REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 37 OF 2012

MOMBASA MAIZE MILLERS LIMITED ……..….. APPELLANT/APPLICANT

V E R S U S

HASSAN SURA DELE ……………………..…………… 1ST RESPONDENT

MOHAMED JALEH & CO. LIMITED …………………….. 2ND RESPONDENT

RULING

1. This is an appeal against judgment of the Principal Magistrate's Court in Mombasa being **Civil Case No. 812 of 2008**. It was delivered on 10th February 2012. By that judgment the lower Court found the Appellant 40% liable for the accident in which the 1st Respondent was injured.

2. The Appellant before this Court by a Notice of Motion dated 5th September 2012 sought stay of execution of that judgment pending determination of this appeal.

3. The Court after hearing that Motion delivered its ruling on 17th October 2012. By that ruling that Motion was dismissed with cost.

4. The Appellant filed a Notice of Motion dated 6th November 2012 which is the subject of this ruling. By that Motion the Appellant again seeks stay of execution of the lower Court judgment delivered on 10th February 2012 pending the determination of this appeal. In submissions the Appellant stated that the previous Motion of stay of execution was dismissed on a technicality and that it was on that basis that it had filed this present Motion. The Appellant submitted that the ruling of 17th October 2012 was on the basis that a Decree had not been extracted of the lower Court judgment.

5. The 1st Respondent raised various objections to that Motion but I will deal with one of those objections because in my view that objection will entirely determine this Motion.

6. The 1st Respondent termed the Appellant’s Motion as an abuse of the Court process since this Court had dismissed a similar Motion on 17th October 2012.

7. What essentially the 1st Respondent was submitting was that the present Motion of 6th November 2012 was res judicata.

8. Section 7 of the Civil Procedure Act provides 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."***

That Section prohibits a party reopening a subject matter that had been the subject of a previous determination. This was well stated in the case **HENDERSON -VS- HENDERSON (1843-60) ALL E.R. 378** in that case the Court stated-

> ***"… 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."***

9. The Court of Appeal in the case **MBURU KINYUA -VS- GACHINI TUTI [1976-80]IKLR 790** had this to say in respect of an application that had been filed-

> ***"That the second application was res judicata since the facts on which it was based were known to the Appellant at the time when he made the first application."***

10. This decision was furthering the provisions of Section 7 as reproduced

above. That Section requires a party to bring before a Court its whole case. A party is not permitted to bring before Court his case in piece meal.

11. The Court of Appeal in the case **UHURU HIGHWAY DEVELOPMENT**

LTD -VS- CENTRAL BANK OF KENYA & 2 OTHERS CIVIL APPEAL NO. 36 OF 1996 added its voice on this issue by stating-

> ***"What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard and determined in the same suit?***
>
> ***… There is no doubt at all that provisions of Section 7 of our Civil Procedure Act relating to res judicata in regard to suits do apply to applications for execution of decrees but there is no doubt, also, that these provisions are governed by principles analogous to those of res judicata.***
>
> ***… There is not one case cited to show that an application in a suit once decided by courts of competent jurisdictions can be filed once again for a rehearing. This shows only one intention on the part of the legislature in India and our Civil Procedure Act. That is to say, there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications with the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new***

applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."

12. In what seems to be the Appellant's defence in bringing this second

Motion it is argued that the first Motion was dismissed on a technicality. Justice Mwera (as he then was) by his ruling of 17th October 2012 had this to say in respect of that first Motion-

> ***"However, the Respondents added that the appellant/applicant had not demonstrated what substantial loss it stood to suffer if the stay order was not granted and there being no decree to execute, this application was considered premature. In that connection the case of <u>Illiana Ingasiali Regina & Another vs. Likhanga Shikani & Another (2005)eKLR</u> was cited in that Order XLI Civil Procedure Rules, (now Order 42) could only be invoked where a decree/order has been issued and therefore execution was imminent. And thus where neither a decree has been extracted nor the order extracted, such an application as presented by the applicant is premature and ought to be dismissed. That was the view of Gacheche J on 18th July, 2005 sitting at Eldoret. This court concurs with that position and accordingly dismisses this application with costs."***

13. A simple response to the Appellant's argument is that Section 7 does

not permit a party to litigate a matter or issue which was determined previously. In the previous Motion the Appellant submitted that it would suffer substantial loss if stay was not granted. Similarly, in the Motion being considered now in this ruling it was submitted that if stay was not granted the Appellant would suffer substantial loss.

14. But over and above that, the fact remains that the Appellant's Motion

for stay pending appeal was dismissed on 17th October 2012 by Justice Mwera. Dismissal unlike a striking out is final and the only option open to a party is to file an appeal against such dismissal. This was clearly stated in the case **<u>MBURU KINYUA</u>** (supra) where the Court stated –

> ***"That, although the judge had not referred in his ruling on the first application to the appellant's application to file a further affidavit, the appropriate mode of testing the judge's decision on that application was to appeal against his ruling rather than to make another application."***

15. Similarly, I will echo that finding and state that the Appellant ought to

have tested the ruling of 17th October 2012 by appealing the Court of Appeal. It is for the reasons stated above that the Notice of Motion dated 6th November 2012 is dismissed with costs to the first Respondent for being res judicata.

Dated and delivered at Mombasa this 17th day of October, 2013.

MARY KASANGO

<u>JUDGE</u>