



REPUBLIC OF KENYA



KENYA LAW
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Rafiki Microfinance Bank Limited v Hauliers & another (Civil Appeal E143 of 2023) [2024] KEHC 1722 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1722 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL APPEAL E143 OF 2023**

DK KEMEI, J

FEBRUARY 22, 2024

BETWEEN

RAFIKI MICROFINANCE BANK LIMITED APPELLANT

AND

**GABRIEL NYABANDE OGOLLA T/A MARKEN HAULIERS 1ST
RESPONDENT**

**DICKSON OMONDE T/A DIMONDE AGENCIES & AUCTIONEERS 2ND
RESPONDENT**

RULING

1. The application under consideration is the one dated 13th day of December, 2023 filed by the Appellant/Applicant seeking the following reliefs namely:
 - a. Spent.
 - b. Spent.
 - c. That the honourable court be pleased to set-aside and/or discharge the warrants of attachment dated 7th December, 2023 and proclamation notice dated 8th December, 2023 issued by Armok Auctioneers.
 - d. That the Honourable court be pleased to reinstate the orders issued vide the ruling delivered by Honourable Justice David Kemei on 19th October, 2023 and further vary the said orders to the effect that the Appellant/Applicant deposits the decretal sum in court within seven (7) days of the date of the court order.
 - e. That this honourable court do make such other order (s) as it may be deem fit, fair and just in the circumstances in the interest of justice.



2. The application is premised on the grounds set out on its face and the supporting affidavit sworn on even date by Henry Macharia, learned counsel in conduct of the matter on behalf of the Appellant. The Appellant's gravamen is inter alia; that on 19th October, 2023 the Honourable Justice David Kemei delivered a ruling allowing the Applicant's notice of motion application dated 20th July, 2023 seeking orders *inter alia* that this honourable court be pleased to grant an order of stay of execution of the ruling of the Honourable Charles Soi Mutai (SPM) delivered on 16th June, 2023 in Bungoma Magistrate's Court Civil Miscellaneous Application No. E287 of 2022 – *Dickson Omonde T/A Dimonde Agencies & Auctioneers -vs- Rafiki Microfinance Bank Limited & Another* and all consequential orders arising therefrom pending hearing and determination of the appeal; that in allowing the said application, the Honourable court directed the Appellant/Applicant herein to deposit the sum of Kenya shillings three hundred and seventy – eight thousand six hundred only (Kshs.378,600.00) (being the decretal sum in Bungoma Magistrate's Court Civil Miscellaneous Application No. E287 of 2022) in an interest earning account held jointly by advocates of both parties within thirty (30) days failing which the orders for stay of execution would stand discharged; that the counsel for the Applicant herein in their quest to comply with the orders issued by the Honourable court engaged counsel for the 1st Respondent with respect to opening the joint account in the names of Advocates on record for the purpose of depositing the said decretal amount; that the counsel for the applicant herein wrote to counsel for the 1st Respondent vide a letter dated 27th October,2023 requesting for the name and details of the Bank in which they would prefer the joint interest earning account in the names of the Advocates for the parties herein be opened for purposes of depositing the decretal amount in full compliance with the orders and/or directions issued by the Honourable court on 19th October, 2023; that until 22nd November, 2023 the counsel for the parties on record herein agreed that the joint account as directed by the Honourable court be opened at NCBA Bank Kenya PLC and to that effect, counsel for the applicant forwarded the account opening forms together with the agreement to open a joint account on 7th December, 2023 to the counsel for the 1st respondent herein; that in a strange twist of events, the applicant herein was served with warrants of attachment dated 7th December, 2023 together with a proclamation notice dated 8th December, 2023 demanding settlement of the decretal amount being the sum of Kenya shillings three hundred and seventy eight thousand six hundred only (kshs. 378,600.00/-). ; that vide a letter dated 11th December 2023, the counsel for the 1st Respondent responded to the applicant's letter of 7th December, 2023 whereby he blatantly declined to execute the account opening forms as well as the agreement to open a joint Escrow Account and further insisted on proceeding with execution with a view of frustrating the Applicant's efforts to comply with the orders and/or directions issued by the Honourable Court on 19th October, 2023; that in light of the above, parties have been unable to open the joint interest earning account which precedes compliance by the applicant of the court orders requiring a deposit of the decretal amount in the aforesaid account; that the Appellant has already transferred the decretal sum to its advocates on record who are eager to comply with the orders issued by the Honourable court on 19th October, 2023; that the non- compliance on the part of the applicant has been occasioned by counsel for the 1st Respondent in frustrating the agreement on the bank in which the account is to be opened as well as their refusal to execute the account opening forms, factors which are not within the control of the Applicant or its Advocates on record; that the Applicant's subject appeal raises serious triable issues with high chances of success, which appeal the applicant is keen on prosecuting and has taken positive steps in that direction; that whereas the Applicant's advocates are eager to deposit the decretal amount in a joint interest earning account as ordered by this Honourable court, it does not have the autonomy and control over the process of opening the account which has proved to be an uphill task; that in light of the foregoing that the Applicant is at risk of facing execution proceedings, which proceedings have since commenced by virtue of the warrants of attachment & proclamation



