Ndumberi General Merchants Limited v Ewaso Ngiro North Development Authority (Civil Suit 14 of 2017) [2023] KEHC 27628 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEHC 27628 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NYERI

CIVIL SUIT 14 OF 2017

FN MUCHEMI, J

FEBRUARY 9, 2023

BETWEEN

NDUMBERI GENERAL MERCHANTS LIMITED ..... PLAINTIFF

AND

EWASO NGIRO NORTH DEVELOPMENT AUTHORITY ..... DEFENDANT

RULING

Brief Facts

1. This application dated July 26, 2022 seeks for orders of lifting of the garnishee *order nisi* issued against Consolidated Bank of Kenya Limited ordering that all the monies deposited and being held in Bank Account Number xxxxx to the credit of the applicant and grant stay of the execution proceedings herein pending the hearing and determination of the appeal. The applicant also seeks for the orders of stay of execution of the judgment herein delivered on March 24, 2022 pending the hearing and determination of the intended appeal at the Court of Appeal.

2. The respondent filed a replying affidavit dated November 14, 2022 in opposition to the application.

3. The application was heard orally and the court granted parties leave to file submissions thereafter on the applicability of Section 21(4) *Government Proceedings Act* to this case.

Applicant's Case

4. The applicant argues that it is a government agency and therefore a garnishee order against it ought not to have been issued pursuant to Order 29 Rules 2 and 4 of the *Civil Procedure Rules*. The procedure for execution against the government entity is contained in the *Government Proceedings Act* and the applicant therefore contends that the issue of the order was irregular.

5. The applicant further states that the garnishee order is against Account No.xxxxx held at Consolidated Bank of Kenya which is a recurrent account for payment of staff salary and other day to day expenses. The applicant further contends that the said account is the only account it holds.

6. The applicant further states that the garnishee order is for the sum of Kshs 41,267,151.94/- which amount is grossly exaggerated and foreign compared to the amount in the decree. As such, the applicant contends that there is an apparent and clear variance on the face of the order dated 20th July 2022 and further that the garnishee order nisi seeks to illegally and unjustifiably enrich the respondent. Moreover, the applicant contends that since the account meets the daily expenses of the applicant, the garnishee order nisi will greatly prejudice innocent third parties and halt its operations which includes provision of services to the citizens of the republic.

7. The applicant states that it was never informed of the judgment and decree and the impending execution and therefore is being condemned unheard. The applicant is apprehensive that if the said execution is not stayed, the appeal shall be rendered nugatory. The applicant further states that it filed the application six (6) days after he was served with the judgment and therefore there was no undue delay.

8. The applicant relied on the case of *Charles N. Ngugi vs ASL* (2022)eKLR and submits that it stands to suffer substantial loss as the decretal sum is colossal and the respondent has not provided any proof that it is capable of refunding the said sum. The applicant argues that the respondent ought to have attached evidence of financial capability and thus the burden of proof has shifted to him. On the issue of security, the applicant states that the court has a discretion to give the orders and terms and since it is a government agency, it is ready to give a bank guarantee as security.

9. The applicant further avers that it has an arguable appeal with high chances of success. The applicant further avers that it shall suffer greater harm and prejudice if the stay is not granted as the respondent will proceed with the enforcement and claim of the decretal sum. Moreover, the applicant contends that the respondent will not suffer any prejudice if the orders sought are granted while it stands to suffer substantially since it relies on funding from the National Government to carry out its mandate and thus execution of the judgment would be detrimental to its operations as a public entity.

10. The applicant further argues that the contract was never performed and thus there was loss of public funds and allowing the judgment to stand will lead to further loss of public funds.

The Respondent's Case

11. The respondent opposes the application and states that the application is an exact replica of an application that the applicant filed in the Court of Appeal Civil Application No. E065 of 2022. The respondent states that the application was fully heard by the Court of Appeal after both parties put in their written submissions. The Court of Appeal declined to grant the applicant the orders it is currently seeking in this application namely (c), (f) and (g). As such, the application in terms of prayers (c), (f) and (g) are *res judicata* as the application was already handled by the Court of Appeal and cannot be relitigated before the High Court. Moreover, the applicant ought to move the Court of Appeal to have a full bench constituted for the hearing of his application on the orders that he is seeking in this application. To support his contentions, the respondent relied on the cases of *Charles Mwangi Gitundu vs Charles Wanjohi Wathuku* [2021] eKLR and *Car House Ltd & Another vs Erastus Kavita Musyoka* [2022] eKLR. The respondent further submits that entertaining the current application when a similar application was filed in the Court of Appeal will lead to multiplicity of determinations. As such, the respondent urges the court to strike out the application.

12. The respondent refers to Order 50 of the *Civil Procedure Rules* and argues that the grounds of an application must be clearly spelt out. The impression created by the applicant that the payment to the respondent was irregular and the applicant being a parastatal like any other debtor ought to pay its debts. The respondent further argues that the case was fully heard and determined and a garnishee order extracted. Therefore, the applicant has a legal obligation to pay debts and as such cannot claim that this would amount to wasting of public funds.

