



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA IN NAIROBI

FAMILY DIVISION

CIVIL APPEAL CAUSE 99 OF 2015

K.M.M.....APPELLANT/APPLICANT

VERSUS

J.I.L.....RESPONDENT

PRELIMINARY OBJECTION

PLEADINGS

By an application filed on 24th February 2016, The Respondent /Applicant raised a Preliminary Objection on the following grounds;

- a. The application for stay of execution is *res judicata*
- b. The Applicant is estopped by estoppel from rearguing the Application for stay
- c. The court is *functus officio* having delivered a Ruling on the same issues raised in a similar application
- d. The Court dismissed an application for the stay in its order
- e. The Applicant is asking the Court to sit on its own appeal of its own decision
- f. The applicant's application is hopelessly misconceived, frivolous, totally devoid of merit
- g. There are no new and important issues for determination before this Court

The Preliminary Objection is supported by the Applicant's supporting affidavit filed on 22nd February 2016 outlining in more detail facts to support this position

The Applicant cited the case of

TRANSPORT & ALLIED WORKERS UNION Vs SOCIETE INTERNATIONALE DE TELECOMMUNICATION AERONAUTIQUES (SITA) CAUSE 1947 OF 2012

The case refers to the following in terms of *res judicata* and estoppel principle;

“The principle of *res judicata* is well grounded in law. Its aim is to prevent multiple litigation of issues.

Estoppel arises where a particular issue forming necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving different cause of action to which the same issue is relevant one of the parties seeks to reopen

that issue”.

The Respondent filed grounds of Opposition on 25th February 2016, that the application for stay of execution is not *res judicata*

The Court is not *functus officio* as it has powers to stay its orders pending the hearing and determination of the Appeal herein.

The Respondent has no basis to bring this Preliminary Objection.

The Respondent filed an affidavit dated 23rd February 2016.

The Respondent relied on the case of; **MUKISA BISCUITS CO vs WEST END DISTRIBUTORS C.A. 701**

Where it was stated;

“A preliminary objection raises a pure point of law, which is argued on the assumption that all facts pleaded by the other side are correct...”

DETERMINATION

The Court heard oral submissions from Counsel on the Preliminary Objection based on the pleadings filed.

The Court wishes to address this matter as follows;

1. **Section 7 of Civil Procedure Rules 2010** stipulates;

“No Court shall try any suit or issue in which the matter 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.”

The test to determine *res judicata* was well laid down in

DSV SILO vs. THE OWNERS OF SENNAR [1985] 2ALL ER 104 and repeated in the Kenyan Case of **BERNARD MUGO NDEGWA vs. JAMES NDERITU GITHAE & 2 OTHERS [2010]eKLR**

This Court heard and determined a stay of execution application of the Trial Court’s orders pending hearing and determination of the appeal. This culminated with the Court’s Ruling of 8th February 2016. Thereafter, the Respondent through Counsel applied for the Court’s orders pending hearing and determination of the *interpartes* hearing of the matter in the Trial Court scheduled to commence on 21st April 2016. This court declined, as the orders are interim orders pending hearing and determination of the appeal. The Respondent filed a formal application on stay of execution of 12th February 2016, which this Court has not heard yet.

This Court is *functus officio* on the hearing and determination of the stay of execution of the Trial Court’s orders. The Court shall only interfere with the same in a review of the Ruling of 8th February 2016 application, which is not the case.

The stay of execution application filed cannot be dismissed without hearing because it is not clear to the Court whether similar issues are going to be raised to amount to *res judicata*.

Secondly, on 8th February 2016 a formal application of stay of execution was not filed, fully heard and determined.

In the interests of natural justice, each party ought to be heard before the Court can pronounce itself on the matter being *res judicata*.

The matter at this stage does not fall under **Sect 7 CPR 2010**.

On estoppel in the following case laid out exceptions to the rule;

ARNOLD VS NATIONAL WEST MINISTER BANK (1991) 2 A.C. 93;

Lord Lowry stated;

“It appears from this review that there are arguments in favor of the proposition that estoppel constitutes a complete bar to re-litigating a point once it has been decided but I am now of the opinion that the Court can and in exceptional circumstances should relax the rule.”

This Court has jurisdiction to hear and determine an application brought under **Order 42 Rule 6 of the CPR 2010** for stay of execution.

For these stated reasons the Court cannot pre-empt the hearing of the present application. The Preliminary Objection is not upheld but dismissed.

DELIVERED AND SIGNED IN OPEN COURT AT NAIROBI THIS 29TH DAY OF FEBRUARY, 2016

M.W. MUIGAI

JUDGE

In the presence of:

Ms. Kiguatha for the Respondent

Ms. Nganga for the Applicant