



**Woo & another v Chogo and Kirogo (Suing as the legal representatives of the estate of the deceased Julius Kahindi Kalu) (Civil Appeal 4 of 2021) [2022] KEHC 3389 (KLR) (25 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 3389 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MALINDI  
CIVIL APPEAL 4 OF 2021  
SM GITHINJI, J  
APRIL 25, 2022**

**BETWEEN**

**KIM JIN WOO ..... 1<sup>ST</sup> APPELLANT**

**KIM JNG KYU ..... 2<sup>ND</sup> APPELLANT**

**AND**

**HARRIET HAMIDA CHOGO AND CHARO KATANA  
KIROGO ..... RESPONDENT**

**SUING AS THE LEGAL REPRESENTATIVES OF THE ESTATE OF THE  
DECEASED JULIUS KAHINDI KALU**

*(Being an Appeal from the Judgement/Decree of Honourable D.Wasike – Resident Magistrate delivered on 16th December, 2020 in Malindi CMCC No.46 of 2019)*

**RULING**

1. Through a Notice of Motion dated October 6, 2021, the appellants sought the following orders:
  1. Spent.
  2. Spent.
  3. That pending the hearing and determination of this Application interparties M/S Misa Mugaro Auctioneers be ordered to release/restitute motor vehicle registration number KCB 025H Toyota Noah to the 2<sup>nd</sup> appellant/applicant.
  4. That the Honourable Court be pleased to grant a stay of execution of the decree in CMCC No. 46 of 2019 Harriet Hamida Chogo and Charo Katana Kirogo [Suing as the legal representatives of the estate of the deceased Julius Kahindi Kalu versus Kim Jin Woo and Kim Jong Kyu] pending the hearing and determination of this Appeal.



2. The application is premised on the grounds on the face of it and supported by the affidavit of Kim Jong Kyu. Mr Kim deposed that on September 17, 2021, M/s Misa Mungaro Auctioneers seized his motor vehicle registration number KCB 025H Toyota Noah pursuant to warrants of attachment issued by the Court. On the same date he instructed the firm of M/s Nyambura Kamau Advocates to file an application for stay of further execution of the decree issued in CMCC No. 46 of 2019. However, when that application came up for hearing, he was informed that a similar application had been filed by the firm of Murimi Ndumia Mbago & Muchela Advocates on January 14, 2021, and a conditional stay granted by the lower court on June 16, 2021.
3. He added that the appellants stand to suffer substantial loss if the appeal is successful since the Respondent is not a person of means and or his estate has no known assets. That no draft decree was ever sent to the appellants for approval, neither was he served with any proclamation notice. That the decree holder has already been paid a sum of Kshs 3,000,000/- by the Insurer. Mr. Kim deposed that he is ready and willing to comply with the conditions of stay that may be imposed by this court.
4. In response, the respondent filed a replying affidavit sworn on October 9, 2021 and a further replying Affidavit sworn on December 1, 2021 by counsel Geoffrey Kilonzo who deposed that judgment was delivered in CMCC 46 of 2019 against the appellant for Kshs. 4, 366, 386.25/-. That the present application is res judicata as another similar application dated January 14, 2021 was allowed on June 16, 2021 on condition that the appellant deposit the decretal sum in a joint interest earning account within 21 days from the date of ruling. That failure to comply, the respondent exercised its rights by obtaining warrants of attachment and sale.
5. Mr. Kilonzo deposed that the present application is also sub judice as there is another dated September 20, 2021 and still pending before the trial court. He explained that the Appellants were served with the bill of costs on January 14, 2021 through their advocates, but the same was not challenged. In addition, the Appellants were served with the proclamation notice dated July 26, 2021.
6. According to Mr Kilonzo, the present application was brought after inordinate delay and that the order to deposit security in court was not complied with. He added that the appeal has no chances of success and the application is only meant to block the respondent from enjoying the fruits of his judgment.
7. He added that the application is overtaken by events for the reason that the subject vehicle was sold by public auction on October 15, 2021. That at the time of the sale, there were no stay orders in place barring the same. Mr Kilonzo deposed that the said sale was indeed confirmed by the court in Misc. Civil Application No 489 of 2021 on October 28, 2021.
8. The application was directed to be canvassed by way of written submissions, which as at the time of writing this opinion, only the respondent had complied.
9. The respondent submitted that the application violates the provisions of section 6 and 7 of the *Civil Procedure Act* as it was explained in the replying affidavit, thus robbing this court of jurisdiction to hear and determine the same.
10. On *res judicata*, the respondent relied on the cases of *John Florence Maritime Services Limited & another v CS for Transport and Infrastructure & 3 others* [2015] eKLR; *IEBC v Maina Kiai & 5 others* [2017] eKLR; *Uhuru Highway Development Limited v Central Bank of Kenya Exchange Bank Limited [in voluntary liquidation]* and *Kamlesh Mansukhlal Pattni; Ram Kirpal v Rup Kuari* [ILR] Vol VI 1883 Allahabad Series; and *Benjoh Amalgamated Limited & Muiri Coffee Estate Limited v Kenya Commercial Bank Limited* [2006] eKLR.



