



Mukherjee v Software Technologies Limited; Attorney General & 2 others (Interested Parties) (Cause E416 of 2022) [2023] KEELRC 2717 (KLR) (1 November 2023) (Ruling)

Neutral citation: [2023] KEELRC 2717 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
CAUSE E416 OF 2022
JK GAKERI, J
NOVEMBER 1, 2023**

BETWEEN

CHAITANYA MUKHERJEE CLAIMANT

AND

SOFTWARE TECHNOLOGIES LIMITED RESPONDENT

AND

THE ATTORNEY GENERAL INTERESTED PARTY

NATIONAL POLICE SERVICE INTERESTED PARTY

DIRECTORATE OF CRIMINAL INVESTIGATION INTERESTED PARTY

RULING

1. Before the court for determination is the Applicant’s Notice of Motion dated 27th April, 2023 filed under Certificate of Urgency seeking orders that:-
 1. Spent.
 2. There be a stay of any intended issuance of police summons or investigations by the 1st and 2nd Interested Parties on the Applicant surrounding the facts raised in the Applicant’s Application dated 28th July, 2022 and also a stay on any precipitate action as against the applicant owing to the delivery of the ruling on the said application delivered by this honourable court on 27th April, 2023 pending the hearing and determination of this application inter- partes.
 3. There be a stay of any intended issuance of police summons or investigations by the 1st and 2nd Interested Parties on the applicant surrounding the facts raised in the applicant’s application dated 28th July, 2022 and also a stay of any



precipitate action as against the applicant owing to the delivery of the ruling on the said application delivered by this honourable court on 27th April, 2023, pending the hearing and determination of the applicant's intended appeal.

4. The court be pleased to grant the orders sought subject to any conditions as the court may deem fit.
5. The costs of this application be provided for.
2. The Notice of Motion is expressed under Order 42 Rule 6(1) of the *Civil Procedure Rules*, 2010 and Section 3A of the Civil Procedure Act and is based on the grounds set out on its face and supported by the Affidavit of the applicant sworn on 27th April, 2023.
3. The affiant deposes that he is dissatisfied with the ruling delivered by this court on 27th April, 2023 and intends to appeal against the same and believes that he has an arguable appeal with a high probability of success as advised by counsel.
4. That following the delivery of ruling, the 2nd and 3rd Interested Parties will proceed with summons and investigations against him in contravention of the spirit of court orders issued by the Honourable Lady Justice Anna Ngibuini Mwaure on 4th July, 2022 and will render the appeal nugatory.
5. The affiant deposes that he is ready and willing to comply with any such conditions/terms as to provision of security as may be determined by the court for granting of the orders sought.
6. The affiant urges the court to exercise its discretion favourably and grant the orders sought.

Response

7. By 28th September, 2023 when the court retired to prepare this ruling, the Respondent had not filed its response to the Notice of Motion.

1st, 2nd and 3rd Interested Parties Grounds of Opposition

8. The Interested Parties argue that it is not in the public interest to warrant grant of the orders sought.
9. That the instant application lacks merit, is frivolous, vexatious and an abuse of the court process as the applicant seeks orders to curtail the constitutional and statutory mandate of the 3rd Interested Party.
10. That the applicant's right should not be prejudicial to the rights of others.
11. The Interested Parties contend that the application is an abuse of court process to circumvent impending investigations.
12. That the application is brought in bad faith, lacks merit and should be dismissed.

Applicant's submissions

13. Counsel isolated a singular issue for determination, namely; whether the applicant should be granted orders for stay of proceedings.
14. Counsel submitted that Order 42 Rule 6 of the *Civil Procedure Rules*, 2010 provides for stay in case of appeal and paraphrased the rule.
15. Reliance was also made on Order 42 Rule 6(2) which prescribes the conditions for a stay of execution pending appeal as aptly captured in *Butt V Rent Restriction Tribunal* (1979).



16. As regards substantial loss, reliance was made on the sentiments of the Court of Appeal in *Shell Ltd V Kibiru and another* (1986) KLR 410 to urge that the applicant stood to suffer substantial loss if a stay was not granted as he would be under threat from the 2nd and 3rd Interested Parties and would not be in a position to discharge his duties effectively and the appeal would be rendered nugatory.
17. As regards unreasonable delay, counsel submitted that the application was timeously made as it was made on the date the ruling was delivered on 27th April, 2023.
18. Counsel did not submit on the last condition on provision of security and/or what the applicant was willing to provide as security.

Respondent's submissions

19. The Respondent's counsel isolated two issues for determination, namely; whether the Respondent is in violation of court orders dated 4th July, 2022 and whether the Respondent can halt, prevent or otherwise interfere with the mandate of the 2nd and 3rd Interested Parties.
20. As to whether the Respondent acted in violation of the court orders dated 4th July, 2022, counsel relied on the decision in *Commercial Bank of Africa Ltd V Isaac Kamau Ndirangu* for the proposition that court orders must be obeyed to enhance the authority and dignity of the court.
21. Counsel submitted that the Respondent understood the orders in question and did not pursue the matter further as alleged and resolved to reinstate the applicant until the orders were abrogated by subsequent hearing of the application and the main suit.
22. As to whether the Respondent can halt, prevent or otherwise interfere with the mandate of the 2nd and 3rd Interested Parties, counsel submitted that it could not do so as their mandate was constitutional and statutory and there had been no official communication from the Respondent to the 2nd and 3rd Interested Parties since the orders dated 4th July, 2022 were made.
23. Reliance was made on the sentiments of Odunga J. (as he then was) in *Isaac Tumunu Njunge V Director of Public Prosecution and 2 others* (2016) eKLR on the mandate of the police to investigate the commission of offences.

