REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC CASE NO. 159 OF 2014

MUSILI KIVINGO.....1ST PLAINTIFF

KITHUKA MUSINGILA.....2ND PLAINTIFF

-VERSUS-

KITILI KILONZO..... DEFENDANT/APPLICANT

RULING

INTRODUCTION:

1. Vide a Notice of Motion Application dated**,** 29th September 2020, brought under sections 1A, 3B and 79G of the Civil Procedure Act, Order 42 Rule 6(1) and Order 51 of the Civil Procedure Rules, the Applicant sought the following orders:

   a) **Spent.**

   b) **Spent.**

   c) **Spent.**

   d) **That a stay Order be issued pending the hearing and determination of the Appeal.**

   e) **Costs do abide the application.**

2. The application is supported by the Affidavit of Kitili Kilonzo, the Defendant/Applicant herein who deposed that the Respondents were in the process of execution and that he had been served with a notice of taxation slated for 2nd October 2020; that he was dissatisfied with the decision of the court made on 20th September 2019 and had preferred an appeal against the same; that he had applied and has been supplied with proceedings and that the Appeal has high chances of success because the application was not heard on merit and the same was an abuse of the court process; that it was fair that the execution of the taxation be stayed awaiting the outcome of the Appeal and that execution will render the Appeal futile and he will not be able to pursue the same.

3. In response, the Plaintiffs filed a preliminary objection and grounds of opposition on 18th February 2022. In the preliminary objection, they argued that the application was incompetent, frivolous, vexatious and an abuse of the court process, and that the application was *res judicata*. In their Grounds of Opposition, the Plaintiffs stated that the application was misconceived, frivolous, vexatious, incompetent and aimed at wasting judicial time; that the application seeks the same orders that were sought in the application dated 23rd November 2017 which was dismissed on 31st July 2018 for non-attendance; that the applicant blatantly filed another application dated 13th September 2017 seeking similar orders which application was dismissed on 20th September, 2019; that the instant application is *Res Judicata;* that the application is made in bad faith and is only aimed at wasting judicial time; that the Defendant/Applicant has not demonstrated sufficient cause to warrant the orders sought.

4. The application was canvassed by way of written submissions and on record are the Defendant/Applicant's submissions dated 14th October 2021 and the Plaintiff's submissions dated 8th November 2021.

APPLICANT/DEFENDANT'S SUBMISSIONS

5. The Defendant/Applicant's counsel submitted that the application before court was for stay pending appeal against the decision made by this court on 20th September 2020. Counsel submitted that the decision denied the applicant a chance to set aside the Judgment of this

Honourable court made on 22nd September 2017. Counsel contended that as a result, the Respondent had commenced the process of execution involving eviction and payment of costs.

6. Counsel submitted further that the applicant had lodged an appeal which had high chances of success and that the appeal shall be rendered nugatory if the Applicant is evicted since these were substantive Orders to be executed unless the stay order is issued. Counsel stated that the that this matter be stayed pending the outcome of the Appeal.

7. Counsel also contended that the Applicant has a right of appeal, which he is pursuing and has filed a record of appeal.

PLAINTIFFS/RESPONDENTS' SUBMISSIONS

8. Counsel for the Plaintiffs submitted that Judgment in this suit was delivered on 20th September 2017 in favour of the Plaintiffs and since the delivery of that judgment, the Defendant has filed a myriad of Applications similar to the instant application, which amounts to an abuse of the court process as the said applications have been dismissed with costs to the Plaintiffs.

9. Counsel submitted further that the Defendant filed an application seeking stay of execution dated 23rd September, 2017 which was dismissed on 31st July, 2018 for non-attendance. Counsel urged that the Defendant filed yet another Application dated 13th September, 2017 premised on the same grounds and that the learned Judge delivered his ruling on the application on 20th September, 2019 and stated as follows:

> ***"…instead of filing an Application seeking to set aside or review the Orders of 31st July, 2018 dismissing the application dated 8th November, 2017, the Defendant/Applicant has filed an application similar to the one that was dismissed for want of prosecution. This in my view is an abuse of the court process."***

10. Counsel argued that the above application was *res judicata*, relied on section 7 of the Civil Procedure Act and referred to the cases of **E.T.V v Attorney General & Another (2012) eKLR** and **Mohamed Dado Hatu vs Dhadho Gaaddae Godhana & 2 Others [2017] eKLR** for the proposition that the application before court is Res judicata. Counsel prayed that the Preliminary Objection be allowed and the instant application be dismissed with costs.

ANALYSIS AND DETERMINATION

11. I have considered the Application, the Grounds of Opposition, the Preliminary Objection, the rival submissions and authorities cited. In my considered opinion the issues that arise for determination are as follows;

i) Is the instant application *Res Judicata*?

ii) Should the court Grant Stay of Execution pending Appeal?

12. Section 7 of the Civil Procedure Act, cap 21 Laws of Kenya provides for the doctrine of *res judicata* as a bar for the court to determine a subsequent similar suit in the following terms;

> **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**.

13. It is therefore clear that to succeed in the plea of res judicata, the following elements must be proved;

i) The court that heard the matter must have been competent

ii) The matter directly and substantially in issue must be the same as that formerly determined.

iii) The parties must be the same and or litigating under the same titles.

iv) The matter must have been heard and finally decided.

