



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwangi & another v Kahihu & another (Suing on behalf of the Estate of Lesley Nyariki Aundi)  
(Civil Appeal E540 of 2022) [2025] KEHC 1318 (KLR) (Civ) (28 February 2025) (Ruling)**

Neutral citation: [2025] KEHC 1318 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL APPEAL E540 OF 2022**

**JN MULWA, J**

**FEBRUARY 28, 2025**

**BETWEEN**

**GEORGE MACHARIA MWANGI ..... 1<sup>ST</sup> APPELLANT**

**BENARD SOITA ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ANNE WAMUYU KAHIHU ..... 1<sup>ST</sup> RESPONDENT**

**JULIA MORAA SESE ..... 2<sup>ND</sup> RESPONDENT**

**SUING ON BEHALF OF THE ESTATE OF LESLEY NYARIKI AUNDI**

**RULING**

1. Before the Court for determination is the motion dated 29/04/2024 filed by George Macharia Mwangi (hereafter called the Applicant) against Anne Wamuyu Kahihu and Julia Moraa Sese (hereafter called the 1<sup>st</sup> & 2<sup>nd</sup> Respondent/Respondents) brought pursuant to Section 1, 1A, 1B, 3, 3A & 80 of the [Civil Procedure Act](#) and Order 45 Rule 1 & 2 of the [Civil Procedure Rules](#), seeking inter alia:
  - a. Spent.
  - b. That the honorable Court be pleased to grant leave for M/S Gesumwa Mayieka & Co. Advocates to come on record for the Applicant.
  - c. Spent.
  - d. Spent.



- e. That this honorable Court be pleased to review and set aside the order for conditional stay issued by this Court on 23<sup>rd</sup> January 2024 upon consideration of the grounds reiterated in the application;
  - f. That the honorable Court do enlarge the time for compliance with the conditions of the stay orders issued on 23<sup>rd</sup> January 2024;
  - g. That in the alternative, this honorable Court be pleased to allow for the deposit of alternative/ substitute security into the Court of title No. Tigithi/Matanya Block/6/1735 (Thome IV) registered in the name of the Applicant for the satisfaction of the orders issued by this honorable Court on 23<sup>rd</sup> January 2024;
  - h. That this honorable Court do review and set aside the orders dismissing the appeal by the Applicant dated 20<sup>th</sup> July 2022 for want of prosecution on 25<sup>th</sup> October 2023 upon consideration of the grounds reiterate in the instant application;
  - i. That the appeal dated 20<sup>th</sup> July, 2022 by the Applicant raise pertinent and arguable questions for consideration and determination by this honorable Court as are reiterated in the grounds filed in support of this instant application; and
  - j. That the honorable Court do issue any and further orders that it may deem fair and just in disposition of this application.
2. The motion is premised on grounds found at the supporting affidavit sworn by the Applicant. The gist of his deposition is that the honorable Court issued orders on 23/01/2024 which were conditional and subject to deposit of Kshs. 3,000,000/- as security. That the amount was substantial and as such was unable to deposit the same within the period of twenty-one (21) days as he was in the first instance not made aware of the order and secondly was unable to raise the amount within the stipulated period. He states that despite his financial challenges he is desirous of disposing of the matter expediently therefore the Court ought to consider a review of its orders issued on 23/01/2024 in favour of depositing the title to LR. No. Tigithi/Matanya Block/6/1735 (Thome IV) as security (hereafter called the suit property), of which, is valued at Kshs, 3,450,000/- as at 04/03/2024. He concludes by stating that the application has been made without undue delay whereas the Respondents will not suffer any injury or prejudice should the prayer sought be granted.
  3. The Respondents oppose the motion by way of grounds of opposition alongside a replying affidavit deposed by 1<sup>st</sup> Respondent. The nucleus of her response and opposition to the motion is that the Applicant's motion is frivolous, vexatious and offends both principles of *Res Judicata* and Sub Judice as such the motion is an abuse of the Court process. That the Applicant had filed a similar application dated 19/01/2024 meanwhile the issue of stay of execution of the subordinate Court judgment was canvassed and determined vide an earlier motion dated 06/12/2023. He maintains that the prayer for enlargement of time towards compliance with the stay orders is untenable given that the latter was conditional and self-execution meanwhile no foundational basis for the motion has been advanced given that the appeal upon which the said orders were premised on was dismissed for want of prosecution on 25/10/2023 and the same has never been reinstated. In summation, he deposes that motion is capricious, a legal misadventure noting that the Court is functus officio on the matter therefore the application ought not to be entertained.
  4. Benard Soita, did not participate in the instant proceedings.
  5. Despite direction being issued on disposal of the Applicant's motion by way of written submissions neither of the parties complied with the said directions. That said, having ex facie considered the



motion and rival affidavit matter, it is the Court's postulation that the issues for determination concern:

