



**Rukwaro v Mwangi (Civil Appeal E096 of 2021)
[2024] KEHC 4691 (KLR) (Family) (6 May 2024) (Ruling)**

Neutral citation: [2024] KEHC 4691 (KLR)

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

**FAMILY
CIVIL APPEAL E096 OF 2021**

MA ODERO, J

MAY 6, 2024

BETWEEN

JAMES MWANGI RUKWARO APPELLANT

AND

ROSE NJAMBI MWANGI RESPONDENT

RULING

1. The Appellant/Applicant in this matter James Mwangi Rukwaro filed in this court the Notice of Motion dated 25th August, 2022, seeking the following orders;-
 - “1 Spent
 - 2 Spent
 - 3 That this Honourable Court be pleased to issue an order of stay on the Ruling delivered on 24th August, 2022 by the subordinate court in Children’s Case No. 1666 of 2019 pending the hearing and determination of the appeal.
 - 4 That this Honourable court be pleased to set-aside the Ruling on Notice to Show Cause delivered on 24th August, 2022.
 - 5 That costs of this application be in the cause.”
2. The application which was premised on order 40 Rule 1 and 3, Order 51 Rule 1 Section 1A, 1B and 3A of the *Civil Procedure Act* was supported by the Affidavit of even date sworn by the Applicant.
3. The Respondent Rose Njambi Mwangi in opposing the application filed a Notice of Preliminary Objection dated 12th September, 2022.



4. The Applicant filed a response to the Notice of Preliminary Objection which response was dated 11th October, 2022. The court directed that the Preliminary Objection be canvassed first by way of written submissions. The Applicant filed the written submissions dated 11th November, 2022, whilst the Respondent relied upon her written submissions dated 25th October, 2022.

Background

5. The parties herein were engaged in Nairobi Children's Case 1666 of 2019.
6. Vide a judgment delivered on 2nd September, 2021 in Childrens Case No. 1666 of 2019 the learned Senior Resident Magistrate Hon. G. N. Opakasi made the following orders:-
 - “(a) The plaintiff shall have the actual custody, care and control of the minors.
 - (b) The parties shall have joint legal custody of the minors.
 - (c) The defendant shall have access of the minors every alternate Saturday of the month from 10.00am to Sunday at 4.00pm.
 - (d) The parties shall share custody of the minors equally during school and public holidays.
 - (e) The defendant shall cater for the minors' school fees and school related expenses until they all attain their first university degrees or an equivalent thereto.
 - (f) The defendant shall provide for the medical needs of the minors.
 - (g) The defendant shall cater for the minors food at the rate of Kshs. 30,000/- per month payable to the plaintiff by the 5th of every month.
 - (h) The plaintiff shall cater for the minors shelter, clothing, household utilities and part of the remaining food expenses.
 - (i) Both parties shall cater for the minor entertainment while in their custody.
 - (j) Parties are at liberty to apply.
 - (k) No orders as to costs.”
7. Being aggrieved by that decision the Appellant/Applicant filed the Memorandum of Appeal dated 3rd September 2021. The Applicant also filed in the High Court a Notice of Motion dated 10th September, 2021 seeking to stay the judgment delivered in the Childrens Court pending the hearing and determination of his appeal.
8. This court heard the application for stay and vide a Ruling dated 18th March, 2022 dismissed the said application.
9. Following the ruling from the High Court the Respondent moved to execute the judgment of the lower court.
10. The Applicant then filed this present application seeking to stay the Ruling delivered by the children court in the same case on 24th August, 2022.



11. In the Ruling of 24th August, 2022, the learned trial magistrate allowed the Notice to show cause dated 9th June, 2022 filed by the Respondent who sought that warrants of Arrest issue against the Applicant on account of his non-compliance with the courts orders which had been issued on 2nd September, 2021.
12. The respondent now contends that this court lacks the jurisdiction to hear and determine the present application on the grounds that:
 - “(a) (a) The issue of stay of execution has been dealt with and determined vide a ruling delivered on 18/03/2022 which was to the effect that for avoidance of doubt the orders of 2/09/2021 made by the children’s court in case No. 1666 of 2021 remain valid and enforceable.
 - (b) This court is {{term{refersTo |title Once a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker; finality.

An enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon} *Functus Officio*}} having determined the issue of stay. It cannot at the same time act as an appellate court.”

