Pasha Enterprises Limited v Kenya Alliance Insurance Company Limited & another; Karama & Yussuf (Suing as the Legal Representative of the Estate of Abdul Wahab Hassan - Deceased) & 3 others (Interested Parties) (Civil Case E002 of 2024) [2025] KEHC 1493 (KLR) (6 February 2025) (Ruling)

Neutral citation: [2025] KEHC 1493 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MERU

CIVIL CASE E002 OF 2024

EM MURIITHI, J

FEBRUARY 6, 2025

BETWEEN

PASHA ENTERPRISES LIMITED ..... PLAINTIFF

AND

KENYA ALLIANCE INSURANCE COMPANY LIMITED ..... 1ST DEFENDANT

GACHICHIO INSURANCE BROKERS ..... 2ND DEFENDANT

AND

YUSSUF HASSAN KARAMA & HALIMA YUSSUF SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ABDUL WAHAB HASSAN - DECEASED) ..... INTERESTED PARTY

AMOS MAINGI ..... INTERESTED PARTY

MOHAMED ALI DAWA & JAMILA MOHAMED (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ADAN ALI - DECEASED) ..... INTERESTED PARTY

BISHRO ALI HASSAN & RUKIA ABDULLAHI ALI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ALI HASSAN BORU - DECEASED) ..... INTERESTED PARTY

RULING

1. The Interested Parties took out a Notice of Preliminary Objection dated 16/9/2024 on grounds that:
    1. The application dated 14/8/2024 offends the provisions of Section 7 of the *Civil Procedure Act* Chapter 21 Laws of Kenya as it is res judicata.

2. The application is vexatious and an abuse of the court process

Submissions

2. The Applicant urges that the application of 25th January, 2024 did not include the 2nd defendant and the facts therein are different. It urges that Joseph Kiarie Wetanga T/A Front Bench Auctioneers obtained breaking orders against it despite the partial payment of the decretal sum of Ksh.5,613,615 by the 1st defendant. It urges that the preliminary objection ought to fail as the claim of res judicata does not meet the threshold set out under section 7 of the *Civil Procedure Act*, and cites *George Kamau Kimani & 4 Others v County Government of Trans Nzoia & Another* (2014) eKLR.

3. The Defendants/Respondents did not file any submissions.

4. The Interested Parties urge that the prayers in the application of 14th August 2024 are similar to those sought in the earlier application of 25th January 2024, and cite *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* (2022) eKLR. They urge that the application is not only vexatious but also an abuse of the court process which should be struck out with costs, and cite *Nancy Musili v Joyce Mbete Katisi* (2018) eKLR.

Analysis and Determination

5. The sole issue for determination is whether the application dated 14/8/2024 is res judicata, in view of the court orders of 18/4/2024 and 16/5/2024.

6. The doctrine of res judicata is set out under Section 7 of the *Civil Procedure Act* 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."

7. The basis for the doctrine being embedded in the *Civil Procedure Act* is to ensure public confidence in the finality of decisions made by the courts. This doctrine affords litigants protection from being faced with a vicious cycle of disputes which have been determined by a competent court. It is designed to save litigants from loss of time and resource in endless litigation. Without such control, litigants would abuse the judicial process by filing multiplicity of similar suits in different courts hoping to obtain favourable outcomes.

8. That doctrine was encapsulated in *Lotta v Tanaki* [2003] 2 EA 556 as follows:

> "The doctrine of res judicata is provided for in Order IX of the Civil Procedure Code of 1966. Its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9, therefore, contemplates five conditions which, when co-existent, will bar a subsequent suit. The conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former

suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

9. The Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR held that:-

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice."

10. In order to fully appreciate the case herein, it is imperative to set out, albeit briefly, the factual matrix of this matter. In apparent bid to ultimately defeat the course of justice and render the conditional stay orders already in existence unenforceable and inconsequential, the Applicant by an application dated 25/1/2024 wittingly or unwittingly led the court into granting interim injunctive orders to indefinitely restrain the Interested Parties from executing their lower court decrees.