13. On the issue of stay of execution, the respondent contends that he has attached his Replying Affidavit and submissions as filed in the Court of Appeal. He argues that the applicant has not satisfied the requirements as set out in Order 42 Rule 6 of the *Civil Procedure Rules* except one, that of filing the application timeously. On the issue of substantial loss, the respondent relies on the cases of *Gianfranco Manenthi & Another vs Africa Merchant Assurance Company Ltd* [2019] eKLR and *Michael Ntouthi Mitheu vs Abraham Kivondo Musau* [2021] eKLR and submits that substantial loss ought to be proved through empirical and documentary evidence. It was further argued that the applicant has not demonstrated what substantial loss it stands to suffer. Moreover, counsel for the applicant is the one who has sworn the affidavit himself and not the applicant being well aware tht the matters in issue are contentious.

14. The respondent further relies on the case of *National Transport and Safety Authority vs Samper Tours Travel* [2022] eKLR where the court refused to grant stay in a case of a monetary decree.

15. On the contention that the respondent cannot refund the decretal sum, the respondent states that he annexed title deeds, showing his financial capability in his Replying Affidavit filed in the Court of Appeal. As such, the duty to prove inability to refund is on the applicant.

16. The respondent further argues that the applicant's counsel swore the affidavit stating that the amount held by the garnishee is almost paralyzing the applicant. However, the applicant has not shown that it does not have other bank accounts, which evidence would have been important in this application.

17. The respondent thus states that since substantial loss has not been established, the application must fail. The respondent contends that the contract between the parties is an old one dating back to 2012 and he has been locked out his money for that whole duration. Thus, the court ought to balance the interests of both parties.

The Respondent's Submissions on the applicability of Section 21(4) *Government Proceedings Act*

18. The respondent submits that the provisions of Section 21(4) *Government Proceedings Act* do not cover parastatals such as the applicant. The respondent relied on the cases of *Green star Systems Limited vs Kenyatta International Conference Centre & 2 Others* (2018) eKLR and *Anniversary Press (K) Limited vs National Water Conservation & Pipeline Conservation* (2020) eKLR to support his contentions. Further, the respondent submits that the applicant is established under the provisions of Cap 448 Laws of Kenya as a parastatal. Section 3 of the Act describes the applicant as a body corporate, with perpetual succession and a common seal. The Act further provides that the applicant is capable of suing and being sued in its name. The respondent submits that there is no mention at all that it has to be sued through the name of the Attorney General.

19. The respondent further urged the court to strike out the application as the applicant did not show any evidence of irreparable loss. The applicant did not provide a master roll of employees to show how many employees work for them. Further, the applicant did not offer any security. Instead counsel for the applicant swore the affidavit stating that there would be a bank guarantee with no information as to which bank had offered the said guarantee.

The Applicant's Submissions

20. The applicant reiterates that it is a government agency as it satisfies the conditions set out in *Association of Retirement Benefits Scheme vs Attorney General & 3 Others* (2017) eKLR. The applicant further argues that the fact that the Attorney General was never sued in the matter, was an issue beyond its purview and ambit.

21. The applicant further submitted that this court has jurisdiction to hear and determine the current application as the court of appeal in its ruling indicated that it does not have jurisdiction to hear and determine the pending application. Thus, the applicant states that it has moved this honourable court to ventilate and prosecute its application on its merit.

22. On the issue of substantial loss, the applicant submits that the amount is colossal and has already affected its operations. Lack of payment of salaries or non-delivery of services by the applicant cannot be proved by documentation as it is impossible to prove a negative.

23. The applicant relied on the case of *Rana Auto Selection Ltd vs Lilian Osebe Moses* [2021] eKLR and submits that once it expresses a reasonable fear that the respondent would be unable to pay back the decretal sum, the evidential burden must then shift to the respondent to show what resources he has since that is a matter which is peculiarly within his knowledge. In this case, the respondent failed to do so as he did not attach any titles, valid certificates of official search or valuation certificates.

The Law

Whether the matters are *res judicata*

24. The doctrine of *res judicata* is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been fully determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Section 7 of the *Civil Procedure Act* provides:-

> 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.

25. This principle was enunciated in the Court of Appeal in the case of the *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others* [2017] eKLR where the court held:-

> For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;
>
> a. The suit or issue was directly and substantially in issue in the former suit.
>
> b. That former suit was between the same parties or parties under whom they or any of them claim.
>
> c. Those parties were litigating under the same title.
>
> d. The issue was heard and finally determined in the former suit.

e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.

26. The Court went on to state on the role of the doctrine:-

> The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation an affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against the wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, 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 or calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.

27. It therefore follows that the rationale for the doctrine of *res judicata* exists 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.

28. The respondent argues that the issues raised in the instant application are same as those in the application dated August 1, 2022 pending in the Court of Appeal. Upon perusal of the application dated August 1, 2022 in the Court of Appeal and the one before this court, it is clear that in both applications the parties are the same, the issues raised by the applicant are similar and the orders the applicant is seeking are identical. The Court of Appeal presided over by a single judge delivered its ruling on October 28, 2022 and noted that it only had jurisdiction to determine the issue of extending time to file the appeal out of time.

