



**REPUBLIC OF KENYA**  
**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**  
**AT NAIROBI**

*(Before Hon. Lady Justice Maureen Onyango)*

**CAUSE NO. 2400 OF 2012**

**JACKSON MUGOLIO MUSUNJI** **CLAIMANT**

**VERSUS**

**DAMBUSTERS EAST AFRICA LIMITED** **RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 2467 OF 2012**

**SCHOLASTICA WANGARE** **CLAIMANT**

**VERSUS**

**DAMBUSTERS EAST AFRICA LIMITED** **RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 2468 OF 2012**

**JUDITH NTHOKI NDUVA** **CLAIMANT**

**VERSUS**

**DAMBUSTERS EAST AFRICA LIMITED** **RESPONDENT**

**CONSOLIDATED WITH CAUSE NO. 2033 OF 2012**

**EVANS MORARA NYANTIKA** **CLAIMANT**

**VERSUS**

**DAMBUSTERS EAST AFRICA LIMITED** **RESPONDENT**

**RULING**

1. Before me, for determination is the Respondent/Applicant's notice of motion application dated 9th September, 2020. It seeks the following orders **THAT**:

*(i) Spent.*

*(ii) That pending the inter partes hearing and determination of this Application, an injunction do issue directed at the Respondents jointly and severally whether by themselves, their agents and/or employees:*

*(iii) Restraining them from attaching, possessing, distraining, carting off, or in any manner whatsoever levying execution against the Applicant's business premises, goods or property.*

(iv) *Staying the Execution of the Judgment and Orders of 21<sup>st</sup> June, 2019 and all subsequent Orders of this Court.*

(v) *An injunction do issue directed at the Respondents;*

(vi) *Restraining them from attaching, possessing, distraining, carting off, or in any manner whatsoever levying execution against the Applicant's business premises, goods or property.*

(vii) *Staying the execution of the Judgment and Orders of 21<sup>st</sup> June 2019 and all subsequent orders of this Court.*

(viii) *This Honourable Court be pleased to extend time accorded to the Applicant to comply with the Order to deposit the decretal sum of Kshs.1,041,968.25 in an interest earning account maintained by the Advocates of the parties herein pending the hearing and determination of its Appeal from Judgment of this Court.*

(ix) *This Honourable Court be pleased to issue any other order it may deem just in the circumstances of the matter.*

2. The Application is premised on the grounds **THAT**:

(a) *The Applicant has received a 7 day Proclamation Notice purporting to have been served upon it on 4<sup>th</sup> September, 2020 which therefore expires on Friday 11<sup>th</sup> September, 2020.*

(b) *The Applicant is in the hospitality business and runs a Restaurant and Bar near the Wilson Airport hence its business has adversely been affected by the Covid-19 pandemic which resulted in the closure and scaling down of business.*

(c) *The Applicant has been unable to raise the decretal sum of Kshs.1,041,968.25 and to deposit it in a interest earning account pending the hearing and determination of its intended Appeal.*

(d) *The Auctioneers have purported to charge the Applicant Kshs.150,000/- for proclamation, which amount the Applicant maintains is unfair and is only meant to prejudice it.*

(e) *The Applicant is willing to deposit the decretal sum as directed by the Court. It is however constrained by the effect Covid - 19 pandemic had on its operations.*

(f) *Should execution against it proceed, it shall lose its property and shall suffer irreparable harm and loss.*

(g) *No prejudice shall be occasioned to the Respondents if the orders sought in the instant Application are allowed.*

(h) *It is in the interest of justice that the Applicant is accorded a fair chance to pursue its Appeal which has reasonable chances for success.*

3. The application is further supported by the affidavit of **PETER KIMANI**, a Manager of the Respondent/Applicant sworn on 9<sup>th</sup> September, 2020 in which he reiterates the grounds as set out on the face of the Notice of Motion application.

4. In response to the Application the Claimants filed a replying affidavit sworn by **EVANS MORARA NYANTIKA**, the 4<sup>th</sup> Claimant herein on 17<sup>th</sup> September, 2020 in which he maintains that the instant application is frivolous and an abuse to Court process.

5. He averred that this Court delivered its Judgment in this matter on 21<sup>st</sup> June, 2019, approximately 15 months prior to the outbreak of Covid – 19 and therefore the Applicant cannot use the pandemic as a reason not to settle the amount.

6. He further averred that a similar application was filed by the firm of Messrs Paul Elkington & Associates previously on record for the Respondent/Applicant on 29<sup>th</sup> July, 2019.

7. The affiant maintains that following the Court's Ruling on the application delivered in December, 2019 the Applicant was to deposit the decretal sum in a joint interest earning account within 30 days from the date of the Ruling, which has not been done to date.

8. He further maintained that no appeal has been lodged in the Court of Appeal contrary to the provisions of the Court of Appeal Rules.

9. Mr. Morara further averred that through their Advocates on record, an application for taxation for costs was made and a ruling delivered on 30<sup>th</sup> April, 2020 marking the matter as concluded.

10. That following the Respondent/Applicant's failure to comply

with Court Orders for the deposit of the decretal sum, the Claimant's Advocates were forced to commence execution after notifying the Applicant's Advocates of their intentions.

11. Mr. Morara maintains that the sum of Kshs.150,000/- charged on execution is reasonable taking into account the decretal sum together

with costs and is therefore payable to the Auctioneers.

