



Muoria & another v Synergy Industrial Credit Limited & another (Commercial Case E045 of 2020) [2023] KEHC 17742 (KLR) (Commercial and Tax) (17 March 2023) (Ruling)

Neutral citation: [2023] KEHC 17742 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E045 OF 2020
DO CHEPKWONY, J
MARCH 17, 2023**

BETWEEN

GEORGE MUORIA 1ST APPELLANT

BEATRICE NYAKIO MUTHARIA 2ND APPELLANT

AND

SYNERGY INDUSTRIAL CREDIT LIMITED 1ST RESPONDENT

EXCELL HOLDINGS LIMITED 2ND RESPONDENT

(Being an Appeal from the Judgment of the Chief Magistrate's Court at Milimani Commercial Courts (Hon. Edgar Kagoni [Mr.] Principal Magistrate) delivered on the 21st day of August, 2020 in CMCC No.2340 of 2019)

RULING

1. This ruling determines the appellants' notice of motion application dated November 23, 2022 brought under the provisions of sections 1A, 1B, 3A and 65 all of the [Civil Procedure Act](#), and order 42 of the [Civil Procedure Rules, 2010](#) seeking for the following orders:-
 - a. Spent;
 - b. That this honourable court do stay execution of the judgment of the Chief Magistrate Court at Milimani Commercial Court (Hon Kagoni E. M, PM (Mr) delivered on the August 21, 2020 in CMCC No 2340 of 2017) pending hearing and determination of this application.
 - c. That this honourable court do stay the judgment of the lower court for a period of five (5) months to enable the appellant get the security of cost.



- d. That the honourable court do review its orders directing
 - e. the appellant to pay the security of cost within thirty (30) days and the appellants be granted five (5) months from the filing of this application to raise the Kshs 1,500,000/=.
 - f. Any other relief that this honourable court may deem fit to grant.
 - g. Cost of this application
2. The application is premised on seven (7) grounds on its face and reiterated in the affidavit sworn in support thereof by the 1st appellant/applicant, George Muoria. The applicants' case is that they are husband and wife and are unable to raise Kshs 1,500,000/= from their business owing to difficulties visited on their business by covid-19 ramifications which has now turned to a loss making venture. Nonetheless, the applicants contend that they have an arguable appeal which might in-turn be rendered nugatory by the impending execution which has been set in motion by the 1st respondent's notice to execute dated November 11, 2022. It is their case that they can organize a fund raising activity to raise the Kshs 1,500,000/= if the court allows them five (5) months to do so.
 3. The 1st respondent has vehemently opposed the application and in doing so, they filed a notice of preliminary objection dated December 5, 2022 raising the following grounds:-
 - a. The application dated November 23, 2022 herein is *res judicata* as the issues therein have been decided on merit in the ruling made by W. A Okwany J delivered on the March 17, 2022 whereby prayers for review of this court's orders of conditional stay were denied and an application for stay had been conditionally granted by the same judge *vide* a ruling delivered on the July 15, 2021.
 - b. This honourable court has no jurisdiction to entertain the application dated November 23, 2022 as honourable court has become *funtus officio* having fully discharged its duty on the issues raised in the application dated November 23, 2022.
 - c. That the appellants/applicants have no audience of this honourable court due to non-compliance of the court order issued on July 15, 2021 requiring the appellants/applicants to deposit a sum of Kshs 1,500,000/= within thirty (30) days from the date of the said court order in an interest earning account in a banking institution of repute to be held in the joint names of counsel for both parties. The appellants/applicants are in contempt of court.
 - d. The application dated November 23, 2022 is filed herein inordinately late without offering any valid reason or at all as the only recourse which the appellants/applicants had if they were aggrieved with this honourable court's order of conditional stay was to apply for variation and/or review of the set conditions prior to the expiry of the thirty (30) days' period.
 - e. The application dated November 23, 2022 is hopelessly incompetent, fatally defective and inadmissible and the same ought to be dismissed forthwith, even suo motu.
 - f. The application dated 23rd November is an abuse of and a waste of the court's judicial time and is solely meant to defeat the overriding objective of the court as per the provisions of section 1A and 1B of the *Civil Procedure Act*.
 4. On December 20, 2022 respective counsels for the parties appeared before the court and orally canvassed the application, reiterating the grounds raised on the face of the application and the preliminary objection respectively. For purposes of discussion of the issue arising, it is important to lay a brief summary of the submissions.