11. The Interested Parties moved the court to review the orders of injunction, and in its ruling dated 16/5/2024, the court concurred that the two orders were self-contradicting and set aside the injunctive orders of 18/4/2024 as follows:

> " The injunctive orders in this suit would defeat any consequential execution that the Interested Parties/Applicants decree-holders are entitled to in the event of default in the conditional stay of execution in the appeals. The orders for stay in the appeals would then be rendered nugatory by the order in this suit. That is what counsel for the Interested Parties uncharitably but properly calls an absurd outcome...It is this court's respectful view that the principle of presumption against absurd result is a principle of general application in construction of all law, including statutes, orders of the court and directions on procedures as indeed of all judicial process because the Rule of Law is based on the doctrine of reasonableness. And a court should not act in vain; for what would be the purpose of granting an order which cannot be enforced while the whole idea of judicial remedy is based on the possibility of enforcement of the judicial determinations? The situation before the court is resolved in this way: the plaintiff insured has a right under access to justice to file the declaration suit in enforcement of alleged breach of contract. The decree holder in the trial court is entitled to enforcement of the fruits of his judgment, subject only to a successful appeal. The decree-holder is not beholden to the insured's claim in breach of contract in a declaratory suit. Consequently, the decree-holder is entitled to recover the award in his judgment, subject only to appeal but the insured defendant is entitled to recover by declaratory suit or otherwise the benefit of his insurance contract in which no privity of contract exists as against the successful suitor/decree-holder. Consequently, in giving effect to the parties' rights aforesaid, the conditional stay orders already in place in Civil Appeal Nos. E202, E203 and E204 of 2023, must be given specific effect; and the insured plaintiff in this suit must be facilitated to pursue his declaratory remedy against its defendant insurer,

while avoiding any absurd result. Accordingly, for the reasons set out above, this court will review and set aside the injunctive orders issued in this suit on 18/4/2024."

12. The Applicant went on to file the application dated 14/8/2024 seeking inter alia that:

    1. The honorable court be pleased to issue an injunctive order against the breaking orders dated 25th July 2024 in execution of the judgment/decree in Isiolo Civil Suit No. 46 of 2015, Isiolo Civil Suit No. 47 of 2015, Isiolo Civil Suit No. Isiolo Civil Suit No. 48 of 2015 and Isiolo Civil Suit No. 49 of 2015 by the interested parties and anyone acting at their behest particularly JOSEPH KIARIE WATENGA T/A FRONT BENCH AUCTIONEERS and all consequential orders pending the interparties hearing and determination of this application.

    2. The honorable court be pleased to issue an injunctive order against the breaking orders dated 25th July, 2024 in execution of the judgment/decree in Isiolo Civil Suit No. 46 of 2015, Isiolo Civil Suit No. 47 of 2015, Isiolo Civil Suit No. Isiolo Civil Suit No. 48 of 2015 and Isiolo Civil Suit No. 49 of 2015 by the interested parties and anyone acting at their behest particularly JOSEPH KIARIE WATENGA T/A FRONT BENCH AUCTIONEERS and all consequential orders pending the interparties hearing and determination of this suit.

13. This court finds that the prayers in the application dated 25/1/2024 are similar to those sought in the instant application, because they both seek to effectively restrain the Interested Parties from executing their decrees. It is urged that the Applicant is in the process of settling the decretal sum and the eventual execution of the decrees will render the suit nugatory and condemn the Applicant unheard. The court notes that the setting aside of the injunctive orders issued on 18/4/2024 paved way for the Interested Parties to execute their lawful decrees. This is a classic example of the Applicant having its cake and eating it, because the Applicant purports to enjoy stay of execution hereinbefore granted without fulfilling the conditions set out therein. With respect, that is an abuse of the court process which this court cannot condone.

14. This court finds that the application dated 14/8/2024 is res judicata because the issues raised therein are strikingly similar to those in the application dated 25/1/2024, which issues were conclusively and decisively determined by the court vide its ruling of 18/4/2024.

15. The inevitable conclusion is that the application dated 14/8/2024 is indeed res judicata, vexatious and an abuse of the court process. The Court also considers that having set aside the injunctive orders and paving way to the execution of the decrees, it has done everything on the question of the stay of execution issue, and it is functus officio. The Court cannot, therefore, consider the application for the same relief of stay of execution by way of "an injunctive order against the breaking orders dated 25th July 2024 in execution of the judgment/decree" as sought in the application of 14/8/2024.

Orders

16. Accordingly, for the reasons set out above, the Interested Parties' Notice of Preliminary Objection dated 16/9/2024 is merited and it is allowed.

17. The Applicant's application dated 14/8/2024 is res judicata and it is struck out.

18. The Applicant shall pay the costs of the application to the Respondent and Interested Parties.

    Order accordingly.

DATED AND DELIVERED THIS 6TH DAY OF FEBRUARY, 2025.

EDWARD M. MURIITHI

JUDGE

Appearances:

Ms. Maina Advocate for Mutuma Advocate for Plaintiff.

Mr. Kanja Advocate for 2nd Defendant

Mr. K. Arithi Advocate for Interested Party with Gikunda Arithi Advocate.

Ms. Janet Advocate for 1st Dependant