



REPUBLIC OF KENYA



KENYA LAW
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**Dada v Dada & 3 others (Succession Cause 255 of 2001)
[2022] KEHC 11293 (KLR) (29 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 11293 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
SUCCESSION CAUSE 255 OF 2001
JN ONYIEGO, J
JULY 29, 2022**

BETWEEN

SAKINABHAI SULEIMAN KASSAM DADA APPLICANT

AND

ZAINAB SULEIMAN KASSAM DADA 1ST RESPONDENT

LATIFA SULEIMAN KASSAM DADA 2ND RESPONDENT

KHATOONISHA SULEIMAN KASSAM DADA 3RD RESPONDENT

FATMA SULEIMAN KASSAM DADA 4TH RESPONDENT

RULING

1. Pursuant to this court's ruling dated 17th February 2021 and delivered on 5th March, 2021 the following orders were made;
 - (a) The executrix shall forthwith distribute of Kshs 14,846,279/=, and Kshs 6,279,159/= shall be shared amongst the beneficiaries in accordance with the will of the deceased.
 - (b) This matter shall be mentioned on 16.3.21 for directions on the taking of viva voce evidence:
 - i. From the executrix on the administration of the estate.
 - ii. On the cost of construction of the flats on Mombasa/block Xv/101 and contribution of each of the 5 beneficiaries.
 - iii. On the operations of Popat Brothers milling business.
 - iv. Yasmin's share.
 - v. From the auditor on the audited accounts.



2. The matter came up for mention severally with the petitioner filing an application for stay of execution dated 26th march, 2021. The court allowed the prayer for temporary stay of execution on prayer (a) of the ruling issued on 17th February, 2021. The application was canvassed by way of written submissions. Subsequently, the court delivered its ruling on the same on 31st August, 2021 and allowed the prayer for stay of execution pending the intended appeal subject to the appeal being filed within 30 days.
3. Later, the parties fixed the matter for mention on 6th October, 2021 before this court for directions. On that day, the respondents /applicant’s advocate Mr.Asige told the court that the matter was coming for fixing a hearing date pursuant to the ruling of 17th February 2021 and sought for a hearing date.
4. On the other hand, Mr Hamisi holding brief for the petitioner/respondent advocate Mr.Karega, informed the court that they had filed a Record of Appeal as directed on 31st August 2021. He urged the court to stay further proceedings. Upon hearing counsel for both parties, the court stated as follows;

“The appeal having been filed within the 30 days, the stay order remains. On balance of convenience, and for all practical purposes the matter shall remain stayed as parties fast track the appeal. Proceedings be typed within seven days. Matter stood over generally.”
5. Dissatisfied with the said directions, the respondents herein moved this court vide a Notice of Motion application dated 1st November,2021 seeking the following orders;
 - (a) Spent
 - (b) That the honourable court orders on a date to be given that *viva voce* evidence be taken herein as ordered by the court on 17th February, 2021 in a ruling delivered on 17th March, 2021.
 - (c) That the costs of this application be provided for.
6. The application is premised on the grounds therein and a supporting affidavit of Latifa Suleiman Kassam Dada sworn on 15th October, 2021 in which she stated that the appeal lodged by the respondents only affected order number (a) and not (b) hence *viva voce* proceedings should continue in respect of the uncontested order. She further stated that she and the other respondents had been kept away from their lawful entitlement of shares in the estate as willed by their late father more than 20 years ago. That they were in desperate need of what was lawfully due to them and any further delay in concluding this matter will be prejudicial and a calculation by the executrix to defeat their right to the estate as stated in the will of their late father.
7. She went further to state that the court ought to grant a date for taking *viva voce* evidence to avert any probable injustice, irreparable prejudice and unfair enrichment by the petitioner courtesy of the estate resources. That the 3rd and 4th respondents were sickly and in need of medical care/treatment thus urgently requiring their monetary share as willed by their father for specialised medical treatment overseas.
8. That the order of stay issued on 6th October, 2021 was prejudicial and injurious as it gave the petitioner the excuse to delay the conclusion of this matter which had been pending for over 20 years.
9. In response, the petitioner/respondent filed grounds of opposition stating that the issues raised in the application were raised orally before this court on 6th October, 2021 upon which the court directed that the matter shall await the outcome of [MSA] *Civil Appeal No.90 Of 2021 –[sakinabbai Suleiman Kassam Dada v Latifa Suleiman Kassam Dada & 3 Others](#)*.



