Patriotic Group of Companies Limited v Sewe & 15 others (Appeal E020 of 2024) [2025] KEELRC 887 (KLR) (20 March 2025) (Ruling)

Neutral citation: [2025] KEELRC 887 (KLR)

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU

APPEAL E020 OF 2024

JK GAKERI, J

MARCH 20, 2025

BETWEEN

PATRIOTIC GROUP OF COMPANIES LIMITED ..... APPLICANT

AND

JOHN OGANGO SEWE ..... 1ST RESPONDENT

JOHN OCHIENG ..... 2ND RESPONDENT

ALLAN MAJWA ..... 3RD RESPONDENT

CAROLINE AUMA ..... 4TH RESPONDENT

CARSTONE ODHIAMBO ..... 5TH RESPONDENT

GEORGE OJOWO ..... 6TH RESPONDENT

ALICE AKOTH ..... 7TH RESPONDENT

JOHN OKELLO ..... 8TH RESPONDENT

WILLICE ONYANGO ..... 9TH RESPONDENT

NICHOLAS OKARA ..... 10TH RESPONDENT

JACKLINE ATIENO ..... 11TH RESPONDENT

CHARLES RAY ONYANGO ..... 12TH RESPONDENT

JOHN ORIEDA ..... 13TH RESPONDENT

DAVID ODHIAMBO ..... 14TH RESPONDENT

CHRISTOPHER WAKHUNGU ..... 15TH RESPONDENT

GEORGE OUMA OUNDO ..... 16TH RESPONDENT

RULING

1. Before the Court for determination is the appellant/applicant's Notice of Motion dated 9th January, 2025, filed under certificate of Urgency seeking Orders that: -

    1. Spent

    2. Pursuant to the Orders made by the court on 28th November, 2024 that the decretal sum be deposited in an interest earning account, the same be reviewed to state that the decretal sum of Kshs.582,500 be deposited in an interest earning account in a reputable bank in Kenya held in the joint names of the Advocates on record within 45 days.

    3. The court be pleased to enlarge the time for depositing the decretal sum within 14 working days from the date hereof.

    4. Costs be in the cause.

2. The Notice of Motion is expressed under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 45 Rule 6(1) and (2) of the Civil Procedure Rules, 2010 and the High Court Practice andvacation Rules and is based on the grounds set out on its face and the Supporting Affidavit of Titus Kigen sworn on 9th January, 2025.

3. The affiant deposes that after the court granted temporary stay of execution conditional upon on deposit of the decretal sum, and the sum of Kshs.582,500 was offered, the respondent demanded Kshs.809,594 and the applicant is ready and willing to deposit the sum of Kshs.582,500.00 in compliance with court Orders.

Response

4. In his Replying Affidavit sworn on 15th January, 2024, Mr. John Ogango Sewe depones that by letter dated 29th November, 2024 Ms Wachakana & Co. Advocates proposed to deposit the Decretal sum at Diamond Trust Bank.

6. Subsequently, by letter dated 2nd December, 2024 the affiants advocate proposed that the Decretal sum be deposited at the Co-operative Bank of Kenya Ltd.

7. The affiant further depones that after the court judgment and Taxation Ruling of the Party and Party Bill of Costs dated 22nd November, 2023, the Lower Court issued a Decree and Warrant of Attachment and sale for Kshs.809,594.00 computed as:

    a. Principal Decretal sum Kshs.582,500.00

    b. Costs of the suit Kshs.172,855.00

    c. Interest at court rates Kshs..53,239.00

    d. Further court fees Kshs.1,000.00

    Total Kshs.809,594.00

8. That subsequently M/s Moran Auctioneers proclaimed the appellants movable property for Kshs.809,594.00.

9. The affiant further depones that the amount contemplated by the court order made on 28th November, 2024 is Kshs.809,594.00 and the proposed deposit of Kshs.582,500 cannot fully comply with the Order for security and shall adversely prejudice the respondents if the appeal is dismissed.

10. That the application dated 9th January, 2025 is mischievous frivolous and made in bad faith and intended to delay and derail the respondent's enjoyment of the fruits of litigation.

Applicant's submissions

11. As to whether the applicant has satisfied the conditions under Order 42 rule 6 of the Civil Procedure Rules 2010, counsel submitted that although an appeal does not operate as an automatic stay, the applicant had fulfilled the conditions set out under Order 42 Rule 6 of the Civil Procedure Rules and the court granted a stay subject to the deposit of the Decretal sum within 45 days and the applicant was ready and willing to deposit the sum of Kshs.582,500 devoid of cost and interest pending the hearing and determination of the appeal.

