



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISUMU

CIVIL APPEAL NO 87 OF 2013

JOHN KENNEDY AGENGO

t/a Kengen Enterprises.....APPLICANT/APPELLANT

VERSUS

MOSES L. OCHANDA.....RESPONDENT

RULING

1. By a notice of motion dated 9.7.18 brought under Section 3A of the Civil Procedure Act and Order 36 Rule 1(a) of the Civil Procedure Rules, the applicant/appellant prays for orders that

1. **Pending the hearing and determination of this appeal, a stay of execution of the decree in *KISUMU CMCC NO.395A OF 2012. MOSES L. OCHANDA VERSUS JOHN KENNEDY AGENG'O* be granted**

2. **Costs of this application be provided for**

2. The application is based on the grounds among others that the appellant is aggrieved with a ruling delivered on 11.10.13 in by the judgment in ***KISUMU CMCC NO.395A OF 2012, MOSES L. OCHANDA VERSUS JOHN KENNEDY AGENG'O*** where summary judgment was entered against him for Kshs. 4,750,000/-. That by a ruling delivered on 3.12.13, he was granted a conditional stay of execution but has been unable to comply since the court file was missing and further that the respondent has moved the court and obtained warrants for his arrest in execution of the judgment.

3. The application is supported by an affidavit sworn by the applicant on 9.7.18 in which he reiterates the grounds on the face of the application. Attached to the affidavit pleadings in ***KISUMU CMCC NO.395A OF 2012, MOSES L. OCHANDA VERSUS JOHN KENNEDY AGENG'O***; letter dated 15.3.18 requesting the Deputy Registrar of this court if it was necessary to reconstruct the file and letter dated 27.3.18 to Chief Magistrate, Kisumu, requesting for proceedings in ***KISUMU CMCC NO.395A OF 2012, MOSES L. OCHANDA VERSUS JOHN KENNEDY AGENG'O***.

4. The application is opposed on the grounds set out in the respondent's replying affidavit sworn on 23.7.18. He avers that on 3.12.13, the applicant was granted a stay on condition that he deposits Kshs. 4,750,000/- or fixed security of an equivalent sum and that the application for stay is therefore *res judicata*. He further avers that applicant has not complied with a court order issued 5 years ago and has similarly not prosecuted his appeal. He urged the court to find that the applicant is undeserving of any conservatory order since he has not come to court with clean hands.

5. I have considered the application in the light of the affidavits on record. I have also considered the provisions of **Section 7** of the **Civil Procedure Act, Cap 21** and **Order 42 (6)** of the **Civil Procedure Rules**. This application turns principally on two issues namely the doctrine of *res judicata* and whether applicant is deserving of the order for stay of execution. I commence my analysis by examining the principle of *res judicata*.

6. **Section 7** of the **Civil Procedure Act, Cap 21** states 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”.

7. The following cases show that the doctrine of *res judicata* is held with reverence in legal practice.

In HOYSTEAD AND OTHERS V TAXATION COMMISSIONER, (1925) ALLER REP 56 at 62 it was stated that: -

“The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact;..... Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted....”

8. I am equally persuaded by the words of the Court of Appeal of Tanzania in LOTTA VS TANAKI& OTHERS [2003] 2 EA 556 (CAT) where the Court held as follows with regard to the doctrine of res judicata;

“Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit”. Further that “a person does not have to be formally enjoined in a suit, but he will be deemed to claim under the person litigating on the basis of a common interest in the subject matter of the suit”. See also E.T VS ATTORNEY GENERAL &ANOTHER (2012) eKLR.

9. The word ‘suit’ is defined in **Section 2 of Civil Procedure Act, Cap 21**, as: - *“All civil proceedings commenced in any manner prescribed”*. Bearing that definition in mind, I find and hold that the question in this application was directly and substantially the same issue in the notice of motion dated 15.10.13. The ruling of the court dated 3.12.13 gave the applicant a conditional stay which he has to date not complied with.

10. While it is true that the deputy registrar of this court has confirmed that the court file is missing, it is also evident that applicant only enquired about the file by a letter dated 15.3.18 which is a period of 4 years and 3 months since the conditional order of stay was granted. Applicant has not demonstrated that he has at any one time presented to court the Kshs. 4,750,000/- or fixed security of an equivalent sum as was ordered on 3.12.13, and that the same could not be received on the ground that the court file was missing.

11. Res judicata is a doctrine of general application and the general consensus remains that it is a fundamental principle of law that may be raised to prevent abuse of process.

12. From the analysis I have made above, I have come to the conclusion that this application is res judicata and an abuse of the court process. Having said that, I also find that the applicant is undeserving of the order of stay of execution the same having already been granted on 3.12.13.

13. The upshot of my analysis is that notice of motion dated 9.7.18 is devoid of merit. It is dismissed with costs to the respondent.

DATED AND DELIVERED AT KISUMU THIS.....2nd...DAY OF... August.....2018

T. W. CHERERE

JUDGE

Read in open court in the presence of-

Court Assistant - Felix

Applicant/Appellant - Mr. Abida h/b for Mr. Onsongo

Respondent -Mr. Mwesigwa h/b for Mr. Odongo