



REPUBLIC OF KENYA



KENYA LAW
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**Osoro v Crownkings Enterprises Ltd & another (Civil Appeal
106 of 2023) [2024] KEHC 6899 (KLR) (12 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 6899 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL APPEAL 106 OF 2023
PN GICHOHI, J
JUNE 12, 2024**

BETWEEN

GIDEON MERISH OSORO APPELLANT

AND

CROWNKINGS ENTERPRISES LTD 1ST RESPONDENT

HALIMA BORU 2ND RESPONDENT

RULING

1. The Appellant moved this Court vide application dated 16/06/2023 invoking Order 42 Rule 6 and Order 51 of the Civil Procedure Rules and Sections 1A (1) (2) (3), 3A of the Civil Procedure Act seeking orders :-
 1. Spent.
 2. Spent
 3. That pending hearing and determination of appeal herein, there be a stay the proceedings in Nakuru Small Claims Court No. E147 of 2023.
 4. That this Court be pleased to issue any other orders as it may deem just, appropriate and expedient in the interest of justice.
 5. That cost of the application be provided.
2. The grounds are that the trial court delivered a ruling dismissing the preliminary objection on res judicata. That dissatisfied with the said ruling, the Appellant /Applicant has filed an appeal herein and that he will be prejudiced unless stay of proceedings is granted as sought.



3. In support of that application is the Affidavit sworn by Gideon Merish Osoro on 16/06/2023. He deponed that there was another case being Nakuru Small Claims Court Civil Case No. 218 of 2022 where he was a defendant and that judgment in that matter was delivered dismissing the claim.
4. That he was shocked to be served with another claim being Nakuru Small Claims Court No. E147 of 2023 involving the same parties and therefore filed the Preliminary Objection which was dismissed. He was aggrieved and therefore filed an appeal against the said ruling.
5. The Respondent filed a Replying Affidavit sworn on 04/07/2023 by Francis Mathenge as the Direction of the 1st Respondent and with authority of the 2nd Respondent. He deponed that 1st Respondent had entered into a car hire agreement with the Applicant on 16/07/2022 where it offered to him motor vehicle registration number KCP 245 S Toyota Axion for hire for a period running between 16/07/2022 to 18/07/2022 at a fee of Kshs. 3,000/= per day.
6. He deponed that on 16/07/2022, the Applicant negligently and /or carelessly drove and/or managed the said motor vehicle while along Elementaita – Kongasis Road and permitted it to veer of the road and therefore caused it to roll down subsequently causing the it extensive damage and making it uneconomical to repair as per the valuation report.
7. That as a result of the said damage, occasioned in the said motor vehicle and loss of income , the Respondents filed against the Applicant, Nakuru Small Claims Court Civil Case No. 218 of 2022 seeking redress.
8. He further deponed that in its judgment dated 01/03/2023, the trial court dismissed the said claim on ground that it is premature and that proceeding with it would antagonise known principles of insurance as the insurer’s report on its obligation with regard to the accident was still pending.
9. He deponed that on 22/03/2023, Occidental Insurance Company Ltd who were the 2nd Respondent’s insurers wrote a letter to the 2nd Respondent repudiating the claim.
10. That as a consequence , the Respondents filed Nakuru Small Claims Court No. E147 of 2023 against the Applicant seeking special damages and loss of income occasioned to the Respondents as a result of the accident caused by the Applicant and therefore, the matter is not res judicata. That the insurer had already made its obligation known to the 2nd Respondent. In the circumstances, the Respondents state that the ruling dismissing the Appellant/Applicant’s Preliminary Objection was proper.
11. Further, the Respondents deponed that the intended appeal is frivolous, that the Applicant has not satisfied conditions of stay pending appeal as set out under Order 42 Rule 6 of the [*Civil Procedure Rules*](#) and has not demonstrated what prejudice he would suffer if stay is denied.
12. Parties agreed to canvass the application by way of written submissions and in compliance, the Applicant filed his 24/07/2023 emphasising on the application and the affidavit and he submitted that should the claim before the trial court proceed, it will render his appeal nugatory as his appeal raises the issue of res judicate which is a jurisdiction issue.
13. On whether he has satisfied conditions of stay of proceedings, the Applicant submitted that the conditions of stay of proceedings pending appeal have not been specified. He submits that the prayer for stay of proceedings is an equitable relief which is within the discretion of the court. That the Court should consider whether or not application for stay of proceedings has been brought expeditiously.
14. On the question of security, he submitted that no award was granted to the Respondent and therefore, the issue does not arise. He urged the Court to allow the application.



