



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT SIAYA

CIVIL APPEAL NO. 40 OF 2019

CORAM: R.E. ABURILI J

JENIPHER ANYANGO OLOO.....APPELLANT

VERSUS

BUZEKI ENTERPRISES LIMITED.....1ST RESPONDENT

AFRICAN MERCHANT ASSURANCE COMPANY LIMITED.....2ND RESPONDENT

(An appeal against the ruling of Hon. J. Ong'ondo (Senior Principal Magistrate)

delivered on the 27.6.2019 in Siaya Principal Magistrate's Court

Civil Case No. 36 of 2019)

JUDGMENT

1. This is an appeal against the ruling of Hon. J. Ong'ondo (Senior Principal Magistrate) delivered on the 27.6.2019 in Siaya Principal Magistrates Court Civil Case No. 36 of 2019.

2. The appellant initially filed her memorandum of appeal dated 26th September 2019 but vide an application dated 19th September 2020, sought to have the same amended. Subsequently, the appellant was granted leave to amend her memorandum of appeal vide this court's ruling of 26th April 2021. The appellant filed her amended memorandum of appeal dated 19/7/2021 on the 26.7.2021, which memorandum was based on the following grounds:

a. The Learned Trial Magistrate grossly misdirected herself in treating the submissions by the appellant/interested party superficially and consequently coming to a wrong conclusion on the same.

b. The Learned Magistrate failed and/or erred in law and in fact by not considering the submissions by the appellant/interested party at all and instead focusing on the plaintiff and defendant solely and treating the interested party as a non-entity in the proceedings.

c. The Learned Magistrate erred in law and in fact when he failed to appreciate the history of the suit leading to the said application by plaintiff which could have largely informed the decision of the court.

d. The Magistrate proceeded on very wrong principles of law by allowing the application dated 20th December 2018 which was an outright abuse of court process.

e. The Magistrate erred in law and in fact by purporting to overturn the decision of a court of similar jurisdiction when he allowed the application dated 20th December 2018 which had previously been dismissed in SIAYA PMCC NO. 75 OF 2016, JENIPHER ANYANGO OLOO (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF VICTOR OWINO OLOO – DECEASED) VS BUZEKI ENTERPRISES LIMITED and which the ruling of the lower court has now stayed.

3. The background to this matter is that the appellant herein Jennipher Anyango Oloo obtained judgement against the 1st Respondent Buzeki Enterprises Limited to the tune of Kshs. 1,110,000 as general damages arising from the death of one Victor Owino Oloo as a result of a road traffic accident caused by a motor vehicle owned by the 1st respondent. This was vide judgement and decree issued on the 11.9.2018 in Siaya

4. Subsequently, the 1st respondent Buzeki Enterprises Limited filed Declaratory Suit vide Siaya Principal Magistrate's Court Civil Suit No. 36 of 2019 against its insurer African Merchant Insurance Company Limited. It also filed an application seeking stay of execution of the judgment and decree in Civil Suit No. 75 of 2016 as issued on the 11.9.2018, pending the hearing and determination of the declaratory against the insurer, the 2nd respondent herein African Merchant Insurance Company Limited. The trial court vide its ruling delivered on 27th June, 2019 granted the 1st respondent stay of execution of judgement and decree issued on the 11.9.2018 pending the hearing and determination of the declaratory suit by the 1st respondent against the insurer. It is that ruling of 27/6/2019 which is the subject of this appeal, with leave of court granted by the trial court.

5. The parties agreed to canvas the appeal by way of written submissions, however, only the appellant filed her written submissions.

The Appellant's Submissions

6. It was submitted on behalf of the appellant that the application giving rise to the impugned ruling was made in a different suit where the 1st respondent had sued the 2nd respondent whereas the orders sought were aimed at the appellant. The appellant further submitted that the 1st respondent sought similar orders in Siaya PMCC No. 75 of 2016 where it was the defendant and the orders were denied.

7. The appellant's counsel submitted that in the circumstances, the filing of an application for stay of execution in Siaya PMCC No. 36 of 2019 when a similar application had been denied in PM CC No. 75 of 2016 was an abuse of court process and an attempt by the 1st respondent to trample on the appellant's right.

8. The appellant's further submissions was that the 1st respondent's action in filing for stay of execution in Siaya PMCC No. 36 of 2019 is res judicata of its previous applications in Siaya PMCC No. 75 of 2016. Reliance was placed on the case of **ANM v PMN [2016] eKLR** where the court stated that for a matter to be res judicata, the matters in issue must be similar to those that were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction.

