



REPUBLIC OF KENYA

High Court at Nyeri

Civil Case 87 of 2003

PETER NJOROGE NGAHU t/a Ngahu Associates.....PLAINTIFF

Versus

TETU HOUSING CO-OP SOCIETY.....DEFENDANT

RULING

The judgment creditor took out a preliminary objection dated 7th March 2012 on the following points:

- 1. That the two applications are frivolous vexatious and abuse of court process***
- 2. That the firm of Sichangi & Associates be barred from representing both the judgment/debtor and the Garnishee simultaneously as there is an obvious conflict of interest.***
- 3. That the said applications were filed more than two years ago and there is no explanation for the delay in prosecuting them.***
- 4. That the issue raised in those applications were canvassed in application dated 27th July 2009 and ruling on the same delivered on 8th October 2009 and the same are therefore res judicata for all "interest" and purposes.***
- 5. That the Garnishee is in outright and blatant disobedience of a court order dated 27th July 2009.***

The preliminary objections was in respect of an application by the Garnishee/applicant dated 2nd December 2009 in which the same sought an order that notice to show cause dated 18th November 2009 issued against the Garnishee for a sum of Kshs. 3,773,727/60 be set aside and an application dated 23rd October 2009 in which the Garnishee/applicant sought an order that the orders made on 21st October 2009 dismissing the application dated 14th October 2009 be set aside or varied and the application be reinstated for hearing.

It was submitted by Mr. Njuguna learned counsel for the decree holder that by a ruling delivered on 8th October 2009 by Justice Makhandia on an application dated 30th July 2009 in which the applicant sought for an order of review of the order issued on 27th July 2009 wherein the applicant sought for stay pending review and that the judgment/creditor decree holder had raised the issue of conflict of interest in the firm of Sichangi & Associates representing both the judgment debtor and the Garnishee. Justice Makhandia dismissed all the prayers sought including the prayer for stay and held that there was conflict of interest and apparent collision between the garnishee and the judgment debtor.

He therefore submitted the issues of stay had been determined by a court of competent jurisdiction

and it therefore does not matter whether it was stay pending review or stay pending appeal.

On behalf of the applicant Mr. Kioni submitted that the issue of stay pending appeal has never been adjudicated upon since what was dismissed was stay pending review. He submitted that the issue of conflict of interest was orbiter in the said ruling and that the issue of the indebtedness of the judgment debtor to the Garnishee had not been raised.

On the issue of conflict of interest he relied upon the case of CHARLES GITONGA KARIUKI vs AKUISI FARMERS CO; LTD. Nakuru High Court civil case No. 797 of 2007 and Eldoret High Court Civil Case No. 77 of 1997 NATIONAL BANK OF KENYA LTD VS JOSEPH SERONEI.

To my mind there are only two issues for determination in this P.O.

i. *Is there a conflict of interest in the firms of Sichangi & Associates representing both the Garnishee and the judgment/Debtor.*

ii. *Is the application before court resjudicata.*

I will start with the issue of conflicting of interest as it had been submitted by Mr. Njuguna that the same was dealt with by Mr. Justice Makhandia and as it stands the same is concluded.

I have noted at page 5 of the said judgment the learned judge had this to say:

“Counsel maintained however that it was not open to Ngahu to raise the issue of conflict of interest in her representation of both the garnishee and Tetu.

Mr. Njuguna, learned counsel for Ngahu countered those submissions by stating that it was not a mere coincidence that the garnishee and Tetu were being represented by the same firm of lawyers. There was therefore serious conflict of interest. In her representation of both the garnishee and Tetu...”.

and at page 16 thereof the learned judge had this to say:-

“Finally I have no doubt at all in my mind that there is a serious conflict of interest in the representation of the garnishee and Tetu by the same firm of advocates. If indeed the garnishee is of the view that Tetu is indebted to it in the amount claimed why should it retain counsel for it? Much as the garnishee claimed that Tetu was indebted to it in the amount mentioned and that it held a sum of Kshs. 1,037,707/20 to the credit of Tetu it did not as much tender any documentary proof to sustain that allegations. If anybody is looking for evidence of collusion between the garnishee and Tetu this it it...”

It is therefore clear to my mind that the issue of conflict of interest was raised before the learned judge who ruled on it in the terms set above.

I have looked at the authority submitted by the applicant and note that the issue of conflict of interest discussed therein is different from the conflict between Tetu and the garnishee as those authorities discusses a situation where an advocate acts for both the defendant and the plaintiff. The conflict which is presented in this case before the court is where the interest of the decree holder and the garnishee conflict with those of the judgment debts and since the firm of Sichangi & Associates had acted for the judgment /debtor in the decree holder's case against the same I agree with the finding of fact by Justice Makhandia that it was therefore not proper for the firm of Sichangi and Associates to represent the garnishee in this particular issue.

I therefore agree with the submission of Mr. Njuguna that the issue of conflict of interest has been ruled upon by a court of competent jurisdiction and it therefore stand that there is conflict of interest in the firm of Sichangi & Associates as officers of this court representing both the judgment debtor and the

decree holder.

The final issue is that of res judicata. It is submitted by Mr. Njuguna that the issue of stay has been adjudicated upon and dismissed while Mr. Kioni has urged the court to distinguish the difference between stay pending appeal and stay pending review.

The principal of res judicata is that

“No court shall try any suit or any 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”

Which issue is explained as follows:

“Any matter which might to or ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.”

In the case of KAMUNYE & OTHERS vs THE PIONEER GENERAL ASSURANCE LTD (1971)EA 263 the court of appeal had this to say on the issue of res judicata.

“The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court in another way and in the form of a new cause of action a transaction which had already been put before a court of competent jurisdiction in earlier proceedings and which had been adjudicated upon. If so the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but every point which belongs to the subject to litigation and which parties exercising reasonable deligence might have brought forward at the time.”

The object of res judicata is that “parties might not to be permitted to begin a fresh litigation because of a new view they may entertain of the law of the case or new version which they present as to what should be a proper apprehension by the court of the legal result if this were permitted, litigation would have no end except when legal inqunity is exhausted. It is a principle of law this cannot be permitted and there is abundant authority to reinstating that principle” See HOYSTEAD VS TAXATION COMMISSIONER (1925) ALL ER. 56

From the above authorities then if you take the broader view that the issue of stay has been determined then the issue before the court is res judicata but if you take the narrow view that the issue of stay pending appeal has never been placed before the court then the matter is not res judicata.

In the interest of justice I take the view that the court has not exercised its judicial mind and come to a decision on the issue of stay pending appeal and therefore the preliminary objection by the respondent on the issue of res judicata is dismissed with no order as to costs.

I therefore order that the application be fixed for hearing on its merit.

Dated and delivered at Nyeri this 6th day of December 2012.

**J. WAKIAGA
JUDGE**

Court: Ruling is read in open court in the presence of both parties

**J. WAKIAGA
JUDGE**