Little Sisters of St. Francis v Kundu & another (Suing as the Representatives of the estate of the late BENJAMIN WANGILAPASILLIANO) (Civil Appeal 51 of 2021) [2022] KEHC 13483 (KLR) (26 July 2022) (Ruling)

Neutral citation: [2022] KEHC 13483 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT BUNGOMA

CIVIL APPEAL 51 OF 2021

DK KEMEI, J

JULY 26, 2022

BETWEEN

LITTLE SISTERS OF ST. FRANCIS ..... APPELLANT

AND

DENNIS WANGILA WAFULA ..... 1ST RESPONDENT

JANEPHER NASIMIYU KUNDU ..... 2ND RESPONDENT

SUING AS THE REPRESENTATIVES OF THE ESTATE OF THE LATE BENJAMIN WANGILAPASILLIANO

RULING

1. *Vide* a notice of motion application pursuant to the provisions of sections 1A, 3, 3A of the *Civil Procedure Act* and article 159 of the *Constitution of Kenya* 2010, the applicant sought the following orders:

    i. Spent;

    ii. There be a stay of execution of the judgement and decree pending the hearing and determination of this application *interpartes* and pending hearing and determination of the appeal in Bungoma HCCA No 51 of 2021-Little Sisters of St Francis vs Janepher Nasimiyu Kundu & another.

    iii. Costs of this application be provided for.

2. The application is premised on the grounds *inter alia*; that the judgement has been delivered herein; that the appeal is not frivolous; that the appellant has a good appeal with high chances of success; that the appellant will suffer irreparable loss and damage if the orders sought are not granted; that no

prejudice shall be occasioned to the plaintiffs if the orders sought herein are issued and that the orders sought will meet the ends of justice and fair play.

3. The application is supported by an affidavit sworn by SR Mildred Nyukuri, on April 20, 2022 who deponed *inter alia*; that the appellant's appeal raises serious issues worth the attention of the court regarding liability and quantum; that the respondents are persons of no means and likely not to refund the decretal sums in the event of success of the appeal; that the appellant stands to suffer great damage and loss if stay is not granted and will lead to the appeal being rendered nugatory; that the appellant is willing to offer security.

4. In response to the application, the respondents filed a replying affidavit dated May 5, 2022. They depone that: the applicant/appellant's application is frivolous, defective, vexatious and bad in law; the applicant/appellant filed a similar application in the mother suit, Bungoma CMMC No 414 of 2016, which was heard and determined; the application was already allowed in the lower court on the condition that the applicant/appellant deposits one third of the decretal sum into a joint interest earning account and make a payment of the assessed costs of Kshs 220,034/=within 30 days' failure of which execution to prevail; the application is a ploy meant to delay the justice; the appellant has not appealed against the orders of the trial court; the matter is already *res judicata* the same having been determined by the trial court which handled a similar application; the appeal has minimal chance of success in the first instance.

5. The application was canvassed by way of written submissions. However, it is only the respondents who complied.

6. The respondents' submissions are dated May 23, 2022. They submit that the application is *res judicata* as it was already dealt with in the lower court and it ought to be dismissed. It was further submitted that the application offends the provisions of sections 6 and 7 of the *Civil Procedure Act*. The respondents sought for the dismissal of the application.

7. I have considered the rival affidavits and the submissions by learned counsel. I find that the issue for determination is whether the application has merit.

8. Article 165(3) of the *Constitution* provides for jurisdiction; and article 159 provides that judicial authority, on the whole, is derived from the people. The relevant part provides thus:

> " 159 (2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –
>
> (a) justice shall be done to all, irrespective of status;
>
> (b) justice shall not be delayed
>
> (c) ...
>
> (d) ...
>
> (e) the purpose and principles of the Constitution shall be protected and promoted."

9. I am duly guided by section 7 of the *Civil Procedure Act* wherein the principle is codified: -

> " 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." (emphasis added).

10. Thus, for a suit to be *res judicata*, the following elements have to be fulfilled: -

    a) The former suit was between the same parties.

    b) The parties were litigating under the same title.

    c) The issues in the former suit had been subsequently raised.

    d) The issues in the former suit has been heard and finally decided by such court.

