



Njeru v Kaburu (Suing as the legal representative of the Estate of the late Alfred Murithi Rufus (Deceased)) (Civil Appeal E001 of 2020) [2023] KEHC 18665 (KLR) (20 March 2023) (Ruling)

Neutral citation: [2023] KEHC 18665 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT CHUKA
CIVIL APPEAL E001 OF 2020
MS SHARIFF, J
MARCH 20, 2023**

BETWEEN

ANITA KAARI NJERU APPELLANT

AND

STELLA KABURU RESPONDENT

**SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF THE LATE
ALFRED MURITHI RUFUS (DECEASED)**

(Being an Appeal from the Ruling of the Learned Trial Magistrate Hon. J. M. Njoroge in Chuka Chief Magistrate's Court Civil Case No 87 of 2019 delivered on 23rd September 2020)

RULING

A. Case Background

1. The Appellant herein was aggrieved by the Judgement of the Chief Magistrate made on September 23, 2020 in Chuka CMCC No 87 of 2019; Stella Kaburu vs Anita Kaari Njeru and filed the Appeal herein which was heard and dismissed on July 27, 2022 for being incompetent.
2. Subsequent thereto the Appellant filed two cases before the Chief Magistrate's court Chuka being CMCC No E166 of 2022; Anita Kaari Njeru vs CIC Insurance Ltd & Stella Kaburu and CMCC No E202 of 2022; Anita Kaaru Njeru vs CIC General Insurance Ltd and she sought stay of execution orders in both cases and got the stay orders ex parte in the first instance.
3. Upon obtaining the first stay of execution order in CMCC No E 166 of 2022 the Appellant issued 3 cheques postdated the October 20, 2022 for Kshs 990,000, the November 20, 2022 for Kshs 600,000 and one dated December 20, 2022 for Kshs 602,345 respectively.
4. On 5th October 2022 Hon Herbert Inonda Mwenda declined to extend the stay orders that were initially issued by Hon Njoki Kahara on September 8, 2022.



5. On October 17, 2022 the Appellant filed Chuka CMCC No E202 of 2022 and on October 18, 2022 she wrote to the Respondent's Advocates instructing them not to bank the postdated cheques on grounds that loan facility that she had intended to use to settle the decretal sum had been declined by her bank.
6. On the same day she revisited the original suit; CMCC No 87 of 2019 and applied for stay of execution of the judgement and yet again Hon. Njoki. Kahara granted her stay orders ex parte.

B. Application

7. It is the aforesaid events that precipitated the filing by the Respondent of this application dated 27th October 2022 which is premised on the provisions of article 47(1), 3 a, b and article 48 of *the Constitution*, sections 3 and 3A and 7 of the *Civil Procedure Act*, order 45, rule 2 and 51 of the *Civil Procedure Rule* 2010 and is supported by the affidavit of the Respondent.
8. The Appellant has resisted the application vide an affidavit in reply sworn on 1st November 2022 wherein she deposes that the Respondent herein ought to have filed an appeal against the stay orders issued by Hon. Njoki. Kahara and not otherwise

C. Submissions

9. Whereas parties were directed to file written submissions, the only submissions filed are by the Respondent.
10. The Respondent craves that this court do lift, review, vary and set aside the orders issued on 19th October 2022 by Hon Njoki Kahara which orders stayed the execution of the judgement of the trial court.
11. The Respondent moves this court to declare that the issue of stay of execution is res judicata.
12. The Respondent also faults the representation of the Appellant herein by the firm of Evans Mutegi Mugambi as being without leave of court hence irregular.

