



**Musimba v Kituyi (Commercial Case E110 of 2018)  
[2024] KEHC 1003 (KLR) (Commercial and Tax) (9 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1003 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E110 OF 2018  
A MABEYA, J  
FEBRUARY 9, 2024**

**BETWEEN**

**HON DR PATRICK MWEU MUSIMBA ..... PLAINTIFF**

**AND**

**HE DR MUKHISA KITUYI ..... DEFENDANT**

**RULING**

1. This ruling determines the application dated 23/6/2023. The same was brought pursuant to sections 1A, 1B and 3A of the Civil Procedure Act, Order 22 rules 1,22,25 and 59, Order 27 rule 1, Order 42 rule 7 and Order 51 rule 1 of the [Civil Procedure Rules](#).
2. The application sought for the setting aside of the warrants of attachment issued on 16/06/2023 and deposit of the decretal sum of Kshs 35,000,000/- into Court. That there be a permanent stay of execution subject to the deposit of the decretal sum in Court.
3. In support of the application, the applicant relied on the grounds on the face of it and his affidavit sworn on 23/6/2023. The applicant's position was that, he had been willing to deposit the decretal sum and had written letters to the plaintiff's advocates proposing payment. That the figure of Kshs. 84,251,915.60 was foreign to him since he was not aware of how it was arrived at.
4. Further, that there had been no Party & Party bill of costs and no taxation proceedings had been undertaken to give rise to the taxed costs. It was averred that the plaintiff was using multiple forums to execute the judgment and the applicant was likely to suffer great loss and prejudice if the warrants of attachment are not set aside. That there was a pending Insolvency Cause involving the same parties and the plaintiff was frustrating the applicant's attempts to pay the decretal sum.



5. The plaintiff opposed the application vide his affidavit of 14/7/2023. He deposed that the applicant had not disclosed to Court that a similar application for stay before the Court of Appeal had been dismissed and that there was another application before this Court on the same. That on 11/12/2019, judgment for Kshs 35,000,000/- with costs and interest was entered in his favor and the same had cumulatively totalled to Kshs 84,251,945/- as at 16/6/2023.
6. That the costs had been taxed and assessed at Kshs 663,610/- and a certificate of taxation issued on 18/2/2021. That the applicant fully participated in the taxation and had not made any payments with regard to the decretal sum. That the sum of Kshs. 35,000,000/- deposited in Court should be released to him in order for him to pursue the balance via execution.
7. Further, the plaintiff raised a preliminary objection on 14/7/2023 on the grounds that the application was res-judicata as the applicant had made a similar application for stay of execution which had been dismissed by the Court of Appeal. That there was another application for stay of execution dated 23/5/2023.
8. The application and preliminary objection were canvassed by way of written submissions.
9. The applicant submitted that there was no evidence on the part of the plaintiff guaranteeing that the decretal sum of Kshs. 35,000,000/- would be refunded should the appeal be successful. That a litigant should not pursue two processes which would result in the same outcome. On res-judicata, the applicant submitted that the application was for a permanent stay and not stay of execution pending appeal.
10. On its part, the plaintiff submitted that the application was res-judicata since it raised issues which were substantially similar to the issues in Civil Appeal 91 of 2020 where an application for stay pending appeal was dismissed. That the applicant had failed to prove the requirements for stay of execution.
11. I have carefully considered the pleadings, submissions and authorities relied on. There are two issues for determination namely: -
  - a. Whether the preliminary objection is sustainable.
  - b. Whether the warrants of attachment should be set aside.
12. On the first issue, the plaintiff raised a preliminary objection dated 14/7/2023 on the ground that the Court lacked jurisdiction on account of the fact that the application was *res-judicata*.
13. A Preliminary Objection was defined in *Mukisa Biscuits Manufacturing Co. Ltd v West End Distributors Ltd* (1969) EA 696 to consist a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.
14. The plaintiff contended that the applicant had made a similar application for stay of execution before the Court of Appeal which was dismissed vide a ruling dated 20/11/2020. The doctrine of *res-judicata* as set out in section 7 of the *Civil Procedure Act*, 2010 bars a court from trying a matter that has been determined by a court of competent jurisdiction between the same parties.
15. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR, the Court of Appeal held: -
 

“ 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.

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.”

16. It is not in dispute that the applicant had made an application for stay of execution in the Court of Appeal. That the same was dismissed on 20/11/2020. The issue of stay of execution was directly and substantially in issue in the former application and it was heard and finally determined. Accordingly, it is the courts finding that the same is res-judicata and cannot fall for determination before this Court again.
17. The second issue is whether the warrants of attachment should be set aside. The applicant did not demonstrate why the same should be set aside. Even though the Court notes that the plaintiff has sought to execute the decree using two different forums, nothing was produced to show that the plaintiff was precluded from pursuing the present mode of execution.
18. Accordingly, I find merit in the preliminary objection and uphold the same. The application is hereby struck out with costs.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

