



Gitonga v Wafula (Suing through father and next friend Charles Wafula) (Civil Appeal 93 of 2010) [2022] KEHC 13284 (KLR) (27 September 2022) (Ruling)

Neutral citation: [2022] KEHC 13284 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 93 OF 2010
EKO OGOLA, J
SEPTEMBER 27, 2022**

BETWEEN

ARTHUR G. GITONGA APPLICANT

AND

RODGERS W WAFULA RESPONDENT

SUING THROUGH FATHER AND NEXT FRIEND CHARLES WAFULA

RULING

1. By way of Notice of Motion dated 10th July 2020, the Applicant seeks the following orders;
 - a) Spent
 - b) That this honourable court be pleased to order the sum of kshs. 402,000/- together with the accrued interest in a joint interest earning account deposited in the names of M/s J.M Kimani & Co Advocates and M/s Nyairo & Co. Advocates deposited in a Consolidated Bank of Kenya Limited account No.014746 as security of the lower court decree pending hearing and determination of the appeal in Eldoret High Court Civil Appeal No. 93 of 2010 to be released to J.M Kimani & Co Advocates on behalf of the Appellant since the appeal has already been decided on merit and the appellant was absolved from any liability in this matter.
 - c) That such orders be made as may be just and expedient in the circumstances of this matter and the issue in question.
 - d) CostsThe application is based on the grounds set out therein and is supported by affidavit of Arthur G. Gitonga sworn on 10/7/2020.
2. The facts leading up to the application are that the applicant herein was ordered to deposit the sum of kshs. 402,000/- being the entire decretal amount in Eldoret CMCC No. 504 if 2001 in a joint interest



earning account in the joint names of the advocates on record, that is M/s J.M Kimani & Co Advocates and M/s Nyairo & Co. Advocates as a condition for stay of execution pending the determination of Eldoret High Court Civil Appeal No. 93 of 2010. The appellant complied and deposited the same. The appeal was determined on its merits and the applicant was absolved of any liability. The applicant then approached this court seeking to have the money released.

3. He deponed that his advocates have severally approached the firm of M/s Nyairo & Company advocates for release of the funds to no avail. He filed an application in Eldoret CMCC 504 of 2001 to have the funds released but the court indicated that it was functus officio based on the sentiments expressed by the respondent.
4. He contended that it is in the interest of justice to have the money released to him.

Respondent's Case

5. The respondent opposed the application vide a replying affidavit dated 24th March 2022 sworn by Anne Halwenge Odwa. Counsel for the respondent who deponed that the applicant had filed a similar application dated 10th July 2022 before this court which he abandoned on realising it was not the correct forum to present the application as the order of stay of execution was issued by the subordinate court. He then moved the subordinate court with a similar application dated 1st February 2021 which was determined vide a ruling dated 17th September 2021. The same was dismissed. The ruling has never been appealed or set aside to date.
6. The respondent avers that this application is res judicata the issues herein having been determined in the application dated 29th March 2021. Therefore, this Court lacks jurisdiction to entertain a similar application and grant the orders sought. The respondent's position is that the application should be dismissed with costs to the respondent.
7. Upon perusing the application and the response to the same I have identified the following issues for determination; Whether the matter is res judicata Whether the orders sought should be granted

Whether the Application is Res Judicata

8. The doctrine of res judicata is set out in the [Civil Procedure Act](#) at Section 7 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 can 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.”

9. The [Civil Procedure Act](#) also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.



10. The applicant filed an application dated 1st February 2012 in the Chief Magistrates' Civil Case No. 504 of 2001. Understandably, this was the court that granted the stay orders and therefore it was the first port of call. In that application the applicant had sought to have the money deposited as security for costs released to his advocates. However, the court held that it was functus officio and dismissed the application.
11. In my view, the main test to be applied as to whether the application is res judicata is whether the matter that was substantially in issue was heard and determined by a competent court on its merits. What was in issue was the release of the security deposited and the magistrate's court did not determine this issue. In fact, by declaring itself functus officio the trial court rendered itself incompetent to determine the application. The learned magistrate even went to the extent of advising the applicant to file the application in the High Court that was ceased with the matter.

It is my finding that the application is not res judicata.

Whether the Orders sought should be Granted

12. The issue before this Court is one that need not be litigated to this extent. It is very clear that the appellant succeeded in his appeal. The purpose of security in this appeal was served as the appellant participated in the appeal which he prosecuted successfully. The respondent has given no reasons as to why the money should not be released to the applicant. Counsel for the respondent has relied on the issue of res judicata and given this court no explanation as to why the successful appellant should not have the deposits released. It would not be in the interests of justice to allow the respondent continue withholding the deposit made by the applicant. If the respondent intends to prosecute the appeal, the applicants' security is of no consequence to the appeal.
13. I find that the application is merited and is allowed with costs. The said deposit shall be refunded complete with applicable accrued interests.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH OF SEPTEMBER 2022.

E. K. OGOLA

JUDGE

