



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT BUSIA

CIVIL APPEAL NO.E8 OF 2020

JAMHURI EVANS NAMAYIAPPELLANT

VERSUS

1. DAVID OYE ASHIOYA1ST RESPONDENT

2. ANDREW LUTHER ASHIOYA2ND RESPONDENT

3. KENNEDY SHIKUKU3RD RESPONDENT

RULING

[1] The appellant **JAMHURI EVANS NAMAYI** Filed a suit against the four respondents at the Chief Magistrate’s Court at Busia, being **CMCC No.418 of 2015** in which a ruling was made on 15th October 2020.

Being dissatisfied with the ruling, the appellant filed the present appeal on the basis of the grounds contained in the memorandum of appeal filed herein on 26th October 2020. This was followed by a notice of motion for stay of proceedings dated 30th November 2020. This was however withdrawn in Court on the 14th December 2020 and replaced with the notice of motion dated 15th December 2020 for stay of execution of the judgement and decree of the Lower Court in the aforementioned civil suit pending the hearing and determination of this appeal. The 4th respondent **SUSAN BUKOSHE** opposed the application on the basis of the grounds of opposition filed herein on 22nd January 2021, while the first respondent **ASHIOYA & CO. ADVOCATES**, filed a notice of preliminary objection to the application on the 25th January 2021.

[2] The Court directed that the preliminary objection be heard prior to the hearing of the application dated 15th December 2020, by way of written submissions.

In that regard the applicant’s /first respondent’s submissions were filed herein on 18th March 2021, while those of the appellant had been filed earlier on 8th February 2021, but are more on the application for stay of execution rather than the preliminary objection to the application.

The second respondent’s submissions are also more on the application rather than the preliminary objection.

Apparently, the third and fourth respondents did not file submissions on the preliminary objection but the Court was informed by counsel for the applicant/first respondent that the third and fourth respondents rely on the applicant’s submissions.

[3] Having given due consideration to the objection on the basis of the supporting grounds and submissions, it is the opinion of this Court that the objection solely turns on the doctrine or principle of “*res judicata*”

It is thus argued by the applicant/first respondents that the appellant’s application for stay of execution dated 15th December 2020 is “*res judicata*” since similar issues were raised and determined in a previous matter being **BUSIA HIGH COURT MISCELLANEOUS APPLICATION NO.123 OF 2020**. This position is also shared by the fourth respondent.

[4] Under S.7 of the **CIVIL PROCEDURE ACT** “no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantial 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.”

Although the first and fourth respondents contended herein that the application by the applicant dated 15th December 2020 is “*res judicata*” they failed to establish the fact in terms of the aforementioned provision of the Law by their failure to avail the relevant record of the proceedings in the said Busia High Court Misc. Application No.123 of 2020. There was even no mention of this case in the first respondent’s submissions nor the fourth respondent’s grounds of opposition.

[5] Besides, whereas the first respondent alluded to a previous matter having been filed in and dismissed by this Court, the fourth respondent alluded to a previous matter filed in and dismissed by the Lower Court.

It is not enough to merely raise the issue of “*res judicata*” without establishing it by way of credible facts and evidence as was done herein.

In the circumstances, the present preliminary objection is lacking in merit and is hereby overruled and dismissed with each party bearing their own costs.

It is instructive to note that what was argued herein by the first respondent in support of the objection was actually an objection to the appellant’s application for stay of execution. And, what was argued herein by the appellant seemingly in answer or protest to the preliminary objection was actually an argument in support of his application for stay dated 15th December 2020, for which directions on the hearing have to be given on a date to be set today now that the preliminary objection has been dismissed.

J.R KARANJAH

J U D G E

[Read and signed this 22nd day of April 2021]