REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MACHAKOS

MISCELLANEOUS CIVIL APPL. NO. 20 OF 2017

PAUL NDUNGU.....1ST APPLICANT

ELIAS NDUNGI MWAURA.....2ND APPLICANT

VERSUS

STELLA NDUNGWA MUSAU)

DOMINIC MUTISO)

MERCY WANJIRU) .....RESPONDENTS

RULING

1. The brief background to this ruling are that applicants approached this court vide notice of motion dated 28th February, 2017 seeking orders of stay pending determination of the hearing and determination of the application and appeal; the application as well as leave to file an appeal out of time whereupon vide ruling dated 19th January, 2018 the court allowed the application and gave conditions that the decretal sum be deposited in a joint interest earning account within 30 days failing which the stay would lapse and that the applicants were to file the appeal within 14 days. Vide application dated 13th February, 2018 the applicants approached this court seeking an extension of stay orders for a further 30 days on the grounds that they just got to know about the orders that were issued on 19th January, 2018. The application was dismissed for want of prosecution. On 15th August, 2018, the applicant approached the court seeking extension of interim orders of stay of execution being that they were served with warrants of attachment. Vide application dated 16th February, 2019 and filed on 18th February, 2019 the applicants approached the court seeking stay of execution pending determination of the application as well as interim orders of stay of execution pending ruling in the said application.

2. The court directed that he application dated 16.2.2019 be canvassed vide submissions.

3. Having considered the pleadings on record, the issues to be considered by this court as raised by both counsel are as follows:

a) Whether the application dated 16th February, 2019 is barred by res judicata and is an abuse of the court process, scandalous, frivolous and vexatious.

b) What orders may the court grant.

4. I have deemed it necessary to consider whether the application that has been brought by the applicant that is dated 16.2.2019 is *res judicata*. The law has defined what *res judicata* is according to 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 the subsequent suit or the suit in which the issue has been subsequently raised and had been heard and finally decided by the court"

5. In the case of ***Henderson vs Henderson*****(1843) 67 ER 313** it was held that :

"Essentially the test to be applied by court to determine the question of res judicata is this;

"Is the plaintiff in the second suit or subsequent action trying to bring before the court, in another way and in the form of a new

cause of action which he or she has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If the answer is in the affirmative, the plea of res judicata applies not only to points upon which the first court was actually required to adjudicate but to every point which belongs to the subject matter of litigation and which the parties or their privies exercising reasonable diligence might have brought forward at the same time"

6. ***Halsbury's Laws of England, Volume 12 (2009) 5th Edition, Para*** stated that;

> ***"The law discourages re-litigation of the same issues except by means of an appeal. It is not in the interest of justice that there should be re-trial of a case which has already been decided by another court, leading to the possibility of conflicting judicial decisions, or that there should be collateral challenges to judicial decisions; there is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute"***

7. Further still, the case of ***Kamunye & others v the Pioneer General Assurance Society Ltd (1971 E. A 263*** gives the test to be applied by court to determine the question of res judicata. It state:

> ***"The test whether or not a suit is barred by res judicata seems to me to be – is the plaintiff in the second suit trying to bring before the court in another was and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of res judicata applies not only to points upon which the first court actually required to adjudicate but to every point which properly belonged to the subject of litigation and which parties, exercising reasonable diligence, might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply".***

8. According to the facts at hand as elicited from the pleadings, the applicant's complaint before the court that culminated in the ruling dated 19.1.2018 was the need for stay of execution of the judgement and decree rendered between the parties in Kithimani PMCC 109 of 2014 as well as leave to file the appeal out of time. The application dated 16.2.2019 seeks stay of execution of the judgement and decree rendered between the parties in **Kithimani PMCC 109 of 2014** pending the determination of the application.

9. To illustrate this matter further, one of the issues addressed by the court vide ruling delivered on 19.1.2018 was that of satisfaction of conditions for grant of stay under Order 42 Rule 6 of the Civil Procedure Rules. This is the same order sought for in application dated 16.2.2019 because and vide the applicants' submissions dated 21.3.2019 the said provisions have been discussed at length. The court vide its ruling dated 19.1.2018 found that the applicants had satisfied the conditions for grant of the order sought and placed conditions upon the applicants. Therefore I find that all the issues were directly and substantially in the former application before the court are the same as the one in the application dated 16.2.2019 and this makes the present application to be Res judicata.

10. For emphasis and for the following reasons, I find the application dated 16.2.2019 is *res judicata*;

i) The applicants pleaded in both the application dated 28th February, 2017 and the application dated 16.2.2019 that they were seeking orders of stay pending determination of the hearing and determination of the application.

ii) The ruling on which the application dated 28.2.2017 was founded had already been put before this court of competent jurisdiction and had been adjudicated upon.

iii) The points raised by the applicants in the application dated 16.2.2019 properly belonged to the subject of litigation which had already been adjudicated upon.

iv) It is very clear that this court tackled all the issues which are being re-awakened in the application dated 16.2.2019. It is quite clear that the present application is a regurgitation of the previous one as the camouflage can easily be seen that it seeks same reliefs that had already been substantially adjudicated upon. The present application being res judicata is an abuse of the court process.

11. In the result it is my finding that the application dated 16/2/2019 lacks merit. The same is dismissed with costs to the 1st Respondent.

Orders accordingly.

Dated and delivered at **Machakos** this **19th** day of **November, 2019.**

D. K. Kemei

Judge