



REPUBLIC OF KENYA

IN THE HIGH COURT AT EMBU

CIVIL APPEAL NO. 14 OF 2018

NICHOLUS KIURA.....APPELLANT/APPLICANT

VERSUS

NJIRU M. RIUMBA & DOMINIC KATHURI NJIRU (Suing as

legal representatives of STELLA MUKAMI NJIRU- DCD.....RESPONDENTS

RULING

A. Introduction

1. This ruling pertains to the application dated 28th August 2018 in which the applicant seeks to have the orders dated 17/07/2018 reviewed/set aside or altered and an order of stay pending appeal be issued. The applicant also moves this court to make an order that he deposit an alternative security equivalent in value to the cash deposit of Kshs. 1,100,000/= previously ordered by court.
2. It is the applicants case that the court erroneously issued a condition for stay without issuing the substantive order of stay as provided under Order 42 Rule 6 (1). The applicant further states that he is not in a position to raise the Kshs. 1,100,000/= ordered as security due to financial constraints but is willing to place an alternative equivalent of the cash amount.
3. It is the applicants case that he be accorded the lawful opportunities to pursue his legal rights without any form of prejudice arising from execution proceedings.
4. In rejoinder, it is the respondent's case that the application is guilty of laches, that it is *res judicata* and that the applicant has failed to adduce any new ground that could not be tendered at the hearing for stay dated 15th May 2017. The respondents further oppose that application on the grounds that it is an abuse of the court process brought after an unreasonable delay.
5. The parties argued the application dated 28/08/2018 by way of written submissions.

B. Appellant's Submissions

6. It is the appellant's submission that this court did not pronounce its verdict in the ruling delivered on the 17th July, 2018 but instead proceeded to order the applicant to deposit half the decretal sum in an interest earning account and as such the respondent remains at liberty to execute the judgement of the lower court.
7. It is further submitted that the applicant has met all the criteria to warrant grant of orders of stay of execution and as such it is imperative that the court grant him stay so that he can pursue his appeal.
8. The applicant further submits that his application seeks to vary the terms as to the order on security to be deposited and not eliminate the deposit an action which would not prejudice the respondents.

C. Respondents' Submissions

9. It is submitted that the current advocates of the applicant did not seek leave to come on record and as such the present motion is fatally defective and premised on nothing. Reliance on this proposition is placed on the case of **Dr. Wario Ali v Dr. John Ngundu [2011] eKLR.**
10. The respondents further submit that the orders currently sought to be impugned by the applicant were made on the 17th July 2018 and if he was not satisfied with the same he ought to have appealed or reviewed the same.

11. It is submitted that the issue of the applicant's financial position as well as the issue of placing an alternative security were fully addressed in the court's ruling at paragraph 9 and as such the instant application violated the doctrine of res judicata.

D. Analysis & Determination

12. I have considered the application dated 28th August 2018, the grounds of opposition by the respondents as well as the submissions by both parties.

13. The gist of the instant application is that the applicant seeks review of the orders granted by this court vide its ruling delivered on the 17th July 2018. Specifically, the applicant seeks that the order as to the deposit of half decretal amount be reviewed/varied to an alternative security of equal value. It is the applicant's case that this court proceeded to direct that he provides security without addressing itself to the issue of stay that was the substantive issue in the application dated 15/05/2018 that was subject of the aforementioned ruling.

14. The respondents are opposed to the instant application on among other grounds that it is res judicata as it raises issues and seeks orders that had already been determined vide the ruling delivered on the 17th July 2018. The respondent further opposes the application on the ground that the applicant's current advocate failed to seek leave to come on record and that in any case, the applicant has failed to meet the requirements to warrant grant of orders of review.

15. Accordingly, it is my considered view that the issue for determination herein are as follows:

- a) *Whether the instant application is fatally defective for failure by the applicant's advocate to seek leave to come on record;*
- b) *Whether the instant application is res judicata; and*
- c) *Whether the applicants have satisfied the test to warrant grant of orders of review.*

16. On the first issue, the respondents submitted that the current advocates on record for the applicant did not seek leave to come on record and as such the present motion is fatally defective and premised on nothing. Reliance on this proposition is placed on the case of **Dr. Wario Ali** (supra).

17. Under **Order 9 Rule 9 of the Civil Procedure Rules 2010**. That rule is in the following terms: -

“9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court –

(a) upon an application with notice to all the parties; or

(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.”

