



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 691 OF 2017

KANAKE PETER WAHIRE.....APPELLANT/APPLICANT

-VERSUS-

JOSEPH MAINA KAMAU &

GEOFFREY KAMAU MAINA

(Suing as the administrators of the estate

of CICILIA RIGURU MAINA-Deceased).....RESPONDENTS

RULING

1. The appellant/applicant has filed the Notice of Motion dated 28th September, 2018. The Motion is supported by the grounds laid out on its face and the facts deponed in the affidavits of the applicant and his advocate, *Eric Kirimi*. The applicant is seeking the following orders:

(i) Spent.

(ii) Spent.

(iii) THAT this Honourable Court be pleased to order a stay of execution of the judgment and decree given by Honourable E. Wanjala (Ms.) (Senior Resident Magistrate) on 9th November, 2017 in CMCC NO. 1258 OF 2015 pending the hearing and determination of the appeal.

(iv) THAT the attachment by Okuku Agencies Auctioneers be nullified.

(v) THAT the judgment entered on 9th November, 2017 and all consequential orders be stayed.

(vi) THAT the costs of the application be in the cause.

2. The applicant stated in his affidavit that being dissatisfied with the decision arrived at by the trial court on 9th November, 2019 he lodged the appeal challenging the same. He went on to state that he had previously filed the application dated 11th December, 2017 seeking an order for stay of execution which was allowed on 16th May, 2018 on condition that he deposits the decretal sum in a joint interest earning account within 30 days from that date.

3. It was the applicant's explanation that there was a slight delay in complying with the order on the part of his insurer but that the decretal sum was eventually deposited in a joint interest earning account albeit outside of the timelines given by the court.

4. Flowing from the above, the applicant is apprehensive that the respondents will proceed to execute their decree before the appeal is heard, and that the applicant may not be able to recover the decretal sum from them should the appeal succeed, thereby rendering the appeal nugatory.

5. It was likewise the applicant's assertion that the respondent has issued proclamation and warrants of sale which are incorrect since they indicate that the applicant ought to pay the entire decretal sum yet the trial court had found liability against the applicant in the ratio of 70%.

6. On his part, *Eric Kirimi* reiterated the averments made by the applicant save to emphasize that the delay in depositing the decretal sum ordered by the applicant's insurer was at all material times communicated to the respondents' advocate and their indulgence sought on the

same.

7. The Motion is opposed by way of the replying affidavit sworn by *Faith Mutio Mutuku* on 8th October, 2018 asserting that first and foremost, the current application is *res judicata* since a similar application was heard and allowed by the court on 16th May, 2018. The deponent also stated that following the granting of the conditional order for stay of execution by the court on 16th May, 2018, her office wrote to the advocate for the applicant requesting for account opening forms which were sent about one (1) month later.

8. The advocate further stated that the interest earning account remained unopened, prompting her office to proceed with the extraction of the decree and engage the services of an auctioneer who then served the respondent with a proclamation notice. She also denied that the decretal sum has been deposited in an interest earning account as earlier ordered by the court.

9. In reply, *Eric Kirimi* swore the supplementary affidavit on 22nd November, 2018 in essence restating the contents of his earlier affidavit. However, the deponent added that since the respondents commenced execution proceedings against him on the same day the cheques bearing the decretal amount were deposited, such execution ought to be deemed a nullity.

10. The parties filed written submissions on the application. On his part, the applicant argued that at all material times, his advocate had indulged the respondents' advocate on the challenges being faced in depositing the decretal sum in terms of cash flow and that the respondents' advocate in fact expressed a willingness to renegotiate the judgment terms of the trial court, thus prompting the applicant's advocate to hold on to the cheques for a few days.

11. Tied to the above, the applicant; in urging this court to allow the Motion; submitted that while the negotiations were ongoing, the respondents engaged the services of Okuku Agencies Auctioneers to proclaim the applicant's property, going further to mention that his advocate deposited the two (2) cheques in the sum of Kshs.55, 898/- each with KCB Bank Kenya Limited in the joint interest earning account which goes to show that the applicant has complied with the order requiring him to deposit his share of the decretal sum in a joint interest earning account, citing *inter alia*, the case of ***Bhachu Engineers Limited v Samwel Otieno Orwa [2018] eKLR*** where the court elaborated on the purpose of an application for a stay of execution.

12. The respondents through their opposing submissions contended that the present application is *res judicata* for the reason that save for order iv) of the same, the remaining orders are similar to those previously sought in the application dated 11th December, 2017 and that the latter application was heard and determined on 16th May, 2018.

