



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 406 OF 2018

EDDIE JATIANGA AMADI.....APPELLANT/APPLICANT

-VERSUS-

TITUS OTIENO KOCEYO.....RESPONDENT

RULING

1. The appellant/applicant has brought forth a Notice of Motion dated 6th February, 2019 supported by the grounds set out on the face of the motion and the facts deponed supporting affidavit. The applicant is seeking for the following orders *inter alia*:

i. Spent.

ii. Spent.

iii. Spent.

iv. THAT there be a stay of execution of the judgment delivered by the Cooperative Tribunal on 31st July, 2018 and the ruling delivered on 10th December, 2018 pending the hearing and determination of the appeal.

v. THAT the applicant be granted leave to amend the case number on the memorandum of appeal from Tribunal Case No. 831/2016 to Tribunal Case No. 835/2016.

vi. THAT in the alternative, there be a stay of execution pending the hearing and determination of HCCC NO. 257/2017 between the parties herein.

vii. THAT the costs of the application be provided for.

2. The respondent has sworn a replying affidavit to oppose the Motion.

3. At the hearing of the aforesaid Motion, the parties' respective counsels opted to rely on the material placed before this court in support and against the application.

4. I have considered the grounds set out on the face of the Motion, as well as the facts presented in support and against the application.

A brief background of the matter is that the parties herein, both advocates of the High Court of Kenya, were previously co-partners in the Law firm known as Koceyo & Amadi Advocates.

5. A dispute later on ensued between them over the allegation on misappropriation of funds. The applicant is also said to have taken out a loan from Sheria Sacco and for which loan the respondent agreed to act as his guarantor.

6. It was thereafter said that the applicant defaulted in repaying his loan, resulting in the attachment of the respondent's savings. This led to the filing of Tribunal Case No. 835 of 2016 before the Co-operative Tribunal (*The Tribunal*) by the respondent against the applicant seeking to recover the sum of Kshs.510,315/55 together with costs thereon. In the end, the Tribunal rendered its judgment in favour of the respondent.

7. The applicant is now desirous of appealing against the said judgment and has filed a memorandum of appeal to that effect.

8. Having outlined the brief background of this dispute, I now turn to the Motion currently before this court. In view of the arguments raised by the parties, I find the following to be the issues left for the determination of this court.

a) *Whether the res judicata rule applies in this instance.*

b) *Whether the applicant is entitled to the orders sought.*

9. The first issue which is on *res judicata* was raised by the respondent, who submitted that a similar application had previously been filed by the applicant and determined by the Tribunal.

10. The *res judicata* rule is provided for under Section 7 of the *Civil Procedure Act*. Further to the above, the court in ***Hashim Salim Ghahim v N. Njagi - Senior Principal Magistrate Mombasa & 2 others [2017] eKLR*** relied upon the principles on *res judicata* as advanced in ***Bernard Mugo Ndegwa v James Nderitu Githae & 2 Others (2010) eKLR*** as follows:

“(i) *the matter in issue is identical in both suits;*

(ii) the parties in the suit are the same;

(iii) sameness of the title/claim;

(iv) concurrence of jurisdiction; and

(v) finality of the previous decision.”

11. I have perused a copy of the abovementioned application annexed to the replying affidavit and it is apparent that the same relates to an order for a stay of execution pending appeal and which order was granted conditionally by a Tribunal of competent jurisdiction. It therefore follows that the equivalent order now sought before this court offends the *res judicata* rule.

12. The Tribunal granted the order for a stay on condition that the applicant deposits the judgment amount in an interest earning account in the joint names of the parties within 30 days. This has not been complied with, neither has the applicant sought for a review of or appeal against the said order.

13. In view of the foregoing, I concur with the respondent to the extent that the application for an order of stay of execution pending appeal amounts to an abuse of the court process.

14. The prayer seeking to amend the Tribunal Case Number as appearing on the filed memorandum of appeal has not been challenged. It appears it is a minor typographical error that does not alter the content of the appeal, it is allowed.

15. As regards the prayer seeking for an order of stay of execution pending the hearing and determination of HCCC NO. 257/2017. The applicant did not elaborate on the basis for seeking the aforementioned order, neither did Mr. Kwaro appearing as counsel for the said applicant.

16. I have perused the pleadings relating to the above case and it is apparent that though the same concern the same parties herein, the subject matter and reliefs sought are distinct from those raised before the Tribunal. Consequently, I find no basis to grant order.

17. The upshot is that the Motion fails but only succeeds in the prayer for amendment. The applicant shall file an amended memorandum of appeal incorporating the amendments sought within 21 days from the date of this ruling. A fair order on costs is to direct which I hereby do, that each party bears his own costs.

Dated, Signed and Delivered at Nairobi this 31st day of May, 2019.

.....

J. K. SERGON

JUDGE

In the presence of:

.....for the Appellant/Applicant

.....for the Respondent