



**Mwangi & another v Mwaniki (Suing as the Legal Representatives  
of the Estate of Late Peterson Maina Mwaniki) (Civil Appeal  
E124 of 2022) [2023] KEHC 23563 (KLR) (4 October 2023) (Ruling)**

Neutral citation: [2023] KEHC 23563 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL APPEAL E124 OF 2022  
DO CHEPKWONY, J  
OCTOBER 4, 2023**

**BETWEEN**

**NJOROGE MWANGI ..... 1<sup>ST</sup> APPELLANT**

**PAUL NCHORE MOGENI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANDREW FRANCIS KARITI MWANIKI (SUING AS THE LEGAL  
REPRESENTATIVES OF THE ESTATE OF LATE PETERSON MAINA  
MWANIKI) ..... RESPONDENT**

**RULING**

1. What is before the court for determination are two applications, one being the Notice of Motion application dated January 18, 2023 (hereinafter “the first application”) which was filed by the Respondent herein seeking the following orders:-
  - a. Spent;
  - b. That the Honourable Court be pleased to issue an order to strike out the suit in its entirety for being res judicata;
  - c. That the Honourable Court be pleased to issue an order for stay of suit;
  - d. That costs for this suit be provided for.
2. The second application is the Notice of Motion dated April 19, 2023 and filed by the Appellants (hereinafter “the second application”) seeking the following orders:
  - a. Spent.



- b. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to stay the Warrants of Attachment dated 4<sup>th</sup> April, 2022 and the Intended sale of Motor Vehicle Registration Number KBS 206T Nissan UD Bus.
  - c. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to stay, lift and/ set aside the warrants of attachment dated 04<sup>th</sup> April, 2022 and the Notification of sale dated 18<sup>th</sup> April, 2023.
  - d. That pending the hearing and determination of this Application inter-parties, this Honourable Court be pleased to order and/or direct the Respondents to immediately and unconditionally discharge and/or release of the Defendants/ Applicants' detained/ attached property being Motor Vehicle Registration Number KBS 206T Nissan UD Bus.
  - e. That upon grant of prayer No. (5) above, this Honorable Court be pleased to order and/or direct the OCS, Thika Police Station to offer any police assistance required for enforcement of the Order.
  - f. That this Honourable Court be pleased to stay the Warrants of Attachment and Notification of Sale of the Appellants Motor Vehicle Registration Number KBS 206T Nissan UD Bus.
  - g. That this Application be served on the Respondents and heard inter parties on such date and time as this Honourable Court may direct.
3. The first application has raised an issue which touches on the competence of the suit and jurisdiction of this Court, so That if it succeeds, it will have the effect of disposing off the 2<sup>nd</sup> application.

### **The First Application**

4. The first Application is based on the Affidavit of Andrew Francis Kariti Mwaniki sworn on January 18, 2023 in which he set out the following grounds:
- a. That the Respondents/Appellants herein had filed a similar application with similar parties over the same subject matter being MISC Application No. E027 of 2022.
  - b. That MISC Application No. E027 of 2022 formed the basis on which Appeal would be admitted /disallowed by the Honourable Court as it was seeking leave to file the Appeal out of time.
  - c. That the Respondents/Appellants even having filed the said application were not keen to execute it and the same was dismissed for nonattendance and noncompliance of court orders.
  - d. That MISC Application No. E027 of 2022 was heard and ruled upon by hon Lady Justice Rachael Ngetich on 15<sup>th</sup> December, 2022.



- e. That the Respondents/Appellants went ahead to file this Appeal even after having filed a similar one which clearly shows That this Appeal was already res sub judice from the first instance.
5. The Application has been opposed through Replying Affidavit of Faith Ongwenyi sworn on March 18, 2023, wherein the Appellants aver That the Application is misconceived and bad in law. They hold That the Appeal is not resjudicata since there is no other appeal with the same parties.
6. The Appellants argue That they filed a Miscellaneous Application seeking leave to appeal out of time being MISC Application No. E027 of 2022. The Honourable Court considered this application and granted the Applicants interim stay on condition That they deposit the decretal sum in court. The Appellants contend That they complied with the stay orders and deposited the sum of Kshs.2,309,400.00 into the court.
7. The Appellants hold That they received a notice from court That Appeal being No.E124 of 2022 had been admitted by the court and directions issued on its disposal. It is their contention That the court ought to have closed the Miscellaneous Application file due to an oversight on the part of the court. The Appellants has urged That since the appeal has already been admitted cannot be res-judicata and therefore the application ought to be dismissed.
8. The Application was canvassed by way of written submissions whereby the Respondent filed the Submissions dated 29<sup>th</sup> May, 2023 and the Appellants filed theirs dated 21<sup>st</sup> June, 2023 which the court has considered.

