



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**CIVIL DIVISION**

**HIGH COURT CIVIL APPEAL NO. E113 OF 2021**

**LANDMARK HOLDINGS LIMITED.....APPELLANT/RESPONDENT**

**VERSUS**

**ROBERT MACHARIA KINYUA(suing as legal representative of the Estate of**

**GRACE MWARI KIMOTHO (deceased).....RESPONDENT/APPLICANT**

**RULING**

The Application herein dated 11<sup>th</sup> March, 2021 seeks orders that **this court be pleased to strike out that Memorandum of Appeal dated 8<sup>th</sup> March, 2021**

2. Secondly, that **upon grant of prayer 2 above, the money deposited in CMCC NO. 4055 OF 2015 be released to the Respondent/Applicant**

3. The application is premised on the grounds on the face of the Application and the depositions in the Supporting Affidavit by Wincate Muthoni Mwangi. It is stated that the genesis of the Appeal is a plaint that was filed in 2015 instituting the suit CMCC 4055 OF 2015 wherein parties recorded a consent on liability and judgment was entered on 1<sup>st</sup> November 2017. That being dissatisfied with the trial court's finding, the Appellant filed an Appeal under HCCA NO. 656 of 2017 which Appeal was dismissed on 14<sup>th</sup> June 2019. That again the Appellant filed an Application on 26<sup>th</sup> June, 2019 and another on 10<sup>th</sup> July, 2019 seeking to review the judgment of the trial court which was also dismissed for want of jurisdiction. Further that another Application of 23<sup>rd</sup> January, 2020 which is the subject of this Appeal was dismissed and while dismissing it, the trial court noted that the Appellant had exhausted its chances as the High Court had made a determination.

4. The Applicant contends that the issues raised in the Memorandum of Appeal have already been dealt with conclusively both in the lower court in CMCC 4055 OF 2015 and the High Court's Civil Appeal no. 656 of 2017. That the instant Appeal is not only *res judicata* but also a blatant abuse of the court's process. Further, that the instant Appeal is highly prejudicial to the Applicant and the Appellant should not be given audience for the protection of the reputation and integrity of this honorable court. That it is in the interest of justice that this Application be allowed as prayed.

5. The application is opposed. It is stated in the replying affidavit that the Application herein is misconceived, constitutes an abuse of the court process with the intention to mislead the court and attract sympathy and a delaying tactic. That the Appeal is against the ruling of Hon. Grace Matsi and relates to the execution, discharge and satisfaction of the decree in question. Further that the present Appeal was filed pursuant to this court's ruling in Nairobi High Court Miscellaneous Civil; Application No. E494 of 2020 on 4<sup>th</sup> March 2021 granting leave to the Respondent to file Appeal out of time. It is contended that the issues raised in the Application dated 23<sup>rd</sup> January, 2020 and in the present Appeal are clear, self-explanatory, deserving meritorious determination and this court should consider it on merit and in the manner prescribed by law.

6. It is further contended that issues relating to execution, satisfaction and settlement of the decree dated 1<sup>st</sup> of November, 2017 could only be determined through the motion as the Appellant lodged with the trial court on 23<sup>rd</sup> January, 2020 and not otherwise with a further Appeal to this honorable court.

7. It is further stated that the Appeal is on the ruling and order of the trial court delivered on 29<sup>th</sup> May, 2020 and does not challenge any aspect of the decree in place but only its settlement and satisfaction. That the Applicant is using the court to subject the Respondent to double

jeopardy so that he is compensated twice under the Work Injury Benefits Act and through the proceedings determined by the trial court in not disclosing payment prior to filing of the suit.

8. It is deposed that the prayers sought in the instant motion are similar to those sought in the motion dated 26th November, 2020 which had been canvassed and determined hence it is *res judicata* and should be dismissed.

9. The Application was canvassed by way of written submissions which I have considered.

10. Section 7 of the Civil Procedure Act on matters *res judicata* stipulates 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 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.”**

11. The Court of Appeal in *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) 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.”**

12. It is worth noting that the Applicant made a substantially similar Application dated 26<sup>th</sup> November, 2020 seeking substantially similar orders against the Respondent’s Application to institute an Appeal out of time stating that this court had no jurisdiction since the intended Appeal was *res judicata*. This court at paragraph 10 of the ruling of 4<sup>th</sup> March, 2021 held that:

**“...However, there is no Appeal filed against the ruling of the lower court delivered on 29<sup>th</sup>, May, 2020. The Appeal against the said ruling is therefore not *res judicata*.”**

13. This court has already found that this Appeal is not *res judicata* as it relates to the subordinate court’s ruling of 29<sup>th</sup> May, 2020 and not the Judgment of the subordinate court or the Appeal to the High Court. I have equally looked at the memorandum of Appeal in question and it does not in any way challenge the judgment of the trial court or the Appeal that was determined by the High Court. Even if the instant Application was not *res judicata*, the Appeal herein would not fall under the set out principles above to be termed as *res judicata*.

14. Consequently, I hold that the Application herein is *res judicata* and lacks merits and is hereby dismissed with costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30<sup>TH</sup> DAY OF SEPT., 2021**

**B. THURANIRA JADEN**

**JUDGE**