



Kimeto (Suing as the Personal Representative of the Estate of Jonah Kipkoske Arap Chumo) v Board of Governors Chebwagan Youth Polytechnic (Environment & Land Case 30 of 2016) [2024] KEELC 3625 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 3625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 30 OF 2016
MC OUNDO, J
FEBRUARY 29, 2024**

BETWEEN

JANEFER CHEBII KIMETO (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JONAH KIPKOSKE ARAP CHUMO) PLAINTIFF

AND

BOARD OF GOVERNORS CHEBWAGAN YOUTH POLYTECHNIC DEFENDANT

RULING

1. Pursuant to a ruling delivered by this court on the 6th May, 2021, the Applicant herein had filed a Notice of Motion Application dated 21st May, 2021 seeking for orders of stay of execution of the orders of 6th May, 2021 which had directed her to deposit in court the taxed costs of Kshs. 794,557/= as a condition for reinstatement of the suit, as well as stay of any consequential orders pending the hearing and determination of the intended Appeal. The said Application had been dismissed with costs for lack of merit vide this Court's Ruling delivered on 7th October, 2021.
2. Subsequently, the Court had issued Warrants of Attachment and Sale of Property dated 21st October 2021 wherein on 7th October, 2022, the Applicant herein and the Defendant/Respondent's Advocate had entered into a Consent Agreement to pay the decretal amount in instalments and in default of any instalment by the Plaintiff, execution to issue.
3. The Plaintiff/Applicant has now approached the court vide a Notice of Motion dated 13th April, 2023 brought under the provisions of Order 24 Rule 6 Order 40 Rules 1 & 2 of the *Civil Procedure Rules*, Sections 1A), 3 and 3A of the *Civil Procedure Act* (sic) and all other enabling provisions of law seeking the following orders:
 - i. Spent



- ii. That this honourable court be pleased to grant leave to the firm of M/S Omwoyo, Momanyi Gichuki & Co. Advocates Bruce House, 14th Floor Room 1404, North Wing Standard Street, P.O Box 50380-00200 Nairobi to come on record for the Applicant/Plaintiff (sic).
 - iii. spent
 - iv. That this honourable court be pleased to issue a temporary order staying execution of the Decree and Warrants pending the hearing and determination of the Notice of Motion dated 12th April, 2023 filed in High Court of Kenya at Milimani Commercial and Tax Court Bankruptcy Cause No. 46 of 2004 or pending further orders of this honourable court (sic).
 - v. That this court be pleased to direct that the Decree and warrants be settled through official Receivers office under Bankruptcy Cause No. 46 of 2004.
 - vi. That the costs of this application be provided for.
4. The Application is supported by the grounds set on its face as well as on the Supporting Affidavit of the Applicant sworn on the 13th April, 2023 to the effect that she had petitioned the Honourable Court in Nairobi Commercial and Tax Division in Bankruptcy cause No. 46 of 2004 sometime in the year 2004. That this court had issued warrants of sale dated 21st October, 2021 against her hence she had been forced to enter a consent dated 7th October, 2022 in order to avert the sale of the estate asserts whereby she had so far made payment of Kshs. 60,000/= to the Respondent's Advocates. That personally, she had nothing attachable hence her decision to take a Receiving Order. That her father's estate was at risk of being auctioned since she had been unable to service the consent order hence she had wished to petition the court at Nairobi in Bankruptcy Cause No. 46 of 2004 to admit the instant claim to be payable through the official Receiver's office prorate together with other debts listed there.
 5. The said Application was opposed vide the Defendant/Respondent's Grounds of Opposition dated 26th June 2023 to the effect that the instant application had been filed to frustrate the decree holder from enjoying the fruits of its judgement, the Receiver Order having been issued in the year 2004 yet no Official Receiver had been appointed and gazetted since then because the Applicant had not provided evidence to that effect. That the proceedings in this court had been initiated and prosecuted by the Plaintiff/Applicant and not the Receiver Manager. Further that the Applicant had appointed more than three Advocates to prosecute the instant matter before court despite having been declared bankrupt. That the Applicant had admitted that she had paid a sum of Kshs. 60,000/= with the receiving order in existence hence the instant application was self-defeating. That the Applicant had not demonstrated sufficient reasons to warrant the stay of execution of the court's decree and further that there had been a consent dated 7th October, 2022 filed in court on 11th October, 2022 signed by the Applicant herein and the Defendant's Counsel which consent had not been set aside hence it was still binding on the Plaintiff herein.
 6. On 12th July 2023, parties took directions to have the application disposed of by way of written submissions. Accordingly, the parties complied and filed their submissions to which I shall herein summarize as follows;

Plaintiff's Submissions.