notice, both dated 8th December, 2023 taking into account that the thirty (30) days of execution have since lapsed and the joint interest earning account is yet to be opened; that if the application herein is not certified as urgent and the orders sought granted, the same will prove prejudicial and the Applicant stands to suffer substantial loss as the stay of execution of the ruling pending appeal is conditional on deposit of the decretal amount in a joint interest earning account; that the Applicant seeks that the decretal amount being the sum of Kenya shillings three hundred and seventy eight thousand six hundred only (kshs. 378,600.00) be deposited in court pending the hearing and determination of the appeal; that the honourable court has the discretion to extend time and make any other orders as may be necessary to serve justice; that the respondent will not be prejudiced in any way whatsoever if the instant application is allowed and the orders sought herein granted; that the applicant has moved diligently and expeditiously in bringing this application; that the applicant has a right to be heard as envisaged under the provisions of Article 50 of the constitution and pursuant to the rules of natural justice; that the prayers sought in the application be granted.

3. The 1st Respondent opposed the application and filed a replying affidavit sworn on 15th December, 2023 wherein he deponed inter alia; that the application dated 13th December, 2023 is res judicata and a duplicity of the previous application dated 20th July, 2023 in High Court Misc. Application No. E0 46 of 2023 seeking similar orders like the present application; that the Appellant/applicant's application dated 20th July, 2023 was heard and determined and that this Honourable court pronounced itself on the matter; that in delivering its ruling on 19th October, 2023, this honourable court allowed the application dated 20.7.2023 in the following terms;
 - a. The Appellant/Applicant is granted leave to file and serve its Memorandum of Appeal within ten (10) days from the date hereof.
 - b. An order of stay of execution of the decree in Bungoma CMCC NO. E287 OF 2022 is hereby granted pending the determination of the intended appeal upon the Applicant depositing the entire decretal sums into a joint interest earning account in the names of both Advocates for the Appellant/applicant and 1st respondent within thirty (30) days from the date hereof failing which the stay shall lapse
 - c. The costs of the Application shall abide in the intended appeal.
4. The 1st Respondent further averred that as per consideration of the ruling, the appellant /applicant was granted leave to file and serve a memorandum of appeal within ten (10) days from the date of the ruling and that the ten (10) days were to lapse on 28th of October, 2023 and that the appellant applicant was supposed to file and serve its memorandum of appeal on or before the 28th October, 2023; that the Appellant applicant herein filed its memorandum of appeal on 31st October, 2021 as indicated on the face of the memorandum of appeal and on the minute sheet; that the high court at Bungoma registry through an email dated 3rd November, 2023 addressed the appellant/applicant herein and notified it that they filed a memorandum of appeal out of time with no attachment of any order granting the appellant /applicant leave to file the appeal out of time; that the filed memorandum of appeal is improperly filed before this honourable court since the same ought to have been filed with leave of court which the Appellant/Applicant herein never sought and that the same should be struck out or expunged from he court's record; that as per condition two of the ruling dated 19th October, 2023, an order of stay of stay of execution of the decree in Bungoma CMCC No. E287 of 2022 was granted to the appellant/applicant pending the determination of the intended appeal upon the applicant depositing the entire decretal sums into a joint interest earning account in the names of both Advocates for the Appellant/applicant and 1st respondent within thirty (30)days from the date thereof failing which the stay shall lapse; that the Appellant/applicant was to ensure the joint interest Account



