



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT EMBU

PETITION NO. 4 OF 2019

SAMWEL MWANGI MUNYIRI.....PETITIONER/APPLICANT

VERSUS

JOSEPH NDWIGA M'THIMU.....RESPONDENT

R U L I N G

A. Introduction

1. This ruling pertains to the application dated 14th May 2019 in which the applicant moves this court for stay of the judgement in Embu CMCC No. 276 of 2016 until this petition is determined.
2. It is the applicant's case that judgement was entered against him in Embu CMCC No. 276 of 2016 and his efforts to set aside the same have failed. He further states that if he is arrested he will suffer double jeopardy and will be condemned without being heard.
3. In rejoinder, the respondent opposes the motion on the grounds that they are *res judicata* the same having been heard and determined in an application dated 15/03/2018 filed in High Court Civil Appeal No. 9 of 2018. The respondent states that Civil Appeal No. 9 of 2018 is still pending before court and as such the current application should be dismissed.

B. Analysis of Law

4. I have considered the application before me, the supporting affidavit and the affidavit in response. The respondent has raised a preliminary issue of *res judicata* which I find necessary to dispose of first as this would have the effect of determining the application and the petition to its finality.
5. It is the applicant's case that this court ought to stay execution of the judgement in Embu CMCC No. 276 of 2016 as failure to do the same would expose him to double jeopardy. The prayer for stay of execution is one of those in this petition. The respondent submits that the instant application and petition are *res judicata*, the same issues having been raised and addressed in an application dated 15/03/2018 filed in Civil Appeal No. 9 of 2018.
6. The principle of *res judicata* is provided for under **Section 7 of the Civil Procedure Act** which provides as follows: -

“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.”

7. In **Mercy Munee Kingoo & Another v. Safaricom Limited & Another [2016] eKLR** the Court of Appeal expounded on section 7 of the Civil Procedure Act in the following words: -

“... section 7 aforesaid raise four pre-requisites to be met for a matter to be deemed res judicata. These were defined in the case of Uhuru Highway Development Limited v Central Bank of Kenya & 2 others [1996] eKLR to mean that there has to be:

- 1.A previous suit in which the same matter was in issue***
- 2.The parties are the same or litigating under the same title***
- 3.A competent court heard the matter in issue and determined***

4. The issue has been raised once again in a fresh suit.”

8. In the Court of Appeal case of John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR, the court made the following finding at pages 7:

“On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of *res judicata*. However, we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.”

9. Flowing from the above observation, *res judicata* is a legal principle that applies even in constitutional petitions it is found appropriate and its purpose is to bring litigation to an end and save the precious judicial time.

10. In an application dated 15/03/2018 filed in Civil Appeal No. 9 of 2018 the applicant sought to stay execution of the ex-parte judgement in Embu CMCC 276 of 2016. The application was dismissed on the 22/05/2018 for lack of merit.

11. A year later, the applicant filed the instant petition in which he sought stay of execution of the ex-parte judgement in Embu CMCC No. 276 of 2016. Annexed to the petition is the instant application which also sought similar orders for stay of execution in Embu CMCC No. 276 of 2016.

12. Apart from the issue of stay of execution, there is a prayer in the petition seeking for orders that the petitioner be given a chance to prove that he does not owe the respondent any money in CMCC No. 276 of 2016 which is a fraud. The claim of the respondent was dealt with by the trial court and it is now pending hearing by this court in Civil Appeal No. 9 of 2018. Raising the issue in this petition is a duplication of suits which should not be allowed to avoid wasting of judicial time and having duplicated ruling and judgments which may be conflicting.

13. Applying the principle of *res judicata* to the instant application and petition, it is clear to me, that the same raise the same issues between the same parties and also the issues raised herein have been determined by a competent court.

14. The petitioner does not deny the allegations that he sought similar prayers in Embu Civil Appeal No. 9 of 2018. For the avoidance of doubt, this court has perused the appeal file and confirmed that such an application between the same parties was determined and dismissed for lack of merit.

15. Consequently, the motion dated 14th May 2019 and the petition are thus dismissed for being *res judicata* with costs to the respondent.

16. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 12TH DAY OF NOVEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Mbwiria for B.G. Kariuki for Petitioner

Ms. Mutegi for Ochichi for the Respondent