- a. Whether the Court can entertain the orders for review, setting aside and or enlargement of time within which to comply with the orders of this Court issued on 23/01/2024?
- b. Whether the application is Res Judicata and or Sub Judice?
- c. Whether the motion is merited?
- d. Who ought to bear the costs of the motion?

**Whether the Court can entertain the orders for review, setting aside and or enlargement of time within which to comply with the orders of this Court issued on 23/01/2024?**

6. As earlier noted, the Respondents have questioned the competency of the motion particularly as to whether this Court ought to review, set aside and or enlarge the time within which to comply with the orders of this Court issued on 23/01/2024. The appeal was dismissed on 25/10/2023. The dismissal formed the foundational basis upon which the Applicant's motion dated 19/01/2024 was premised. The orders of this Court issued on 23/01/2024 were conditional stay orders pending hearing and determination of the Applicant's motion, intent on averting execution. The orders were not issued in respect of hearing and determination of a pending appeal, as at the time of issuance of the said orders the instant appeal had since been dismissed. Therefore, the Respondent's objection on the question cannot be sustained.

**Whether the application is Res Judicata or Sub Judice?**

7. A plea based on the doctrine of Sub Judice and Res Judicata by dint of Section 6 and 7 of the CPA respectively, appertains the Court's jurisdiction to entertain proceedings before it. To the foregoing end, the exhortation of Nyarangi, JA (as he then was) in the locus classicus case of Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1, needs no restatement here.
8. As to the doctrine of Res Judicata, the conjunctive ingredients being that in the present suit the issues being directly and substantially in issue where canvassed in the former suit; that the former suit being between the same parties or parties under whom they or any of them claim; that the parties having litigated under the same title; that the issue in present suit having been heard and finally determined in the former suit; and that the court that formerly heard and determined the issue being competent to try the subsequent suit or the suit in which the issue is raised, was succinctly addressed by the Court of Appeal in Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR). Here, it is evident that the motion dated 19/01/2024 has yet to be heard and conclusively determined whereas no material has been tendered by the Respondents in respect of the motion dated 06/12/2023. Therefore, the requirement that the conditions are conjunctive, it is on the aforesaid front alone, that the plea of Res Judicata cannot sustain or succeed.
9. With respect to the plea of Sub Judice, the ingredients thereto constituting there being more than one suit over the same subject matter; that one of the suit being instituted before the other; that both suit being pending before Courts of competent jurisdiction; and that the suits being between the same parties or their representatives was distilled by the Supreme Court in Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others (Interested Parties) [2020] KESC 54 (KLR). Likewise, to the plea of Res Judicata, it is this Court reasoned deduction that the ingredients on a plea of Sub Judice must be read conjunctively. Other



than the above, one of the key instrumental issues for consideration on a plea of Sub Judice concerns whether the suit or issue in question is pending before another Court of competent jurisdiction.

10. Here, it is equally apparent that the Applicant has not demonstrated that the pending application is being litigated before another Court of competent jurisdiction and the motion is on all fours within the aforesaid constitute parameters to satisfactorily conclude that the present motion is Sub Judice. Despite the exhortation that the motion dated 19/01/2024 and the instant motion, seek similar reliefs that in itself does not constitute Sub Judice but a different form of infraction that the Court will proceed to address later in this ruling. To the foregoing end, the plea of Sub Judice equally must fail alongside the plea of functus officio that this Court believes it need not belabor on, in light of definition as captured in *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 and this Court's earlier finding on the plea of Res Judicata.