10. It was his position that the orders of 6th October, 2021 had not been appealed against nor reviewed thus they were still valid and binding upon the applicants/respondents hence the issues being raised amount to Res judicata. That the *viva voce* evidence to be taken was inextricably linked to the appeal thus proceeding with the same would prejudice the appellant and also put both the appellate and trial court in an awkward situation hence a display of inefficient administration of justice.
11. He deposed that the application was filed in bad faith hence a deliberate move by the applicants to delay the typing of proceedings. That the application was mis-contemplated, incompetent, unmeritorious and an abuse of the court process.
12. The applicant through his advocate Asige Keverenge & Anyanzwa Advocates filed his written submissions dated 9th February, 2022. Learned Counsel submitted that the appeal before the court of appeal was limited to paragraph 17(a) of this court's ruling dated 17th February, 2021 and delivered on 5th March, 2021 and not the rest of the orders. Counsel contended that the orders not appealed against ought to be complied with. That the petition herein has been pending for the last 21 years and the delay being occasioned by the petitioner is injurious to the respondents who are beneficiaries named in the deceased's will.
13. The petitioner/respondent through her advocates Wanjiku Mohamed Advocates LLP filed written submissions dated 15th February, 2022 basically adopting averments contained in the affidavit in support. Counsel submitted that the application herein was res judicata as the applicant orally made a similar application on 6th October, 2021 and upon hearing counsel for both parties, the court directed that this matter awaits the outcome of [MSA] *Civil Appeal No.90 Of 2021 Sakanibhai Suleiman Kassam Dada v Latifa Suleiman Kassam Dada & 3 Others*. That the issue raised in the application was the same issue raised on 6th October, 2021, same parties and determined by the court conclusively.
14. Counsel contended that the orders of 6th October, 2021 were not reviewed and or appealed against thus they are still valid and binding to the applicants. It was further submitted that the application was sub judice as the *viva voce* evidence which is intended to be taken relate to issues that are directly and substantially in issue in the appeal filed by the respondent. That though the appeal may seem as merely against order (a) only, the said order was inextricably linked with order (b) and there was no way the court of appeal could handle one without dealing with the other. Counsel urged the court to consider grounds number 1 and 3 of the memorandum of appeal and items (i) and (ii) of order b.
15. On the aspect of whether the application amounts to an abuse of court process and against the overriding objectives of the court, counsel submitted that the application is a classic example of piecemeal litigation or litigation by instalments as it is demanding issues touching on the same matter be dealt with in pieces by 2 different courts of competent jurisdiction. That it was impractical for one order to be dealt with by the court of appeal and another by this court yet they both relate to the administration of the same estate. That such practice would lead to contradictions, escalate costs/ expenses, unnecessary delays and wastage of time in the administration of disputes.
16. Counsel opined that the applicants had failed to demonstrate the prejudice they stood to suffer if this matter was stayed and appeal fast tracked. In conclusion, counsel urged the court to dismiss the application with costs.
17. I have considered the application herein, response thereof and counsel's rival submissions. Issues that emerge for determination are;
 - (a) Whether this application amounts to *res judicata*.
 - (b) Whether this application is a sub judice.