12. Reliance was placed on the sentiments of the Court in Arun C. Sharma v Ashana Raikundalia t/a Raikundalia & Co. Advocates & 2 Others [2014] eKLR to urge that the applicant is ready and willing to deposit the said sum.

13. Counsel then submitted on the purpose of stay and cited the Court of Appeal decision in Co-operative Bank of Kenya Ltd v Banking Insurance & Finance Union [2025] eKLR to contend that the respondent was acting arbitrarily, and unlawfully and contrary to the orders of the court demanding a deposit of Kshs.809,594.00 in lieu of Kshs.582,500.00.

14. That it was in the interest of justice for the court to review its orders to allow the applicant to deposit Kshs.582,500.00 in the joint interest earning account.

Respondent's submissions

15. Counsel for the respondent relied on the provisions of Section 7 of the *Civil Procedure Act* and Court of Appeal decisions in as Uhuru Highway Development Ltd v Central Bank of Kenya & 2 Others [1996] eKLR and Independent Electoral and Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR) to submit that the instant Notice of Motion was res judicata and the court had no jurisdiction to entertain it.

16. Section 7 of the *Civil Procedure Act* provides: -

> 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.

17. Section 2 of the *Civil Procedure Act* states that suit means all civil proceedings commenced in any manner prescribed.

18. The issue of whether an interlocutory matter is subject to the principle of Res Judicata was considered by the Court of Appeal in Uhuru Highway Development Ltdv Central Bank of Kenya & 2 Others (supra), where the court expressed itself as follows:

19. What is before us is: can a matter of interlocutory nature decided in one suit be subject of another similar application in the same suit? Does the principle of res judicata apply to an application heard

and determined in the same suit? We would like to refer to the decision in the case of Ram Kirpal v Rup Kuarireported in I.L.R.vI 1883 Allahabad series. The Privy Council sitting on appeal from a decision of the full bench of Allahabad High Court said:

> " The questions, if the term "res judicata" was intended, as it doubtless was, and was understood by the full Bench, to refer to a matter decided by a court of competent jurisdiction in a former suit, was irrelevant and inapplicable to the case (emphasis ours). The matter decided by Mr. Probyn was not decided in a former suit, but in a proceeding of which the application, in which the orders reversed by the High Court were made, was merely a continuation. It was as binding between the parties and those claiming under them as an interlocutory judgement in a suit is binding upon the parties in every proceeding in that suit, or as a final judgement in a suit is binding upon them in carrying the judgement into execution. The binding force of such a judgement depends not upon S.13, Act I of 1877 but upon general principles of law. If it were not binding, there would be no end to litigation."

20. What did the Privy Council say in Ram Kirpal's case? Their Lordship clearly were concerned about the desirability of bringing an end to litigation and went on to say that Section 13 of Act 1 of the 1877 which is equivalent to Section 7 of the *Civil Procedure Act*, was not exhaustive, really; and that the law of "res judicata" did not apply to a matter decided in the same suit and that upon its general principles it applied to interlocutory proceedings in the same suit...

21. That is to say there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is the precise problem that Section 89 of our *Civil Procedure Act* caters for...

> This can only mean that interlocutory proceedings come within the purview of the word "suit" for purposes of the issue of res judicata byvirtue of Section 89 of our *Civil Procedure Act*..."

22. Similarly, in Mburu Kinyua v Gachini Tuti [1978] KLR 69, the Court of Appeal held that a second application to set aside a judgment entered ex parte would be res judicata.

23. Having demonstrated that the principle of res judicata applies to judgments and interlocutory applications as well, is the instant application res judicata?

24. The elements or prerequisites of res judicata were aptly captured by the Supreme Court in I.E.B.C v Maina Kiai & 5 Others [2017] eKLR as follows:

    a. The suit or issue was directly and substantially in issue in the former suit.

    b. The former suit was between the same parties or parties under whom or any of them claim.

    c. Those parties were litigating under the same title.

    d. The issue was heard and finally determined on 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.

25. Since the issue before the court involves interlocutory applications by the appellant/Applicant it is relatively easy to determine whether the requirements of res judicata have been met.