29. The first avenue available to an applicant is to file his application in the High court if it is the trial court, and in the event that it is rejected or is unsuccessful, the applicant can approach the Court of Appeal by way of appeal. It was held in the case of *Patrick Kalaya Kulamba & Another vs Philip Kamosu and Roda Ndanu Philip (Deceased)* [2016] eKLR where Meoli J. held:-

> " For the purpose of this case, the operational words are as underlined above. Thus, whether an application for stay pending appeal has been allowed or rejected in the lower court, the High Court "shall be at liberty....to consider" an application for stay made to it and to make any order it deems fit. The High Court in that capacity exercises what can be termed "original jurisdiction". And from my reading of the rule, the jurisdiction is not dependent on whether or not a similar application had been made in the lower court, or the fate thereof....

30. One of the orders the applicant is seeking is for stay of execution pending the appeal. Although Order 42 Rule 6 of the *Civil Procedure Rules* has been interpreted by courts to allow an applicant to file an application for stay in the High Court being the trial court and also in the Court of Appeal where the appeal lies depending on what the applicant chooses, the scenario of the two applications herein is different. The applicant has chosen to gamble in the two courts on two identical applications.

31. The Court of Appeal has expressed itself on the application of Order 42 Rule 6(1) of the *Civil Procedure Rules* in both its original and appellate jurisdictions in several decisions, while considering its own Rule 5 (2)(b) which is essentially at *pari materia* with Order 42 Rule 6(1) of the *Civil Procedure Rules*.

Githinji JA held in *Equity Bank Limited vs West Link Mbo Limited* [2013] eKLR:-

> " It is trite law that in dealing with Rule 5 (2)(b) applications the court exercise discretion as a court of first instance and even where a similar application has been made in the High Court or other similar court under Rule 6(1) of Order 42 of the Civil Procedure Rules and refused, the court in dealing with a fresh application still exercises original independent discretion as opposed to appellate jurisdiction. (Githunguri vs Jimba Credit Corporation Ltd No. 2 [1988] KLR 838."

Musinga JA observed on the same question in his judgment and stated:-

> " The court is said to be exercising special independent original jurisdiction because on considering whether to grant or refuse an application for stay, it is not hearing an appeal from the High Court decision. It can grant orders of stay, irrespective of whether or not such an application has been made in the High Court."

32. It is therefore clear that whether an application for stay was granted or refused by the trial court, the Court of Appeal is at liberty to consider such application and to make such orders as it deems fit.

33. It is my considered view that this application cannot be said to be *res judicata* for the reason that both the Court of Appeal and the High Court have jurisdiction to her the matters in issue and further because the pending prayers are yet to be heard and determined.

Is the application sub judice?

34. However in this instance, the applicant has filed an application for stay in the appellate court and then filed a similar application in this court. It is noted that the applicant did not disclose that it made two similar applications in both the High Court and in the Court of Appeal. It was the respondent who brought the matter to the attention of this court by annexing the application and the ruling of the Court of Appeal to its Replying affidavit.

35. I have perused the ruling of Karanja J.A whereas the court granted the first two prayers in the said application. Two prayers are still pending, that is for stay of execution and for lifting the garnishee order. In my view, the said application is part-heard, by the Court of Appeal and what is pending is for a full bench to be constituted to hear and determine the pending prayers. It would be unprocedural and in violation of the *sub judice* rule for this court to proceed to hear and determine the application before it for this may result in conflicting determinations that are likely to embarrass the courts in its noble duty of administration of justice.

36. Superior courts have pronounced themselves in cases with similar facts. In Judicial Review No. HCJR/E045 of 2020 *Republic Vs. Paul Kihara Kariuki, Attorney General and Law Society of Kenya*, Mativo J as he then was held:-

> " I find that the applicant has presented the same issues which were being litigated on in the earlier case. This suit presents a sad scenario of not only having parallel proceedings on the same issues involving the same parties but also a great risk of coordinate courts granting conflicting orders. The applicant did not disclose in its pleadings the existence of the earlier suit. This suit is hereby struck off with no orders as to costs."

The court went on to state that:-

> " Abuse of court process creates a factual scenario where a party is pursuing the same matter through two court processes. In other words, a party by the two court processes is involved in some gamble; a game of chance to get the best in the judicial process."

37. I am of the view that the applicant herein has no right to pursue two processes on the same matter involving the same parties and especially where he has one application partly dealt with by one court just to move to another court to pursue similar prayers. I am convinced that this application offends the rule of subjudice under Section 6 of the *Civil Procedure Act*.

38. It is my finding that the application dated July 26, 2022 is incompetent and ought not to be entertained. It is hereby stuck out with costs.

39. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 9TH DAY OF FEBRUARY, 2023.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS 9TH DAY OF FEBRUARY, 2023