



REPUBLIC OF KENYA



**Maina t/a Matra International Asociates & 8 others v China IETC Corporation & 8 others
(Civil Appeal 440 of 2011) [2024] KEHC 2721 (KLR) (Civ) (13 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2721 (KLR)

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

CIVIL

CIVIL APPEAL 440 OF 2011

JN NJAGI, J

MARCH 13, 2024

BETWEEN

**EDWARD KINGS ONYANYA MAINA T/A MATRA INTERNATIONAL
ASOCIATES 1ST PLAINTIFF**
HENRY SAKAWA MAINA 2ND PLAINTIFF
VERONICA WAITHIRA KIMOTHO 3RD PLAINTIFF
CATHERINE BOYANE ONYANCHA 4TH PLAINTIFF
JOTHAM KIMOTHO WAITHIRA 5TH PLAINTIFF
VALLERY NYAMBONYI ONYANCHA 6TH PLAINTIFF
KEVIN KAHIGA THEURI 7TH PLAINTIFF
MONICA WANJIKU MASESE 8TH PLAINTIFF
BILL SATO MAINA 9TH PLAINTIFF

AND

CHINA IETC CORPORATION 1ST DEFENDANT
**JAMES OCHIENG ODUOL T/A ONYANGO KIBET & OHAGA
ADVOCATES 2ND DEFENDANT**
RVR WENDOH 3RD DEFENDANT
J NYAMU 4TH DEFENDANT
MARY M MUGO 5TH DEFENDANT
KW RAWAL 6TH DEFENDANT
J RANSLEY 7TH DEFENDANT



CHIEF JUSTICE OF KENYA 8TH DEFENDANT

ATTORNEY GENERAL OF KENYA 9TH DEFENDANT

RULING

1. The 1st Plaintiff/Applicant, Edward Kings Maina, has filed an application dated 7th September 2021 seeking for orders that the orders issued by Justice Kamau on 30th July 2020 barring the Plaintiff from filing applications in this matter without leave of the court be rescinded. The Notice of Motion had other prayers asking the court to strike out some submissions, notices and affidavits earlier filed and to issue warrants of attachment on 1st Defendant's property.
2. The application was opposed by the 1st and 2nd Respondents vide grounds of opposition dated 22nd September 2021.
3. The 1st and 2nd Respondents in addition filed a Notice of Motion dated 22nd October 2021 seeking that this court orders the 1st Plaintiff to provide security for costs in respect of this matter.
4. The applications and the grounds of opposition were canvassed by way of written submissions.

1st Plaintiff's Submissions

5. In brief, the court was asked to strike out the submissions dated 19/4/2022, the Notice of motion dated 22/10/2022 and the supporting affidavit by James Ochieng Oduol dated 22/10/2022.
6. The court was also asked to allow submissions dated 19/4/2022 and in default issue sequestration Orders and warrants of attachments for sale of property of China Jiangsu IETC Corporation enjoined by James Ochieng Oduol.

1st and 2nd Defendants' Submissions

7. The two Defendants submitted that the 1st Plaintiff in his application is essentially seeking to set aside the orders made by Hon. Justice Kamau on the 26th July 2021 wherein the Honourable Judge set aside the Notices to Show Cause that the 1st Plaintiff had taken out against the 1st Defendant on the ground that the issues raised therein had been determined by other courts who had dealt with the matter and were therefore res judicata. The Respondents submitted that the reasons given by the 1st Plaintiff to set aside the orders of Justice Kamau are not sound and that he is only attempting to relitigate matters that have been settled by reinstating the Notices to Show Cause. It was submitted that there are no new grounds other than the ones argued in the previous applications.
8. The 1st and 2nd Respondents submitted that the Plaintiff has not appealed against the orders of 26th July 2021 and neither do the grounds in the instant application satisfy grounds for review.
9. It was submitted that the Judge in the orders of 26th July 2021 barred the 1st Plaintiff from filing applications against the Defendants without first seeking leave of the court. That the Plaintiff has disregarded those orders and filed the instant application without leave of the court. Therefore, that the application has no basis.
10. On their application whether the 1st Plaintiff should be ordered to provide security for costs, it was submitted that the 1st and 2nd Defendants have a solid defence. That the 1st Plaintiff is totally unable to pay the immense costs that he has made the 1st and 2nd Defendants to incur.



