



REPUBLIC OF KENYA



**Mwinzi & another v Kimanzi & 4 others (Civil Suit
E12 of 2021) [2024] KEHC 9005 (KLR) (25 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9005 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT E12 OF 2021
HI ONG'UDI, J
JULY 25, 2024**

BETWEEN

CAROLINE MUTWA MWENDE MWINZI 1ST PLAINTIFF

KASYETHAU NOBLE TRADING LIMITED 2ND PLAINTIFF

AND

GEORGE NGUI KIMANZI 1ST DEFENDANT

ANNAH MWALE KIMANZI 2ND DEFENDANT

THE REGISTRAR OF COMPANIES 3RD DEFENDANT

THE HON. ATTORNEY GENERAL 4TH DEFENDANT

FRANCIS GATHENYA GATHUKU 5TH DEFENDANT

RULING

1. This ruling is in respect of two applications dated 11th December, 2023 and 19th December, 2023 plus the Preliminary Objection dated 7th February, 2024.
2. In the Preliminary Objection the 1st, 2nd and 5th defendants prays for orders that;
 - i. That the Applicant's Application dated 19th December 2023 is res-judicata, in that a similar Application involving the same parties over the same subject matter by the same Applicant was heard and decided on merits in (Nakuru H.c Elc Appeal No.eo24 Of 2023 (caroline Mutwa Mwendu Mwinzi-vs Kasyethau Noble Trading Limited, George Ngui Kimanzi & Annah Mwale Kimanzi) where similar reliefs were sought and declined by the Court on 13th December, 2023.
 - ii. That section 7 of the *Civil Procedure Act* prohibits "recycling" of matters.



3. In the application dated 11th December 2023 the 1st and 2nd defendants pray for orders that there be stay of execution of the ruling delivered on the 22nd November, 2023 pending the hearing and determination of their appeal against the said ruling.
4. The said application is based on the grounds on its face and the affidavit of the 1st applicant sworn on even date. He deposed that the plaintiffs had already extracted and obtained from the court order arising from the ruling of 22nd November, 2023 and they had put in place the appropriate mechanism of implementing the said orders. Further, that if the said orders were implemented/executed, this application would become an academic exercise and the appeal in the Court of Appeal would be rendered nugatory.
5. He deposed further that the plaintiffs would suffer no prejudice at all if the prayers sought were granted because the main suit was yet to be decided. Furthermore, that the plaintiffs would still have their day in court since the application that gave rise to the ruling of 22nd November, 2023 was at interlocutory level and the main case was yet to be heard and decided. He added that they would abide by all the conditions that this court shall issue while granting an order of stay pending the hearing and determination of their Appeal in the Court of Appeal.
6. The plaintiff opposed the application dated 11th December, 2023 vide the grounds of opposition dated 10th January 2023. She states that in the event the applicant sought to appeal against the decision read on 22nd November, 2023, the Appeal would be time barred by dint of Rule 77 (2) of the Court of Appeal Rules which states:
 - “77, A person who desires to appeal to the Court shall give notice in writing, which
 - (1) notice shall be lodged in two copies, with the registrar of the superior court.
 - (2) Each notice under sub-rule (1) shall subject to rules 84 and 97 be lodged within fourteen days after the date the decision against the decision for which appeal is lodged”
7. The plaintiff stated further that the application herein was an afterthought and meant to deny her the fruits of her judgment. Further, that the applicants had not satisfied the requirements for stay of execution pending appeal since there had been inordinate delay in filing the application and no explanation for the delay had been offered.
8. In addition, that the applicants had not demonstrated any substantial loss or offered security for costs. She went on to state that the notice of motion had been filed in reaction to the execution proceedings and therefore an abuse of the court process and it should be dismissed with costs.
9. Both applications were canvassed by way of written submissions.

1st and 2nd Defendants submissions in support of the Preliminary Objection

10. The said submissions dated 6th May, 2024 were filed by Karanja Mbugua & Company Advocates on the same date. Counsel submitted on the doctrine of res judicata as envisaged under section 7 of the *Civil Procedure Act*, Cap 21 of the Laws of Kenya. He cited the decision in *Musankishay Kalala Paulin v Director Criminal Investigation & 4 Others* [2022] eKLR, where the learned Judge stated that the rationale for the doctrine of res judicata existed to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.