14. These principles were restated in the case of ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*****, [2017] eKLR,** where the Court of Appeal held that:

> **"For the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;**
>
> **a) The suit or issue was directly and substantially in issue in the former suit.**
>
> **b) That former suit was between the same parties or parties under whom they or any of them claim.**

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

15. Similarly, in the case of ***Invesco Assurance Company Limited & 2 Others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company & Another (Interested Parties)*** **[2020] eKLR**, at Paragraph 44, the court held as follows;

A close reading of section 7 of the Act reveals that for the bar of *Res Judicata* to be effectively raised and upheld, the party raising it must satisfy the doctrine five essential elements which are stipulated in the conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that;

a. The suit or issue raised was directly and substantially in issue in the former suit.

b. That the former suit was between the same party or parties under whom or any of them claim

c. That those parties were litigating under the same title

d. That the issue in question was heard and finally determined in the former suit

e. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.

16. The Supreme Court stated the purpose of the doctrine of *res judicata* in the case of ***John Florence Maritime Services Ltd & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others (2021) eKLR***, **para 54** as follows;

"The doctrine of Res judicata in effect, allows a litigant only one bite at the cherry. It prevents a litigant or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier actions. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively."

17. In the instant application, the Plaintiff/Respondent has argued that this application is *res judicata* as similar applications were made dated 23rd November 2017 and 13th September 2017, which were both dismissed. I have considered the record and I note that there is an application dated 8th November 2017 filed on 23rd November 2017, in which the Defendant sought to set aside Exparte judgment together with consequential orders made on 22nd September 2017. That application was dismissed on 31st July 2018 for reasons that the Defendant/Applicant did not comply with the orders of 27th February 2018 and further that the application was dismissed for want of prosecution. The application dated 13th September 2017 sought for orders to set aside Exparte judgment and consequential orders of 22nd September 2017. That application was dismissed by the court for seeking similar orders to the application dated 8th November 2017. In the instant application, the defendant seeks for stay of execution pending appeal. In my view, the orders sought in the instant application are not similar to those sought in the applications dated 8th November 2017 and 23rd September 2017.

18. It is therefore my considered view that the instant application is not *res judicata* in view of the fact that this court has not made a previous determination on the issue of whether or not to grant stay of execution pending appeal hence the preliminary objection is unmerited and therefore dismissed.

19. Having dismissed the preliminary objection, I will proceed to determine the application dated 29th September 2020 on merit.

20. Grant of stay of execution pending appeal is provided for under Order 42 Rule 6 of the Civil Procedure Rules, which provision states as follows;

(1) No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the Court Appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

(2) No order for stay of execution shall be made under subrule (1) unless—

a. the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

b. such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

3) …

4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

5) …

6) …

21. An applicant for stay of execution of a decree or order pending appeal is obligated to satisfy the conditions set out in Order 42 Rule 6(2), aforementioned; namely

(a) that substantial loss may result to the applicant unless the order is made;

(b) that the application has been made without unreasonable delay, and

(c) that such security as the court orders for the due performance of such decree or order as may ultimately be binding on the applicant has been given.

22. In ***Butt vs. Rent Restriction Tribunal*** **[1979]**, the Court of Appeal stated conditions to be considered in determining whether to grant or refuse stay of execution pending appeal. The court stated that the power of the court to grant or refuse an application for a stay of execution is a discretionary, and that the discretion should be exercised in such a way as not to prevent an appeal. Secondly, the general principle in granting or refusing a stay is, if there is no other overwhelming hindrance, a stay must be granted so that an appeal may not be rendered nugatory should the appeal court reverse the judge's discretion. Thirdly, a judge should not refuse a stay if there are good grounds for granting it merely because, in his opinion, a better remedy may become available to the applicant at the end of the proceedings. Finally, the court in exercising its discretion whether to grant or refuse an application for stay will consider the special circumstances of the case and its unique requirements.

23. In ***Vishram Ravji Halai vs. Thornton & Turpin Civil Application No. Nai. 15 of 1990 [1990] KLR 365*****,** the Court of Appeal held that whereas the Court of Appeal's power to grant a stay pending appeal is unfettered, the High Court's jurisdiction to do so under Order 41 rule 6 of the Civil Procedure Rules is fettered by three conditions namely, establishment of a sufficient cause, satisfaction of substantial loss and the furnishing of security. Further the application must be made without unreasonable delay.

24. In my view, a stay may be granted where there is sufficient cause in light of the circumstances of the case and the court ought to be guided by the overriding objective provided for in sections 1A and 1B of the Civil Procedure Act as well as section 3 of the Environment and Land Act No. 19 of 2011.

25. In the instant application, the applicant has argued that he has filed an appeal in the court of appeal which has high chances of success and that if stay is not granted, the execution in respect of the taxation may issue and render the appeal futile. From the provisions of Order 42 Rule 6, it is incumbent upon the applicant seeking stay of execution pending appeal to demonstrate that he stands to suffer substantial loss if stay is not granted. The applicant has only stated that execution may issue, but in my view has not shown that he is likely to suffer substantial loss if execution proceeds. A mere fact of an imminent execution is not proof that there is bound to be substantial loss. In the case of ***James Wangalwa & Another vs. Agnes Naliaka Cheseto*** **[2012] eKLR**, the court held that:

> **No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the CPR. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory.**

26. Having considered the affidavit upon which the Defendants application is anchored, I do not find sufficient material to demonstrate that the applicant stands to suffer substantial loss if stay of execution pending appeal is not granted.

27. In the result, I find no merit in the Notice of Motion dated 29th September 2020, and the same is dismissed with costs.

28. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF MARCH 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the presence of:

No appearance for the Applicant

No appearance for the Respondent

Josephine Misigo – Court Assistant