### **Analysis and Determination**

9. Having read through and considered the pleadings and the submissions filed by all the parties, the court finds the main issue for consideration is whether the Appeal is res judicata.
10. The substantive law on res Judicata is found under section 7 of the [Civil Procedure Act](#) cap 21 which provides That:

“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.”
11. The issue of res judicata was also discussed by Kuloba J., in the case of *Njangu vs Wambugu and Another*, Nairobi HCCC No.2340 of 1991 (unreported), which held That:

“If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata...”

  - i. what issues were really determined in the previous Application;
  - ii. whether they are the same in the subsequent Application and were covered by the Decision.



- iii. whether the parties are the same or are litigating under the same Title and That the previous Application was determined by a court of competent jurisdiction.
12. To provide context in this matter, it is necessary for the background of the case to be set out so as to establish if the issue of res-judicata arises herein. In the trial court in Ruiru CMCC No.E023 of 2020, the trial court delivered a Judgment on 21<sup>st</sup> October, 2021, in favour of the Respondent in terms of Kshs. 50,000.00 for pain and suffering; Kshs.100,000.00 for loss of Expectation of Life; Kshs.1,872,000.00 for loss of Dependency and Kshs. 287,400.00 as Special Damages together with costs and interest of the suit.
13. On 17<sup>th</sup> February, 2022, the Appellants filed MISC Application No.E027 of 2022 seeking leave to file an appeal out of time and for stay of execution orders to issue. And on 21<sup>st</sup> February, 2022, the court held That there was no appeal on record and thus no stay of execution orders could issue. It then directed That the matter proceeds for interparties hearing.
14. On 7<sup>th</sup> March, 2022, the court in Ruiru SPMCC No.E23 of 2023 directed the Appellants to deposit into court a sum of Kshs.2,309,400.00 and upon such deposit being made there be a stay of execution of the decree.
15. The matter came up on 17<sup>th</sup> May, 2023 for interparties hearing of the application dated 17<sup>th</sup> February, 2022 and the court dismissed it due to non-attendance by the parties and or their advocates. The Appellants then filed an Application dated 30<sup>th</sup> June, 2022 seeking to reinstate the dismissed application and for stay of execution orders, but the same was also dismissed on 15<sup>th</sup> December, 2022.
16. On the other hand, in this present case being HCCA No.E124 of 2022, the appeal was admitted for hearing by the court on 2<sup>nd</sup> September, 2022 and directions duly issued. From a reading of both this Appeal file and MISC Application No.E027 of 2022 file, the issue of res judicata does not arise since in the Miscellaneous Application file, the Appellants were seeking leave to appeal out of time and in this Appeal file, the Appellant seeks to appeal against the decision.
17. The court notes That the Miscellaneous Application file was already closed after the court delivered a Ruling dated 15<sup>th</sup> December, 2022, wherein it declined to reinstate the Application and therefore the same is not pending. Further, the orders being sought in the two files are different. What is now pending is the determination of the Appeal which is an issue That has not been canvassed by parties and determined by any other court. Therefore, the Appeal herein does not qualify under the doctrine of res judicata and it then follows That the Notice of Motion application dated 18<sup>th</sup> January, 2023 lacks merits and the same is dismissed with costs to the Appellants.

### **The Second Application**

18. The second application which is dated 19<sup>th</sup> April, 2023 is supported by the Affidavit of Paul Nchore Mogeni sworn on 19<sup>th</sup> April, 2023 and is premised on the following grounds:-
- a. That Judgment was delivered on 29<sup>th</sup> September, 2021 in Ruiru CMCC No. E023 OF 2020 by the Honorable J.A Agonda in favor of the Plaintiff in the said suit for a total sum of Kshs. 1,685,400.00.
  - b. That being aggrieved with the said judgment the Appellants proceeded to file a Miscellaneous. Application dated 21<sup>st</sup> February, 2022 seeking to appeal out of time.



