



REPUBLIC OF KENYA
IN THE ENVIRONMENTAL AND LAND COURT
AT MOMBASA

CIVIL SUIT NO. 11 OF 2017

SARLA DEVI

GORAVE AMARNATH

VAIBHAV AMARNATH (suing as Administratrix and administrators of the

Estate of the late **AMARNATH GUPTA**)...**PLAINTIFFS/RESPONDENTS**

- VERSUS -

OMAR SHARIF ALI.....**DEFENDANT/APPLICANT**

RULING

I. Introduction

1. The Defendant/Applicant's Notice of Motion application is dated 5th October 2021. It is brought under several provisions of law being Order 45 Rule 1, Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B & 3A of the Civil Procedure Act.

II. The Applicants' case

2. The Defendant/Applicant seeks the following orders:

a. Spent

b. Spent

c. That this Honourable court be pleased to review, vary and/or set aside orders (b) and (c) entered on 23rd September 2021 against the Defendant/Applicant.

d. That upon the grant of prayer 3 above, the Defendant/Applicant be allowed to deposit a Certificate of title deed to all that parcel of land known as Land reference Numbers L.R No. Kilifi/Kawala 'B'/31 as security for the decretal sum of Kshs 8,200,000/= and mesne profits at Kshs 150,000/= per month to the Plaintiffs/Respondents

e. That the cost of this application be in the cause.

3. The application is founded on the testimony, grounds and the averments based on the Supporting Affidavit of OMAR SHARRIF ALI and premised on the facts on the face of the said application. The Defendant/Applicant provided a brief background that led to the filing of the said application. He stated that on 17th March 2021 this court delivered Judgement against the Defendant/Applicant and in favour of the Plaintiff/Respondent. The Defendant/Applicant filed an application dated 19th May 2021 seeking for stay of execution of the said judgment and decree pending of the intended appeal. The application was heard and determined vide a ruling delivered on 23rd September 2021. Vide the said ruling, court ordered that the Defendant/Applicant to deposit a sum of Kenya Shillings Eight Million Two Hundred (Kshs. 8,200,000/=) as security for costs for consideration in the intended appeal. The amount was to be deposited in a joint account to be held by both the Advocates the Plaintiff/Respondent. the Defendant/Applicant within 30 days from date of the ruling. In addition, the Defendant/Applicant was ordered to pay mesne profits a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs 150,000/=) per month to the Plaintiffs/Respondents.

4. However, the Defendant/Applicant deponed that due to the tough economic times, his business got greatly affected and the 30 days were insufficient to comply with the said orders. For this reason, the Defendant/Applicant urged court to allow him to deposit the original Certificate of title deed to all that parcel of land known as L.R No. Kilifi/Kawala 'B'/31 as security. He stated that, currently the said property was valued at a sum of Kenya Shillings Fifty Three Million (Kshs. 53,000,000/=) lest he suffered irreparable loss by the execution of the Judgement and the decree by the Plaintiff/Respondent thereof.

III. The Respondent's case

5. The Plaintiffs/Respondents opposed the application by filing a Notice of Preliminary Objection and a Replying Affidavit filed on 15th October 2021. They raised objections on issues of law being breach of the principles of *Sub – Judice and Res judicata* holding that the Defendant/Applicant had raised issues similar to those in the application dated 19th May 2021. The Learned Counsel submitted that the application had failed to demonstrate the threshold set down in Order 45 of the Civil Procedure Rules that would warrant a review of the said orders. The Plaintiff/Respondents urged court to dismiss the application with costs.

6. Nonetheless, the Plaintiffs/Respondents adduced evidence in support of their opposition to the application vide a Replying Affidavit affirmed by GORAVE AMARNATH dated 15th October 2021. The deponent claimed that the Defendant/Applicant was out to keep him out of enjoying the fruits of his judgement by creating delaying tactics. He termed the application as premature since no execution could proceed before taxation was finalized, which he urged court to stay until taxation of the Bill of costs is determined. The deponent castigated the Defendant/Applicant for abusing the court process, with the application yet he had indicated on oath, in the affidavit supporting his application for stay that he was in a position to give the security of costs.

IV. The Submissions

7. When the application came up for inter parties hearing on 19th October 2021, the Honorable court directed the application together with the Preliminary Objection be canvassed by way of written submissions.