11. It was submitted that the test for provision of costs is as was stated in the case of *Abmed Kulinye Bin & 2 others v Kenya Revenue Authority & another* (2012) eKLR where the court while quoting the case of *Shah v Shah* (1982) KLR 95 held that:

....a court has a discretion, to be exercised reasonably and judicially to refuse to order that security be given. The test on an application for security is not whether the Plaintiff has established a prima facie case but whether the Defendant has shown a bona fide defence.

12. The Defendants also cited the case of *Ocean View Beach Hotel Limited v Salim Sultan Moloo & 5 others* (2012) eKLR where it was held that:

The Court of Appeal in Civil Appeal No. 9 of 2005 *Messina & another v Stallion Insurance Co. Ltd* [2005]I EA 264(CAK) embraced the principles laid down in *Keary Development v Tarmac Construction* [1995]3 ALL EK 534 as the guide on how a Court should exercise its discretion on whether to order a Plaintiff Limited Company to provide security for costs to a Defendant in a suit....

The first question I need to determine is whether there is credible testimony to believe that the Plaintiff is unable to pay costs of the Defendants.

Second, the question posed by this application is about the current ability of the Plaintiff not its past fortunes. Reference of the Plaintiff to its affairs in 2004 is, in the Courts view, unhelpful.

13. It was submitted that the 1st Plaintiff does not possess the ability to pay the 1st and 2nd Respondents' costs. That he has repeatedly been directed to pay the costs to no avail. Therefore, that he should be compelled to provide security for costs in the sum of Ksh.7,733,333.34.

Analysis and Determination

14. I have considered the two applications that are before court. First is the 1st Plaintiff's application dated 7th September 2021.

15. In the said application, the Plaintiff is challenging the orders issued by Justice Kamau on the 26th July 2021 in which the learned Judge allowed the 1st and 2nd Respondents' application dated 10th February 2020 and recalled 5 Notices to Show Cause that had been issued by the Deputy Registrar. The basis of recalling the Notices was that the same were irregular and had no legal basis. Further that the orders and the judgments the Plaintiff was relying on to execute the Notices were not valid having been barred by the Law of *Limitations Act* cap 22 Laws of Kenya as determined by Mabeya J. and Kamau J. in some previous rulings.

16. It is clear that instead of the Plaintiff appealing against the ruling of Justice Kamau or filing a review against the orders, he is re-litigating on the same issues that Justice Kamau dealt with in the application dated 10th February 2022. The issue, in my consideration, is res judicata.

17. The substantive law on the doctrine of *res judicata* (Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

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a cause of action may not be relitigated once it has been judged on the merits; finality.} udicata}} is found in section 7 of the Civil Procedure Act cap 21 which provides 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 such court.”

18. 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...”

19. Kuloba J., in the case of Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), while discussing the doctrine stated thus:

‘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.....”

20. I find that the issues raised in the application dated September 7, 2021 have been settled and are thus res judicata. This court has no jurisdiction to revisit them. The application dated 7th September 2021 is for dismissal.

21. On the application for the Plaintiff to provide security for costs, the court has wide discretion in ordering a party to provide security for costs – see *Shah v Shah* (supra).

22. In this case, it has severally been noted by judges who have previously dealt with the matter that the Plaintiff has been filing application after another. As a result of this uncontrolled tendency, costs have been going up. Even after the Plaintiff was barred by Justice Kamau from filing further applications without leave of the court he ignored the order and went ahead to file the application dated 7/9/2021 without obtaining leave. The Plaintiff has not shown that he has the means to meet the 1st and 2nd Respondent’s costs. I find the prayer to provide security for costs to be merited.

23. I have considered that the case has been going on for many years. The Defendants have however not shown the basis of asking the 1st Plaintiff to deposit a sum of over Ksh.7 million in security for costs. I consider a sum of Ksh.1,00,000/= to be reasonable in the circumstances of this case. I accordingly order the Plaintiff to provide security for costs in the sum of Ksh.1,000,000/- within three months from the date hereof.

24. The upshot is that the Plaintiff’s application dated 7th September 2021 is dismissed while the application for security for costs dated October 22, 2021 is allowed in the terms stated above.

25. The 1st and 2nd Respondents to have the costs of the two applications.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 13TH MARCH 2024.



J. N. NJAGI

JUDGE

In the presence of;

1st Plaintiff - appearing in person

No appearance for 1st and 2nd Defendants

Court Assistant – Amina

30 days Right of Appeal.