11. Counsel submitted further that the application dated 19th December, 2023 was dated and filed 6 (six) days after delivery of the ruling of by her Ladyship M.A. Odeny (J) in Nakuru H.C ELC Appeal No. EO24 of 2023. That instead of appealing against that decision, the plaintiffs filed and reproduced the defeated application verbatim. That from a simple glance at the instant application dated 19th December 2023 its evident that it's an exact replication of the application dated 9th October, 2023. He urged the court to dismiss the said application with costs to the 1st, 2nd and 5th Defendants.

1st and 2nd defendants/applicants' submissions to the application dated 11th December, 2023

12. The said submissions dated 30th January, 2024 were filed by Karanja Mbugua & Company Advocates on 2nd February, 2024. Counsel in support of the application for stay of execution placed reliance on Order 42 rule 6(2) of the Civil Procedure Rules and the decisions in Nesco Services Limited v CM Construction (EA) Limited [2019] eKLR and Daniel Chebutul Rotich & 2 Others v Emirates Airlines Civic Case No. 368 of 2001.
13. Counsel submitted that in the Ruling dated 6th October 2023 the Court had directed that there be an agreement between the 2nd defendant/applicant and the 1st plaintiff/ respondent on the management of the rental property known as Nakuru Municipality Block 20 /285/T6. Further, that in the event the parties could not agree, the Deputy Registrar was to choose an agent.
14. He further submitted that in the Ruling of 22nd November, 2023 the Court directed that the management of the said rental property be solely done by the plaintiff. In that regard, they filed a Notice of Appeal and the instant application. That the court granted interim orders of stay of the execution of the terms thereof. Additionally, that the application for stay of execution had been made before the court without unreasonable delay and they had satisfied the conditions set out in Order 42 rule 6 of the Civil Procedure Rules.
15. Counsel went on to submit that the purpose of an order of stay of execution pending appeal was elaborated in the case of RWW v EKW [2019] eKLR where court held as follows:

“The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay, however, must balance the interests of the Appellant with those of the Respondent.”

16. In conclusion, he submitted that the applicant was willing to deposit any such security that the court deemed fit and that the plaintiffs would not suffer any prejudice if the prayers sought are granted.

Plaintiffs' submissions on the preliminary objection dated 7th February, 2023 and Notice of Motion dated 19th December, 2023.

17. These are dated 15th February, 2024 and were filed by Sabaya & Associates Company Advocates on the same date together with a case digest. Counsel identified two issues for determination, the first being whether the Notice of Preliminary filed was a true preliminary objection. She submitted that the same was not since the plea of res judicata required probing of evidence. She relied on several cases among



them Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another [2014] eKLR, where the Court held that:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res ‘judicata, duplicity of suits and suit having been sent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope the ‘jurisdiction (sic) on preliminary objection. Court of laws (sic) have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly”.

18. On the second issue whether the application dated 19th December, 2023 is res judicata, counsel submitted that the 1st 2nd and 5th respondents pleaded that the said application was res judicata to Nakuru ELC Appeal No. E024 of 2021-Caroline Mutwa Mwendu Mwinzi v Kasyethau Noble Trading Limited, George Ngui Kimanzi & Anna Mwaleh Kimanzi.

19. Counsel submitted that the same was not, and she relied on the Malindi Land Case 56 Of 2020 Ngala & 2 Others v Randu & 2 Others And Case S6 Of 2020 2023 Keelc 19334 KLR 29 August 2023, where the court restated the ingredients of res- judicata as follows:

“ 14. The test in determining whether a matter is res judicata was summarized in the Bernard Mugo Ndegwa v James Nderitu Githae and 2 others [2010] eKLR as follows:

- a) The matter in issue is identical in both suits;
- b) The parties in the suit are the same;
- c) Sameness of the title/claim;
- d) Concurrence of jurisdiction; and e) Finality of the previous decision.”

20. According to the plaintiffs/respondents’ counsel, the above listed ingredients are not present in the application dated 19th December, 2023.