V. The Submissions by the Defendant/Applicant

8. On 28th October, 2021, the Learned Counsel for the Defendant/Applicant the law firm of Messrs..... filed written submissions in support of the application. They submitted that the application was not and/or breach on the principles of "*Res Judicata*" as claimed by the Plaintiff/Respondents. On saying this, they held that the orders sought are yet to be heard and determined by court. To buttress on this point, they relied on the case of **The Estate of David Wanganga Gichuhi (2020) eKLR** where court ruled that the application was not res judicata as the issues brought before court were yet to be heard and determined on merit to its conclusion.

9. The Learned Counsel argued that the application had met the requirements needed by the provisions of Order 45 of the Civil Procedure Rules. They submitted that for court to grant an order of review there ought to be sufficient reasons to warrant the review sought and the application has been made without unreasonable delay. The Learned Counsel contended that the Defendant/Applicant had fulfilled all these fundamental requirements of law. The Learned Counsel further submitted that the Defendant/Applicant's transport business had been greatly affected by the global phenomenon on the Covid - 19 Pandemic. They stated that, as a result currently facing financial constraints.

10. They averred that the Defendant/Applicant was not in a position to comply with the court orders of depositing security and paying the mesne profits. Counsel contended that the applicant is the registered owner of L.R No. Kilifi/Kawala 'B'/31 as security, which is currently valued at Kenya Shillings Fifty Three Million (Kshs. 53,000,000/=) . But all in all, he was ready and willing to deposit the original Certificate of title deed in court as security to review, vary and/or substitute the orders from a ruling delivered on 23rd September 2021. The Learned Counsel argued that the value of the said property would cover the Plaintiff/Respondents' interest should the appeal be in their favour. He pleaded with court to allow the application lest the Defendant/Applicant suffered irreparable loss and financial embarrassment. He pleaded with court to consider that the application was filed on 6th October 2021 after the said ruling and orders were issued on 23rd September 2021, less than two weeks from then, so there was no delay whatsoever on the Defendant/Applicants part. The Learned Counsel urged court to allow the application since the Defendant/Applicant had met the criteria for review of orders.

VI. The Submission by the Plaintiff/Respondent

11. On 27th October 2021, the Learned Counsel for the Plaintiffs/Respondents, the law firm of Messrs. filed submissions to oppose the application. They submitted that the application upsets the provision of Section 7 of the Civil Procedure Act for being "*Res Judicata*". They submitted that the Defendant/Applicant had litigated on the issue of security before and is barred from raising it again since it has been closed and could not be re – opened again. The Learned Counsel relied on the case of **Gurbacham – Versus - Yowani Ekori (1958) EA** to submit that the Defendant/Applicant ought to have placed all material facts before the trial court for a final determination on security. The court in that case held thus:-

“...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 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.”

12. The Learned Counsel urged court to find that the Defendant/Applicant was res judicata and had also failed to meet the threshold set for an order of review set out in Order 45 of the Civil Procedure Rules. They submitted that the Defendant/Applicant was raising matters that were within his knowledge and further to that, being ordered to pay menses profits as decreed in the judgement was not an error or is giving land a security new matter of evidence. He relied on the case of **Republic – Versus - Advocates Disciplinary Tribunal Ex parte Appollo Mboya (2019) eKLR** where the court stated that **“review is impermissible without a glaring omission, evident mistake or similar**

ominous error. An error which has to be established by a long drawn process of reasoning on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record and reappraisal of the entire evidence or how the judge applied or interpreted the law would amount to exercise of appellate jurisdiction which is not permissible.”

13. The Learned Counsel argued that the Defendant/Applicant had not demonstrated ownership of the said parcel of land. In any case, they argued that he had not attached the Certificate of the title, a valuation report or even land survey report to show the status on the land parcel. The Learned Counsel maintained that the Defendant/Applicant was on a fishing expedition that should not stop the Plaintiff/Respondent from enjoying the fruits of his judgement. The Counsel contended that even if the court did not find the application as res judicata, the application still failed since the issues raised were for appeal and not review. He prayed for the application to be dismissed with costs.

ANALYSIS AND DETERMINATION.

14. I have carefully considered the application, the preliminary objection in review as well as the written submissions filed herein in relation to the application by the Defendant/Applicant dated 5th October, 2021.

Thus, in a nutshell, the salient issues before me for consideration are follows:-

- a. Whether the Defendant/Applicant had met the requirements set out in under the provision of Order 45 of the Civil Procedure Rules to warrant this court issue an order of review as well as considering;**
- b. Whether the Defendant/Applicant is res judicata as claimed by the Plaintiff/Respondents.**
- c. Whether the Defendant/Applicant is entitled to the orders sought?**
- d. Who will bear the costs of the application?**

ISSUE No. a). Whether the Defendant/Applicant had met them requirements set out in under the provision of Order 45 of the Civil Procedure Rules to warrant this court issue an order of review as well as considering.

