecution decided to prefer new charges before the Senior Principal Magistrate’s Court Nyando, in respect to the same motor vehicle.
3. In the circumstances, it was the contention of the Applicant, that the new proceedings at the Nyando Court were not only prejudicial to it, but they also amounted to double jeopardy.
4. The Applicant pointed out that the particulars of the offences for which there was a pending case at Busia, were similar to those of the new case at Nyando. The said particulars were in relation to the following three dates;
 - a. 14th January, 2019;
 - b. 10th February, 2019; and
 - c. 6th May, 2019.



5. The Applicant pointed out that whilst the driver charged before the court at Busia was Peter Mwangi Ngugi, the persons charged before the Court at Nyando were Awadh Ali Slem and Harith Self Suleiman.
6. The application was supported by the affidavit sworn by Kaka Hussein Hamisi, who was the Applicant's Western Kenya Regional Manager.
7. The deponent stated that both Awadh Ali Slem and Harith Seif Suleiman were not employees of the Applicant.
8. The Applicant's Regional Manager further deponed that it was not in order to open Criminal Proceedings in separate courts, on the basis of the same offence against the same accused person.
9. In his view, the prosecution ought to have extracted Warrants of Arrest against the Applicant, in the proceedings which were at the Court in Busia.

The Offences

10. In the case before the Court at Busia, the offences were in relation to the overloading of the bus, on 3 different dates.
11. As I understand it, the accused persons in that case were on trial for driving the bus whilst it was overloaded.
12. Meanwhile, the case at the Court in Nyando was NOT against the drivers of the bus in issue. The two accused persons at Nyando faced charges for permitting the use of an overloaded vehicle.
13. In effect, the offences were not the same, although they stemmed from the same set of facts.

Accused Persons

14. The accused person before the court at Busia is different from the accused persons before the court at Nyando.

Res Judicata

15. The Applicant indicated that the Court at Busia had not yet rendered its verdict. Therefore, the proceedings before the court at Nyando cannot be construed as being res judicata when there has not yet been any determination of the case filed earlier.
16. When the court asked the Applicant's advocates whether or not the court at Busia had made a final determination of the case before it, the learned counsel answered in the negative. Thereafter, he promptly stated that the application should have made reference to "sub judice", rather than "res judicata".
17. The Applicant's concession came at the tail-end, when responding to a question raised by the court.
18. Obviously, the said concession appears to be an acknowledgement that the declaration sought cannot be granted. But that is not only because the Court at Busia had not yet made a determination of the case before it.
19. It is also because the offences in the 2 cases were different, and the accused persons were different too.



20. I appreciate the concerns of the Applicant, however. I say so because the new case at Nyando arises from events that occurred two years earlier; and which events had led to charges being preferred against the accused at the Court in Busia.
21. It is possible, (although I do emphasize that I do not have the benefit of the record of the proceedings), that the case could be dismissed.
22. If the case lodged at the Court in Nyando were to proceed, whilst the Court at Busia had not yet made a determination, there might arise a real risk of inconsistent decisions being made by the two courts.
23. The converse was also possible; if the Court in Busia convicted the accused, whilst the Court at Nyando acquitted the accused persons.
24. If such eventualities were allowed to occur, the same would result into the courts being put into disrepute.
25. Prudence demands that the two cases ought not to proceed simultaneously.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 27TH DAY OF APRIL 2022

FRED A. OCHIENG

JUDGE