9. The appellant further relied on the cases of **Rose Njeri Munoru & 13 Others v Hannah Mwhiki Muturi & 4 Others [2016] eKLR** and that of **Accredo Ag & 3 Others v Stefano Ucceli & Another [2019] eKLR** where the court in both instances observed *inter alia* that a plaintiff's application was res judicata a previous one which had been heard and determined in a previous suit which the applicant had withdrawn.

10. The appellant further relied on the case of **Invesco Insurance Company Limited & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company Advocates & Another (interested parties) [2020] eKLR** where the court declined to grant the applicants their prayers citing presence of res judicata of the said application to other several applications that had been determined in other courts.

11. It was submitted that there was gross abuse of the court process by the 1st respondent since the orders sought in the replicated application of 20.12.2018 were aimed at the appellant, who though an interested party in Siaya PMCC No. 36 of 2019, was the plaintiff in the parent suit against which both applications were aimed at. Reliance was placed on the case of **Rose Njeri Munoru & 13 Others (supra)** where it was observed that the applicant had abused the court process by withdrawing a suit in which a similar application to which was before the court in the current suit had been dismissed.

12. Relying on the case of **Re the matter of the National Lands Commission Under Article 163 (6) of the Constitution of Kenya** the appellant's counsel submitted that the 1st respondent clearly abused the court process and went forum shopping and indeed managed to hood wink the lower court into granting it a stay of execution orders.

14. It was submitted that the 1st respondent had not met the conditions precedent for grant of stay of execution as it had failed to show what kind of substantial loss it would be subjected to should execution against it proceed compared to the appellant as the 1st Respondent was in a better position to claim directly from the 2nd respondent, its insurer, upon satisfying the decretal sum awarded to the appellant.

14. The appellant's counsel relied on the cases of **Dolk Limited v Invesco Assurance Company Limited & 5 Others [2018] eKLR** and that of **Muthuri Ntara & Another v Francis Mworira Igweta [2016] eKLR** where the court in both instances stated that despite the fact that section 10 (1) of the Insurance (Motor Vehicle Third Party Risks) Act providing for the mandatory satisfaction of a judgement of any sum payable to its insured under a policy, the section does not provide for a stay of execution against the insured by the third party and further that the statutory right to seek a declaration against the insurer by the insured does not and cannot bar a decree holder from executing his/her decree against the judgement debtor who is the insured.

15. Further, the appellant's counsel submitted that Order 22 Rule 22 of the Civil Procedure Rules does not provide for stay of execution of decrees against a decree holder by the judgement debtor pending the hearing and determination of a declaratory suit to which she is not a party.

16. The appellant further submitted that Order 22 Rule 25 of the Civil Procedure Rules contemplates a situation where the decree holder in a certain suit is sued by the judgement debtor in another suit so that the judgement debtor can have the right to seek stay of execution in the suit where the decree holder wields a decree against him.

17. The appellant's counsel further relied on the case of **Jane Wanjiru Mwangi v Explico Insurance Company Limited: Duncan Odhiambo Owino (Interested Party/Respondent [2021] eKLR** where the court dismissed the applicant's application for stay of execution

pending the hearing and determination of the declaratory suit against her insured as she could seek compensation therefrom and further, that a stay would occasion injustice on the respondent by hindering him from realizing the fruits of his judgement.

18. The appellant further submitted that the 1st respondent was sued for the torts of its driver and not the insurer and that since the appellant is a third party who is not privy to the contract between the 1st and 2nd respondent, the 1st respondent can pursue a claim for breach of contract against the 2nd respondent upon the 1st Respondent settling the decretal amount to the appellant.

19. It was further submitted that the 1st respondent's application dated 20.12.2018, just like that of 24.9.2018, did not prove that the 2nd respondent had attempted to avoid liability under the contract between it and the 1st respondent and was thus malicious and made with the sole aim of denying the appellant the fruits of her judgement in Siaya PMCC No. 75 of 2016.

20. The appellant submitted that if the court found it fit to allow the appeal, she sought to be struck off from the instant suit as she had no interest in the contractual wrangles between the 1st respondent and her insurer.

Analysis & Determination

21. I have considered the grounds of appeal as well as submission by the appellant's counsel and the authorities filed in the matter. Being a first appeal, this court's duty is to analyze and re-assess the evidence on record and reach its own independent conclusions as was held in the case of **Selle vs. Associated Motor Boat Co. [1968] EA 123**.

22. As earlier stated, the basis of this appeal is whether the trial magistrate Hon. J. Ong'ondo (Senior Principal Magistrate) erred in granting the 1st respondent stay of execution orders in his ruling delivered on the 27.6.2019 in Siaya Principal Magistrates Court Civil Case No. 36 of 2019.