The jurisdiction of the Court to review orders is provided as follow. Under the provision of Section 80 of the Civil Procedure Act which states:-

Any person who considers himself aggrieved—

- a. by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or**
- b. by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.**

Order 45 Rule 1 of the Civil Procedure Rules also states:-

(1) Any person considering himself aggrieved—

- a. by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or**
- b. by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.**

15. The Defendant/Applicant has pleaded with court to review the orders issued on 23rd September 2021 that ordered him to deposit into an interest earning account in a joint names of the advocates for both parties security in the sum of Kenya Shillings Eighty Two Million (Kshs 8,200,000/=) within 30 days from the date of delivery of the ruling as well as pay mesne profits at Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/=) per month to the respondents as decreed in the judgement. The ruling also directed that if the two conditions were defaulted the stay of execution would automatically lapse. Before the conditional stay of execution could lapse, the Defendant/Applicant rushed to court with this application to stay the conditional stay of execution. The Defendant/Applicant asked court to review, vary and substitute the said orders with the deposit of the original Certificate of title deed to Kilifi/Kawala ‘B’/31 as security for the decretal sum of Kshs 8,200,000/= and mesne profit at Kshs 150,000/= per month to the Plaintiffs/Respondents.

16. The Defendant/Applicant has based this application of review on “any other sufficient reason’. He claimed that he was willing to comply with the orders issued on 23rd September 2021. But due to the financial constrains he can only deposit a title deed as opposed to cash as directed. He argued that the said parcel was valued at Kshs 53,000,000/= that was enough to cover the orders issued therein. He claimed that the title was available for deposit to court as security pending the hearing and determination of the applicant’s intended appeal. Counsel for the Plaintiff/Respondent has dismissed the applicant, and claimed that the applicant has not attached a copy of the title of the said land, a valuation report or even survey report to confirm the status of the said land. Counsel argued court to dismiss the application for back of evidence on ownership of the said parcel and allow the Plaintiff/Respondents enjoy the fruits of their judgement.

ISSUE b). Whether the Defendant/Applicant is res judicata contrary to the provisions of Section 7 of the Civil procedure Act as claimed by the Plaintiff/Respondents.

17. Additionally, the issue raised by the Plaintiff/Respondent herein to the effect that there were in breach of the Provision of Section 7 – *Res Judicata* while instituting the application by the Defendant/Applicant. Section 7 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 or between parties under whom they or any of them claim, litigating under the same title, in court competent to try such subsequent suit or this suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court’.

18. From the above provisions of the law, for the doctrine of *Res Judicata* to be achievable, the following the ingredients must to be fulfilled:-

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

Expounding on the essence of the doctrine of *Res Judicata*, the court in *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 Judgements by reducing the possibility of inconsistency in Judgements 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*, very essence of the rule of law would be in danger of unravelling uncontrollably”

19. The Plaintiff/Respondents in opposition claims that the application seeks review of the stay orders is *res judicata*. The Counsel for the Plaintiff/Respondent has argued that the issue of security has been closed and cannot be reopened.

20. The Defendant/Applicant was therefore locked out from re-litigating on the same issues against the same opponent. On the other hand, the Defendant/Applicant has argued that the application was not *res judicata* as the issues brought before the court were yet to be heard and determined on merit.

21. I have perused the ruling that was delivered by this court on 23rd September 2021 as well as this present application that seeks review of the orders issued on 23rd September 2021. Indeed, applying this principles to the instant case, the court fails to appreciate this argument by the Plaintiff/Respondent at all. The Defendant/Applicant has not instituted a fresh suit away from this case. They have merely filed an application for review, varying or setting aside the orders of this court within the same cause. The issue of reviewing stay orders cannot be said to be “*res judicata*” because it is yet to be heard and determined on merit to its conclusion. This application ought to be determined on its merit which I proceed to do.

22. For this fundamental preposition, this court totally rejects that said objection by the Plaintiff/Respondent as it does not meet the requirement under the law – Section 7 of the Civil Procedure. I find the Notice of Preliminary Objection 15th October 2021 has no merit and is dismissed with no orders as to costs.