18. The use of the word “shall” in the rules above connote a mandatory obligation on the part of the relevant party. The applicant having been represented by the firm of P.N. Mugo & Co. Advocates could not be represented by the firm of Eddie Njiru & Co. Advocates without the leave of the court because a ruling had been entered in this matter, which ruling had the effect of settling the issue of stay that had been raised then.

19. As to whether the instant application is *res judicata*, the law on this subject is well established. The principal of *res judicata* is provided for in Section 7 of the CPA 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.”

20. The doctrine of *res judicata* as stated in the said Section has been explained in a plethora of decided cases. In the recent case of **The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)**, the Court of Appeal held that:

“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.”

21. My understanding of the *res judicata* principle is that it is meant to lock out from the court system a party who has had his day in a court of competent jurisdiction from re-litigating the same issues against the same opponent. The question therefore is whether the applicant has satisfied the conditions for the application of the principle of *res judicata* in view of the facts of this case. Looking at the record, it is worth noting that the substantive issue in the instant application is review of the ruling delivered on the 17th July 2018 whereas the substantive issue in the application dated 15/05/2018 was stay of execution. Consequently, the respondents' contention that the instant application is *res judicata* is therefore untenable.

22. Finally, in consideration as to whether the applicant has satisfied the requirements to warrant the review of this court's ruling/order delivered on the 17th July 2018, the applicable law is Order 45 of the Civil Procedure Rules. Order 45 of the Civil Procedure Rules, 2010 is very explicit that a court can only review its orders if the following grounds exist: -

(a) There must be discovery of a new and important matter which after the exercise of due diligence, was not within the knowledge of the applicant at the time the decree was passed or the order was made; or

(b) There was a mistake or error apparent on the face of the record; or

(c) There were other sufficient reasons; and

(d) The application must have been made without undue delay.

23. The pertinent issue for determination herein, therefore, is whether the applicant has established any of the above grounds to warrant an order of review

24. I have well carefully considered the reasons given by the applicant for seeking an order of review. One of the key elements a court is bound to consider when granting an order for stay is the security given by the Applicant for the due performance of the decree. And it is upon such consideration that a court of law will make a determination on the same. This court well considered the applicant's arguments on the same and made an order for the applicant to deposit one half of the decretal sum in a joint interest earning account. This order was made after considering the arguments by the respondents that they have a decree which he would like to execute versus the applicant's plea that he was in financial difficulties.

25. Indeed, if parties were allowed to seek review of decisions on grounds that they are not in a position to carry out the orders sought to be reviewed, or rather that the orders are not convenient to them, then a dangerous precedent would be set in which court decisions that ought to be examined on appeal would be exposed to attacks in the courts in which they were made under the guise of review.

26. It should be noted that the grounds for review are very specific as discussed herein above. The applicant herein has not demonstrated that he discovered new evidence which was not within his knowledge, neither does he state that there was an error apparent on the record. The applicant only states that depositing the ordered sum is too much for him and he wants the orders reviewed so that he can deposit the amount of money which he can conveniently raise. This is a court of justice but not court of convenience such that it has to consider the conflicting interest of the parties. And in so considering, courts have to be guided by the laid down principles of law. The Respondents have a decree which they are desirous of executing and it is the court's duty to ensure that the decree is secured pending the determination of the appeal.

27. It is my considered view that the applicant has not established any ground for review of the orders. The applicants counsel as I have said earlier did not comply with Order 9 Rule 9 of the Civil Procedure Rules thus rendering this application incompetent.

28. The applicant attempts to suggest that the court did not pronounce itself in its ruling delivered on 17/07/2018. This is not correct and it is a misleading statement. The court in paragraph 10 of its ruling allowed the application for stay pending appeal on condition that the applicant deposits half of the decretal amount within 30 days. These orders were very clear.

29. For further clarification, failure to comply with the orders for deposit of the money within the stipulated period means that the orders for stay expired at the end of that 30 days period. As we stand, the orders for stay pending appeal are no longer valid or in existence. The respondent herein is at liberty to execute and enjoy the benefits of his judgment.

30. I come to a conclusion that this application is incompetent, and an abuse of the due process of the court. I have reason to believe that the application is designed to buy time by an applicant who is not willing to comply with the orders of the court that were in his favour.

31. The upshot is that this application for review lacks merit and is hereby dismissed with costs.

32. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT EMBU THIS 5TH DAY OF DECEMBER, 2019.

F. MUCHEMI

JUDGE

In the presence of: -

Ms. Muriuki for Eddie Njiru for Appellant/Applicant

Ms. Muthama for Ogweni for Respondent