PN Mashiru Limited v Sina & another (Suing as the Administrator of the Estate of Catherine Mueni)Sina (Deceased) (Civil Appeal E058 of 2021) [2024] KEHC 12783 (KLR) (23 October 2024) (Ruling)

Neutral citation: [2024] KEHC 12783 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT ELDORET

CIVIL APPEAL E058 OF 2021

E OMINDE, J

OCTOBER 23, 2024

BETWEEN

PN MASHIRU LIMITED ..... APPLICANT

AND

STEPHEN WAMBUA SINA ..... 1ST RESPONDENT

PASCHAL MUTWETUMO KYULE ..... 2ND RESPONDENT

SUING AS THE ADMINISTRATOR OF THE ESTATE OF CATHERINE MUENI)SINA (DECEASED

RULING

1. The application before this Court is the Notice of Motion application dated 22nd February 2024 brought pursuant to provisions of Section 1A, 1B, 3A of the *Civil Procedure Act*, Order 22, Order 51 Rule 1 of the Civil Procedure Rules, and all other enabling provision of law. The Applicants seek the following orders:

    1. Spent.

    2. That the sum of Kshs.2,693,502/= paid to the firm of M/s A.N. Oreri & Co. Advocates (being ½ decretal sum) be forthwith paid and/or released to our clients APA Insurance Limited and/or be deposited in a joint interest earning account.

2. The application is premised on the grounds on the face of it and is further supported by the Affidavit of the Applicant's Counsel, Dennis Onyimbo Onyikwa sworn on even date.

3. Counsel in the said Affidavit deposes that the Respondent filed a suit in the lower Court vide Eldoret CMCC No.1189 Of 2019 where judgement was delivered on 21st May 2021 and that being aggrieved by the said judgement, the Applicant herein preferred an appeal to the High Court.

4. That by application dated 14th June 2021 the applicant sought for orders of stay of execution of the judgement pending the hearing and determination of the appeal filed at the High Court.

5. That on the 17th September 2021 via email, the Subordinate Court delivered its Ruling dated 14th June 2021 on the application for stay in Eldoret CMCC No. 1189 of 2019. In the said Ruling, the Applicant/Appellant was directed to deposit half the decretal amount in the names of M/s A.N. Oreri & Co. Advocates as a pre-condition for stay of execution pending hearing and determination of the appeal.

6. That the Applicant complied with the orders as directed and paid the Respondent Kshs.2, 693,502/- being half of the decretal sum and the other half amounting to Kshs.2,693,502/= was deposited in a joint interest earning account in the names of the two counsel on record as appearing for the parties.

7. Counsel deposes that subsequently; judgement was rendered on their appeal to the High Court. Being aggrieved by the decision of the High Court, the Respondents herein preferred an appeal to the Court of Appeal.

8. The Applicants on their part file an application dated 7th June 2023 seeking an order for release of the money that was deposited in the joint interest earning account pending the appeal to the High Court seeing as there were no stay orders in force.

9. That on 13th December 2023 when the matter came up for mention to confirm filling of submissions to the application dated 7th June 2023, Hon Mr. Justice John Wananda ruled that the Kshs.2, 693,502/- that was deposited in the joint interest earning account continues to operate as security pending the hearing and determination of the appeal filed in the Court of Appeal.

10. That in the meantime, the Respondents were also still holding the other half of the decretal sum being Kshs.2,693,502/- paid to their advocate M/s A.N. Oreri & Co. Advocates

11. The applicant deposes that ideally the Respondents should have provided fresh security pending the hearing and determination of their own appeal filed at the Court of Appeal and that the Respondents should not continue to retain the Kshs.2, 693,502/- and yet the other half that was deposited in the joint account already operates as security pending the hearing and determination of the appeal at the Court of Appeal.

12. That the Respondent's financial status is unknown and that they are unlikely to refund the half decretal sum paid to them in the event their appeal is not successful and/or at all and the Appellant is therefore desirous that the Kshs.2,693,502/- plus the interest accrued thereon be refunded to them.

13. That no prejudice will be occasioned to the Respondents if the said amount is refunded. That this application has been brought in good time, without delay and in best interest of justice.

The Response

14. The application is opposed by the Respondents vide a Preliminary Objection dated 2nd April 2024 and a Replying Affidavit sworn by Stephen Wambua Sina on the same day.

15. The Respondent's Preliminary Objection is premised on the following grounds:

    1. That this Honourable Court lacks proper jurisdiction to hear and determine the Application dated 22nd February 2024 as the same is res judicata

    2. That the Applicant does not have the locus standi to litigate in the piecemeal.

3. The orders sought are incapable of being granted.

4. The Application is an abuse of the Court Process.

16. The long and short of the Replying Affidavit is that the Court directed that half of the decretal sum to be paid to the Respondent and not M/s A. N. Oreri & Co. Advocates. That in this regard, the money was released to Advocate who in turn released the same to the family of the deponent for the upkeep and maintenance of the minor who was left an orphan.