ISSUE c). Whether the Defendant/Applicant is entitled to the relief sought

23. The purpose of security for costs as provided by Order 42 Rule 6 of the Civil Procedure Rules is to guarantee the due performance of such decree or order as may ultimately be binding on the Defendant/Applicant. The Defendant/Applicant herein was ordered to deposit Kenya Shillings Eight Million Two Hundred Thousand (Kshs. 8,200,000/=) within 30 days from 23rd September, 2021 and pay the Plaintiff/Respondents mesne profits at a sum of Kenya Shillings One Hundred and Fifty Thousand (Kshs. 150,000/=), this was to act as security to the decree holder and not to punish the judgement debtor.

24. The alternative security proposed by the Defendant/Applicant presents several problems. Firstly, the Defendant/Applicant failed to attach the original or copy of the Certificate of title nor a certificate of official search to prove ownership or any due encumbrances, no valuation report to authenticate its value or even a survey’s report to confirm its status in terms of what is contained on it.

In the case of **Arun C Sharma – Versus - Ashana Raikundalia t/a A Raikundalia & Co Advocates & 2 others [2014 eKLR Gikonyo J**

stated “The judgement is like a debt hence the applicants become and are judgement-debtors in relation to the respondent. This is why any security given under Order 42 Rule 6 of the Civil Procedure Rules acts as security for the due performance of such decree of order as may ultimately be binding on the applicants. I presume, the security must be one which can serve that purpose. When one imagines, if it becomes necessary, the steps required to be taken for such security being offered to be realized by the decree holder, it becomes absolutely clear that mere affidavit by the owner does not convert the said property into any legally binding security for the due performance of such decree or order as may ultimately be binding on the applicant. I, therefore, hold that the security offered is not suitable for purpose of Order 42 Rule 6 of the CPR. The court should always remember that both the applicants and the respondents have rights. The applicant has a right to his appeal and the prospects that it shall not be reduced to pious aspiration or a barren results if they pay out the decretal sum to a person who may not make a refund. The respondent, on the other hand, has a right to the fruits of its judgment which should not be taken away; and where the right is postponed, it can only be upon adequate security for the due performance of such decree or order as may ultimately be binding on the applicant. There is no legally binding assignment for the proprietary rights in the proposed security which the court may consider adequate for secure the due performance of such decree or order as may ultimately be binding on the applicant.”

25. The Defendant/Applicant has based the application on his inability to raise the security as a result of the tough economic times caused by the global phenomenon of the Covid – 19 pandemic. I do find this argument rather unconvincing, unsatisfactory and deceiving. The application for stay was made on 19th May 2021 by which time, the said Covid - 19 Pandemic was still racking havoc in the country. This court is aware of the adverse impact that Covid - 19 has had on the financial prospects of any person. Indeed, current there are other related complications known as Variants, Omicron and so forth. This are not improving apart from the call for the strict adherence to the well publicized Ministry of Health regulations – to sanitise, regular washing of hands, keeping social distance, wearing of the face mask and of course undertaking and receiving vaccination of the known Covid – 19 Astra Zeneca, Moderna, Johnson and Johnson vaccines among others. However, it is now common knowledge that we have been living in this new normal and which has become the norm for the past two years which is not news anymore. Despite the Defendant/Applicant citing financial difficulties he has failed to issue court with any further details of the financial loss. Without prove of the financial constraints that the Defendant/Applicant has faced in raising the security ordered, this court is unable to make a finding on those allegations. More to that, the Defendant/Applicant never raised the Covid - 19 Pandemic as an issue when seeking stay of execution neither did they offer this alternative security at that juncture for court to consider. Clearly, this court finds it to be an afterthought to continue frustrating the Plaintiff/Respondent from enjoying the hard earned fruits of the Judgement to his favour.

DETERMINATION

26. With the reasons given above, I proceed to order as follows:-

a. THAT the Notice of Motion application by the Defendant/Applicant dated 5th October, 2021 to wit the Defendant/Applicant’s prayer to review, vary or set aside the order (b) and (c) of the ruling that were entered on 23rd September 2021 be and is hereby dismissed for lack of merit.

b. THAT the request for alternative security being the original Certificate of title deed and instead the orders of this court made on 23rd September 2021 is affirmed.

c. THAT in the interest of justice, I extend the time for compliance with the said orders by another 45 days from the date of this ruling. In default thereof, the respondents shall be at liberty to execute. THAT the costs of the application shall be in the cause.

IT IS ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF DECEMBER, 2021

HON. JUSTICE L.L. NAIKUNI

JUDGE

(ELC- MOMBASA)

In the presence of:-

M/s. Yumna – the Court Assistant

Mr. Odiaga Advocate for the Petitioners/Respondent.

M/s.holding brief for the Defendant/Applicant.