

REPUBLIC OF KENYA.

IN THE HIGH COURT OF KENYA AT KITALE.

CIVIL APPEAL NO. 22 OF 2013.

MOHAMED MUSTAFA ::: APPELLANT.

VERSUS

ROBINSON WANJALA JUMA ::: RESPONDENT.

R U L I N G.

The preliminary objection dated 29th January, 2014 is by the respondent/plaintiff and is directed at the application dated 23rd October, 2013 for stay of execution pending appeal by the applicant/defendant.

The objection is based on nine (9) grounds of which only one ground (i.e. ground four (4)) is truly based on a point of law. The rest of the grounds are more or less an answer or opposition to the defendant's application dated 23rd October, 2013.

With regard to ground four (4), the respondent submitted through his learned counsel, **Mr. Mukabana**, that the defendant's application is “**res-judicata**” in terms of section 7 of the Civil Procedure Act in that it was dealt with and dismissed by the lower court and cannot therefore be brought before the superior court. Instead, the defendant ought to have filed an appeal against dismissal. The respondent contended that the application is contrary to section 63 of the Civil Procedure Act as its intent and purpose is to defeat justice.

In response to the foregoing, the applicant through its learned counsel, **M/s. Nyakibia**, submitted that the application is not “**res-judicata**” since the law does not prevent the filing of a subsequent application even though a similar application was previously made in the lower court.

The applicant contended that the application is proper before the court.

All considered, section 7 of the Civil Procedure Act provides for “**res-judicata**” in terms that 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 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.

Order 42 Rule 6 (1) of the Civil Procedure Rules provides for stay of execution pending appeal and states that no appeal or second appeal shall operate a stay of execution under a decree or order appealed from except in so far as the court appealed from may order stay of execution of such decree or order and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

It is clear from the foregoing provisions of the Civil Procedure Rules that the applicant was at liberty to move the lower court for stay of execution pending appeal from its decision and if the application was dismissed, the applicant could appeal against the dismissal or move the appellate court for an order of stay pending appeal.

Herein, the applicant has opted to make another application for stay before this court rather than appeal

against the lower court's dismissal order. This was in accordance with the law and therefore the application dated 29th December, 2013, is proper before the court and would not be caught up with the doctrine of “**res-judicata**” which presupposes a final determination of issues before the court rather than an interlocutory determination of the same.

Consequently, the preliminary objection by the respondent is lacking in merit and is hereby dismissed with costs to the applicant.

The application dated 29th October, 2013, by the applicant may now be fixed for hearing on a date to be agreed by the parties.

[Read and signed this 4th day of June, 2014.]

J.R. KARANJA.

JUDGE.