7. The Plaintiff, via her submissions dated 12th October, 2023 listed down the orders sought in the instant application before submitting that the second prayer had been overtaken by events since the Plaintiff/Applicant herein had resolved to represent herself and that it was upon the court to make determination on the other prayers.



8. Her submission was that she had been trying to liquidate the decretal sum and had so far paid a sum of Kshs. 100,000/= but with the current economy, it had become a challenge for her to pay the decretal sum as required.
9. That the Defendant's advocate one Mr. Langat misled her that Civil Appeal Application No. E076 of 2021 had been dismissed prompting her to sign and file a Notice of Withdrawal on 22nd November, 2022 and afterwards, she received a message from the court to the effect that the said Civil Appeal Application was to proceed. That upon attending the court, her application for stay of Kshs. 796,057/= was allowed wherein she had been allowed to pay the said amount in monthly instalments of Kshs. 10,000/=. That therefore, the Environment and Land Court Case Number 30 of 2016 was re-opened and that the Defendant's advocate being present, had not opposed her application for payment of the decretal sum in instalments.
10. She submitted that she had brought the instant application especially the documentary evidence of receivership because even after the court had stayed its earlier orders and directed her to pay the decretal amount that she pays the full amount of Kshs. 400,000/= which amount she could not afford. That contrary to the Defendant's Advocate's allegations that she had refused to make payment, she had been paying the amount as per the court of Appeal ruling and order (sic). Further that the auctioneers had been on her case requiring her to settle the debt regardless of her financial situation hence she had been forced to apply that the balance of the decretal amount herein be settled through official receiver 's office under Bankruptcy No. 46 of 2004.
11. That she had found herself in the instant situation because her previous Advocate on record had not been keen in executing her case despite having paid them their legal fees. That to show how serious she had been in handling her case in an appropriate manner, she had even paid throw away costs of Kshs. 25,000/=. That she had proof of her commitment to settle the decretal amount in instalments and although she applied for receivership, she was still capable of paying the same in instalments. She thus prayed that the court grants her the orders sought in the instant Application.

Defendant's submissions.

12. The Defendant/Respondent vide its Submissions dated 25th July, 2023 framed three issues for determination, to wit;
 - i. Whether the court should grant a temporary stay of execution of the decree and warrants herein pending the hearing and determination of the instant application and the Notice of Motion dated 12th April, 2023 filed in the High Court of Kenya at Milimani Commercial and Tax Court Bankruptcy Cause No. 46 of 2004.
 - ii. Whether the court should direct that the decree and warrants be settled through official Receivers office under Bankruptcy Cause No. 46 of 2004.
 - iii. Who is to bear costs of the Application.
13. On the first issue for determination, the Defendant's reliance was hinged on a combination of decision in the case of *Butt v Rent Restriction Tribunal* [1979] eKLR (Madam Miller and Porter JJA (sic) and *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR on what amounts to substantial loss, to submit that the decree and order in the instant matter had been issued on the 6th May, 2021 wherein the Defendant had been awarded Kshs. 794,557/=. That the Applicant had neither shown how and/or that she stood to suffer any substantial loss if the application for stay of execution was not granted nor how the same would affect the proceedings in any other matter.