12. He maintains that the grant of the orders sought in the instant Application will greatly prejudice the Claimants who are eager to enjoy the fruits of the Judgment entered in their favour.

13. The Affiant further avers that the Application is *Res Judicata* this Court having rendered its Ruling to an application seeking similar orders.

14. In Conclusion the Claimants maintain that the Application is devoid of merit and that it ought to be dismissed with costs to the Claimants.

15. The application was fixed for hearing on 23<sup>rd</sup> September, 2020 when the parties agreed to dispose of the same by way of written submissions.

#### **Submissions by the Parties**

16. In its submissions the Claimants maintained that the instant Application is Res- Judicata and urged this Court to dismiss it with costs to the Claimants.

#### **Respondent/Applicant's Submissions**

17. There are no submissions on record filed by the Respondent/Applicant in support of the application.

#### **Analysis and Determination**

18. After considering the Application, Affidavits and Submissions on record and the evidence adduced the issues for determination are:-

(i) Whether the Application is *Res-Judicata*;

(ii) Whether the Applicant has met the threshold for the grant of the orders sought in its Application.

#### **Whether the Application is Res Judicata**

19. The doctrine of *res-judicata* is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. See the Supreme Court's decision in the case of **Kenya Commercial Bank Limited Muiri Coffee Estate Limited & Another (2016) eKLR**.

20. Further the Court in the case of **John Florence Maritime Services Limited & Another Cabinet Secretary for Transport and Infrastructure & 3 Others (2015) eKLR** pronounced itself as follows:

*“The rationale behind res-judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res-judicata ensures the economic use of court's 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. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts. It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unravelling uncontrollably.”*

21. The test for determining the application of the doctrine of *res-judicata* in any given case is elaborately spelt out under Section 7 of the Civil Procedure Act.

22. The Supreme Court in the case of **Independent Electoral**

**& Boundaries Commission Maina Kiai & 5 Others (2017) eKLR**, held that the elements that must be satisfied for a party to invoke the doctrine of *Res-Judicata* include:

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

(b) *That former suit was between the same parties or parties under whom they or any of them claim.*

(c) *Those parties were litigating under the 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.”*

23. In the present case the Claimants/Respondents in their Affidavit and submissions maintain that the instant Application is *Res- Judicata* as this Court granted orders in December 2019 to the effect that there was conditional stay of execution in this matter subject to the Respondent/Applicant depositing the decretal sum in a joint interest earning account in the names of both counsels for the Respondent and Claimants.

24. I have perused the proceedings in this matter and note that

the Respondent/Applicant did in fact file an application dated 29<sup>th</sup> July, 2019 seeking inter alia stay of execution orders.

25. That the Application came up for hearing on 16<sup>th</sup> December, 2019 when this Court allowed the application on condition that the Respondent/Applicant deposits the decretal sum in a joint interest bearing account in the names of counsel for the parties within 30 days.

26. However, the above condition was never met by the Respondent/Applicant and counsel filed the instant application on 9<sup>th</sup> September, 2020 citing effects of Covid- 19 for its failure to comply with court orders.

27. I thus agree with the Claimant's/Respondent's position that the instant application is *Res Judicata*.

28. Besides the foregoing, there is another fundamental reason why this application is doomed to fail. The suit was filed by the firm of ELKINGTON & ASSOCIATES. Judgment was delivered on 21<sup>st</sup> June 2019.

29. Order 9 Rule 9 and 10 of the Civil Procedure Rules provide as follows –

**[Order 9, Rule 9.] Change to be effected by order of court or consent of parties.**

**9. When there is a change of advocate, or when a party decides to act in person having previously engaged an advocate, after judgment has been passed, such change or intention to act in person shall not be effected by order of the court—**

**(a) upon an application with notice to all the parties; or**

**(b) upon a consent filed between the outgoing advocate and the proposed incoming advocate or party intending to act in person as the case may be.**

**[Order 9, Rule 10.] Procedure.**

**10. An application under rule 9 may be combined with other prayers provided the question of change of advocate or party intending to act in person shall be determined first.**

30. Although the firm of KITHINJI MARETE AND COMPANY ADVOCATES filed a notice of change of Advocates and a consent by ELKINGTON & ASSOCIATES for the firm to act for the Respondent, no order was sought and no leave has been granted by the Court to the firm of Kithinji Marete and Company Advocates to act for the Respondent in terms of Order 9 Rule 9 as read with Rule 10 of the Civil Procedure Rules.

31. Order 9 Rule 9 is explicit that no change of advocate shall be effected without an order of the Court. Refer to **John Langat v Kipkemoi Terer & 2 Others [2013] eKLR** and **S.K. Tarwadi v Veronica Muehleemann [2019] eKLR** where the courts held that even where a consent has been filed as between the incoming and outgoing advocates for the incoming advocates to come on record, the change must be sanctioned by the court before it can take effect, as expressly provided in Order 9 Rule 9 of the Civil Procedure Rules.

**32. For the foregoing reasons the application herein is both without merit and by Counsel who is a stranger to the proceedings. The same is accordingly struck out with costs.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 5<sup>TH</sup> DAY OF NOVEMBER 2021**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view 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 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via 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 had 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.

**MAUREEN ONYANGO**

**JUDGE**