Nesco Services Limted v Masila (Civil Appeal 75 of 2019) [2024] KEHC 110 (KLR) (17 January 2024) (Ruling)

Neutral citation: [2024] KEHC 110 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MACHAKOS

CIVIL APPEAL 75 OF 2019

FR OLEL, J

JANUARY 17, 2024

BETWEEN

NESCO SERVICES LIMTED .... APPELLANT

AND

STACY NDINDA MASILA .... RESPONDENT

RULING

A. Introduction

1. The application before this court for determination is the Notice of Motion application dated 5th April 2023 brought pursuant to provisions of Section 1A, 1B, 3, 3A of the *Civil Procedure Act*, Order 42 Rule 1,2 10(1) & (2) of the *Civil Procedure Rules* 2010 and all other enabling provision of law. The prayers sought are that;

   a) That this application be certified as urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.

   b) That the Honourable court be pleased to set aside and/or discharge the orders of stay of execution in terms of the Notice of motion Application dated 11th May 2021 and granted Ex parte on 30th June 2021.

   c) The Applicant be allowed to execute the Decree dated 10th October 2020 to recover the decretal amount of Kshs 10,941,779.80/= plus interest and other costs.

   d) That costs of this Application be borne by the Respondent.

   e) That the Honourable court be pleased to grant any further orders as it May deem fit.

2. The application is supported by the grounds on the face of the said application and the supporting affidavit of one Nanji Ravji Vekariya dated 5th April 2023. He depones that they has a valid decree dated

10th October 2020 issued against the appellant for Kshs 10,941,779.80/= in Machakos CMCC No 162 of 2017, which decree, including interest thereof has not been settled. The appellant did file this instant appeal as against the said judgement/decree and also prayed for stay pending appeal, which application was allowed on condition that the Appellant/Respondent pays half the decretal amount to them and the other half to be deposited in a joint interest earning account opened in the joint names of both parties advocate at Kenya commercial Bank, Machakos branch.

3. The applicant further did content that the Appellant/Respondent initially failed to comply with terms of the said stay condition, and later moved court to extend time to comply, which order was granted and they were given an addition 120 days to comply. Eventually this appeal was heard on merit and vide a judgment dated 19th April 2021, the Appeal was dismissed and costs awarded to them prompting the Appellant/Respondent to file a further Appeal to the court of Appeal.

4. Upon filing the second appeal, once again, the Appellant/Respondent did move court by his application dated 11th May 2011 and sought for orders of stay of execution which orders was granted exparte on 30th June 2021. It was the applicant's contention that ever since the respondent filed the notice of Appeal, they have not followed up with the registry to ensure proceedings are typed nor had they file the memorandum and/or record of Appeal despite having ample time to do so. This lack of action had greatly prejudiced the Respondent/Applicant as no action had been taken for over two years to have the said appeal heard and thus it was in the interest of Justice to allow the prayers sought to enable them execute and enjoy the fruits of his decree.

5. The Appellant/Respondent did oppose this application and filed a replying affidavit by one Harun Osoro Nyamboki dated 26th April 2023. He did depone that the notice of motion under consideration was incompetent and devoid of merit as the Respondent/Applicant had made a similar application dated 9th July 2021, which was heard on merit and a determination made on 7th December 2021, dismissing the same. The court therefore lacked jurisdiction to deal with the same as it was res judicata.

6. The respondent further averred that they had made good effort to have the proceeding typed and had severally followed up on the said proceedings by writing several letters and e-mail to the deputy registrar, which letters they annexed to their replying affidavit confirming their position. Typing proceedings was a function of the court registry and if there was any delay in supplying proceedings it was not on their doorstep and they could not be blamed for the same. The applicants too were also blamed as they kept on filing numerous applications which hindered the typing process as the court file had to be brought to court and applications determined before the court file could be returned to the typing pool. This too in their view lead to delays in having the proceedings typed.

7. The respondents further averred that this was not the right forum for the applicants to apply to strike out their notice of appeal and if in deed they intended to do so, they should have moved the court of Appeal which had the requisite jurisdiction to do so. The application was thus a complete abuse of the court process and they prayed that the same be dismissed with costs.

Analysis & Determination

8. I have carefully considered the Application, Supporting Affidavit, the Respondent's Replying Affidavit and the submissions filed by both parties on 10th July 2023 and 28th August 2023 respectively. The only issue for determination is whether this court should set aside and discharge the orders issued on 30th June 2021 staying execution and further allow the said applicant to proceed and execute the decree herein.

9. First and foremost, this court will deal with the issue of lack of jurisdiction and res judicata as a raised by the Appellant/respondent. It was the respondent's contention that the applicant had filed an application dated 9th July 2021 seeking to set aside the orders dated 30th June 2021. The said motion was considered on merit and dismissed vide a ruling dated 7th December 2021. Further under Order 42 Rule 6(1) of the civil procedure Rules, this court was beret of jurisdiction to set-aside stay orders already granted.

10. Order 42 rule 6(1) of the *Civil Procedure Rules* does provide that;

> " (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 orders thereon as 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.

11. The above provision of law is clear and indeed if the Respondent/Applicant was aggrieved by the orders issue by this court on 30th June 2021, they in law ought to have to apply to the superior court to have them set aside and not move this court review and/or to set aside the same. See *Senate of Kenya & 3 others v Speaker of the National Assembly & 10 others* (Application 7 (E103) of 2022 (2023) KESC 1 KLR.

12. The above finding is enough to settle this application, but there was also the issue of res judicata raised. The applicants had earlier filed an application dated 9th July 2021, wherein they sought to set aside the stay of execution orders issue by the court on 30th June 2021. The said application was heard on merits and dismissed on 7th December 2021. By this application before court the applicant has again moved court to set aside the said stay orders.

13. Section 7 of the *Civil Procedure Act* does provide that;

> " 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 court.

14. The *Black's law Dictionary* 10th Edition defines "res judicata" as

> " An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties..."

15. In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

    i. what issues were really determined in the previous Application;

ii. whether they are the same in the subsequent Application and were covered by the Decision.

iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

16. In the case of *Njangu v Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), Kuloba J held that:

> " If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata….."

17. In *Uhuru Highway Development Ltd – v – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The Court of Appeal further stated that:

> " That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

18. Applied to the circumstances herein, it is not denied by the applicant and further it is confirmed by the court record that the Respondent/Applicant had filed an application dated 9th June 2021 to set aside the stay order dated 30th June 2021. The same application was heard on merit and dismissed. The applicant has again moved this court to set aside the said orders. Clearly this application, though premise on different grounds is res judicata. The applicant would probably had a better chance to have the appeal dismissed for want of prosecution but cannot have two bites to the cherry.

Disposition

19. Taking all relevant factors into consideration I do find that the notice of motion application dated 5th April 2023 lacks merit and the same is dismissed with costs to the Appellant/Respondent.

20. It is so ordered.

RULING WRITTEN, DATED AND SIGNED AT MACHAKOS THIS 17TH DAY OF JANUARY, 2024.

FRANCIS RAYOLA OLEL

JUDGE

Delivered on the Virtual Platform, Teams this 17th day of January, 2024.

In the presence of:-

Ms Kamenja for Respondent/Applicant

Mr Manyara for Appellant

Court Assisant – Susan/Sam