14. It was the Defendant's submission that the Applicant paid Kshs. 60,000/= towards clearing the same amount whilst the receiving order existed hence the instant application was self-defeating since the Applicant had been able to pay the said amount. Further, that the Applicant had ably managed to appoint three Advocates to prosecute the instant matter before the court thus she could not claim that she had been incapable of settling the decretal amount.
15. The Defendants thus submitted that the Applicant had not demonstrated sufficient reason warranting the stay of execution of the decree of the court.
16. On the second issue for determination as to whether the court should direct that the decree and warrants be settled through official Receivers office under Bankruptcy Cause No. 46 of 2004, the Defendant submitted that the Applicant had not exhibited the alleged application dated 12th April, 2023 filed at Milimani Cause No. 46 of 2004 despite it being trite law that whoever alleges ought to prove.
17. That Defendant's submission was that there had been a consent dated 7th October, 2022 filed in court on 11th October, 2022 signed by the Applicant herein and the Defendant's counsel. That the said consent had not been set aside hence it was still binding on the Plaintiff as she could not purport to seek refuge that the court direct that the decree and warrants be settled through official Receiver's office under Bankruptcy Cause No. 46 of 2004 since no official receiver had been appointed and gazetted since the year 2004. That the instant application was an abuse of the court process and waste of court's time.
18. Reliance was placed in the case of *Chairman Co-Operative Tribunal & 8 Others Ex-Parte Management Committee Konza Ranching & Farming Co-Operative Society Ltd* [2014] eKLR where the court cited with approval the decision in the case of *Stephen Somek Takwenyi & Another v David Mbutia Githare & 2 Others* Nairobi (Milimani) HCC No. 363 of 2009 (sic) to submit that it was not in the interest of justice that the stay of execution be granted to the Applicant. That costs were awarded to a successful party in order to indemnify him/her for the expense to which he/she had been put through having been unjustly compelled either to initiate or to defend litigation. Further that it should be noted that the Applicant herein had vide an application dated 21st May, 2021 unsuccessfully applied for a stay of execution of an order of the instant costs.
19. The Defendant thus submitted that granting the Applicant the orders as sort in the instant application would be unjust and not in the interest of justice as it would deny and further frustrate the Defendant who was yet to enjoy the fruits of the judgement and decree that had been delivered in its favour.
20. Regarding the costs of the instant Application, the Defendants submitted that it was trite law that costs followed the event and that the court had discretion as to whom the same should be awarded to.
21. The Defendant concluded that the instant application was an afterthought to frustrate and prevent the Defendant from enjoying the fruits of its judgement, an abuse of court's process hence should be dismissed.

Determination.

22. I have considered the Applicant's Notice of Motion dated 13th April, 2023, where she seeks for orders of temporary stay of execution of the Decree and Warrants pending the hearing and determination of the Notice of Motion dated 12th April, 2023 filed in High Court of Kenya at Milimani Commercial and Tax Court in Bankruptcy Cause No. 46 of 2004 and/or pending further orders of this court. I have further considered that the Applicant also seeks for orders directing that the Decree and warrants be settled through official Receivers office under Bankruptcy Cause No. 46 of 2004.



