



Danish Organization for Sustainable Development v Kenya Organization for Environmental Education; NGO Coordination Board (Interested Party) (Commercial Civil Case 465 of 2011) [2021] KEHC 375 (KLR) (Commercial and Tax) (10 December 2021) (Ruling)

Neutral citation: [2021] KEHC 375 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CIVIL CASE 465 OF 2011
A MSHILA, J
DECEMBER 10, 2021**

BETWEEN

**DANISH ORGANIZATION FOR SUSTAINABLE
DEVELOPMENT APPLICANT**

AND

**KENYA ORGANIZATION FOR ENVIRONMENTAL
EDUCATION RESPONDENT**

AND

NGO COORDINATION BOARD INTERESTED PARTY

RULING

1. There are two Notice of Motion applications that are pending in this matter. The first is the Plaintiff's Notice of Motion Application dated 24th April 2019 brought under Sections 3A and 63 (e) of the [Civil Procedure Act](#) and Order 51 Rules 1 and 3 of the Civil Procedure Rules, 2010. In this application, the Plaintiff seeks the following orders:-
2. Spent
3. THAT the Executive Director of the Defendant, Dorcas Oduor Otieno and other Directors and officials of Kenya Organization for Environmental Education, the Respondent herein be found and held in contempt of court for disobeying and defying the orders made by this Honourable Court on 21st November 2017 and 2nd July 2018.
4. The Executive Director, directors and officials of the Respondent be committed to and/ or detained in prison for a term of six (6) months for contempt.



5. The Executive Director, directors and officials of the Respondent be fined such sums of money as this Honourable Court may direct and the same be paid into the court forthwith.
6. THAT the Respondent be denied audience before this Honourable Court until such a time as its directors and officials shall have purged their contempt by, inter alia:-
 - (a) Release and delivery of Assets listed at paragraphs (B) and (C) of the Decree.
 - (b) Performing any such act as this Court may in its discretion deem fit to order the Respondent to perform.
7. That costs of this application be borne by the Respondent.
8. The application is supported by the grounds on its face and by the supporting affidavit sworn on even date by Lars Jacobsen, the head of the international department of the Plaintiff.
9. The second application is the Defendant's Notice of Motion application dated 8th December 2020 brought under Order 9 Rule 9, Order 40 and Order 51 Rule 1 of the Civil Procedure Rules 2010, Section 3A and Sections 80 of the Civil Procedure Act, Article 50 and 159 of the Constitution of Kenya, 2010. The defendant seeks the following orders:-
 - a. Spent
 - b. Spent
 - c. That pending hearing and determination of this application, this Court be pleased to stay further proceedings of the contempt of court proceedings instituted by the Notice of Motion application dated 24th April 2019.
 - d. That pending the hearing and determination of this application, this Court be pleased to stay execution of the judgment dated 21st November 2017, its derivative order dated 2nd July 2018 and the decree dated 6th March 2019 that the Defendant/Applicant do release assets listed in the decree to UMANDE TRUST REGISTERED TRUSTEES.
 - e. That the costs of this application be provided for.
10. The Defendant's application is supported by the grounds on its face as well as the supporting affidavit sworn on even date by Dorcas Beryl Otieno, the executive director of the defendant.
11. In opposition to the defendant's said application, the plaintiff filed a Grounds of Opposition dated 17th February 2021 on the grounds that:-
 - (1) The Application is res judicata the same having been heard, adjudicated and determined in; Court of Appeal (Civil Application No. 193 of 2019 Kenya Organization for Environmental Education vs Danish Organization for Sustainable Energy);
 - a. The application seeks orders of stay of further proceedings in this Court and stay of execution of Judgment dated 21st November 2017 together with a further order made on 2nd July 2018 which orders were conclusively dealt with by the Court of Appeal in the Ruling delivered on 21st February 2021.
 - b. The issues in the Application are directly and substantially similar to the issues raised in the Court of Appeal and the Defendant cannot avoid the doctrine of res judicata by purporting to file a similar Application in a different forum.



- c. It is in the interests of justice that there be an end to litigation and accordingly, parties or those claiming under them should not be allowed to re-litigate over same issues.
 - d. Accordingly, this Court lacks jurisdiction to re-open, entertain and/ or rehear any issue touching on the stay of further proceedings in the High Court and execution of Judgment delivered on 21st December 2017 and the order made on 2nd July 2018.
- (2) What was before the Court of Appeal Ruling for determination was an Application for orders of stay further proceedings in the High Court and stay of execution of Judgment delivered on 21st November 2017 together with a further order made on 2nd July 2018. The issue of transfer of the identified assets was NOT a matter for consideration by the Court of Appeal. The contents of page 8 of the Court of Appeal Ruling was an obiter dictum and the same did not overturn the finding of the High Court that the assets be released to Umande Trust Registered Trustees.
- (3) The Applicant has made a similar Application dated 22nd March 2019 and filed in this Court on 25th March 2019 seeking orders of stay of execution of Judgment of this Court which Hon. Lady Justice G. Nzioka marked as overtaken by events on 26th February 2020 in view of the dismissal of the Court of Appeal, Civil Application 193 of 2019.
- (4) In the premises, the Application is frivolous, vexatious and constitutes a gross abuse of the court process and the same ought to be struck out and dismissed with costs.
12. On 6th July 2021, the court directed that the applications be disposed of separately and that the Defendant's application dated 8th December 2020 be heard first. The parties were directed to canvass the application by filing and exchanging written submissions; When the matter came up for highlighting of submissions Learned Counsel Mr Chege Njoroge appeared for the Plaintiff whereas Learned Counsel Ms. Ayieko appeared for the Defendant; hereunder are the parties respective submissions;

