



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT BUNGOMA

CIVIL APPEAL NO. E004 OF 2021.

ELIUD MICHAEL SICHEI.....APPELLANT

VERSUS

TUTI HOLDINGS LIMITED COMPANY.....RESPONDENT

(Being an Appeal from the Ruling and Order of Honourable C. M. WATTIMAH –

SENIOR RESIDENT MAGISTRATE, issued on 3rd March 2021)

R U L I N G

The Notice of Motion by **ELIUD MICHAEL SICHEI** (the Applicant herein) dated 7th May 2021 and which is subject of this ruling must be dismissed for being res – judicata.

By a ruling dated 20th February 2021, this Court dismissed an application by the same Applicant dated 29th October 2019 and seeking the following remedies: -

- 1. Spent**
- 2. Spent**
- 3. Spent**
- 4. The orders for the arrest and committal of the Judgment – Debtor to civil jail herein of 16th October 2018 be set aside and is hereby set aside ex – debito – justitiae.**
- 5. The order for the arrest and committal of the Judgment – Debtor to civil jail herein of 16th October 2019 be set aside and is hereby set aside.**
- 6. That there be a temporary stay of execution of the Judgment entered on 3rd April 2019 by the HON. C. M. WATTIMAH (SENIOR RESIDENT MAGISTRATE) pending the hearing and determination of the Appeal.**
- 7. The costs of this application be provided for.**

The reasons for the dismissal of that application are not relevant for purposes of this ruling.

The Applicant has again moved to this Court by his Notice of Motion dated 7th May 2021 and premised under the provisions of **Order 22 Rules 1 and 2, Order 21 Rule 7, Order 42 Rule 6(2)** of the **Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act** seeking the following remedies: -

- 1. Spent**
- 2. Spent**

3. That the ruling delivered on 3rd March 2021 by HON. C. M. WATTIMAH be and is hereby set aside.

4. That an order be and is hereby issued directing the trial Court to recall the defective decree issued on the 3rd July 2019 for purposes of amendment and rectification.

5. That costs of this application be provided for.

The application is predicated on the grounds set out therein and is also supported by the affidavit of the Applicant dated 7th May 2021.

The gravamen of the application is that by a Judgment dated 3rd April 2019, HON C. M. WATTIMAH (SENIOR RESIDENT MAGISTRATE) awarded TUTI HOLDINGS LTD COMPANY (the Respondents herein) the sum of Kshs. 1,500,000/= together with costs which were assessed at Kshs. 213,465.00. That at no time in the said Judgment did the trial Magistrate pronounce herself on the issue of interest on the decretal sum. However, when the decree was extracted on 3rd July 2019, a sum of Kshs. 291,698.00 was factored in being interest yet that was not awarded in the Judgment. Acting on that defective decree, the firm of DIMONDE AGENCIES ACTIONEERS have proclaimed for the total sum of Kshs. 2,321,268.00 and an auction of the applicant's goods is set for 4th November 2020. That it is settled law that the decree must agree with the Judgment. That unless the Applicant is granted orders of stay, he shall suffer irreparable loss and damage.

When the application was placed before me on 25th May 2021, I certified it as urgent and directed that the Respondent be served with the application and submissions within 7 days. The Respondent would then have 7 days within which to file its response and submissions. The matter would then be mentioned on 11th June 2021 but on that day, I was engaged in a 3 Judge Petition being **BUNGOMA ELC PETITION NO 1 OF 2017 – PETER KITELO CHONGEIYWO & 10 OTHERS .V. ATTORNEY GENERAL & 4 OTHERS.**

It would appear from the record that the Applicant did not file any submissions as directed.

However, the Respondent through its Director DR VINCENT WEKESA filed a replying affidavit dated 8th June 2021. Its Counsel MR J. W. SICHANGI also filed his submissions dated 9th June 2021.

In the replying affidavit, DR VINCENT WEKESA has deponed, inter alia, that this application is a mockery of the judicial process as a similar application was dismissed both by the trial Court and also this Court. That the Applicant is abusing the Court process and frustrating his efforts to get back his money ever since he obtained Judgment on 3rd April 2019. That this application is a gimmick to obtain orders which were dismissed and this matter is res – judicata.

In his submissions, MR J. W. SICHANGI Counsel for the Respondent has reiterated the averments contained in DR VINCENT WEKESA's replying affidavit and added that this Court has already pronounced itself on the matter and this application is res – judicata.

I have considered the application, the rival affidavits and annexures thereto as well as the submissions by MR J. W. SICHANGI Counsel for the Respondent.

At the commencement of this ruling, I stated that this application is res – judicata. I shall now demonstrate why.