Plaintiffs’ submissions on the application 11th December 2023

21. The said submissions are dated 5th May, 2024 and were filed by Sabaya & Associates Company Advocates on the same date. Counsel submitted on the grounds of opposition.

22. Regarding the first ground, on the application being fatally defective for referring to non-existent orders, counsel submitted that prayers 2 and 3 of the application sought for stay of execution of the ruling delivered on 22nd November 2023. Further, that the application herein was a mere academic exercise. The court’s attention was drawn to the case of Peter Maosa Nyangau v National Bank of Kenya Ltd & Another [2022] eKLR.

23. Regarding the second ground on the application being incompetent since there was no Appeal pending before the Court of Appeal or any other court to warrant orders of appeal, she submitted that the record showed that the applicants had the habit of filing Notices of Appeal for purposes of applying for stay of execution then fail to appeal. The court’s attention was drawn to the case of Dilpack Kenya



Limited v William Muthama Kitonyi [2018] eKLR, where the court held that there could not be a stay of execution pending hearing of an appeal which did not exist.

24. Regarding the third ground on the application not having satisfied the requirements for stay of execution as provided for under order 42 rule 6 of the Civil Procedure Rules, counsel submitted that there had been delay on the applicants' part in filing the instant motion and that they had not offered any explanation for the delay. Further, that the applicants had not demonstrated substantial loss that they were likely to suffer or offered any security for costs.
25. The fourth ground is that the applicants were approbating and reprobating on the exact orders they are complaining about. Counsel submitted that the applicants sought to appeal against the decision delivered on 28th September, 2022 but the same was time barred by dint of Rule 77(2) of the Court of Appeal Rules. She urged the court to dismiss the application herein with costs.

Analysis and determination

26. I have considered the applications herein, the affidavits and the submissions by both parties. I will first deal with the preliminary objection since it raises the issue of res judicata. Is the Preliminary Objection dated 7th February, 2024 merited? It relates to the plaintiffs application dated 19th December, 2023.
27. It is trite law that for a preliminary objection to be valid; firstly, it must raise a pure point of law. Secondly, the objection should be argued on the assumption that all the facts pleaded by the party against whom it is raised are correct. Lastly, an objection cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. In *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696, Law JA stated as follows:

“So far as I'm aware, 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 of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”

28. The Court also takes into account the fact that a preliminary objection must stem from the pleadings and raises a pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information. See the case of *Oraro v Mbaja* [2005] 1KLR 141, where it was held that: -

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”.

29. The 1st, 2nd and 5th defendants contend that the application dated 19th December is res judicata, but the plaintiffs have disputed the said facts. For this Court to be able to ascertain whether or not the said application is res judicata, it will have to ascertain the facts as pleaded by the 1st, 2nd and 5th defendants and those raised by the plaintiffs. In doing so, the Court will be probing evidence.
30. This position was affirmed in the case of *Henry Wanyama Khaemba v Standard Chartered Bank Ltd & Another* (supra), also relied on by the plaintiffs at paragraph 12 herein. The said court observed in part as follows;

“.....The issues of res 'judicata, duplicity of suits and suit having been sent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are



incapable of being handled as Preliminary Objections because of the limited scope of the ‘jurisdiction on preliminary objection.....”

31. This court shares the same sentiments as those in the case of Henry Wanyama Khaemba (supra) which is that a preliminary objection cannot be raised on disputed facts and as to whether or not the matter is res judicata, it will require the probing of evidence. Therefore, it is this court’s view that what has been raised in the preliminary objection herein does not amount to a Preliminary Objection, as per the law.
32. Consequently, I find that the Preliminary Objection dated 7th February, 2024 is not merited and is hereby dismissed with costs to the plaintiffs/respondents. The application dated 19th December, 2023 should therefore be heard on merit.
33. In addressing the second application, I opine that the issue for determination is whether the application dated 11th December, 2023 is merited.
34. The said application seeks stay of execution of the ruling delivered on the 22nd November, 2023 pending the hearing and determination of the applicant’s appeal against the said ruling.
35. It is not in dispute that this court did not deliver any ruling on 22nd November, 2023 as the same was delivered on 2nd November 2023. This error on the application, in my opinion is self-evident and does not require an elaborate argument to be established. Further, the said error does not make the entire application defective or prejudice the respondents since the same can be heard on merits rather than letting the same be dismissed on procedural technicalities. The constitution in Article 159 (2) (d) of the Constitution stated that:

“in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.”
36. Further, In the case of Republic v District Land Registrar, Uasin-Gishu & Anor [2014] eKLR Justice Ochieng (as he then was) held that:

“.. to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities.”
37. Additionally, in the Court of Appeal case of Phillip Chemwolo & Another v Augustine Kubende [1986] eKLR, Apaloo J.A. appreciated that:

“Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case heard on merit. I think the broad equity approach to this matter is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court as is often said exists for the purpose of deciding the rights of the parties and not the purpose of imposing discipline”.
38. In the foregoing, I have no reason to depart from the above authorities. It is this court’s duty to allow parties herein to operate on equal arms, and in so doing allow the application for stay of execution dated 11th December 2023 to be decided on merits.



39. The principles guiding the grant of a stay of execution pending appeal are well settled. The same are provided for under Order 42 rule 6(2) of the Civil Procedure Rules which provides as follows:
- No order for stay of execution shall be made under sub rule (1) unless—
- (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and
 - (b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.
40. In *RWW v EKW* [2019] eKLR, also relied on by the 1st and 2nd respondents the court addressed the purpose of a stay of execution order pending appeal. See paragraph 15 above.
41. From the law and the above decision, it is clear that the purpose of stay of execution is to preserve the substratum of a case pending the hearing and determination of an appeal. Further, a successful litigant has a right and expectation to enjoy the fruits of the decision rendered in his or her favour by the court, and a respondent who has lost a case also has a right of appeal to ventilate his or her displeasure with the said decision of the court. The court has a duty to weigh and balance both situations.
42. Further, in the case of *Regional Institute of Business Management v Lucas Ondong' Otieno* [2020] eKLR the court observed as follows;
- “ 20. Weighing the Applicants' right to have his dispute determined fairly in a court of law or competent tribunal as provided in Article 50(1) of *the Constitution* of Kenya and the equally important Respondent's fundamental right that justice delayed is justice denied as stipulated in Article 159(2)(b) of *the Constitution* of Kenya, this court determined that there would be more injustice and prejudice to be suffered by the Applicants if they were denied an opportunity to ventilate their Appeal on merit in the event an order for stay of execution was not granted”.
43. The application herein was filed on 13th December 2023 after delivery of the Ruling on 2nd November 2023. There was a delay of 11 days in filing of the application which in my opinion was not inordinate.
44. On substantial loss, the defendants argued that if the stay orders are not granted, the said appeal would be rendered nugatory. The respondent on her part argued that the appellant had not shown what substantial loss he would suffer if the orders were allowed.
45. In the case of *Silverstein v Chesoni* [2002]1 KLR 867, the court observed that substantial loss was the cornerstone of both jurisdictions and the same had to be prevented by preserving the status quo because such loss would render the appeal nugatory.
46. On security the 1st and 2nd defendants/applicants submitted that he was willing to deposit any such the security that the court deemed fit.
47. As earlier noted, the grant of stay of execution is discretionary and the court will exercise this discretion on a case by case basis depending on the circumstances of each case. It is the duty of this court to balance these rights to ensure that justice is served.
48. The above being the position, I allow the prayer for stay of execution on condition that the 1st and 2nd defendants/applicants deposit kshs.5,000,000/= in a joint interest earning account in the names of the parties advocates pending the determination of the appeal. This should be complied with within



45 days. The joint account should be opened within ten (10) days. Failure to comply will lead to an automatic lapse of the order of stay of execution with no further reference to this court.

49. In view of the above, the application dated 11th December, 2023 is allowed with no orders as to costs.

50. The upshot is as follows:

i. The preliminary objection dated 7th February, 2024 is dismissed with costs to the plaintiffs.

ii. The application dated 19th December, 2023 to be heard on merit.

iii. The application dated 11th December, 2023 is allowed with no order as to costs.

51. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 25TH DAY OF JULY, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI

JUDGE