PLAINTIFF'S CASE

13. Whilst urging the Court to dismiss the Defendant's application to enable the execution of the decree, counsel relied on the Grounds of Opposition as well as the written submissions dated 5th July 2020. He submitted that the application is res judicata since the same has already been heard and determined by the Court of Appeal in; Civil Application No. 193 of 2019 Kenya Organization for Environmental Education vs Danish Organization for Sustainable Energy. The Court of Appeal dismissed the application on 21st February 2021. He pointed out that another similar application dated 22nd March 2019 was filed by the defendant before Hon. Nzioka J. Following the Court of Appeal's ruling of 21st February 2019, the aforementioned application was marked as overtaken by events.
14. It was also submitted that the defendant's application is an abuse of the court process in that it is the fourth time that the defendant is seeking orders of stay of further proceedings and execution of judgment of this court. For this proposition, counsel cited the case of; Richard Muthusi vs Patrick Gituma Ngomo & another [2017] eKLR.
15. Counsel further submitted that paragraph 9 of the Court of Appeal's ruling was obiter dicta and that no right can flow from the court's opinion. He cited the case of; *Ekuru Aukot vs Independent Electoral & Boundaries Commission & 3 others* [2017]Eklr, where the court defined obiter dicta. The only orders that were unsuccessfully sought by the defendant at the Court of Appeal were orders of stay of execution of the High Court judgment and not transfer of assets.



16. Additionally, counsel submitted that no substantive appeal has been filed since 2017 when the defendant filed a Notice of Appeal. No draft grounds of appeal have been attached to the defendant's application. Since there is no appeal against this court's judgment, there is no subject matter to be preserved to warrant the exercise of this court's discretion pursuant to Order 42 Rule 6 of the Civil Procedure Rules, 2010. To buttress this, counsel cited the case of; *Ezekiel Mule Musembi vs H. Young & Company E. A. Limited [2019] eKLR*. In addition, the case of; *Peter Kariuki Mburu & another vs Neema Shah [2021]* was cited for the proposition that stay of proceedings can only be granted where an applicant has demonstrated an arguable appeal. It was further contended that the defendant has failed to satisfy the conditions for the grant of orders of stay of execution which were outlined in the case of; *Joseph Gitonga Kuria vs Elizabeth Wambui Gitonga [2016] eKLR*. Apart from not filing an appeal in time, the defendant has not demonstrated any loss it is likely to suffer nor furnished any security for the due performance of the decree.
17. In conclusion counsel urged this court to dismiss the application with costs as it was frivolous, mischievous and an abuse of the court process.

DEFENDANT'S CASE

18. According to Ms. Ayieko, the order emanating from the court's judgment could not be implemented as the defendant had preferred an appeal and filed an application for stay of execution of the judgment and decree pending hearing and determination of the intended appeal. She pointed out that at page 8 of the Court of Appeal's ruling dated 21st February 2020 declining to stay execution, it was stated as follows:-

“The assets were always intended to be applied to charitable purposes and it is reasonable that the assets identified in the judgment should be released to the interested party (the Non-Governmental Organizations Board) to identify a suitable NGO to implement the project.”
19. It was also submitted that the above directive by the Court of Appeal in its ruling varied the decision of this Court and the consequential orders arising therefrom. The decision of this court that the assets be surrendered to Umande Trust Registered Trustees was expunged by the ruling.
20. The defendant has made steps towards releasing the said assets to the interested party.
21. Whether contempt of court proceedings can be founded to enforce an order of court that has been overridden by an order of the superior court.
22. The defendant relied on the case of; *Republic vs. Principal Secretary, Ministry of Defence Ex parte George Kariuki Waitbaka [2019] eKLR* where the court set out what constitutes the disobedience of an order.
23. The defendant contends that the plaintiff has failed to establish his case beyond reasonable doubt. The defendant relied on the case of; *Mutitika vs Baharini Farm Limited [1985] eKLR*.
24. The plaintiff never moved the court to interpret its ruling.
25. The subject matter in the civil application was substantially different from the defendant's application. To support this, they cited the case of; *Suleiman Said Shabbal vs Independent Electoral & Boundaries & 3 Others (2014) eKLR* where it was held;

“To constitute res judicata, there must be adjudication which conclusively determines the rights of the parties with regard to all or any of the matters of controversy”



26. The Applicant prayed that the court grants it the prayers sought in the application dated 8th December, 2021.

ISSUES FOR DETERMINATION

14. The Court has considered the application, the grounds of opposition and the submissions and has framed only one issue for determination which is:-
- a. Whether the application dated 8th December 2020 is res judicata.

