



Growthpad Digital Media Group Limited v Mogoba t/a Turi Investment (Civil Appeal E833 of 2024) [2025] KEHC 3584 (KLR) (Civ) (21 March 2025) (Ruling)

Neutral citation: [2025] KEHC 3584 (KLR)

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

**CIVIL
CIVIL APPEAL E833 OF 2024**

**JN MULWA, J
MARCH 21, 2025**

BETWEEN

GROWTHPAD DIGITAL MEDIA GROUP LIMITED APPLICANT

AND

EMMA KWAMBOKA MOGOBA T/A TURI INVESTMENT RESPONDENT

RULING

1. Before the Court for determination is an application dated 19/07/2024 filed by Growthpad Digital Media Group Ltd (the Applicant) against Emma Kwamboka Mogoba t/a Turi Investments (the Respondent) pursuant to Section 1A, 1B, & 3A of the Civil Procedure Act (CPA) and Order 46 Rule 6 of the Civil Procedure Rules (CPR), seeking inter alia:
 - a. Spent.
 - b. Spent.
 - c. That there be a stay of execution of the default judgment delivered on 18/03/2024 and the subsequent decree pending hearing of this application or until further order of this honorable Court.
 - d. That upon the grant of prayer 3 above, leave be granted to the Applicant to file their responses to the claim together with a list of documents, list of witnesses and the witness statements within three (3) days from the date of the order.
 - e. That the costs of this application be provided for.
2. It is based on grounds found at the supporting affidavit sworn by Robert Asenah the Applicant's finance manager inter alia stating that judgment in default of appearance was entered as against the



Applicant on the first mention before the trial Court which prompted the Applicant to instruct the present counsel on record, who immediately filed an application before the subordinate Court seeking stay of execution and pleaded with the Court to allow the Applicant to defend the suit however the motion was dismissed hence this appeal.

3. In opposition to the application, the Respondent filed a Preliminary Objection(PO) and a replying affidavit arguing that the application is res Judicata by dint of Section 7 of the CPA on accord of the fact that the Applicant had filed a similar motion before the lower Court; that the instant appeal is in contravention Section 79G of the CPA as it was filed outside the statutory period from the date in which the impugned decision of the lower Court was rendered; that the motion constitutes an abuse of the Court process; and that the motion ought to be dismissed with costs.
4. Directions were taken on disposal of the Applicant's motion by way of written submissions. Only the Respondent complied despite the Applicant being accorded ample opportunity to do so. Upon the above, the issues that fall for determination are:
 - i. Whether the application is Res Judicata?
 - ii. Whether the motion is merited?
 - iii. Who ought to bear the costs of the motion?

Whether the application is Res Judicata?

5. The doctrine of Res Judicata is provided for at Section 7 of the CPA. The doctrine was succinctly addressed by the Court of Appeal in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR), that settled the ingredients of the doctrine appertaining:- the issues in the present suit being directly and substantially in issue have been canvassed in the former suit; that the former suit being between the same parties or parties under whom they or any of them claim; that the parties having litigated under the same title; that the issue in present suit having been heard and finally determined in the former suit; and that the Court that formerly heard and determined the issue being competent to try the subsequent suit or the suit in which the issue is raised, have to be conjunctively met, for the plea to succeed.
6. Thus, applying my mind to the above distillation as juxtaposed against the Respondent's objection, firstly, as can be garnered from the response by the Respondent, particularly (Annexure EKM-3), the parties before the subordinate Court are the same parties litigating under the same title before this Court. Secondly, as deposed by the Respondent and gathered from the aforementioned annexure, the relief as sought before the lower Court is a verbatim replica of the relief being sought before this Court.
7. The Applicant has specifically sought an order of stay of execution of the judgment in default before the subordinate Court pending hearing of the instant application and not an order of stay pending hearing of the intended appeal or appeal. Ideally, had the subject of the ruling or motion before the subordinate Court pertaining to stay pending an intended appeal or appeal, the Applicant would have been entitled to rely on Order 42 Rule 6(1) of the CPR. As is, the latter was not the case. Thirdly, the prayer that was for determination before the subordinate Court sought "leave to file a response to the claim together with the list of documents, list of witness and witness statements within three (3) days from the date of the order".
8. By (Annexure EKM-3), it can be reasonably concluded that the said relief was substantively determined by way of dismissal, by a Court of competent jurisdiction therefore the same relief cannot be re-litigated vide the present motion at an interlocutory stage before the appellate Court. In any event, it would appear that the said relief was a substantive issue, that was a preserve for determination by the appellate



Court and by determining the same at this interlocutory stage, would only serve to defeat and or embarrass the appellate proceedings.

9. The totality of the foregoing would be that the matter before this Court satisfies the plea of Res Judicata.
10. It equally necessitates mentioning that having perused the Memorandum of Appeal, it seems that the intention of the Applicant on its face as being an appeal as against the judgment of the lower Court rendered on 18/03/2024 yet the appeal itself was filed on 23/07/2024, which tangibly runs afoul of Section 79G of CPA. Further, no leave has been sought in the instant motion to file an appeal or admission of the appeal filed out of time that has obviously been filed out of time. Further, upon grant of the interlocutory orders of stay pending hearing of instant application and this Court's earlier finding that the contemporaneous prayer seeking leave file to a response to the claim together with the list of documents, list of witness and witness statements within three (3) days from the date of the interlocutory order, was a preserve of the substantive appeal, not during the interlocutory stage of the proceedings.
11. Cumulatively, it is with utmost respect to the Applicant and its counsel that this Court believes the instant motion and intended appeal certainly fit the bill of having been poorly drafted, with a borderline constituting an abuse of the Court process.
12. The upshot is therefore that the Applicant's Application dated 19/07/2024 is struck out with the attendant costs in favour of the Respondent.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 21ST DAY OF MARCH 2025.

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JANET MULWA.

JUDGE