As already indicated above, by a ruling delivered on 20th February 2021, I dismissed with costs the Applicant's Notice of Motion dated 29th October 2019 which sought, inter alia, an order for stay of execution of the Judgment delivered by HON. C. M. WATTIMAH (SENIOR RESIDENT MAGISTRATE) on 3rd April 2019 pending the hearing and determination of an Appeal. The Applicant now seeks in this application the setting aside of the ruling delivered by HON C. M. WATTIMAH on 3rd March 2021 and to recall the decree issued on 3rd July 2019 for purposes of amendment and rectification. The Applicant has already filed CIVIL APPEAL No 4 of 2021 seeking the main prayer that the ruling of HON C. M. WATTIMAH (SENIOR RESIDENT MAGISTRATE) delivered on 3rd March 2021 at SIRISIA COURT in CMCC No 1 of 2018 be set aside. And although a copy of that ruling was not annexed to the Applicant's supporting affidavit, it is clear to me from a perusal of paragraph 9 of the said affidavit that the ruling was pursuant to an application challenging the inclusion of the element of interest in the decree. A copy of the decree extracted on 3rd July 2019 is among the documents annexed to the Applicant's supporting affidavit. It shows clearly that in drawing the said decree, the trial Court included the element of interest at Kshs. 291,698.00. That means therefore that by the time the Applicant filed his application for stay of execution dated 29th October 2019 and which was dismissed vide this Court's ruling dated 20th February 2021, he was already aware that the decree issued on 3rd July 2019 included the sum of Kshs. 291,698.00 awarded as interest on the decretal sum. Clearly, the Applicant is re – agitating an issue that has already been determined by this Court. He is abusing the process of this Court as the Respondent has averred in his replying affidavit. This application is an affront to the provisions of Section 7 of the Civil Procedure Act.

That Section which provides for the doctrine of Res – Judicata reads as follows: -

7: "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 titles, 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."

The term res – judicata is defined in BLACK'S LAW DICTIONARY 10TH EDITION as follows: -

“An issue that has been definitively settled by judicial decision. An affirmative defense barring the same parties from litigating a second law suit on the same claim, or any other claim arising from the same transaction or series of transactions that could have been – but was not raised in the first suit. These essential elements are (1) an earlier decision on the issue, (2) a final Judgment on the merits, and (3) the involvement of the same parties, or parties in privity with the original parties.”

The rationale behind the doctrine of res – judicata was described as follows in the case of **JAMES NJUGUNA CHUI .V. JOHN NJOGU KIMANI 2017 eKLR**: -

“The rationale behind the rule is simple, there has to be an end to litigation and a person who has had his dispute decided must learn to live with it. It is not open to him to re – litigate or re – agitate the issue before the same or another forum in the hope of getting an improved or a better result. It is a pragmatic rule designed to stop vexatious litigants from pestering those with whom they have disputes and so it protects the other party from the spector of endless repetitive litigation hanging over their heads like the sword of Damocles. It also protects the Court system from abuse such as would bring the administration of justice into disrepute not only by having the same decision pronounced over and over by the same or similarly situated Courts, but, worse, by having contradictory decisions emanating from the Court or Courts over the same issue courtesy of repeat litigation.”

The doctrine of res – judicata applies to applications as it does to suits.

In **UHURU HIGHWAY DEVELOPMENT LTD .V. CENTRAL BANK OF KENYA 1996 eKLR**, it was held that: -

“Wider principles of res – judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts would be inundated 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 of litigation.”

Clearly therefore, a party who is aggrieved by the ruling of a Court in an application is barred by the doctrine of res – judicata from filing another application on the same issue. When the Applicant filed his previous application dated 29th October 2019 seeking, inter alia, a stay of execution of the Subordinate Court’s Judgment dated 3rd April 2019, he was fully aware that a decree had already been issued directing him to pay the Respondent the principal sum together with interest thereon because the said decree was extracted on 3rd July 2019. He cannot now return to this Court seeking essentially the same remedy though crafted as an order directing the trial Magistrate to ***“recall the defective decree issued on the 3rd July 2019 for purposes of amendment and rectification.”*** Having already filed an appeal against the trial Court’s ruling on the issue of interest, the Applicant is basically seeking a stay of execution of that ruling pending the hearing and determination of his appeal. That was the same application that was dismissed by this Court on 20th February 2021. The Applicant cannot be allowed to litigate in instalments. In **HENDERSON .V. HENDERSON 1843 3 HARE 100 [1843 67 E.R 313] WIGRAM V. C** stated that: -

“The plea of res – judicata applies, except in special case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time.”

There is already pending at this Court the Applicant’s appeal filed on 3rd May 2019 arising out of the trial Court’s Judgment delivered on 3rd April 2019. In determining that appeal, this Court will consider all the issues pertaining thereto including the resultant decree as a whole. It is therefore not open to the Applicant to again file another appeal and purport to question separate components of the trial Court’s Judgment and worse still, to agitate a matter that this same Court has already heard and made a determination thereon. The Applicant is clearly engaging in a fishing expedition and in the process, abusing the process of this Court. When his appeal is eventually heard and determined, the Court will make a decision on all the issues raised including whether or not the Respondent was entitled to interest on the principal sum. The application is therefore not only res – judicata but it is also frivolous, vexatious and an abuse of the Court process and the Applicant must be stopped in his tracks.

The up – shot of all the above is that the Notice of Motion dated 7th May 2021 is devoid of any merit.

It is accordingly dismissed with costs.

BOAZ N. OLAO.

J U D G E

15th July 2021.

RULING DATED, SIGNED AND DELIVERED AT BUNGOMA THIS 15TH DAY OF JULY 2021 BY WAY OF ELECTRONIC MAIL IN KEEPING WITH THE COVID – 19 PANDEMIC GUIDELINES.

BOAZ N. OLAO.

J U D G E

15th July 2021.