15. In their submissions filed on 18/08/2023, the Respondents emphasised the contents of the affidavits and giving the chronology of the events leading to the impugned ruling and finally submitted that the issues for determination of this application were whether the Applicant should be granted stay of proceedings in Nakuru Small Claims Court No. E147 of 2023 pending hearing and determination of appeal and who should bear costs of the application.
16. While citing several cases including the case of Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited (2005) eKLR relied on by the trial court on when a suit should be barred by *res judicata*, the Respondent submitted that Nakuru Small Claims Court Civil Case No. 218 of 2022 was not *res judicata* as it was determined on technical points and not on merits. The Respondents therefore supported the finding of the trial court. He urged the court to allow the trial court to proceed with the case and to be determined on merit.
17. That if aggrieved, the Applicant may appeal the said judgment as the same is capable of being stayed. Further, he submitted that the court should only stay proceedings in exceptional circumstances but not those advanced. Lastly, they urged the court to dismiss the application with costs.

Determination

18. This Court has considered the application, affidavits and annexures thereto and the submissions by parties together with the case law cited by parties. This Court has also looked at the Memorandum of Appeal filed herein. The main issue for determination for determination is whether the proceedings before the Small Claims Court should be stayed pending appeal.
19. The Applicant relied heavily on the ground that in view of the judgment in Nakuru Small Claims Court Civil Case No. 218 of 2022, the case later filed by the Respondent against the Applicant being Nakuru Small Claims Court No. E147 of 2023, is *res judicata*, which was the sole ground of the Preliminary Objection and the subject of the impugned ruling. Section 7 of the [Civil Procedure Act](#), 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.”

20. The threshold for proving the applicability of the doctrine of *res judicata* was restated in [John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others](#) (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment) [John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others](#) [2021] eKLR, where the Supreme Court held at paragraph 86:-

“We restate the elements that must be proven before a court may arrive at the conclusion that a matter is *res judicata*. For *res judicata* to be invoked in a civil matter the following elements must be demonstrated:

- a) There is a former Judgment or order which was final;
- b) The Judgment or order was on merit;
- c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and



- d) There must be between the first and the second action identical parties, subject matter and cause of action.”
21. A look at the judgment in Nakuru Small Claims Court Civil Case No. 218 of 2022, reveals that no doubt the parties were the same as in Nakuru Small Claims Court No. E147 of 2023.
22. In the judgment in Nakuru Small Claims Court Civil Case No. 218 of 2022, the trial magistrate therein framed the issues for determination as follows:-
- i. Whether the Claim is pre- maturely before Court.
 - ii. Liability: Whether there was an accident involving motor vehicle registration number KCP 242S Toyota Axio on July 16, 2022 and whether the Respondent is to blame for the accident.
 - iii. Quantum: Subject to the outcome in (ii) above , the nature of injuries and damages awardable.
 - iv. Costs of the suit.”
23. However, in dismissing suit, the trial court focused solely issue (i) which was “whether the suit was prematurely before Court”, and after fully analysing that issue, the trial court held:
- “In the light of the above, it is clear in my mind that the suit herein is premature and proceeding with it would antagonise all the known principles of insurance.
- Consequently, I find that the suit herein lacks merit and is dismissed with costs.”
24. It was after that decision that the Respondent proceeded to file Nakuru Small Claims Court No. E147 of 2023 and in determining the Applicant’s Preliminary Objection, the trial court correctly stated what a Preliminary Objection entails. Citing several authorities on the issue of *res judicata* , the trial court noted that the insurance had repudiated the claim and held:-
- “The letter from the insurance is dated January 27, 2023. From the letter , the insurance has denied liability. Guided by the Siri Ram Kaura Case, I am of the view that with insurance letter, the aspect of the case has entirely changed. In view of that finding, I am constrained to dismiss the preliminary objection with costs.”
25. With the reasoning, it is clear that the Preliminary Objection purely hinged on the doctrine of *res judicata* and that would not have disposed of the matter before the trial court.
26. Stay of proceedings is a matter of judicial discretion but that discretion should be exercised judiciously considering the impact such an order has litigation including delay of litigation particularly in Small Claims Court. It can hinder expeditious disposal of cases and access to justice.
27. In the circumstances, the sole issue of *res judicata* being the subject of this application and memorandum of appeal cannot be used to do substantial justice to the parties if stay is granted.
28. The Applicant herein ought to have waited for the case to be heard on merits and a judgment rendered and if aggrieved by the outcome, then either party would be at liberty to appeal. It is therefore clear from the above finding that the Memorandum of Appeal is premature.
29. In conclusion, this Court makes the following orders:-
1. The Application dated 29/05/2023 be and is hereby struck out.
 2. The memorandum of appeal herein be and is hereby struck out.



3. The case before the Small Claims Court being Nakuru Small Claims Court No. E 147 of 2023 to proceed for hearing and on merit.
4. Due to the nature of this matter, each party is ordered to bear his own costs .

DATED,SIGNED AND DELIVERED NAKURU THIS 12TH DAY OF JUNE, 2024.

PATRICIA GICHOHI

JUDGE

In the presence of:

Ms Kiberenge for Ms Sitati for the Appellant/ Applicant

N/A for the Respondent

Ruto- Court Assistant

