



**Pemwai Girls Secondary School & another v ACY (Minor) (Suing through her mother and next friend GT) (Civil Appeal E072 of 2021) [2022] KEHC 14190 (KLR) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14190 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT ELDORET  
CIVIL APPEAL E072 OF 2021  
RN NYAKUNDI, J  
OCTOBER 21, 2022**

**BETWEEN**

**PEMWAI GIRLS SECONDARY SCHOOL ..... 1<sup>ST</sup> APPELLANT**

**SAMUEL CHEPCHIENG ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ACY (MINOR) ..... RESPONDENT**

**SUING THROUGH HER MOTHER AND NEXT FRIEND GT**

**RULING**

1. By a notice of motion filed on 27/7/22 the mover asked this court to grant declarations in terms of Article 159 of *the constitution*, section 3a, 3b of the *Civil Procedure Act*, Order 10 Rule 8 and 11, Order 51 Rule 1 of the *Civil Procedure Rules* couched as follows:
  1. That the honourable court be pleased to order stay of execution of decree issued by this honourable court on further proceedings in this matter pending hearing and determination of this application.
  2. That the honourable court be pleased to order stay of execution of decree issued by this honourable court on further proceedings in this matter pending hearing and determination of the appeal.
  3. That the court be pleased to reinstate the stay order issued pursuant to Ruling of this honourable court delivered on 19<sup>th</sup> September, 2020.
  4. That the court be pleased to set aside orders issued on 16<sup>th</sup> September, 2021 striking out the Appeal on the ground that it was filed out of time.
  5. That the costs of this application be in cause.



2. In support of the application and grounds on the face of it and subsequent affidavit by Lona Japtai Tanui dated 27/6/22. The respondent has proffered strongly in opposition to the applicants notice of motion which is to the effect that there has been a failure on the part of the applicant to comply with the orders of this court dated 19.11.2020 and 5.7.2021. Further that the applicants appeal in the Eldoret Civil Appeal 072 of 2021 was struck out on 16.9.2021 for the very reasons that the same was filed out of time and without leave of the court. The respondent further raised a preliminary objection dated 15.7.2022 on the strength that the notice of motion dated 27.7.2022 is res-judicata having been heard and all issues determined as evidenced by the rulings dated 19.11.2020 and 28.2.2022. Secondly, the appeal was struck out of time and without leave of the court.

### Determination

3. In determining the applicants application, I must first pause the question (a) whether indeed the applicant appeal was struck out having been filed out of time without leave of the court on 16.9.2021. In answer to this question the record is crystal clear that the court did make an order to that effect by the session Judge Sewe. The position however seemed to have changed fundamentally in the sense that new subsequent orders were made as reflected in the ruling dated 19.11.2020 by the same session judge. That issue to me is res-judicata in consonant with the provisions of Section 7 of the *Civil Procedure Act*. That discretion exercised by the court pursuant to section 1(a), 1(b) and 3(a) of the *civil procedure Act* remains unimpeachable. Similarly, in the same ruling the judge reasoned legally so that the applicant was to deposit security amounting to ksh 5,000,000/ in the joint interest earning account of both counsels within a timeframe of 3 months with effect from 1.11.2020. it has not escaped the eyes of the court that on 26/2/2022 there was yet another application by the applicant seeking leave of the court that in the interest of justice the deposit of security referenced as ksh 5,000,000/ be reviewed downwards to ksh 2,000,000/. On that basis the court accepted the plea in its ruling dated 28.2.2022 to appropriately order for compliance of the new deposit terms within a period of 60 days. In circumstances which seems not to be clear to the court the applicant once again has moved this forum to order for stay of execution, reinstatement of stay orders and setting aside orders issued on 16.9.2021 striking out the appeal for being filed out of time.
4. Speaking, broadly the doctrine of res-judicata promulgated under section 7 of the *civil procedure Act* bars the applicant to re-litigate on the same cause of action which has been determined on the merit. In *Kamunye and others –v- The Pioneer General Assurance Society Ltd, civil appeal number 28 of 1970* (Spry, AP, Law, AVP and Mustafa, JA on 17 October 1970) (EACA) (1971) EA 263 “the test whether or not a suit is barred by *Res Judicata* seems to me to be - is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which had already been put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of *Res Judicata* applies not only to points upon which the first court was actually required to adjudicate but every point which properly belonged to the subject to litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.” See *Green-Haghl –v- Mallard* (1947) 2 All ER 255 See also Odunga’s digest on civil case law and procedure.
5. The purpose of the doctrine is to provide finality to litigation and protect parties from being vexed by the same matters twice. In a legal context that is what the applicant are doing to the respondents. Distinctively, any reopening of issues on stay of execution, enlargement of time or any such orders upon the jurisdiction and procedure exercised under Section 1(A), 1(B), 3(A), 3(B), 65, 79(G) of the *civil procedure Act* are in effect by way of estoppel not justiciable by any court or tribunal. Going by the rulings delivered by Sewe J in their nature they are final and conclusive to this subsequent application.



6. It would seem that similar considerations apply to the notice of preliminary objection filed by the respondent. In this connection I rely in the case of *Mukisa Biscuits Manufacturing CO. Ltd -v- West End Distributors* (1969) EA 696 “..... a preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
7. The court finds that the rulings in prior applications conclusively determined by the court constitute a preliminary objection to the present action. The injunctive relief is necessary to protect the respondents from vexatious applications. To this end I dismiss the application dated 27.6.2022 and uphold the preliminary objection dated 1.7.2022 with costs to the respondent.

**DATED, SIGNED AND DELIVERED VIA EMAIL AT ELDORET THIS 21<sup>ST</sup> DAY OF OCTOBER, 2022.**

.....

**R. NYAKUNDI**  
**JUDGE**

