**Muthome & another v Muumbi t/a Junic Logistics (Civil Appeal E132 of 2021) [2023] KEHC 18626 (KLR) (6 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18626 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT MOMBASA**

**CIVIL APPEAL E132 OF 2021**

**DKN MAGARE, J**

**JUNE 6, 2023**

**BETWEEN**

**PETER MULEI MUTHOME ..... 1ST APPELLANT**

**MUPEKI HAULIERS LIMITED ..... 2ND APPELLANT**

**AND**

**MATHI NICHOLAS MUUMBI T/A JUNIC LOGISTICS ..... RESPONDENT**

**RULING**

1. This application is for dismissal. he last time I made a ruling in the matter, I stated that I will be unable to know what constitutes success. This was because the Application filed by the Appellant was confusing and self-defeating that no reasonable court could grant the same. That time has come. The Appellant has once again filed another application seeking stay of execution. It is a replica of the first application for stay dated September 10, 2021.

2. I dismissed the application dated February 7, 2023 on February 28, 2023. This was because the court had already allowed the Application dated September 10, 2021 and there was nothing to review from the earlier Ruling delivered on January 20, 2023 by Justice the court, Justice Njoki Mwangi gave a conditional order stay of execution to the applicants. The Applicant herein was to deposit Security of Ksh 7,200,000/= within 60 days. The orders of stayed have since lapsed.

3. The application is opposed. the Respondent maintains that the application is *res judicata*. I have actually never dealt with a scenario where someone seeks stay for the sake of stay. this matter has already been heard and determined. There is nothing new determine. we are only awaiting the finalization of the process of Appeal

4. Section 7 of the *Civil Procedure Act* stipulates 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."

5. A court has no infinite time to decide the same dispute over and over again. A court cannot be called either by different suit or in another application, to decide the same till the satisfaction of the parties. when a party needs to know the decision of the court, they need to just read a decision that had been made earlier. in the case of *A N M v P M N* [2016] eKLR, the court stated as doth: -

> " In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of *Henderson Vs Henderson* (1843-60) ALL E.R.378, observed thus:
>
> > "...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

6. in the case of *Accredo AG & 3 others v Steffano Uccelli & another* [2019] eKLR. the court stated as doth: -

> " The doctrine of *res-judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See the Supreme Court's decision in the case of *Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & Another* [2016] eKLR.

7. The doctrine of *res judicata* was expounded nicely in the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR pronounced itself as follows: -

> " The rationale behind *res-judicata* is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. *Res-judicata* ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It

promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably."

8. The principles elements for res judicata are well settled. In the case of *Denise Granata v Invesco Assurance Co Ltd* [2022] eKLR, the court restated the elements as doth: -

> "...res-judicata in any given case is spelt out under section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission vs MainaKiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked, that is: -
>
> 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."

9. Courts have also determined that the foregoing elements apply in equal measure. I real don't need to repeat the same. the court has been forced to decide twice already. This is the third time we are dealing with stay of the same decree in the same court. this is other than the Appellant's right which he exercised rightfully in the Lower court.

10. In the circumstance I do no have jurisdiction to deal with stay of execution, that has already been dealt with. the court is functus office, in so far as the Application for stay in concerned.

11. In *ICEA Lion General Insurance Co Ltd v Julius Nyaga Chomba* [2020] eKLR the court, Justice C. MEOLI, pronounced herself as doth: -

> "Petitions Nos 3, 4 & 5 *Raila Odinga & Others vs IEBC & Others* [2013] eklr cited with approval an excerpt from an article by Daniel Malan Pretorius, in "The Origins of the functus officio Doctrine, with Specific Reference to its Application in Administrative Law," (2005) 122 SALJ 832:
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> > "The functus officio doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision-making powers may, as a general rule, exercise those powers only once in relation to the same matter.... The [principle] is that once such a decision has been given, it is (subject to any right of appeal to a superior body or functionary) final and conclusive. Such a decision cannot be revoked or varied by the decision-maker."

12. The court in the above case, also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that:

> "A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change

> of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court functus, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available."

13. Whereas the appeal is still available for hearing, the aspect of stay is done and dusted. The Applicant was proceeding as if execution is a bad thing. Though, unpleasant, it is a legal process, sanctioned by the court. In the circumstances, I dismiss the Application dated May 23, 2023 in limine.

**Costs**

14. Costs follow the event. The event in this case is the dismissal of the application. The Respondent is entitled to costs. No one should begrudge them.

15. Under section 27 of the *Civil Procedure Act*, I am entitled to indicate costs. No amount of costs are sufficient to deal with the nuisance of multiple applications. The costs ordered for this application and the one ordered on February 28, 2023 shall be paid on or before July 4, 2023, failing which execution should proceed for the costs.

**Conclusion**

16. The application dated May 23, 2023 lacks merit and is as such dismissed with costs of 20,000/= to the Respondent payable within 30 days from the date hereof, that is before March 30, 2023, failing which execution for the said amount of Ksh 20,000/= do issue. Interim orders are hereby vacated.

**DATED, ISSUED AND DELIVERED AT MOMBASA VIRTUALLY 6TH DAY OF JUNE THE YEAR OF OUR LORD TWO THOUSAND AND TWENTY-THREE.**

**KIZITO MAGARE**

**JUDGE**

**In the presence of;**

Matheka for the Applicant

Mr. Mokaya for the Respondent

Aziza - Court Assistant.