5. M/S Mkalla, counsel for the appellants submitted that the application seeking orders for stay of execution and extension of time to deposit the sum of Kshs 1,500,000/- has been made on grounds that the appellants are unable to raise the said amounts in the meantime and the impending execution is likely to lead to their losing of their matrimonial home. According to the learned counsel, though the appellants had previously sought orders for stay of execution, which were granted on condition that they deposit Kshs 1,500,000/=, the plaintiffs could not comply with the said order owing to their financial impecunity. She added that *vide* its ruling dated March 17, 2022, this court did not consider any invite to grant any orders for stay but merely declined to substitute the conditions for stay as sought by the appellants and therefore the matter cannot be said to be res-judicata.
6. The learned counsel further submitted that the other reason why this court should favourably consider the application at hand is because of the fatal errors committed by the trial court. She argues that the genesis of the dispute was Kshs 7,000,000 advanced by the 1st respondent under a hire purchase agreement for purposes of purchasing motor vehicle registration No KAV 249M and trailer 2C 7843. That before their business went down, the appellants were committed to payment of the facility and had indeed paid upto 50% of the principal amount which is equivalent to Kshs 3,500,000/=. According to the learned counsel, surprisingly the trial court ignored the repayments that had been and ordered the appellants to repay the initial total amount advanced of Kshs 7,000,000/=:, thus misdirecting itself on both facts and law. The learned counsel further submitted that since the stay orders initially granted lapsed as a result of non-compliance, the court should accord the appellants protection by granting fresh stay orders pending their endeavour to raise the sum of Kshs 1,500,000/=:.
7. On the other hand, throughout his submissions, Mr Meeme, learned counsel for the 1st respondent has urged the court not to grant any of the orders sought. He reiterates that whether or not to grant orders of stay was an issue considered by the same court in its ruling dated July 15, 2021 and revisited by this court in the ruling dated March 17, 2022. He contends that the appellants are precluded from seeking further orders for stay of execution since that subject is re-judicata as the same has previously been considered and determined by this court.
8. The learned counsel has further submitted that since the ruling delivered by this court on March 17, 2022, the appellants have not made any effort to deposit the Kshs 1,500,000.00 and they have only been awakened by the notice to execute dated November 11, 2022, has issued. In addition, he claims the application has been brought after inordinate delay.

Analysis and Determination

9. In considering the application at hand, the entire court record, the preliminary objection filed by the 1st respondent and the oral submissions tendered by respective counsel for the parties. This court finds that there are two issues which have emerged for determination and are as follows:-
 - a. Whether the 1st respondent has put forward a competent preliminary objection; and,
 - b. Whether the appellants/applicants have made sufficient case for grant of the orders sought on face of the application.

The Preliminary Objection

10. The crux of the preliminary objection is that the application at hand offends the doctrine of res-judicata as set out under section 7 of the *Civil Procedure Act*, cap 21. It is argued that the issues in the application dated November 23, 2022 especially on whether stay of execution orders should issue were substantially addressed by the honourable Justice Okwany in the ruling dated March 17, 2022



and specifically granted by the same court *vide* a ruling dated July 15, 2021. The 1st respondent further contends that the court is functus officio with regard to the issue on whether to grant the orders of stay by virtue of the ruling dated July 15, 2021. The question then becomes, can such issue be deemed to make up a competent preliminary objection?

11. This court has occasionally considered and upheld the position that a preliminary objection consists a pure 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 a suit. To discern such “pure point of law” the court has to be satisfied that there is no proper context as to the facts since a preliminary objection cannot be raised if any of the facts has to be ascertained.
12. In the present case, the facts leading to the filing of the instant application are agreed. It is not disputed that judgment was entered by the trial court against the appellants under which the present appeal lies. It is also not in dispute that the appellants had filed a previous application dated October 28, 2020 under which they were allowed orders of stay *vide* a ruling dated July 15, 2021. What is in dispute is whether the conditional orders for stay having allegedly lapsed, the appellants can subsequently seek orders for stay of execution *vide* the application dated November 23, 2022. In this court’s view, these are pure questions of law that properly belong in the province of preliminary objection. They have the potential of determining or affecting the consideration of the prayers sought in the application dated November 23, 2022.
13. Section 7 of the [Civil Procedure Act](#), cap 21 provides 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”.
14. From the plain reading of section 7 above, the bar of res-judicata can effectively be raised and upheld if the applicant proves the following elements:-
 - a. The suit or issue raised was substantially in issue in the former suit.
 - b. That the former suit was between the same party or parties under whom they or any of them claim.
 - c. That those parties were litigating under the same title.
 - d. That’s the issue in question was heard and finally determined in the former suit.
 - e. That the court which heard and determined the issue was competent to try the suit in which the issue was raised.
15. Section 7 has further explanations on the application of the above named requirements, and the main objective of the doctrine of res-judicata as can be seen from those explanations is to have issues in a suit litigated with finality.
16. As earlier stated, it is not in dispute that the appellants/applicants had through the application dated October 28, 2020 sought orders for stay of execution of the lower court judgment pending the determination of the appeal. The orders were allowed by this court differently constituted (Hon Justice Okwany) in a ruling dated July 15, 2021. That court was competent to hear the application and granted the conditional orders for stay as it did. The orders eventually lapsed after 30 days of the order for non-



compliance with the conditions attached thereto and a year later, the plaintiff filed the application at hand seeking similar orders for stay of execution. To that end, this court is persuaded that the issue on whether the applicants should be granted orders for stay of execution with respect to the trial court's judgment dated August 21, 2020 squarely fits the criteria for res-judicata. The same was heard and determined by this court *vide* the ruling dated July 15, 2021 and cannot be re-opened at this stage.

17. This court has also considered the other prayers sought in the application and established that they are all premised on the success of the orders for stay of execution. This court having declined the prayer for orders of stay of execution for the reason of being res-judicata, it then follows that all the other prayers should suffer the same fate.

18. In the premises and for the above reasons, this court finds and holds that the application dated November 23, 2022 as lacking in merit. Consequently, same is dismissed with costs to the 1st respondent.

It is so ordered.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 17TH DAY OF MARCH, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Mukalla counsel for Appellants/Applicants

Mr. Meme counsel for the 1st Respondent

Court Assistant – Mwenda/Sakina