1st, 2nd and 3rd Interested Parties submissions

24. Counsel identified two issues for determination namely; whether the instant application offends the principle of *res judicata* and whether the application met the threshold for granting temporary orders as held in *Giella V Cassman Brown & Co. Ltd* (1973) EA 358.
25. On *res judicata*, counsel relied on the provisions of Section 7 of the Civil Procedure Act, Cap 21 to urge that a person may not commence more than one action in respect of the same or substantially similar cause of action.
26. According to counsel, in order to determine whether a suit was *res judicata*, a court must consider the decision which settled the issues at hand and the instant suit so as to determine;
 - i. The issues determined in the previous suit.
 - ii. Whether the issues were similar to those in the subsequent case and were covered by the decision.



- iii. Whether the parties are the same or litigating under the same title and the previous suit was determined by a court of competent jurisdiction.
27. Reliance was made on the sentiments of Kuloba J. in *Njangu V Wambugu & another* Nairobi HCCC No. 234 of 1991 as well as those of the Court of Appeal in *Siri Ram Kaura V M.J.E Morgan* CA 71/1960 (1961) EA 462 on the essence of *res judicata*.
28. Counsel submitted that it was unjust where a party litigates a fresh matters already determined by the court.
29. Counsel urged that unless a decision was quashed or set aside, it ought be accepted as true and should not be re-litigated by the dissatisfied party.
30. As to whether the instant application meets the threshold for the grant of temporary injunction, counsel relied on the test enunciated in *Giella V Cassman Brown Co. Ltd* (Supra) to urge that the applicant was seeking injunctive relief to curtail the constitutional and statutory mandate of the 3rd Interested Party and had not responded to the allegations made against him.
31. Counsel submitted that the application did not meet the threshold for the granting injunctive orders.

Determination

32. It is common ground that applicant's Notice of Motion dated 28th July, 2022 sought injunctive relief against the National Police Service from summoning him, harassing or threatening him.
33. The applicant wanted the 3rd Interested Party restrained from summoning him for questioning and the Notice of Motion was found to be unmeritorious and dismissed on 27th April, 2023.
34. The instant Notice of Motion seeks stay orders pending the hearing and determination of the applicant's intended appeal.
35. The applicant is seeking a stay of any intended issuance of summons or investigations by the 1st and 2nd interested parties or any precipitate action following the delivery of the Ruling on 27th April, 2023.
36. From the foregoing, the issues for determination are;
 - i. Whether the Notice of Motion dated 27th April, 2023 is *res judicata*.
 - ii. Whether the applicant is entitled to the orders sought.
37. Section 7 of the Civil Procedure Act 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."



38. In *Independent Electoral and Boundaries Commission V Maria Kiai & 5 others* (2017) eKLR, the Court of Appeal held that;

“ . . . the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- 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 they or any of them claim.
- c. Those parties were litigating under same title.
- d. The issue was heard and finally determined in 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.

39. The Court of Appeal went further stating that;

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and afford 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 least outcomes favourable 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 foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

40. The court is guided by these sentiments.

41. It is not in dispute that the parties in the previous application are the same parties before the court.

42. Relatedly, the issue before the court in the former application is substantially similar to the issue before the court in the instant application. The issue was whether the 2nd and 3rd Interested Parties should be enjoined from summoning the applicant for interrogation. The applicant is now seeking a stay of issuance of summons or investigations by the 2nd and 3rd Interested Parties or any action they may wish to take following the dismissal of the Notice of Motion dated 28th July, 2023.

43. In the court’s view, the issues are directly and substantially similar.

44. Similarly, the court had jurisdiction to hear and determine the former application and the instant suit.

45. In the premises, it is evident that instant Notice of Motion by the applicant fits the criteria for holding the suit *res judicata*.

46. To the issue whether the instant application is *res judicata*, the court returns that it is *res judicata*.



47. Assuming that the instant Notice of Motion was not *res judicata*, would the applicant have succeeded in obtaining a stay pending appeal?
48. The answer to the foregoing question is in the negative for the simple reason that the court dismissed the Notice of Motion dated 28th July, 2022 and made no orders capable of being stayed.
49. Strangely, the applicant is not seeing a stay of execution pending appeal as the submissions would appear to suggest. He is seeking the stay of any intended issuance of police summons or investigations by the 1st and 2nd Interested Parties which are not substantially different from the temporary injunction sought on 12th July, 2022 against one Lillian Wanjiru, a police officer attached to the Economic and Commercial Crimes Unit of the National Police Service as well as orders against the 2nd and 3rd Interested Parties.
50. In its ruling on the Notice of Motion dated 28th July, 2022 delivered on 27th April, 2023, the court evaluated the evidence on record and found that the applicant had not demonstrated any interaction between the Respondent and any of the Interested Parties or that the summons in question were actuated by a complaint by the Respondent.
51. Puzzlingly, the orders sought in the instant application are not against any court orders as none were issued on 28th July, 2023, but against the 1st and 2nd Interested Parties, analogous to orders sought by the Notice of Motion dated 28th July, 2022 in relation to intended summons.
52. In sum, the Applicant herein is seeking orders whose effect is similar to the orders sought in July 2022, camouflaged as a stay of execution pending the hearing and determination of the application inter partes and the intended appeal under Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#), 2010.
53. In the courts view, the provisions of Order 42 Rule 6(1) and (2) of the [Civil Procedure Rules](#), 2010 are inapplicable to the instant Notice of Motion.
54. Flowing from the foregoing, it is discernible that the Notice of Motion dated 27th April, 2023 is for dismissal and it is accordingly dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 1ST DAY OF NOVEMBER 2023

DR. JACOB GAKERI

JUDGE

