



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 328 OF 2015

SAIFFUDIN ABDULLABHAI

HUSSEIN ABDULLABHAI

FAKHRUDDIN ABDULLABHAI

MUSTAFA ABDULLABHAI..... PLAINTIFFS

VERSUS

AHMED SURURU.....DEFENDANT

RULING

1. By a notice of motion dated 27th September, 2019 brought under section 1A, 1B, 3A and 80 of the Civil procedure Act, Order 9 rule 9, Order 45 rule 1 and 2 and order 51 rule 1 of the Civil Procedure Rules and all enabling provisions of the Law, the Applicant is seeking orders:

(a) That this matter be certified urgent and service of the same be dispensed with.

(b) That the Honourable court be pleased to grant leave to the firm of M/S Ameli Inyangu & Partners advocates, SULFAT HATIMY COMPLEX, 7TH FLOOR, TREASURY SQUARE, P. O. BOX 82874-80100, Mombasa to come on record for Ali Ahmed Saror Halib, sued herein as the administrator of the Estate of Ahmed Sururu.

(c) That a stay of proceedings in the plaintiff's Notice of Motion dated 13th August 2019 in this suit do issue pending determination of this application.

(d) That this Honourable be pleased to review and set aside its decree and judgment delivered by the Honourable C. Yano on 24th September 2018 in entirety.

(e) That this Honourable court do issue any such other orders that it may deem fit, just and equitable in the circumstances

(f) That costs of this Application be in the cause

2. The application is premised on the grounds therein and supported by the affidavit of **ALI AHMED SARROR HALIB** sworn on 27th September, 2019 and further affidavit sworn on 11th November, 2019. The applicant avers that the suit was instituted against **AHMED SURURU**, the defendant herein and Judgment delivered on 27th September, 2018. The applicant avers that Ahmed Sururu, the defendant died on 8th August 2018 as a result of which the applicant obtained grant of letters of administration ad litem. Copies of the death certificate and letters of administration ad litem have been annexed and marked "AASH1" and "AASH2" respectively. The applicant further avers that he was enjoined as a respondent in this capacity as an administrator of the estate of AHMED SURURU in the Notice of Motion application dated 13th August, 2019. The applicant states that the defendant passed away before the conclusion of the case, and that upon his death, the pending judgment was never arrested nor was the court alerted of the death of the defendant. The applicant contends that the court went ahead and delivered the judgment herein despite the fact that there was no longer a defendant on record against whom judgment could be given. Relying on advice, the applicant states that the judgment herein was made on a clear error on the face of the record, the plaintiff having failed to bring to the attention of the court the demise of the defendant as at the time of judgment. The applicant contends that the judgment was defective as it was issued against a party who no longer existed. The applicant states that his application for substitution was vehemently opposed by the plaintiffs and subsequently dismissed by the court and that without the substitution, the judgment was rendered

against a non-existent person and thus was non effectual, redundant and an academic exercise rendering it defective, null and void. The applicant is apprehensive that the application dated 13th August 2019 may proceed ex-parte and allowed unless this application is allowed. The applicant further seeks leave to appoint the firm of **M/S Ameli Inyangu & Partners Advocates** to act for him in this matter.

3. Regarding the plaintiff's affidavit the applicant avers that the same is fatally defective for lack of authority from the various plaintiffs to the deponent. The applicant's contention is that the judgment is defective and cannot stand. The applicant states that the appearance and presence of parties in a suit goes to the root of the court's jurisdiction and that a court cannot be properly seized of a matter where there is no proper party or any party against whom the orders granted may be enforced. The applicant avers that the judgment delivered herein was in person and can only be enforced against the party against whom it was obtained and not third parties. The applicant states that having never been a party to the suit, he is not bound by the judgment and consequential decree.