23. This application has been opposed by the Respondent for reasons that the Applicant had not demonstrated sufficient reason warranting the stay of execution of the decree of the court. That the Applicant having ably managed to appoint three Advocates to prosecute the instant matter before the court could not now claim that she had been incapable of settling the detrital amount. That further, the Applicant had not exhibited the alleged application dated 12th April, 2023 filed at Milimani Cause No. 46 of 2004 despite it being trite law that whoever alleges ought to prove as proof that indeed there had been a Bankruptcy Cause No. 46 of 2004 pending at the Milimani Commercial and Tax Court. Lastly that there had been a consent dated 7th October, 2022 filed in court on 11th October, 2022 signed by the Applicant herein to pay the detrital amount in instalments and in default of any instalment, execution to issue. That the consent had not been set aside hence it was still binding on the Applicant.
24. It is not in dispute that the Applicant, vide an application dated the dated 21st May 2021 sought for:
- “.....stay of execution of the order of 6th May 2021 directing her to deposit in court the taxed costs of Kshs. 794,557/= as a condition for reinstatement of the suit as well as stay of any consequential orders pending the hearing and determination of an intended Appeal.”
25. Vide a ruling dated the 7th October 2021, this court had dismissed the said Application with costs wherein the Applicant had been directed to lodge her Appeal against the decree of the Court within 45 days from the date of the ruling.
26. The Applicant now brings this application again seeking for orders of temporary stay of execution of the Decree and Warrants pending the hearing and determination of the Notice of Motion dated 12th April, 2023 filed in the Milimani Commercial and Tax Court in Bankruptcy Cause No. 46 of 2004 and/or pending further orders of this court and for orders directing that the Decree and warrants be settled through official Receivers office under Bankruptcy Cause No. 46 of 2004.
27. First, it must be remembered that there had been a consent dated 7th October, 2022 between the Applicant and the Respondent’s Counsel which consent had been adopted by the court on the 13th October 2022 according to the terms of the parties who had agreed on the mode of payment of the taxed costs by the Applicant wherein default, execution would ensure.
28. It is trite law that once a consent order or judgment has been entered into by the parties, the procedure available to challenge or set aside or vary the same is by way of an application for review or by a different suit.
29. That notwithstanding, the matter for determination in the circumstance is whether the present consent Judgment which has been adopted as Judgment of the Court can be varied or set aside. Secondly, whether this Application is *res judicata*.
30. On the first issue for determination, there is now dearth of authorities on the law governing the setting aside of consent Judgments or orders.
31. The Court of Appeal in the decision in *Munyiri v Ndungunya* (1985) KLR 370 held as follows:
- “..... will exercise its jurisdiction to review, vary or set aside a consent order if it is shown that such an order has been obtained by fraud or collusion, by agreement contrary to the policy of the Court, or the consent was given without sufficient material fact, or misapprehension or ignorance of material facts or for a reason which would enable a Court to set aside an agreement or by the consent of the parties themselves.”



32. In the case of *Samuel Mbugua Ikumbu v Barclays Bank of Kenya Limited* [2015] eKLR the Court of Appeal held that:

“The law on variation of a consent judgment is now settled. The variation of a consent judgment can only be on grounds that would allow for a contract to be vitiated. These grounds include but are not limited to fraud, collusion, illegality, mistake, an agreement being contrary to the policy of the Court, absence of sufficient material facts and ignorance of material facts.”

33. I find that there were no circumstances shown to exist that suggested that there was fraud or collusion in the consent entered into by the parties herein. Indeed all material facts were known to the parties, who consented to the compromise in terms as clear and unequivocal as to leave no room for any possibility of mistake or misapprehension. Indeed the consent had also been adopted by the Court of Appeal sitting in Nakuru in Civil Application No. 076 of 2021 wherein the Notice of Appeal dated 22nd November 2021 had been marked as withdrawn.

34. On the second issue for determination, the substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 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”

35. The test in determining whether a matter is *res judicata* as stated was summarized in the case of *Bernard Mugo Ndegwa v James Nderitu Githae and 2 Others* (2010) eKLR, as follows that:

- i. The matter in issue is identical in both suits;
- ii. The parties in the suit are the same;
- iii. Sameness of the title/claim;
- iv. Concurrence of jurisdiction; and
- v. Finality of the previous decision.

36. Looking at the circumstance of the present suit wherein the Applicant now seeks for stay of execution pending a matter that was allegedly filed in Milimani Commercial and Tax Court in Bankruptcy Cause No. 46 of 2004, and the ruling herein delivered on the 7th day of October 2021 in *Janefer Chebii Kimeto (suing as the personal representative of the estate of Jonah Kipkoske Arap Chumo) v Board of Governors Chebwagan Youth Polytechnic* [2021] eKLR, I find that this Application is *res judicata* the said proceedings and the Applicant having given the current application a face lift, is estopped from litigating under the provisions on Section 7 of the *Civil Procedure Act*.

37. Indeed it was held in the case *E.T v Attorney General & Another* (2012) eKLR that:

“The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the Plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* (2001)



EA 177 the court held that, ‘parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported) where he stated,

‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....’

38. The upshot of the foregoing is that litigation cannot be conducted on the basis of trial and error and that is why there are provisions of the law and procedure to be adhered to. The Application herein dated the 13th April, 2023 lacks merit and the same is dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT KERICHO THIS 29TH DAY OF FEBRUARY 2024

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