11. The Court of Appeal explained the above doctrine in the case of the *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No 105 of 2017 ([2017] eKLR), where it held that:

> " Thus, for 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." (Emphasis mine).

12. In *Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 others* [2014] eKLR the court held:

> " 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." (Emphasis mine).

13. Similarly, in *E T V vs Attorney General & another* (2012) eKLR it was held: -

> " The courts must be vigilant to guard against litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction." (Emphasis mine).

14. My understanding is that the doctrine of *res judicata* is meant to lock out parties from the judicial system from re-litigating on the same issues which were previously settled either by the trial or appellate court.

15. Emphasis is placed on issues which were finally determined so that even if the same parties appeared before any court and issues were framed differently over the same subject matter, the court can read through the plaintiff/appellant and note the outcome would not be any different.

16. The application dated September 11, 2021 sought stay of execution of the decree and judgement in the lower court suit pending the hearing and determination of the appeal in Bungoma HCCA No 51 of 2021 while the application dated April 20, 2022 sought stay of execution of the decree and judgement in the lower court suit pending, the hearing and determination of the appeal in Bungoma HCCA No 51 of 2021. The questions in issue and the orders being sought are similar and the parties are litigating under the same title. Indeed, the trial court determined the application dated September 11, 2021. The appellant has not indicated whether it has appealed against the orders of the trial court dated March 4, 2022 or sought for review of the same. All that is on record regarding the appellant's grievance against the lower court is the memorandum of appeal dated August 31, 2021. As matters stand, it would appear that the applicant's present application is a replica of the one dated September 11, 2021 that had been determined by the trial court. It is thus clear that the present application offends the clear provisions of sections 6 and 7 of the *Civil Procedure Act* since the issue in dispute was substantially determined by the trial court on March 4, 2022.

17. As was held by Kimaru, J on the issue of abuse of the court process in *Stephen Somek Takwenyi & another vs David Mbuthia Githare & 2 others* Nairobi (Milimani) HCCC No 363 of 2009:

> " This is a power inherent in the court, but one which should only be used in cases which bring conviction to the mind of the court that it has been deceived. The court has an inherent jurisdiction to preserve the integrity of the judicial process. When the matter is expressed in negative tenor it is said that there is inherent power to prevent abuse of the process of the court. In the civilised legal process it is the machinery used in the courts of law to vindicate a man's rights or to enforce his duties. It can be used properly but can also be used improperly, and so abused. An instance of this is when it is diverted from its proper purpose, and is used with some ulterior motive for some collateral one or to gain some collateral advantage, which the law does not recognize as a legitimate use of the process. But the circumstances in which abuse of the process can arise are varied and incapable of exhaustive listing. Sometimes it can be shown by the very steps taken and sometimes on the extrinsic evidence only. But if and when it is shown to have happened, it would be wrong to allow the misuse of that process to continue. Rules of court may and usually do provide for its frustration in some instances. Others attract *res judicata* rule. But apart from and independent of these there is the inherent jurisdiction of every court of justice to prevent an abuse of its process and its duty to intervene and stop the proceedings, or put an end to it".

18. This court is under a constitutional obligation pursuant to article 159(2)(b) not to delay justice but to determine the matters placed before it without undue delay.

19. From the foregoing, the instant application is unfounded. The orders sought in this application were already issued in Bungoma CMCC No 414 of 2016. It is incumbent for this court with inherent jurisdiction to preserve the integrity of the judicial process and prevent abuse of the process of the court by litigants. There is no indication that the applicant lodged an appeal against the orders of the lower court and the confirmation of a similar application been dispensed with at the lower court is another indication that the applicant is simply on a mission to frustrate the successful litigants from enjoying the fruits of their judgement. Its actions in approaching this court despite having dispensed with the same application before the trial court smacks of mischief which cannot be countenanced.

20. In the result, it is my finding that the application dated April 20, 2022 lacks merit and the same is dismissed with costs to the respondents.

    It is so ordered.

DATED AND DELIVERED AT BUNGOMA THIS 26TH DAY OF JULY, 2022.

D.KEMEI

JUDGE

In the presence of:

Shiku for Magare Omusundi for the Appellant/Applicant

Onkangi for Juma for the Respondents

Kizito Court Assistant