- c. That on 31<sup>st</sup> October, 2022 the Honorable court considered That application and proceeded to give orders for Stay of execution subject to the Respondents depositing the decretal sum in court, orders which were complied with.
  - d. That on 22<sup>nd</sup> September, 2022 Lady Justice Mary Kasango went ahead and admitted the Appeal being Civil Appeal No. El24 of 2022 in Kiambu High Court which is pending determination and has a date in court for 15<sup>th</sup> June, 2023.
  - e. That the 1<sup>st</sup> Respondent has proceeded to extract warrants of attachment dated 4<sup>th</sup> April, 2023.
  - f. That the 2<sup>nd</sup> Respondent herein, Chador Auctioneers has proceeded to attach and detain the Appellants Motor Vehicle Registration Number KBS 206T notwithstanding That the Appellants herein have complied with the stay conditions and deposited in this Honourable Court a sum of Kshs. 2,309,400.00.
  - g. That the. Appellants continue to suffer substantial and irreparable loss as the attached motor vehicle is a public service vehicle which he entirely relies on 2023.
  - h. That the continued detention of Motor Vehicle Registration Number KBS 206T Nissan UD Bus is occasioning the Appellants severe financial loss.
  - i. That the Appellants Motor Vehicle is a public service motor vehicle That carries out business in order to assist the Applicants in their day to day activities and plays a major role in the livelihood of the Appellants.
  - j. That the release of Motor Vehicle Registration Number KBS 206T Nissan UD Bus will not occasion any prejudice to the Respondent as the Appellant has already deposited a sum of Ksh. 2,309,400.00 in court which is the decretal amount.
  - k. That the Applicants herein suffer double jeopardy having parted with two securities tor the same cause of action in giving a court deposit and continued detention of Motor Vehicle Registration Number KBS 206T Nissan UD Bus by Chador Auctioneers.
  - l. That the Appellants stand to continue to suffer substantial loss for continued detention of Motor Vehicle Registration Number KBS 206T.
  - m. That it is in the interest of justice That the orders herein be granted as prayed.
19. The Respondent filed Replying Affidavit sworn on 4<sup>th</sup> May, 2023 opposing the application on the basis That the Appellants have not deposited security in this Appeal and therefore they cannot claim double jeopardy in the matter. The Respondent holds That the deposit was made in compliance with Misc. Application No.E027 of 2022 case and not in this appeal .
20. It is the Respondent’s contention That the Appellants have not given any tangible ground on why the subject motor vehicle should not be sold by way of public auction . He further adds That the decretal sum in the trial court was Kshs. 2,309,400.00 and not Kshs. 1,685,400.00. The Respondent holds That the Appellants had not complied with the court’s directions given on 7<sup>th</sup> March, 2022 on depositing



security in court by the time their application was dismissed for non-attendance and only deposited it on 18<sup>th</sup> May, 2022. The Respondent therefore urges the court to dismiss the application as it is a means of delaying him enjoyment of the fruits of a Judgment he obtained on behalf of his deceased brother who died in the road accident culminating to the suit.

21. This Court has considered the position of the parties in the matter and notes That in the Miscellaneous Application file, the court had directed the Appellants to deposit security which was done in 18<sup>th</sup> May, 2022. And from the record, although the Application in the Miscellaneous Application file was dismissed, there is no evidence to confirm whether the security which had been deposited had been discharged or not. Therefore, as it stands this court agrees with the Appellants That having already deposited the decretal sum as security for the due performance of the Appeal and since its Motor Vehicle has been repossessed by Chador Auctioneers in preparation of its sale, it will suffer double jeopardy.
22. Therefore, in this court's considered view, although it ought to consider the rights of the successful litigant who should not be kept away from its Judgment, it is also its duty to ensure That the rights of the other party are not infringed or compromised. The Appellants herein have urged the court, and which has not been rebutted, That the Subject Motor Vehicle has been repossessed which action has caused them substantial loss since the same is a Public Service Motor Vehicle That carries out business . for this reason, the court finds That the release of the said motor vehicle will not cause any prejudice upon the Respondent since the decretal amount had already been deposited in court as security. In the circumstances, the Notice of Motion dated 19<sup>th</sup> April, 2023 is hereby allowed with the following orders issuing That:-
  - a. There shall be a stay of the Warrants of Attachment dated 4<sup>th</sup> April, 2022 and the intended sale of Motor Vehicle Registration Number KBS 206T Nissan UD Bus.
  - b. The court hereby directs the Respondent, either by himself or agents, particularly Chador Auctioneers to unconditionally discharge and release of the Defendants/Applicant's Motor Vehicle Registration Number KBS 206T Nissan UD Bus.
  - c. The OCS Thika Police Station are hereby directed to provide police assistance for enforcement of the court orders.
  - d. The Appeal having been admitted by the Court, the Appellants are granted 30 days leave to file and serve their Submissions and in response thereto, the Respondent are equally granted 30 days corresponding leave to file and serve their submissions.
  - e. Mention on 4<sup>th</sup> November, 2023 for the parties to confirm compliance of the said orders.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 4<sup>TH</sup> DAY OF OCTOBER, 2023.**

**D.O CHEPKWONY**

**JUDGE**

**In the presence of:**



M/S Terer for the Appellantd

M/S Wanjiru Mwangi counsel for Respondent

Court Assistant – Martin