26. In its Notice of Motion dated 28th November, 2024, the applicant sought a review of the Orders of the court dated 27th November, 2024 and allow the application dated 9th July, 2024 on condition that the applicant deposited half of the decretal sum in a joint interest earning account of the Applicant/ Respondent Advocates within 30 days from the date of the directions.

27. The instant Notice of Motion seeks a review of the Orders made by the court on 28th November, 2024 to allow the appellant to deposit the sum of Kshs.582,500.00 as the decretal sum in an interest earning account within 45 days.

28. On 28th November, 2024 the court directed that the appellant/Applicant shall deposit the decretal sum in an interest earning account in a reputable bank in Kenya held in joint names of the advocates for the parties within 45 days failing which the Decree-Holder would be at liberty to execute the Decree.

29. This is the Order sought to be reviewed.

30. Although both applications relate to the deposit of security and are review applications, the issue of security was not addressed in the earlier application as the review was found to be unmerited and accordingly dismissed.

31. Notably, however, the issue of security was significantly covered in the ruling dated 27th November, 2024 but in the context of an application for stay as opposed to an Order of the Court.

32. Puzzlingly, the appellant/Applicant seeking review of a court Order that is spent.

33. The court directed the applicant to deposit the Decretal sum within 45 days and did not do so and now seeks a review of the order, which was self-executing in that the stay was conditional upon the deposit of the decretal sum and was only effective for 45 days after which execution would ensue.

34. Having failed to honour the court's directions, the court cannot turn the clock backwards and extend an Order that is already spent.

35. The foregoing is fortified by the provisions of Order 42 Rule 6(2) that:

    No order for stay of execution shall be made under subrule(1)unless— (a) ...

    (b) Such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

36. On 28th November, 2024, the court directed that the decretal sum be deposited in an interest earning account.

37. The applicant appears to be contesting the phrase "decretal sum".

38. The sentiments of the court in Mwaura Karuga T/A Limit Enterprises v Kenya Bus Services Ltd & 4 Others [2015] eKLR are worth repeating;

39. The security must be one which shall achieve due performance of the decree which might ultimately be binding on the applicant. The rule does not, therefore, envisage just any security. The words "ultimately be binding" are deliberately used and are useful here, for they refer to the entire decree as will be payable at the time the appeal is lost. That is the presumption of law here. Therefore, the ultimate decree envisaged under order 42 rule 6 (2) (b) of the Civil Procedure Rules includes costs and interest on the judgment sum unless the latter two were not granted-which is seldom. The security to be given is measured on that yardstick".

40. See also Mutahi Kiranga v Margaret Waweru & Another [2015] eKLR, Carter & Sons Ltdv Deposit Protection Fund Board & 2 Others [1997] eKLR and Equity Bank Ltdv Taiga Adams [2006] eKLR among others.

41. Documents availed by the respondent reveal that the decretal sum inclusive of costs and interest is Kshs.809,594.00, an amount the appellant/Applicant is aware of but intriguingly contends that the respondent was acting arbitrarily, unlawfully and inviolation of the court order.

42. In the upshot, the applicant had no alternative but to deposit the sum of Kshs.809,594.00 in an interest earning account as directed but opted to determine how much it ought to deposit and ultimately did not comply with the directions of the court.

43. The pray for the court to enlarge time within which to deposit the decretal sum is not supported by any evidence to show why the decretal sum was not deposited within the stipulated time.

44. Counsel for the applicant did not make any application or request for the court to alter orvary the terms of the security and as adverted to elsewhere in this ruling the applicant did not reciprocate the respondents' accommodation on the amount.

45. In the court'sview, no substantive justification has been provided for the court to review its directions issued on 28th November, 2024 at the instigation of the applicant and under Certificate of Urgency for the simple reason that the applicant did not account for the 45 days given, which is 1[1]/2 months and has not demonstrated how the duration requested will be effectively utilized. However, in the interest of justice, the appellant is granted 10 days to comply.

46. From the foregoing, it is discernible that the applicant's Notice of Motion dated January 9, 2024 is for dismissal and it is accordingly dismissed save for the 10 days leave to comply.

    Parties shall bear own costs.

DATED, SIGNED AND DELIVEREDvIRTUALLY AT KISUMU ON THIS 20TH DAY OF MARCH, 2025.

DR. JACOB GAKERI

JUDGE

ORDER

Inview of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020 that judgments and rulings shall be delivered throughvideo conferencing orvia email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2)(d) of *the Constitution* which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of *the Constitution* and the provisions of Section 1B of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

DR. JACOB GAKERI

JUDGE

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