



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 70 OF 2015

1. JOHN OCHIENG ORWA

2. RAJAB ALIAPPELLANTS

VERSUS

1. MICHAEL KARIUKI MUTUGI

2. LUCY MONICA WANJIRU.....RESPONDENTS

RULING ON PRELIMINARY OBJECTION

1. Before the court for determination is a preliminary objection by the Respondent dated the 15/7/2016. The gist of that objection to the application dated 5/5/2016 and seeking stay of execution, is that the same application has been considered by the court appealed from and a determination made hence this court cannot consider same application a second time.

2. The Preliminary Objection is coached and worded as follows:-

a. This Court has no jurisdiction to hear and determine this Application or indeed the Application dated 5th May 2016 as the matters directly and substantially in issue in the Application herein have been directly and substantially in issue in Mombasa Chief Margaret Chief Court No. 19 of 2012 and the same was heard and determined on its merit therein on 8th April 2016.

b. This Honourable Court in entertaining the Application dated 5th May 2016 and 14th September 2016, does so per incuriam, in breach of express statutory provisions and doctrines of common law.

3. That objection is premised on the provisions of section 7, (*the Respondent says section 6*) of the Civil Procedure Act. The Respondent duly appreciates that order 42 Rule 6(4) specifically allows a second application to the court appealed to but contends that rule cannot and ought not to override the statutory provision under the Act. The Respondent relies on the provisions of section 31 of **Interpretation And General Provisions Act, Cap 2**, which provides that no provision of a subsidiary legislation should be inconsistent with the provision of an act.

4. For that stand the Respondent has cited the decision in Machakos *High Court Civil Appeal No. 142 'B' of 2015 Heritage Insurance Co. Ltd vs Patrick Kasina Kisilu [2015] eKLR* in which the court held

that the provision that allows filling of an application for stay in the court appealed to irrespective of the outcome of a similar application in the court appealed from most accord with the ordinary principles of civil litigation including the principles of *sub-judice* and *res-judicata* and went on to stay an application for stay in the High Court pending the determination of a similar application in the lower court.

5. The appellant has responded to such submission by own submissions dated 4/8/2016 and filed in court on the 5/8/2016. The appellant takes the position that the provision of the law specifically permit the filing of a subsequent application in the appellate court. For that reason the appellant takes the view that the principles of *judicata* is not applicable or relevant in such scenario.

6. To this court the only question that avails itself for the courts determination is whether or not the application dated 5/5/2016 is *res judicata* the decision by the trial court on a notice of motion dated 23/8/2015. To undertake that task, it is important to reproduce the prayers in the two applications and the provisions of order 42 Rule 6(1) just to find out if the two applications are the same.

7. Prayers c & d in the application before the trial court dated 23/9/2015 sought orders that:-

c. THAT this court be pleased to issue an order of stay of execution of the judgment delivered on 29th April 2015 by Mombasa Chief Magistrate Hon. Maxwell Gicheru in Mombasa Chief Magistrate Civil Case No. 19 of 2012 pending the hearing and determination of this application interparties.

d. THAT after the hearing of this application interparties the court be please to order a stay of execution of the Judgment of the Mombasa Chief Magistrate in Mombasa Chief Magistrate Civil Case No. 19 of 2012 delivered on 29th April 2015 pending the determination of the appeal.

The current application seeks at prayer b that:-

“That this court be pleased to issue an order of stay of execution of the judgment delivered on 29th April 2015 by Mombasa Chief Magistrate Hon. Maxwell Gicheru in Mombasa Chief Magistrate Civil Case No. 19 of 2012 pending the hearing and determination of this application interparties, and pending the hearing and determination of the appeal”.

8. That application is expressed to be brought pursuant to section 1A, 1B, 3A, and Order 42 Rule 4 Civil Procedure Act and the Rules also brought pursuant to order 42 Rule 6(1).

9. I hold view the that the clear provision of Order 51 Rule 10, failure by a party to cite the provision of the law or Rule allowing the making of an application is not fatal to the application and that that rule is in tandem with the overriding objective of the court and the dictates of Article 159(2) d. I will therefore consider the application having sought expressly that the court grants stay of the judgment appealed against as an application premised on order 42 Rule 6(1).

10. An under Order 41 an Order issued pursuant to Order 42 Rule 6(1) is not appealable as of right. It is not appealable because there exist a remedy in having the order set aside. The operative words in the provision are that “any person aggrieved by an order for stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside”. To me, this provision does not allow a judgment debtor denied stay to file a fresh application for stay in the court appealed. He can and is allowed to seek to set aside the order granted by the trial court set aside.

11. I must admit that as worded, order 42 Rule 6(1) in wordy and winded but my interpretation of it is that it recognizes the principle that no court should employ its resource in judicial time to consider an application or any matter already considered and determined by a court of competent jurisdiction otherwise than by review, setting aside or an appeal. To that extent I fully agree with Muriithi J in the decision cited above.

12. For the purposes of this matter the application dated 5/5/2010 cannot escape being faulted for being res judicata. It seek that this court grants stay of the judgment of the court appealed for when infact a similar application dated 23/9/2015 was heard and granted on terms on the 8/4/2016 by the trial court. I do strike it out for being res judicata. Having so struck it out there would be no useful purpose served by reviewing an order that is intended to further a bad application.

13. I award to the Respondent the costs of the application.

Dated and delivered at Mombasa this **10th** day of **March 2017**.

HON. P.J.O. OTIENO

JUDGE

In the presence of:-

Mr. Jengo for Applicant

Mr. Githinji for Respondent

Hon. Justice P.J.O. Otieno J

10/03/2017