



**Waigwa v Insurance Regulatory Authority & another; Ngatia (Interested Party)
(Petition 7 of 2019) [2023] KEHC 2159 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 2159 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
PETITION 7 OF 2019
FN MUCHEMI, J
MARCH 23, 2023**

BETWEEN

MWAI WAIGWA APPLICANT

AND

INSURANCE REGULATORY AUTHORITY 1ST RESPONDENT

ATTORNEY GENERAL 2ND RESPONDENT

AND

PETER GITHAIGA NGATIA INTERESTED PARTY

RULING

Brief facts

1. The applicant filed an application dated 2nd August 2022 and later filed an Amended one dated 9th December 2022. The applications are brought under Section 1, 1A, 3 and 3A of the *Civil Procedure Act* and Section 10(2) and 203 of the *Insurance Act* and seek for orders to set aside the warrants of arrest on grounds that they are unconstitutional.
2. The Interested party filed a replying affidavit sworn on 18th August 2022 in opposition to the application.

Applicant's Case

3. The applicant deposes that at the time the Notice to Show Cause came up for hearing, he sent his advocates to court to represent him for he was held up in a meeting in Nairobi and therefore, he did not ignore the court summons deliberately. He further avers that he later learnt that his request was declined by the court which proceeded to issue against him warrants of arrest. He therefore urges the court to allow him ventilate his case on the merits and set aside the warrants of arrest.



The applicant further argues that the proceedings arise from an insurance matter under which he is protected. Moreover, he states that civil jail is outlawed internationally for civil matters and prays for the intervention by this court.

The Interested Party's Case

4. The interested party, through his advocate states that the application is a non-starter as it is not seeking any substantive orders. The interested party states that judgment was delivered on 24/6/2021 whereby the applicant's case was dismissed with costs. The costs were taxed and awarded against the applicant at Kshs. 178,400/-. The interested party further states that on 26/1/2022, the matter came up for notice to show cause why the judgment debtor should not be committed to civil jail but the judgment debtor did not personally attend court and sent his advocate instead. As such, warrants of arrest were issued against him.
5. The interested party states that on 31/1/2022, the applicant filed an application seeking stay of execution and setting aside of the warrants of arrest issued on 26/1/2022, which application was dismissed with costs on 6/4/2022. As such, the interested party argues that the issues being raised in the instant application are *res judicata*. Moreover, the interested party states that the applicant has not lodged an appeal against the said ruling.
6. The interested party avers that the only thing that is outstanding is the execution of the warrants of arrest. The interested party further states that the execution of the decree by way of arrest and committal to civil jail is both constitutional and lawful, as the court has already found that the applicant is personally liable to pay the decretal amount.
7. Parties disposed of the application by way of written submissions.

The Applicant's Submissions

8. The applicant submits that he was duly insured by M/s United Insurance which is under statutory management till today. The applicant thus argues that the liability to settle third party claims falls within the purview of the insurance company by operation of the law. As such, the applicant contends that the notice to show cause proceedings are a nullity. The applicant supports his submissions by citing the case of *Kensilver Express Ltd & 3 Others v Commissioner of Insurance & 3 Others* [2007] eKLR.

The Interested Party's Submissions

9. The interested party submits that the issues raised in the instant application are *res judicata*. He states that the prayers for stay of execution and setting aside of the warrants of arrest in the current application are similar to those in the application dated 31/1/2022. Further, the prayer for an injunction against execution by way of committal to civil jail was the main prayer in the petition which was dismissed by this court. The interested party further submits that the parties involved in the petition and the two applications are the same. Moreover, the interested party contends that the applicant has not appealed against the findings of the court. As such, the interested party argues that the issues of stay of execution and the constitutionality of execution by arrest and committal to civil jail are *res judicata*.
10. The interested party submits that the decree is a money decree and the applicant has not made any allegations that if the sum of Kshs. 178,400/- is paid, it would be difficult to recover the same from the interested party. Furthermore, the applicant has not offered any security for the performance of the decree and the applicant filed the application 8 months after the warrants of arrest were issued and offered no explanation for the inordinate delay. As such, the interested party contends that the applicant has not met the requirements for grant of stay of execution.



11. The interested party relies on Section 38 of the [Civil Procedure Act](#) and the case of [Hussein Marshallo Guracha v Marshallo Gurasha & Another](#) [2021] eKLR and submits that enforcing a decree by arrest and detention in prison is lawful and has not been declared unconstitutional by any courts.
12. The interested party argues that the matter is already concluded and the only thing remaining is the payment of costs. Moreover, there is no appeal and thus the instant application is an abuse of the court process and is intended on delaying the payment of costs.

The Law

Whether the issues raised are *res judicata*.

13. 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.

14. This principle was enunciated in the Court of Appeal in the case of [The Independent Electoral and Boundaries Commission v 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.
15. 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 and 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.

16. It is important to note 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.
17. The interested party argues that the prayers for stay of execution and setting aside the warrants of arrest in the instant application are similar to those in the application dated 31/1/2022. The application dated 31st January seeks similar orders as the ones sought in this application, being stay of execution and setting aside of the warrants of arrest issued on 26/1/2022. The court on 6th April 2022 determined the application and dismissed it with costs. Thus it is evident that the issues raised in the application dated 31/1/2022 are similar to those raised in the current application. Furthermore, the issues have been determined by a court of competent jurisdiction and the parties in both the applications are the same. It is therefore my considered view that the issues raised in the instant application are *res judicata*. Moreover, the applicant raised the issue of the constitutionality of executing the decree by way of arrest and committal to civil jail. This issue was already addressed by this court when it rendered its judgment on 24th June 2021.
18. The applicant further seeks for orders to set aside the proceedings culminating in the issuance of the warrants of arrest. Evidently, the matter herein has already been concluded and judgment delivered on 24th June 2021. Notably, the applicant has not lodged any appeal against the judgment of this court nor has he lodged any appeal against the ruling of 6th April 2022. In this case, it is only the payment of costs that is pending to which the applicant is indebted to the Interested Party. The applicant is complaining about orders made by the Deputy Registrar on January 26, 2023. He has not approached this court by way of appeal as required but relies on ground of unconstitutionality of the orders made by the Deputy Registrar. In my view, this application is misconceived. The applicant ought to have filed a review application before the Deputy Registrar. There are no constitutional issues that have been raised in this application for this court to consider. In any event, the Deputy Registrar and this court have dealt with these issues of execution before and rendered their rulings.
19. It is my considered view that this application is *res judicata* and it is hereby struck out.
20. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 23RD DAY OF MARCH, 2023.

F. MUCHEMI

JUDGE

Ruling delivered through videolink this 23rd day of March, 2023