17. That the net effect is that the money released to them was expended on the child in terms of school fees and other related expenses like food, shelter and general upkeep. That it is therefore not true that the monies are lying in their Advocates account.

18. That they proceeded to expend the money in this manner because the Ruling delivered in the Chief Magistrate's Court on 17th September 2021 were categorical that the monies should be released to the family for purposes of the child's maintenance which mandate, they have since executed.

19. The deponent further maintained that they have incurred a lot of money towards the upkeep of the minor which has exceeded what was released to them as per the orders of the Court the same having been spent they are not in a position to refund the same but should the Court of Appeal not find in their favour, they will hold a fund raising to refund the money despite losing the deceased in the Appellant's motor vehicle

20. He deposed in response to paragraph 13 of the Appellant/Applicant's Supporting Affidavit, that the deceased never left any property behind and neither do they have any salary to deposit in Court because he is retired.

21. That however, they are certain that their appeal will be allowed and the balance of the decretal sum released for the benefit of the minor and so the minor rights as a child cannot be compromised simply because he has no salary to deposit in Court pending the hearing of the Appeal.

Submissions

22. The application was canvassed vide written submissions. Pursuant to this Court's direction both parties filed their respective submissions.

The Respondent's Submissions on the Preliminary Objection and Application

23. The gist of the submissions by Counsel for the Respondent based on their Preliminary Objection is that the application by the applicant that the money deposited in a joint interest earning account in the name of the two Counsel is res judicata for reason that it was the subject of the application dated 7th June 2023 which this Court determined on 13th December 2023.

24. That in that decision, the Court directed that the monies continue to be held in the joint account to operate as security pending the hearing and determination of the appeal lodged by the Respondent and pending hearing before the Court of Appeal.

25. Counsel premised his submission on Section 7 of the *Civil Procedure Act* and also relied on the case of Independent Electoral & Boundaries Commission v Maina Kia & 5 Others [2017] eKLR where this Doctrine was expounded by the Court of Appeal.

26. With regard to the issue of the other half decretal sum that the Court directed be deposited in the account of the Advocate for the Respondents, Counsel submitted that this matter ought to have been raised by the Appellant in the application dated 7th June 2023 but it was not.

27. Counsel submitted that the applicant is proceeding to prosecute his application piecemeal and/or in instalments which too amounts to res judicata as has been held by the Courts time and again. To buttress this position, Counsel cited inter alia the following cases;

    i. Henderson Vs. Henderson (1843-60) ALL ER 378

    ii. Mburu Kinyua v Gachini Tuti (1978) KLR 69;[1976-1980] 1 KLR 790

    iii. Churanji Lal & Co. v Bhaijee 919320 14KLR 28

    iv. Kennedy Mokua Ongiri [2022] eKLR

28. Counsel further submitted that in any case, it is not in dispute that an Appeal has been preferred to the Court of Appeal against the judgment and decree of this Honourable Court. That in these circumstances, the subject matter of the present appeal has left the jurisdiction of this Honourable Court and crystallized upon the jurisdiction of the Court of Appeal.

29. Counsel added that because this Court has already made a determination on both the previous Application and on the appeal from the Subordinate Court, it is now functus officio in so far as the subject matter of the Appeal before the Court of Appeal is concerned.

30. Counsel therefore submitted that the right recourse available to the Applicant in seeking to revisit the issue of the money deposited in the account of the Advocate was to either amend its pleadings and include the issue of the decretal sum paid directly to the Respondent for determination in the Court of Appeal, or seek the setting aside and/or review and/or variation of the order issued by this Honourable Court 13/12/2023 upon the principles set in law, rather than waste precious judicial time litigating the present proceedings in piece-meal.

Applicant's Submissions to the Preliminary Objection and Application

31. Counsel for the Applicant in response to the Preliminary objection that their application is res judicata in light of their application dated 7th June 2023 submitted that the issue of the money deposited in a joint interest earning account and the money deposited in the Account of the advocate representing the Respondents are two separate and distinct issues and the Doctrine of res judicata is therefore not applicable.

32. Counsel submitted that in this instant application, the Applicant seeks to have the other half of the decretal sum that was paid to the Respondents' advocate refunded to the Applicant and that this was not an issue at all in the application dated 7th June 2023

33. That the Respondent should not retain one half of the decretal sum yet the other half of the decretal sum continues to operate as security pending the determination of the Respondent's appeal at the Court of Appeal which appeal was necessitated by the fact that Applicant's appeal before the High Court succeeded entirely and so to continue holding the Applicant's money as security for an appeal filed by the Respondent's is to punish the Applicant.

34. Counsel submitted that since it is clear that the Applicant herein was the successful party before the High Court, then the money paid to the Plaintiff through their Advocates ought to be refunded back to the Applicant or in very least the same be deposited in the joint interest earning account in light of the fact that it is a fundamental factor to bear in mind that a successful party is prima facie entitled to the fruits of his judgement.