### **Whether the motion is merited?**

11. As earlier noted, alongside the prayer concerning the orders issued by this Court on 23/01/2024 on stay of execution, enlargement of time and substitution of security, the Applicant has equally sought an order for review and or setting aside of this Court orders issued on 25/10/2023 - dismissing the instant appeal for want of prosecution. The Respondent vehemently assailed the instant motion by arguing that the Applicant had earlier filed a similar motion seeking stay of execution, review and or setting aside of this Court's orders issued on 25/10/2023, dismissing the instant appeal for want of prosecution.
12. A perusal of record before this Court and Respondent affidavit material, reveals that indeed the applicant had on 22/01/2024 filed the motion dated 19/01/2024 through Messrs. J Harrison Kinyanjui & Co. Advocates seeking inter alia setting aside of the order dismissing the appeal, stay of execution and release of the Applicant's attached motor vehicle. When this Court heard the motion ex parte, in the interim it was ordered that the Applicant deposit in Court Kshs. 3,000,000/- as security within twenty-one (21) days failure to which the stay would automatically lapse. As at 11/03/2024, when parties appeared before this Court, upon hearing representation by counsel, this Court acknowledged that indeed there was non-compliance on the part of the Applicant with respect to the orders on 23/01/2024, a consequence of which the said orders were observed as lapsed.
13. Interestingly, on 11/03/2024 counsel appearing for the Applicant intimated that the proceedings were in respect of the motion dated 08/03/2024, to wit, counsel for the Respondent contended to having not been served with the latter motion and that the stay orders issued by this Court on 23/01/2024 had since lapsed. Later, the Applicant would file the instant motion that is presently for consideration. A perusal of the Case Tracking System (CTS), shows that the Applicant through Messrs. Gesumwa Mayieka & Co. Advocates, on 11/03/2024 filed the motion seeking among other reliefs leave in respect of the latter firm of advocates to come on record, enlargement of time within which to comply with this Court's orders issued on 23/01/2024 and alternate deposit of security.
14. This Court is at a loss as to why the Applicant in the 1<sup>st</sup> instance abandoned the application dated 19/01/2024 and later the motion dated 08/03/2024 whereas the record does not capture any notice of withdrawal in respect of the two (2) currently pending motions on file. 15. The Applicants frequent change of counsel would also impute some form of mischief and in any event replication of applications seeking similar orders. As is, the motions dated 19/01/2024 and 08/03/2024 are live with no indication from the Applicant as to whether he intends to prosecute the same or not given that the motion dated 19/01/2024 was pending, it was not open to the Applicant to proceed filing successive applications seeking similar reliefs. These sought of blunders deliberate or otherwise not only dissipate



limited judicial time but also compound unnecessary legal costs on parties, proliferates confusion let alone delay in clear contravention of the encouragements pursuant to Section 1A and 1B of the CPA.

15. The apparent impropriety on the part of the Applicant by way of instituting subsequent applications seeking similar reliefs in the same suit either deliberately or otherwise typifies abuse of the Court process and noting that the Applicant is represented by counsel reads mischief. The Court of Appeal in Energy Regulatory Commission v John Sigura Oido [2021] KECA 1060 (KLR) while addressing the subject of abuse of the Court process observed that: -

“We start with the issue of alleged abuse of the court process. What is the meaning of “abuse of the court process”” That term has been the subject of consideration in a number of decisions by this Court and other Courts. In *Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 Others* (supra) this Court observed that it is difficult to comprehensively list all possible forms of conduct that constitute abuse of judicial process. The Court cited the Nigerian case of *Sarak v Kotoye* [1992] 9 NWLR 9Pt 264 where abuse of judicial process was defined as follows:-

“The concept of abuse of judicial process is imprecise; it implies circumstances and situations of infinite variety and conditions. It’s one feature is the improper use of the judicial powers by a party in litigation to interfere with the administration of justice...”

16. The same Court went on to cite examples of abuse of judicial process which include: -

- “(a) Instituting multiplicity of actions on the same subject matter against the same opponent on the same issues or a multiplicity of action on the same matter between the same parties even where there exists a right to begin the action.
- (b) Instituting different actions between the same parties simultaneously in different courts even though on different Grounds.
- (c) Where two similar processes are used in respect of the exercise of the same right for example, a cross appeal and a respondent’s notice.”

17. Consequently, without belaboring further on the matter, the instant motion dated 29/4/2024 is certainly an abuse of the Court process and one that is ripe for striking out.

18. Accordingly, the motion is struck out with costs to the Respondents.

Orders accordingly.

**DELIVERED DATED AND SIGNED AT NAIROBI THIS 28<sup>TH</sup> DAY OF FEBRUARY, 2025**

.....

**JANET MULWA.**

**JUDGE**