4. In opposing the application, the plaintiffs filed a replying affidavit sworn by Seifuddin Abdullabhai, the 1st plaintiff on 25th October, 2019. It is the plaintiff's contention that the application is replete with deliberate misrepresentation of facts manifestly calculated to mislead the court into making orders on half truths. The plaintiff's aver that on 24th September, 2018, judgment was entered in their favour against the defendant as a consequent of which the defendant was ordered to give vacant possession or be evicted from the plaintiff's PLOT NO. MOMBASA/BLOCK XVI/27. That subsequent thereto, a decree was extracted for purposes of execution against the defendant and the process was concluded on the 21st January 2019 when the court bailiff issued a certificate of execution and handed over vacant possession. It is the plaintiff's contention that the defendant has never appealed against the judgment and decree herein. That on 14th November, 2018 the applicant herein filed an application through the firm of O. A Hamza & Co. Advocates seeking stay of execution of the Judgment and decree of this court, but the court dismissed the said application vide its ruling delivered on 25th March, 2019. The plaintiffs contend that the present application is incompetent, unsuitable in law and is otherwise an abuse of the court process. The plaintiff's state that it was the responsibility of the defendant's Advocates to inform the court about the demise of the defendant but they failed to do so. The plaintiffs accuse the applicant of being habitual litigator and of being guilty of material non disclosure of facts. It is their contention that the application is an afterthought and intended to delay the quick and just conclusion of this case and to frustrate the plaintiff's from enjoying the fruits of their proper and lawful judgment, and urged the court to strike out the application with costs.

5. The application was canvassed by way of written submissions which were duly filed by the advocate for both parties. I have considered the application and the submissions made. The issue for determination are whether the application herein is res judicata, and if not, whether the court should review the judgment delivered on 24th September, 2018

6. The law pertaining to the doctrine of res judicata is captured under the provisions of Section 7 of the Civil Procedure Act which states:

“No court shall try any suit 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 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. Section 28 of the Environment and Land court Act also bars the court from adjudicating over disputes between the same parties and relating to the same issues previously and finally determined by any court of competent jurisdiction. In the case of **Independent Electoral and Boundaries Commission –v- Maina Kiai and 5 others (2017) eKLR**, the court of Appeal explained the role of the doctrine thus:

“The rule or doctrine of judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundation of re judicata thus rest in the public interest for swift sure and certain justice”

8. It is therefore clear that the re judicata principle 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. In the case of **John Florence Maritime Services Limited & Another –v- Cabinet Secretary for transport and infrastructure and 3 others (2015) eKLR** the ingredients of the doctrine of re judicata where stated as firstly, that the issue in dispute in the former suit between parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is a bar. Secondly, that the former fruit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally. In that case, the court of Appeal stated as follows:

“The rationale behind re judicata is based on the public interest that there should be in an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Re judicata ensures the economic use of courts limited resources and timely termination of cases. Courts are already clogged and overwhelmed.

They can hardly spare time to repeat themselves on issues already decided upon”

9. It has also been stated that the principle of re judicata applies to applications with the same force whether the application is final or interlocutory. I have perused the application dated 27th September, 2019 and the ruling delivered by the court on 25th March, 2018. There is no dispute that the parties are the same in all these proceedings. Both applications are seeking orders for leave to allow a new firm of advocates to come on record for the applicant. The ruling dated 25th March, 2018 also dealt with the issues of stay of the judgment and/or orders given on 24th September, 2018 while the application dated 27th September, 2019 seeks for orders inter alia, that the said judgment be reviewed and set aside. These issues in my view, are similar in all forms and whatever issue being raised now could have been raised in the

previous application. By virtue of section 7 of the civil procedure Act and Section 28 of the Environment and Land court Act, this application is barred by the doctrine of re judicata.

10. Further, the applicant's application for substitution was dismissed by the court on 25th March, 2018. There is no doubt therefore that the applicant is not a party to the suit and has no locus to bring the present application. I find that the applicant is improperly before court and his application is incompetent and an abuse of the due process of the court. Besides, I find that this court is functus officio after it rendered a decision on 24th September, 2018 and that decision has been acted upon or executed upon. Any party who is aggrieved in my view, must pursue the course of appeal or review to a higher court.

11. The upshot is that I find the Notice of Motion dated 27th September, 2019 totally unmerited and misconceived and the same is dismissed with costs.

Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 20th day of July 2020

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Yumna Court Assistant

C.K. YANO

JUDGE