



REPUBLIC OF KENYA



Oyamo v Ekisa (Civil Appeal 103 of 2023) [2024] KEHC 261 (KLR) (24 January 2024) (Ruling)

Neutral citation: [2024] KEHC 261 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL 103 OF 2023
RN NYAKUNDI, J
JANUARY 24, 2024**

BETWEEN

REUBEN OYAMO APPELLANT

AND

JANEROSE EKISA APPLICANT

RULING

1. The applicant approached this court vide a Notice of motion application dated 28th July 2023 seeking the following orders;
 1. Spent
 2. That the court be pleased to set aside its *ex parte* orders made on 18th July 2023.
 3. That the application dated 18th July 2023 be dismissed as it is *res judicata*.
 4. That the appellant/respondent be ordered to pay the costs of this application.
2. The application is premised on the grounds set out therein and the averments in the supporting affidavit to the application.
3. The applicant avers that the respondent application dated 18th July 2023 proceeded *ex parte* on the same days and orders were made in the absence of the applicant. The respondent made a similar application in the small claims court seeking orders for stay and through a ruling dated 13th July 2023 the court pronounced itself on the matter. Therefore, the present application offends the principles of *res judicata*. The application was made in the small claims court case no E247 of 2023, a copy of which the applicant has annexed hereto. The court allowed the application on condition that the appellant pay the respondent half the decretal sum and deposit the remaining half in an interest earning account within ten days of the ruling. The applicant contends that the appellant failed to comply with the orders, has not appealed against the said ruling and filed the impugned application. She urged the court to allow the application as prayed.



4. The respondent opposed the application vide a replying affidavit dated 3rd August 2023. He stated that the application is an abuse of the court process and further, that the applicant ought to have raised any issues as a response to his pending application which already has a fixed court date. He urged that when moving this court under order 42, he asked the court to set aside the order made by the trial court and the issue of stay be considered afresh. He disclosed to the court that he was aggrieved by the order of the trial court and was approaching the court based on the jurisdiction to reconsider the application whether it had been granted or declined. He prayed that the application be dismissed with costs.

Analysis & Determination

5. Upon considering the application and attendant responses, the following issue emerges for determination;

1. Whether the application dated 18th July 2023 is *Res Judicata*
2. Whether the application dated 18th July 2023 is Res Judicata
3. The principles on res judicata are set out in 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 can 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.”

6. The [Civil Procedure Act](#) also provides explanations with respect to the application of the res judicata rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. (2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

7. The principle was well explained in the case of [The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others](#), Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) in which the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.



- e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”
8. The issue arising in the impugned application is the stay of execution on Small Claims Commercial Case No. E247 of 2023 – *Janerose Ekisa v Reuben Oyamo* which was made vide an order made on 13th July 2023. Vide an application dated 23rd June 2023, the appellant sought orders for stay of execution of the orders in the small claims court, which orders were granted conditionally, a fact that the appellant does not dispute. The appellant acknowledged this in seeking that the orders for stay of execution be set aside. It therefore follows that the issue raised herein was substantially in issue in the former suit. Further, it is not disputed that the suit was between the same parties who were litigating under the same title. Both the parties have confirmed that the issue was heard and determined in the final suit, and consequently, the court issued orders on the same.
9. In the premises, it is crystal clear that the application dated 18th July 2023 is Res Judicata. The appellant has not complied with the orders but instead sought to file the same application *ex parte*, an action which is an abuse of the court process intended to steal a march on the applicant herein.
10. Returning to the major question the intended appellant has a right of appeal to the High Court against the decision of an adjudicator. However, as provided for by section 38 (1) of the [Small Claims Court Act](#) it is a limited right of appeal to the High Court on matters of law. As a starting point that threshold must be met by the intended appellant before seeking audience before the High Court.
11. Upon consideration of the issues arising, I find as follows;
2. The application dated 18th July 2023 is struck out as it offends the principles of Res Judicata
 3. The orders granted on 18th July 2023 are hereby set aside
- Costs to the applicant herein.

It is so ordered.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 24th DAY OF JANUARY, 2024

R. NYAKUNDI

JUDGE

