



**Mutuku v Tendeza (Miscellaneous Application E014 of 2022)
[2024] KEHC 2277 (KLR) (5 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 2277 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
MISCELLANEOUS APPLICATION E014 OF 2022**

SM GITHINJI, J

MARCH 5, 2024

BETWEEN

MANFRED WAMBUA MUTUKU APPELLANT

AND

MICHAEL TENDEZA RESPONDENT

RULING

1. For determination, is the Applicant’s Notice of Motion dated June 21, 2023 brought under Order 22 Rule 22, Order 42 Rules 4, 6 and 7, Section 79G of the [Civil Procedure Act](#), Order 51 Rules 1 and 3 of the [Civil Procedure Rules 2010](#), Section 3 and 3A of the [Civil Procedure Act](#) seeking the following orders;
 1. Spent.
 2. Spent.
 3. That this honourable court be pleased to enlarge time within which the applicant can comply with the orders for of stay of execution issued by this honourable court on May 16, 2023 and application be allowed as prayed.
 4. That this honourable court be pleased to grant stay of execution of the judgment and/or decree issued by Honourable N.C Adalo on November 16, 2021 pending the hearing and determination of this appeal.
 5. Spent.
 6. Spent.
 7. That the costs of this application abide the outcome of the appeal.



2. The application is founded on the grounds on its face and the supporting affidavit of Manfred Wambua Mutuku the Applicant herein stating that the court granted conditional order of stay execution on May 16, 2023 wherein the Applicant was to deposit the decretal sum in a joint interest earning account for Kshs. 883,550 within 30 days from the ruling which condition he stated was not complied with due to the fact the ruling was delivered in absence of his counsel. He further stated that his efforts to obtain a certified copy of the ruling were derailed due to unavailability of the same and the stay granted lapsed thus the instant application.
3. The application is opposed by the sworn affidavit of Joel Mwanzia Ngulu who deponed that the application is frivolous, a sham or otherwise an abuse of the court process and ought to be dismissed in limine as it is a deliberate delay tactic. He stated that the principal amount continues to attract interest at court rates. It was also stated that the applicant filed his application dated February 18, 2023 seeking stay of execution wherein the parties are different from the parties herein. That the said application was heard and determined vide the ruling dated May 16, 2023 and the orders in the said ruling are yet to be complied with.

Disposition

4. The application was canvassed by way of written submissions which I have taken into account as well as the authorities relied upon. For determination herein is whether the court should issue the orders for enlargement of time and stay of execution as sought.
5. Firstly, the applicant seeks to enlarge time to comply with the directions issued by this court vide the ruling dated May 16, 2023. In seeking to enlarge time to comply with the said orders, the Applicant's argument is that the ruling was delivered in their absence and efforts to obtain a copy were derailed by the absence of one. Though framed as enlargement of time, I basically construe the same to be a stay of execution of the orders issued by the court on May 16, 2023 and thus shall address the same as so.
- 6.. The applicant herein seeks stay of execution with no substantive prayer after the stay has been granted or as put in their words enlargement of time to comply with the court's orders. in the case of *Lydia Wanjiku Mwangi v James Mwangi Mwaniki* [2006] eKLR, the court held that;

“Without a substantive prayer the application is misconceived and incompetent as the relief sought can only be granted if there is a pending substantive prayer, and there is not one such in this application. For the above reason I will, and hereby do, strike out the application...”
7. In the absence of a substantive prayer and concurring with the authority above, I find this particular prayer unfounded. In addition, from the proceedings in the court file, the date of the ruling was given in court and in the presence of the parties. The Applicant can therefore not purport that one of the reasons for failing to comply with the orders was that the ruling was delivered in absence of his counsel. Consequently, I disallow this prayer on account of lack of merit.
8. As regards the second aspect on stay of execution of the judgment and decree issued by honourable N. C Adalo, I find the same to be *res judicata*, having been determined by this court in the ruling dated May 16, 2023.
9. The doctrine of *res judicata* is set out in the *Civil Procedure Act* at section 7 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.”

10. The doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All E.R. 378, observed thus:

“...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. 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.”

11. The issue of stay of execution of the lower court judgment pending the hearing and determination of the appeal was addressed in the said ruling contingent upon the conditions set by the court. The parties are the same and the issues raised are the same to those which were before this very court. The same have not been varied/ set aside and thus I find the issue of stay in this regard repetitive, a waste of court’s precious energy and time. It’s therefore disallowed on grounds of *res judicata*.
12. In sum therefore, I find that the application is devoid of merit and the same is hereby dismissed with costs to the Respondent. For avoidance of doubt, the orders of the court issued on May 16, 2023 lapsed for failure by the applicant to deposit the entire decretal sum in a joint interest earning account of both Advocates within 30 days from date May 16, 2023.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 5TH DAY OF MARCH, 2024.

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S.M. GITHINJI

JUDGE

In the absence of both parties; -

They be notified and served.

Later;

Mr Njiru for the Appellant now present 10.00am.

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S.M. GITHINJI

JUDGE

5/3/2024