13. The respondents went on to argue that should this court be inclined to find otherwise, then it should appreciate that the applicant has not offered any security as ordered by the court previously, since they have not deposited the entire decretal amount in the joint interest earning account, refuting that the applicant was only to deposit 70% of the decretal sum as he so claims.

14. It was the respondents' further submission that the auctioneer was properly instructed to commence execution and that in any case, no attachment of the applicant's property/goods has been undertaken as of yet. In the end, the respondents took the stand that the applicant is in no way entitled to the orders being sought in his application.

15. I have cautiously considered the grounds set out on the face of the Motion; the facts deponed to in the affidavits supporting and opposing the same; and the rival written submissions alongside the cited authorities. Before I consider the merits of the Motion, I deem it necessary to first address the point raised by the respondents concerning the applicability of the *res judicata* rule. The said rule is catered for under **Section 7** of the **Civil Procedure Act** expressing thus:

“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.”

16. Taking note of the above, I refer to the record which discloses that the High Court had previously entertained a similar application dated 11th December, 2017 seeking orders for a stay of execution. The court, upon hearing the parties on that application, granted the same conditionally.

17. The application now before this court is substantially seeking similar orders for a stay of execution of the judgment delivered on 9th November, 2017 pending the hearing and determination of the appeal and primarily on the same facts.

18. In my reasoned view, the applicant is attempting to litigate the issue of a stay of execution for a second time before a court of concurrent jurisdiction, irrespective of the fact that he indicates that he has since complied with the condition on the provision of security. From where I stand, to entertain this application would amount to re-considering a matter that is *res judicata*.

19. In so finding, I am persuaded by the reasoning adopted in ***Godfrey Kinuu Maingi & 4 others v Nthimbiri Farmers Co-operative Society [2014] eKLR*** where the court acknowledged that the *res judicata* rule is not limited to matters determined in a previous/former suit but extends to matters raised in the same suit on more than one occasion. More specifically, the court in the aforementioned authority made reference to the Court of Appeal case of ***Uhuru Highway Development Ltd v Central Bank of Kenya & 3 Others CA. No. 36 of 1996*** where the following was held, *inter alia*:

“...there must be an end to applications of similar nature that is further, wider 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.

20. In view of the foregoing, I must mention that whereas the earlier application of 11th December, 2017 was not dismissed but was in fact allowed on the condition that the applicant deposits the decretal sum in a joint interest earning account within 30 days from the date of the ruling/order, it is admitted by the applicant that he did not comply with the timelines set by the court. Rather than seek the appropriate orders available to him in the circumstances, the applicant filed a similar application before this court. Consequently, the order for a stay of execution being sought is *res judicata* in my reasoned view and cannot therefore be considered.

21. In that case, I am now left with the order seeking to nullify the attachment by Okuku Agencies Auctioneers. It is not in dispute that the judgment delivered by the trial court was entered in favour of the respondents in the sum of Kshs.1,287,000/ as against the applicant and one Samson Ngigi Muigai who is not a party to the appeal. The award made against the two (2) parties mentioned was assessed in the ratio of 70%:30% respectively.

22. It is well noted that the application for stay of execution was granted conditionally and as earlier indicated, the applicant did not comply with the conditions set out by the court, neither did he seek an extension of the same. As it stands therefore, there was no stay of execution in existence against the respondents as at the lapse of the timelines for meeting the condition.

23. I have seen the letter dated 10th July, 2018 attached to the replying affidavit of Faith Mutio Mutuku addressed to the applicant's firm of advocates and informing them of the intention to execute the decree, which decree was issued on 12th September, 2018.

24. Furthermore, I have looked at the documents attached to the application and noted that warrants of attachment were issued against the applicant and Samson Ngigi Muigai on 18th September, 2018 for the sum of Kshs.1,748,004/. Further to this, the respondents through Okuku Agencies Auctioneers issued a proclamation of attachment dated 21st September, 2018 against the applicant.

25. It would appear from the letter dated 1st October, 2018 from KCB Bank Kenya Limited to both the appellant's and respondents' respective advocates and annexed as "EKM 1" to the supplementary affidavit of Eric Kirimi that the said advocates had indeed opened a joint interest earning account and that the same had the sum of Kshs.1,111,796/ in it as at the above date.

26. Be that as it may, I must reiterate that unfortunately, there is no order currently in place barring the respondents from proceeding with execution of the decree since the stay orders issued by the court on 16th May, 2018 have since lapsed and the applicant never sought to have them extended. I am therefore unable to grant this order as well.

27. The upshot is that the Motion lacks merit and I am only left to dismiss it with costs to the respondents.

Dated, Signed and Delivered at Nairobi this 14th day of October, 2019.

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L. NJUGUNA

JUDGE

In the presence of:

..... for the Appellant/Applicant

..... for the Respondents