D. Analysis and Determination

13. The issues for determination are as follows;
 - i. Whether the firm of Messrs Mutegi Mugambi & Company Advocates are properly on record for the appellant.
 - ii. Whether the applications for stay of execution filed in the subordinate courts are res judicata.
 - iii. Whether this court has jurisdiction to review and vacate the stay orders made by the trial court subsequent to the dismissal of the appeal herein.
14. The Appellant herein was at all material times in the subordinate court and in this appeal represented by the firm of Messrs Basilio Gitonga, Muriithi & Associates however the affidavit in reply to this application is drawn and filed by the firm of Messrs Mutegi Mugambi & Company Advocates who have not sought leave of this court to come on record for the appellant pursuant to the provisions of order 9 rule 10 of the *Civil Procedure Act*. No consent has either been obtained from the firm of Messrs Basilio Gitonga, Muriithi & Associates to allow a change of advocates by the Appellant. I therefore find that the firm of Messr Mutegi Mugambi & Associates are not properly on record for the Appellant and the affidavit of reply sworn by the appellant on the 1st day of November 2022, drawn by the said



law firm is thus equally improperly and irregularly filed and I therefore strike it out and expunge it from the court record.

15. Given that appellant had enjoyed stay of execution orders in this appeal and the same lapsed with the dismissal of her appeal herein she cannot revisit the same application for stay in the original suit and her two other subsequent suits filed in the subordinate court. The issue of stay of execution of the judgement in the original suit was duly canvassed and determined as between the Appellant and the Respondent by this court and the same is thus res judicata.
16. Any litigation must come to an end. Section 7 of the Civil Procedure Act, 2010 provides as hereunder:
- “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.”
17. It is trite that the doctrine of res judicata applies to both suits and applications as was held in *Abok James Odera vs. John Patrick Machira* Civil Application No. Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of res judicata there must be:
- (i) a previous suit in which the matter was in issue;
 - (ii) the parties were the same or litigating under the same title;
 - (iii) a competent court heard the matter in issue;
 - (iv) the issue had been raised once again in a fresh suit.
18. The rationale of the doctrine of res judicata was elucidated in the Court of Appeal case of Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others (2017) eKLR where the court rendered itself as hereunder:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra 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 common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, 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 foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

1. In the Maina Kiai case (supra), the Court quoted with approval the Indian Supreme Court in the case of *Lal Chand vs. Radha Kishan*, AIR 1977 SC 789 where it was stated;

“The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The



practical effect of the res judicata doctrine is that it is a complete stoppage against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the court itself that is debarred by a jurisdictional injunction, from entertaining such suit.”

2. In *Lotta vs. Tanaki* [2003] 2 EA 556 it was held as follows:

“The doctrine of res judicata is provided for in order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit.”

19. The appellant’s available avenue was to lodge an appeal against the ruling of this court to the Court of Appeal but she opted to go back to the trial court and the subordinate courts. Indeed, the Respondent is entitled to be accorded a fair hearing as envisaged under article 50(1) of *the Constitution* of Kenya 2010 and this court will at all times guarantee and guard an individual’s constitutional rights.
20. In the advent of dismissal of this appeal, the subsequent applications for stay of executions made by the appellant in Chuka CMCC Nos E166 OF 2022 and E202 of 2022 epitomize gross abuse of court process which ought not be countenance by any court of law. The conduct of Hon. Njoki Kahara in purporting to exercise an alien jurisdiction over a matter that had already been adjudicated upon by this court on appeal, is unethical, unprecedented, deplorable and ultra vires the appellate jurisdiction of this court and that of the Court of Appeal.
21. Premised upon the matters aforesaid and in order to safeguard the rule of law and promote fair administration of justice and to accord the Respondent a fair hearing, I do hereby exercise my powers under articles 23(1)(3) and 165(6) and (7) of *the Constitution* of Kenya 2010 and I do hereby vacate the orders made on 18th October 2022 and issued on 19th October 2022 by Hon Njoki Kahara in Chuka CMCC No 87 of 2019; *Stella Kaburu vs Anita Kaari Njeru*.
22. The costs of this application shall be borne by the Appellant.
23. This ruling be served upon Hon. Njoki Kahara.
24. It is hereby so ordered.

DATED, SIGNED AND DELIVERED AT CHUKA THIS 20TH DAY OF MARCH 2023

MWANAISHA S. SHARIFF

JUDGE