ANALYSIS

15. At the outset, it is worth noting that it is common ground that the Defendant filed an application under Rules 5 (2) (b) and 42 of the *Court of Appeal Rules* before the Court of Appeal seeking stay of further proceedings in this matter pending the hearing and determination of the motion and of an intended appeal. From a perusal of the Ruling of 21st February 2020, the Court of Appeal dismissed the defendant's application before it as the defendant failed to demonstrate that its intended appeal would be rendered nugatory if stay was not granted. This was because "the jailing of officials for being found in contempt of court for failure to obey court orders cannot be a ground for granting stay of execution of a regular judgment issued by a court."
16. It is also evident from the record that on 31st May 2019, the defendant filed an application similar to the one at hand seeking orders of stay of execution and further proceedings in the matter. On 26th February 2020, the court found that the said application had been overtaken by events following the Court of Appeal ruling of 21st February 2020.
17. The doctrine of res judicata is found in Section 7 of the *Civil Procedure Act* 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."
18. The principles for determining whether a matter is res judicata were succinctly put by the Court of Appeal in the case of; *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 [2017] eKLR*, as follows:-
- "Thus, 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.”

“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 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

19. The doctrine of res judicata also applies to applications of similar nature. In this respect, the Court of Appeal in the case of; *Uhuru Highway Development Ltd vs Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* stated that:-

“.....there must be an end to applications of similar nature, that is to further, under principles of Res Judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or [Civil Procedure Act](#) caters for.”

20. A second application on an issue will be dismissed as res judicata and can only be entertained where the new facts have been discovered. Law JA in *Mburu Kinyua vs Gachini Tuti [1978] KLR 69* observed as follows:-

“To sum up my view of this aspect of the case, an applicant whose application to set aside an ex parte judgment which has been rejected has a right of appeal ... Alternatively, he may apply for a review of the decision, under Section 80 of the [Civil Procedure Act](#). He can only successfully file a second application if it is based on facts not known to him at the time he made the first application. If the facts were known to him, his second application will be dismissed as res judicata, as happened hereof.

The position otherwise would be intolerable. A decree holder could be deprived of the benefit of his judgment by a succession of applications to set aside the judgment and the judges would in effect be asked to sit on appeal over judges. And as regards Madan JA’s expressed feeling that justice can only be done by giving the appellant the right to defend, I would respectfully point out that there are always two aspects to the concept of justice. A successful litigant is convinced that justice has been done, the loser is unlikely to share that view.” (Emphasis added)

21. With the above in mind, this court has carefully considered the orders sought in the application at hand vis a vis the Court of Appeals ruling in Civil Application No. 193 of 2019 (Supra) and the application of 24th May 2019. It is clear that the orders are seeking stay of proceedings and stay of execution pending hearing and determination of the application. In substance, these orders are similar to the orders sought before the Court of Appeal and before this court in the application of 24th May 2019. No new facts



have been advanced by the defendant. Therefore, the court is satisfied that the application is res judicata as it has all elements.

22. In addition to the foregoing, the defendant's submissions regarding interpretation of the Court of Appeal's subject ruling leads this court to opine that the instant application seeks a review but is disguised as an application for stay. It is settled law that an aggrieved party may not seek review and appeal against the same order. To this effect, Section 80 of the [Civil Procedure Act](#) provides as follows:-

- “ 80. 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 hereby 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.”

23. This is reiterated under Order 45 rule 1(a) and (b) of the Civil Procedure Rules, 2010. Once a party has elected to appeal, it is not open to again seek review of the decision. Faced with a similar issue, the court in *Karani & 47 Others vs Kiiiana & 2 Others [1987] KLR 557* observed that:-

“Once an appeal is taken, review is ousted and the matter to be remedied by review must merge in the appeal.”

24. The upshot is therefore, is that the application is not only res judicata and ought to be struck out but is also an abuse of the due process of the court.

FINDINGS AND DETERMINATION

25. For the forgoing reasons this court makes the following findings and determinations;
- (i) This court finds that the application dated 8th December 2020 has all the elements of *res judicata*; the application is found to be incompetent and it is hereby struck out with costs to the plaintiff/respondent.
 - (ii) The plaintiff is at liberty to list its application dated 24th April 2019 for hearing.

Orders Accordingly

DATED SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 10TH DAY OF DECEMBER, 2021.

HON.LADY JUSTICE A.MSHILA

JUDGE

In the presence of;

Wanyama holding brief for Ayiro for the defendant/Applicant

Chege Njoroge for the plaintiff/Respondent

Lucy-----Court Assistant