- (c) Whether the orders sought should be granted.
18. There is no dispute that the appeal pending before the court of appeal is challenging part of the orders made on 17th February 2021. It is also a fact that there is an order staying implementation of order number (a). When the applicants on 6th October 2021 orally raised the issue whether the court would proceed with the rest of the orders not affected by the appeal by calling for *viva voce* evidence, the court was of the view that it would be convenient to await the outcome of the appeal so as to conduct *viva voce* proceedings at once in case the court of appeal upholds the orders of 17th February 2021 rather than conduct piecemeal proceedings.
19. It is this direction made by the court that has made the respondent raise the issue of *res judicata* arguing that that direction culminated to a court order which has not been appealed against nor set aside. The doctrine of *res judicata* is well laid out under section 7 of the CPA which prohibits a court from adjudicating over a matter that has been litigated upon and a decision made on merit by a competent court with jurisdiction over the same subject matter or relating to the same issue or issues in controversy between the same parties. See *Invesco Assurance Company Limited & 2 others v Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020]* eKLR where the court expressed itself regarding *res judicata* as follows;
- “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.
- 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.”
20. Further, the court of appeal in the case of *Accredo AG & 3 others v Steffano Uccelli & another [2019]* eKLR held as follows;
- “Our position is fortified by this Court’s sentiments in *Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014]* eKLR thus,
- “To constitute *res judicata*, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters in controversy.”
21. As correctly admitted by both parties, the directions made on 6th October 2021 are by their very nature an order of the court competent to hear the matter. Having made that direction, it is binding on both



parties unless reviewed, set aside or appealed against. To urge the court to ignore the same and make contradicting orders over the same subject will offend the doctrine of *res judicata*.

22. I do agree with counsel for the respondent that the orders made on 17th February 2021 in my view are intertwined such that you cannot deal with Order (b) without touching on the subject relating with order number (a) which is the core of the pending appeal. To avoid repeating the exercise in case the appellate court rules against the appellant, it would be prudent to await the general outcome of the appeal so that *viva voce* evidence is taken once and for all.
23. Accordingly, it's my finding that the issues being raised by the applicant herein were canvassed on the 6th October, 2021. The court also pronounced itself on the same thus the application is barred by the doctrine of *res Judicata*.
24. On whether the application is *subjudice*, the petitioner's counsel submitted that the application was *Sub Judice* as the *viva voce* evidence which is to be taken concerned issues that are directly and substantially in issue in the appeal filed by the respondent. That though the appeal may seem as merely against order (a) only, the said order was inextricably linked with order (b) and there was no way the court of appeal could handle one without dealing with the other. I quite agree with learned counsel that holding *viva voce* proceedings at this stage will definitely overlap on the subject matter pending before the court of appeal.
25. In arriving at the above conclusion, I am guided by the holding in the case of *Republic v Paul Kihara Kariuki, Attorney General & 2 others Ex parte Law Society of Kenya [2020]* eKLR in which the court considered the doctrine of *subjudice* and made the following observation:

“In order to check this very problem, there exists the concept of *sub judice* which in Latin means “under Judgement.” It denotes that a matter is being considered by a court or judge. The concept of *sub judice* that where an issue is pending in a court of law for adjudication between the same parties, any other court is barred from trying that issue so long as the first suit goes on. In such a situation, order is passed by the subsequent court to stay the proceeding and such order can be made at any stage.

In this regard, section 6 of the Civil Procedure Act⁽⁶⁾ expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

26. I must note that there is an appeal pending in the Court of Appeal as indicated which resulted to this matter being stood over generally by this court on the 6th October, 2021. Dealing with this matter before the conclusion of the said appeal would amount to *subjudice*.
27. On whether the application herein is a mounts to abuse of court process, counsel for the petitioner submitted that the application was a classic example of piecemeal litigation or litigation by instalments as it required issues touching on the same matter be dealt with in pieces by 2 different courts of competent jurisdiction. That it was impractical for one order to be dealt with by the court of appeal and another by this court yet they both relate to the administration of the same estate. I do agree also with learned counsel that to continue with piecemeal litigation would lead to contradictions, attract unnecessary costs/expenses, delays/wastage of time in the administration of disputes hence abuse of the court process.



28. The upshot of the above finding is that the application lacks merit and it's hereby dismissed with no order as to costs.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN MOMBASA THIS 29TH DAY OF JULY
2022**

J.N.ONYIEGO

JUDGE

