



REPUBLIC OF KENYA



KENYA LAW
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**Syeunda v Ojinng & 2 others (Civil Appeal E604 of 2023)
[2025] KEHC 4778 (KLR) (Civ) (13 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 4778 (KLR)

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

CIVIL

CIVIL APPEAL E604 OF 2023

TW CHERERE, J

MARCH 13, 2025

BETWEEN

CATHERINE AKINYI SYEUNDA APPELLANT

AND

MAURICE ODHIAMBO OJINNG 1ST RESPONDENT

MALV INVESTMENT 2ND RESPONDENT

AL ALYAAN MOTORS LIMITED 3RD RESPONDENT

RULING

Introduction

1. By notice of motion dated 01st July 2023, the Appellant sought stay of proceedings in Milimani SCCCOM NO. E4780 OF 2022 mainly on the ground that the 3rd Respondent had already executed the decree.
2. By a ruling dated 29th September 2023, the court dismissed the Appellant's application on the ground that the suit had been determined and there were no proceedings to stay.
3. Subsequent to the dismissal, the Appellant failed to take necessary steps to progress the appeal, leading to its dismissal for want of prosecution on 28th June 2024.
4. In an attempt to revive the appeal, the Appellant filed an application dated 09th October 2024, seeking reinstatement of the appeal and stay of proceedings in Milimani SCCCOM No. E4780 OF 2022.
5. The 3rd Respondent opposed the application, based on grounds of opposition dated 23rd February 2025 that:



1. The Application as filed contravenes the principles of natural justice by causing unnecessary delays in finalizing the matter in Milimani SCCCOM No. E4780 OF 2022, prejudicing the 3rd Respondent's right to a fair hearing
2. The application is frivolous, vexatious, and amounts to an abuse of the court process, deserving dismissal or striking out with costs.

Analysis and Determination

6. Order 17 (2) on Notice to show cause why suit should not be dismissed states:
 - (1) In any suit in which no application has been made or step taken by either party for one year, the court may give notice in writing to the parties to show cause why the suit should not be dismissed, and if cause is not shown to its satisfaction, may dismiss the suit.
 - (2) If cause is shown to the satisfaction of the court it may make such orders as it thinks fit to obtain expeditious hearing of the suit.
 - (3) Any party to the suit may apply for its dismissal as provided in sub-rule 1.
 - (4) The court may dismiss the suit for non-compliance with any direction given under this Order.
 - (5) A suit stands dismissed after two years where no step has been undertaken.
 - (6) A party may apply to court after dismissal of a suit under this Order.
7. In the present case, the appeal was dismissed on 28th June 2024 pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules. The Appellant contends that the notice to show cause was not served, and this assertion remains uncontroverted.
8. In the present case, the appeal was dismissed on 28th June 2024 pursuant to Order 17 Rule 2(1) of the Civil Procedure Rules. The Appellant has asserted that the notice to show cause was not served, and this assertion remains uncontroverted.
9. In light of this, I find that the Appellant has demonstrated sufficient cause for the setting aside of the dismissal order. There is no evidence to suggest negligence or lack of bona fides on the part of the Appellant, considering the facts and circumstances of this case. I am guided by the decision in *Auto Selection (K) Ltd & 2 others v John Namasaka Famba* [2016] KEHC 6922 (KLR) which underscores the principle that a party should not suffer undue prejudice where no fault or deliberate inaction is attributable to them. In the absence of evidence that the Appellant was served with the notice to show cause, it would be unjust to sustain the dismissal.
10. Concerning the prayer for stay of proceedings in Milimani SCCCOM No. E4780 OF 2022, it is evident that the Appellant's notice of motion dated 01st July 2023 and the subsequent notice of motion dated 09th October 2024 seek to achieve the same objective: stay of proceedings in Milimani SCCCOM No. E4780 OF 2022 based on the argument that the 3rd Respondent had already executed the decree.
11. The Court of Appeal in the case of *William Koross (Legal personal Representative of Elijah C.A. Koross) v Hezekiah Kiptoo Komen & 4 others* [2015] eKLR addressed the issue of res judicata and stated as follows:

“The philosophy behind the principle of res judicata is that there has to be finality. Litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives in. It is meant to provide rest and closure, for endless litigation and



agitation does little more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.....”

12. The Court of Appeal in *Kenya Commercial Bank Limited v Benjoh Amalgamated Limited* [2017] eKLR cited with approval the decision in *Lal Chand v Radha Kishan*, AIR 1977 SC 789 where it was stated that;

“The principle of *res judicata* is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue.

The practical effect of the *res judicata* doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

13. With respect, the issues raised by the Appellant in this application are *res judicata*, as they have already been determined by a court of competent jurisdiction. The doctrine of *res judicata*, as codified under Section 7 of the Civil Procedure Act, bars litigation of matters that have been conclusively adjudicated. Accordingly, the present application is untenable.
14. The dismissal order issued in the ruling dated 29th September 2023 was not appealed and, therefore, remains binding on all parties.
15. By seeking a stay of proceedings on the same grounds, the Appellant is effectively attempting to reopen an issue that has already been adjudicated. Allowing such an application would undermine the principle of finality in litigation and disrupt the orderly administration of justice. This court, therefore, declines to entertain an application that amounts to a collateral attack on its prior decision. Litigation cannot be allowed to proceed in perpetuity.
16. From the foregoing analysis, the Appellant succeeds on only one prayer. The notice of motion dated 09th October 2024 is allowed on the following terms:
1. The prayer for stay of proceedings in Milimani SCCCOM NO. E4780 OF 2022 is declined
 2. The order issued on 28th June 2024 dismissing this appeal is set aside and the appeal is reinstated for hearing
 3. The Appellant shall file and serve the record of appeal within 30 days from today’s date
 4. Mention before the Deputy Registrar on 15th April 2025 to confirm compliance with order (2)
 5. These orders be served on the 1st and 2nd Respondents’ advocate
 6. Appellant shall pay the costs of this application to the 3rd Respondent

DELIVERED AT NAIROBI THIS 13TH DAY OF MARCH 2025

WAMAE.T. W. CHERERE

JUDGE

Appearances

Court Assistant - Ubah



For Appellant - Mr. Ojienda for Ojienda & Co. Advocates

For 1st & 2nd Respondents - N/A for P.K.Mtange & Co. Advocates

For 3rd Respondent - Mr. Gathu for Muthee Kihiko & Associates LLP Advocates