23. The genesis of this dispute has been laid out herein above. In her submission, the appellant submitted that the application for stay dated 20.12.2018 was *res judicata* a previous application filed by the 1st respondent in Siaya PMCC No. 75 of 2016 specifically the application dated 24.9.2018 which was heard and dismissed vide a ruling of 7.12.2018.

24. 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.”

25. 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.”

26. Therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of **HENDERSON v HENDERSON (1843-60) ALL E.R.378**, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of *res judicata* applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

27. A Court will therefore invoke the doctrine of *res judicata* in instances where a party raises issues in a subsequent suit, wherein he/she ought to have raised the issues in the previous suit as between the same parties.

28. Applying the foregoing to the present case, I note from the record that indeed the 1st respondent in Siaya PMCC No. 75 of 2016, vide an application dated 24.9.2018 sought to stay execution of the judgement delivered by that court in favour of the appellant herein on 11.9.2018, which application for stay was heard and dismissed vide a ruling dated the 6.12.2018 but seem to have been delivered on the 7.12.2018.

29. Indeed, from the ruling aforementioned, the trial magistrate noted that one of the prayers sought by the 1st respondent herein, who was the defendant therein was as follows:

“That the Honourable Court be pleased to stay execution of the judgement herein and decree issued on 11th September 2018 and all consequential orders pending the filing, hearing and determination of a case against the insurance company herein.”

30. After losing out on stay, the 1st respondent then filed a declaratory suit against the 2nd respondent and added the appellant as an interested party in Siaya PMCC No. 36 of 2019 before proceeding to file the application dated 20.12.2018 seeking stay of execution of the orders issued by the court in Siaya PMCC No. 75 of 2016 on 11.9.2018 pending hearing and determination of the declaratory suit.

31. It is clear that the 1st respondent raised the same issues in the application dated 20.12.2018 in Siaya PMCC No. 36 of 2019 as those issues that it had raised in its application dated 24.9.2018 in Siaya PMCC No. 75 of 2016, which application had been determined by the court.

32. Clearly, the application dated 20.12.2018 in Siaya PMCC No. 36 of 2019 was *res judicata* the one dated 24.9.2018 as it involved the same parties as well as the same issues and had been determined by a court of competent jurisdiction. It is therefore my view that the trial court in Siaya PMCC No. 36 of 2019 ought not to have entertained the application dated 20.12.2018.

33. That aside, I observe that the trial court proceeded to entertain the application dated 20.12.2018, yet the provisions of section 10(1) of the Insurance (Motor Vehicle Third Party Risks) Act do not provide for stay of execution. The said section provides that:

If, after a policy of insurance has been effected, judgment in respect of any such liability as is required to be covered by a policy under paragraph (b) of section 5 (being a liability covered by the terms of the policy) is obtained against any person insured by the policy, then notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled, the policy, the insurer shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any enactment relating to interest on judgments.

34. The 1st respondent was thus justified in seeking a declaratory judgment against the 2nd respondent, its alleged insurer. I also note that the judgment delivered in the Siaya PMCC 75 of 2016 has not been challenged by way of an appeal or review. However, whereas an insured may well be entitled to file a declaration that its insurer is obliged to settle decree against the insured under the insurance policy, that statutory right of action does not bar a person who is injured from executing the decree issued in its favour against the insured directly as was held in the case of *Dolk Limited (supra)*.

35. In the circumstances, it is my view that the trial court erred in staying execution of decree issued in favour of the appellant against the 1st Respondent insured, pending the hearing and determination of the declaratory suit. This is because the application dated 20.12.2018 was firstly, *res judicata* the application dated 24.9.2018 filed by the 1st respondent in Siaya PMCC 75 of 2016 and secondly, because the filing of a declaratory suit is no bar to execution of decree by a genuine decree holder.

36. In the end, I find and hold that the trial Magistrate erred in granting stay of execution of decree in Siaya PMCC No. 75 of 2016 by a ruling delivered on the 27.6.2019 in Siaya Principal Magistrates Court Civil Case No. 36 of 2019. I allow this appeal, set aside and vacate the orders issued on 27/6/2019 by Hon James Ongondo, Principal Magistrate and substitute them with an order dismissing the application dated 20th December, 2018. The appellant shall have costs of this appeal and of the application in the lower court, giving rise to this appeal.

37. This file is closed. The Lower Court file to be returned forthwith.

38. I so order

DATED, SIGNED AND DELIVERED AT SIAYA THIS 20TH DAY OF DECEMBER, 2021

R.E. ABURILI

JUDGE

In the presence of:

Ms Okumu Maureen advocate for the appellant

N/A for the Respondents

CA: Ms Modestar and Mr Mboya