



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 19 OF 2011**

**ESTATE OF JOSHUA WAMBUGU MINJIRE**

**Represented by**

**CALEB MINJIRE WAMBUGU.....PLAINTIFF**

**VERSUS**

**ISAIAH KAVULAFU.....1<sup>ST</sup> DEFENDANT**

**JOSEPH SHIYENJI.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application before me is dated **19/4/2021** is for stay of execution of the judgement of this court delivered on the **19/7/2019**.

2. This court ordered that the application be served and that an affidavit of service be filed in the record. It also ordered that the application be disposed of by way of written submissions. The applicants were ordered to file written submissions within **7 days** of the date the service of the respondent's response to the application was due. Both parties' submissions were filed on **10/5/2021**. I have considered those submissions.

3. The applicant's main ground for seeking a stay is that they have preferred an appeal before the Court of Appeal against the judgment of this court and that the record has been served upon the respondent in this application. It is said that the appeal is arguable and that the applicants are bound to suffer irreparable loss if this court does not order a stay. They aver that they would be left without any compensation for the consideration paid if eviction issues against them. They also aver that they are of advanced age and undergoing health challenges at the moment. The applicants relied on the case of **James Wangalwa & Anor Vs Agnes Naliaka Cheseto 2021 eKLR**.

4. The respondent avers in response that the application is *res judicata* in that a previous application for stay of execution had been filed by the applicants which was dismissed on **27/11/2019**. It is stated that the ruling thereon was not appealed; neither was review sought against it, hence the instant application is an abuse of the process of the court as it seeks the same orders sought in the previous application and made in bad faith and without disclosure of material facts. The respondent relies on the case of **Bernard Mugo Ndegwa Vs James Nderitu Githae & 2 Others [2010] eKLR** and **George Kitiyo Kamary Vs Stephen Lowasikou Mwei [2019] eKLR** and **Monica Wambui Kangangi & Anor Vs John Maina Mugo [2021] eKLR**.

5. The issues that arise therefore are as follows:

**(a) Is the application *res judicata*?**

**(b) Are the applicants entitled to a stay of execution?**

**(c) Who should bear the costs of the application?**

6. As to whether the application is *res judicata* this court finds that an application was filed on **3/9/2019** as stated by the respondent in which the applicants herein sought an order of stay of execution of the judgment delivered by this court on **18/7/2019** pending the hearing of an *intended* appeal. That application was dismissed on the **27/11/2019** on the grounds that the risk of substantial loss had not been demonstrated and that the security offered by the applicants would in any event not be adequate perchance the court gave the stay order in that application.

7. **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.”**

8. It is clear that where an issue between parties has been determined by a competent court of law then the same can not be raised again between the same parties for determination owing to the doctrine of *res judicata*.

9. It is now trite that the doctrine of *res judicata* applies to applications just as it does to suits.

10. The fact that at the time the applicants filed the first application dated **30/8/2019** they had not actually filed the appeal at that time and that they have now filed the appeal is of little relevance or help to them in the instant application. As long as this court finds that the provisions of **section 7** of the **Civil Procedure Act** apply to the instant application it must be dismissed.

11. The test to be applied here is whether the issue of stay or execution arose and was decided on the merits by a court seized of jurisdiction and between the same parties in the application dated **30/8/2019**.

12. In the application dated **30/8/2019** the orders of stay sought were the same as those sought in the instant application. The parties are the same as those before me now. They have come to court in the same capacity as they had come during the last application.

13. This court is now being asked by the applicants to re-assess their situation and to come up with a decision as to whether they deserve a stay of execution in this matter. That, if done would be the second time that this court would be doing it and in this court's view the application is *res judicata*. Determining it on its merits would be contrary to the provisions of **Section 7** of the **Civil Procedure Act**.

14. Consequently I hereby dismiss the application dated **19/4/2021** for being *res judicata*. There shall be no orders as to costs.

**Dated, signed and delivered at Kitale via electronic mail on this 11<sup>th</sup> day of May, 2021.**

**MWANGI NJOROGE**

**JUDGE, ELC, KITALE.**