13. The Respondent contends that in light of the ruling delivered by the High Court on 18th March, 2022 dismissing the Applicants prayer for a stay of execution the present application is ‘Res Judicata’ and that the High Court is now ‘functus officio’
14. The Applicant retorts that since the main appeal is yet to be heard and determined this court cannot be deemed to be ‘functus officio’

Analysis and Determination

15. I have considered the Notice of Preliminary Objection, the response filed by the Applicant as well as the written submissions filed by both parties.
16. The definition of what constitutes a Preliminary Objection was given in the case of *Mukisa Biscuit Manufacturing Company Limited v West End Distributors Ltd*[1969] E.A in which the court stated as follows;

“A Preliminary Objection consists of 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 the suit. Examples are an objection to the jurisdiction of the court, or a place of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration..... A Preliminary Objection is in the nature of what is used to be a demurrer.

It raises a pure point of law, which is argued on the assumption that all facts pleaded by the opposite side are correct. It cannot be raised if any fact is to be ascertained or if what is sought is the exercise of judicial discretion.”

17. In *Aviation& Allied Workers Union Kenya v Kenya Airways Limited& 3 Others*[2015] eKLR, the Supreme Court of Kenya stated that

“a Preliminary Objection may only be raised on a ‘pure question of law’”



18. To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed as they are prima facie presented in the pleadings on record.”
19. Therefore in order for a Preliminary Objection to succeed, the following tests must be satisfied;-
 - (i) The Preliminary Objection should raise a pure point of law.
 - (ii) The Preliminary Objection must be argued on the assumption that all the facts pleaded are correct.
 - (iii) The Preliminary Objection cannot be raised if any fact is to be ascertained or if what is being sought is the exercise of judicial discretion.
 - (iv) A valid Preliminary Objection ought if successful dispose of the entire suit.
20. Therefore a genuine and proper Preliminary Objection can only raise pure points of law and must not itself derive its foundation on facts or information which stands to be tested by normal rules of evidence.
21. The Preliminary Objection filed by the Respondent raises the issue of ‘{{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} Res Judicata}}’. This is indeed a pure point of law which if decided in her favour would determine the entire application. Accordingly I am convinced that before the court is a genuine Preliminary objection.

22. The Principle of {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits; finality.} Res Judicata}} is provided for by Section 7 of the [Civil Procedure Act](#) Cap 21 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 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”

23. The court of Appeal in [Independent Electoral And Boundaries Commission v Maina Kiai & Others](#)[2017] eKLR stated as follows:-

“That rule or doctrine of res Judicata serves the solitary aim to bring finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and wounded by issues and suits that have already been determined by a competent court. It is designed at a pragmatic and common sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders seeking 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 foundation of res judicata thus rest in the public interest for swift, sure and certain justice [own emphasis]



24. It is quite evident that the question of stay of execution was conclusively determined by the High Court in the Ruling delivered on 18th March, 2022. In that Ruling whilst dismissing the Applicants prayer for stay of execution the court stated as follows

“For avoidance of doubt the orders of 2nd September, 2021 made by the children’s court in case No. 1666 of 2021 remain valid and enforceable”

25. Despite that clear pronouncement by the court the Applicant is now trying to appeal and/or review the High Court ruling by bringing another application to stay the ruling of the Children’s Court which was delivered on 24th August, 2022. That ruling which allowed execution to proceed flowed directly from the High Court decision of 18th March, 2022. In this application the Applicant is merely seeking another bite at the cherry.

26. The court in its Ruling of 18th March, 2022 made a clear and unambiguous pronouncement on the question of stay of execution. It is vexatious and indeed amounts to an abuse of court process for the Applicant to come back to the High Court again seeking the same orders in a roundabout way.

27. Undoubtedly the aim of the Applicant is to waste judicial time and to attempt to wear down the Respondent through numerous applications, instead of pursuing the main appeal.

28. In the premises I am satisfied that this Notice of Preliminary Objection has merit and the same is allowed. The issue of stay is Res Judicata and the Applicant is not at liberty to raise it again. The Notice of Motion dated 25th August, 2022 is hereby struck out. The main appeal to be set down for hearing.

Costs to be met by the Applicant.

DATED IN NYERI THIS 6TH DAY OF MAY, 2024.

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MAUREEN A. ODERO

JUDGE