11. To buttress their point on the doctrine of *sub judice*, the respondent cited the cases of [\*Kenya National Commission on Human Rights v Attorney General; IEBC & 16 others interested parties\*](#); and [\*Nyanza Garage v Attorney General\*](#). They submitted that the appellant ought to have prosecuted the pending application in the lower court or withdraw the same.
12. In addition, the respondent submitted that the appellant had not met the conditions to warrant the grant of orders of stay of execution as stipulated under Order 42 rule 6 of the [\*Civil Procedure Rules\*](#).
13. Citing the cases of [\*Kenya Shell Limited v Benjamin Karuga Kibiru & another\*](#) [1986] eKLR; [\*Standard Assurance Co Limited v Alfred Mumea Komu\*](#) [2008] eKLR; and Nairobi Civil Case No. 41 of 1995 [\*United Builders & Contractors \[Africa\] Limited v Standard Chartered Bank Limited\*](#), the Respondent submitted that the Appellant failed to show that he stands to suffer irreparable loss hence granting the orders sought would cause great prejudice to the Respondent.
14. The respondent explained that the fact that the process of execution had been put in motion, by itself did not amount to substantial loss since execution is a lawful process. They relied on the case of [\*James Wangalwa & another v Agnes Naliaka Cheseto\*](#) [2012] eKLR.
15. It was their argument that a successful litigant should not be deprived of the fruits of judgment for reasons of an appeal being preferred, and especially where the losing party is found 100% liable, as it was held in Misc. Civil Case No. 20 of 2021 [\*Hilaa Abdullah Amin v Saumu Umazi Binzi & Saba Dzuya Angatsi\*](#).
16. The respondent added that the present counsel for the appellant was improperly on record for failure to seek leave of this court to come on record after delivery of judgment, as stipulated under Order 9 rule 9 of the [\*Civil Procedure Rules\*](#). Relying on the case of S.K [\*Tarwadi v Veronica Mueblemann\*](#) [2019] eKLR, the respondent urged this court to strike out the application for being incompetent.
17. On whether the subject motor vehicle could be released to the appellant, the respondent relied on the cases of [\*Nadeem A Kana v Lucy Wambui Mwangi\*](#) [2021] eKLR and [\*Rural Electrification Authority v John Kiragu Kimani & another\*](#) [2020] eKLR and submitted that the application is overtaken by events since the sale of the subject motor vehicle had become absolute by virtue of Order 22 rule 64[2] of the [\*Civil Procedure Rules\*](#).

### Issues for determination

1. Whether the Appellant's present counsel is properly on record.
2. Whether the present application is res judicata.
3. Whether the present application is sub judice.
4. Whether this court has jurisdiction to determine the present application.
5. Whether the Appellants are entitled to the orders sought.

### Issue No. 1

18. Order 9 rule 9 of the [\*Civil Procedure Rules, 2010\*](#) provides that: -

When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change of intention to act in person shall not be effected without an order of the court-



- (a) upon an application with notice to all the parties; or
  - (b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.
19. The firm of Murimi, Ndumia, Mbago & Muchela represented the appellant at the trial court and subsequently filed the memorandum of appeal herein. On July 29, 2021, a notice of change of advocates was filed by the firm of Nyambura Kamau Advocates. Again, on January 20, 2022, the Appellants filed a notice of change of advocates to M/s Gicharu Kimani & Associates.
20. It is evident from the above series of events that Order 9 rule 9 of the Civil Procedure Rules does not apply in this case. The present appeal was filed by the same advocates representing the Appellants at trial. Any change of advocates thereafter did not necessitate the need to obtain the leave of this court. Order 9 rule 5 is clear. It reads:
- “A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”
21. The respondent’s argument that the advocates on record are improperly on record is therefore misplaced.

## Issue No. 2

22. 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.”
23. The rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.
24. It is also settled that *res judicata* will successfully be raised as a defence if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.
25. I have perused the lower court documents annexed to the respondent’s replying affidavit. It is evident that the appellants filed at the lower court, a similar application as the present one. That application was dated January 14, 2021. That application was undoubtedly between the same parties and raised substantially the same issue, that is, stay pending appeal. On June 16, 2021, the Honourable SRM D. Wasike, allowed that application. She granted a conditional stay of execution which as at the time of filing the present application, had long expired.



26. Notably, the present application is not an appeal to the stay ruling delivered by the lower court. In that respect, I find that the present application is res judicata. For this reason alone, I do find that this court lacks jurisdiction to determine the present application. In light of the foregoing, I find no basis to delve into the other issues and merits thereon.
27. It follows then that the application dated October 6, 2021 lacks merit. The end result is that the Appellants are not entitled to the orders sought and the application is dismissed with costs to the respondent.

**RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 25<sup>TH</sup> DAY OF APRIL, 2022.**

.....

**S.M. GITHINJI**

**JUDGE**

**In the presence of; -**

1. Mr Gicharu Advocate for the Appellants
2. Mr Kilonzo Advocate for the Respondents