35. Counsel for the Applicant therefore submits that it is deserving of the orders sought for the reasons given notwithstanding the fact that the Respondent has deposed that the money released to them was used in maintenance of the deceased's child in terms of school fees/related expenses, food, shelter and general upkeep because no evidence has been tendered to support this assertion or even how the money was spent.

36. Counsel submitted that because the Applicant herein is the successful party he should be refunded to the money that was paid to the Respondent: so as to return the Applicant to the position he was in before the suit.

37. Counsel further submitted that in light of the admission by the Respondents that they have spent the money, it goes without saying that the Respondents are not people of means hence the intervention of the Court is needed to secure the interest of the Applicant herein because the overriding objective of the Court is to ensure the execution of one party's right should not defeat or derogate the right of the other as was held in the case of *Samvir Trustee Limited vs Guardian Bank Limited Nairobi(Milimani) HCCA 795 of 1997*.

38. Counsel maintained that unless the orders sought are granted Court, the Applicant herein will suffer substantial loss. Counsel added that it is the Court's duty to balance the interest of the Applicant herein to preserve the status quo as it was before the appeal was initiated and the Court cannot shut its eyes where it is clear that there is a possibility that the Respondent will be unable to refund the money back.

Issues for Determination

39. The main issues for determination are:

    a. Whether the Application dated 22nd February 2024 is res judicata

    b. Whether half of the decretal sum should be released to the Applicant

Analysis and Determination

Whether the Application dated 22nd February 2024 is Res Judicata

40. The substantive law on res judicata is to be found in Section 7 of the *Civil Procedure Act* Cap 21 which provides as follows;

> " No Court shall try any suit or issue in which the matter directly and substantially in issue is 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"

41. The three essentials of res judicata are

    a. The suit or issue was directly and substantially in issue in the former suit

    b. Former suit between same parties or parties under whom they or any of them claim.

    c. Those parties are litigating under the same title

    d. The issue was heard and finally determined.

    e. The Court was competent to try the subsequent suit in which the suit is raised."

(See Christopher v Salama Beach (2017) eKLR)

42. As already herein above mentioned, the rationale of the doctrine of res judicata, was stated by the Court of Appeal in the case of Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] eKLR to be as follows:

> " 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 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."

43. Having considered the application before the Court, It is very clear to my mind and I now hereby so find that the order on the provision of security by the applicant herein pending the hearing and determination of the appeal that they had filed to the High Court was a determination made by the Court arising out of a singular matter that was directly and substantially before the Court notwithstanding the order for the payment of the decretal sum into two separate accounts

44. In this regard, I entirely agree with Counsel for the Respondent in his submission that the Applicant should then have canvassed the issue of the release of the monies deposited in the Account of the Advocate for the Respondents in their application dated 7th June 2023 because contrary to the submission by Counsel for the Applicant, these two issues are not separate and distinct but are very intricately connected, intertwined and therefore inseparable.

45. It should be noted that Counsel for the Applicant did concede in his submissions that the issue the subject matter of the money deposited in a joint interest earning account in the name of both Advocates is res judicata in light of the decision of Justice herein referred to

46. Given this concession and in light of my finding above in respect to the instant Application seeking that the money deposited in the account of the Applicant's Advocates be released to the Applicant, I associate myself fully with the holding of the Court in these three cases cited by Counsel for the Respondent;

    v. Henderson Vs. Henderson (1843-60) ALL ER 378

    vi. Mburu Kinyua v Gachini Tuti (1978) KLR 69;[1976-1980] 1 KLR 790

    vii. Churanji Lal & Co. v Bhaijee 919320 14KLR 28

47. Of particular relevance to the issue at hand ae the finding of the Court in the case of Mburu Kinyua v Gachini Tuti (Supra). The Court inter alia stated as follows;

> " However caution must be taken to distinguish between discovery of new facts and fresh happenings.....The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or, which, upon the pleadings or the form of issue, was open in a former proceeding between the parties. The mere discovery of fresh evidence9as distinguished from the development of fresh circumstance) on matters

which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata…"

48. Even more relevant and significant is the holding in Hendred v Hendred (Supra) where the Court stated thus;

> " Where a given matter becomes the subject o0f 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 in 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 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 cases, not only to point upon which the court was actually required by the parties to form an opinion and pronounce judgement but to every point which properly belonged to the subject litigation and which parties exercising reasonable diligence, might have brought forward at the time"

49. In light of my observations as above summarised, I have no difficulty at all in finding that the application by the applicant is res judicata.

Whether half of the decretal sum should be released to the Applicant

50. My finding above on the first issue has effectively determined the entire application and as a consequence rendered this issue moot. Accordingly, I find that the application lacks merit and I dismiss the same in its entirety with costs to be borne by the applicant.

READ, DATED AND SIGNED AT ELDORET ON 23RD OCTOBER 2024

E. OMINDE

JUDGE