



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

Civil Suit 1130 of 1996

LUCY WAIRIMU MWAURA PLAINTIFF

VERSUS

ASWINCHAND HIRJI SHAH 1ST DEFENDANT

NAVICHAND HIRJI SHAH 2ND DEFENDANT

MUKESH KUMAR HIRJI SHAH 3RD DEFENDANT

ABDUL JANMOHAMED 4TH DEFENDANT

R U L I N G

At the commencement of the hearing of the defendants’ application for primarily stay of execution dated 6.6.2006, the plaintiff’s Advocate took a preliminary objection thereto on the ground that the application is res judicata.

The record shows that on 3rd August 2005 the defendants lodged an application by way of Notice of Motion for *inter alia* stay of execution. That application was heard by Ransley, J. who dismissed the same on the ground that the applicants had not demonstrated that they would suffer substantial loss if the orders sought to be stayed were enforced. That was on 24.10.2005. The application had been brought *inter alia* under Order XLI Rule 4 and Order L Rule 1 of the Civil Procedure Rules.

The present application was lodged on 6.6.2006. It is by the same applicants and the provisions of Order XLI Rule 4 and Order L Rule 1 have been invoked. The application also seeks primarily stay of execution, this time limited to the Notice to Show Cause why execution should not issue against the 1st, 3rd and 4th defendants. The 2nd defendant/applicant is now deceased.

Section 7 of the Civil Procedure Act, reads:

“7. 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.”

It is well settled that res judicata plea applies to applications in the same suit.

In my view the present application is clearly res judicata. The application is between the same

parties. The relief sought is the same or substantially similar to the relief sought in the earlier application dated 3.8.2005. The earlier application was heard on merits and dismissed.

The applicants state that they have lodged an appeal against the ruling that has given rise to this application. They have in addition lodged an application for stay of execution of the orders in this suit pending the hearing of the said Appeal. That being the position, the applicants should not have come back to this court for stay of execution – as to entertain their application would amount to sitting on appeal against the ruling of Ransley, J. aforesaid.

The upshot of my consideration of the preliminary objection is that the same is upheld and the application dated and lodged on 6.6.2006 is struck out on the ground that the same is res judicata.

The plaintiff shall have the costs of the struck out application.

Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this 6th day of July 2006.

F. AZANGALALA

JUDGE

Read in the presence of:-