was opened on or before 17th November, 2023; that on 3rd November, 2023 the Appellant/applicant through email correspondences requested the 1st Respondent's Advocates on record to send their office bank details for purposes of opening a joint interest earning account in the names both Advocates for the Appellant/applicant and 1st Respondent; that on 10th November, 2013 his Advocates through email correspondences did sent its firm's bank details to the appellant/applicant's Advocates with a view of opening a joint interest earning account in the names of both advocates for the appellant/applicant and 1st Respondent; that the appellant has not been keen in complying with the directions of this Honourable court as set out in the ruling dated 19th October, 2023; that it is evident that the appellant/applicant is out to frustrate, obstruct and defeat ends of justice by all means; that court orders are not issued in vain but to be complied with; that it is in the interest of justice that litigation must come to an end and in this regard the same has properly come to an end when the Appellant/applicant out of its own indolence failed to comply with the directions issued by this Honourable court vide the ruling in Bungoma High court Misc. Civil Appl No. E046 of 2023.

5. The 1st Respondent also filed a Notice of Preliminary Objection dated 15th December, 2023 wherein he raised objections inter alia; that the application is an abuse of court process and should be struck out; that the application is res judicata as the issues herein were already canvassed in a similar application in Bungoma High Court Miscellaneous Application No. E046 of 2023 after which the court delivered its ruling thereon on 19th October, 2023.
6. Parties canvassed the application by way of written submissions. Both parties duly filed and exchanged submissions.
7. Learned counsel for the Appellant/Applicant raised three issues for determination namely; whether the 1st Respondent's Preliminary Objection dated 19th December, 2023 constitutes a proper preliminary objection; whether the applicant's application is res judicata and finally whether this court has jurisdiction to review and or set aside its orders and/or ruling.
8. As regards the first issue, learned counsel for the Applicant submitted that the said preliminary objection does not raise any proper point of law as per the principles set out in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs West End Distributors Ltd* [1969] EA 696. It was submitted that there is need to present facts which must be ascertained and thus the same is not purely on points of law and must be rejected.
9. As regards the second issue, it was submitted that the application is not res judicata as claimed by the 1st Respondent in that the application has a prayer for review of this court's ruling dated 19.10.2023. It was submitted that the 1st Respondent is attempting to hoodwink this court to deny the Applicant its right of appeal.
10. As regards the third issue, it was submitted that this court has jurisdiction to review its order or ruling pursuant to the provisions of Order 45 of the *Civil Procedure Rules* in view of the 1st Respondent's refusal to participate in the account opening so that the decretal sums are deposited therein and thus the request that the court allows the Applicant to deposit the monies into court pending determination of the appeal.
11. The 1st Respondent's submissions are dated 15.1.2024. Learned counsel relied on the preliminary objection dated 15.12.2023 and submitted that the application dated 13.12.2023 is res judicata on the grounds that the issues raised in the latest application had been canvassed vide a similar application vide High Court Misc. Application No. E046 of 2023 wherein this court delivered its ruling dated 19.10 2023.



12. It was also submitted that the Applicant failed to comply with the conditions imposed by this court and hence the Respondent instructed auctioneers to execute the decree since by then the orders of stay had already lapsed. Finally, it was averred in the Respondent's replying affidavit that the Applicant failed to lodge the appeal on time despite having been granted leave to do so and thus the Memorandum of Appeal lodged herein has been filed without the leave of the court. Learned counsel sought for the dismissal of the application with costs.
13. I have given due consideration to the Applicant's application, rival affidavits and submissions tendered. It is not in dispute that the Applicant had earlier approached this court vide HC Misc. Application No. E046 of 2023 where it was granted orders to lodge appeal out of time and within ten days and to deposit the decretal sums into a joint interest earning account in names of the advocates for the parties within thirty days failing which the order would lapse. It is not in dispute that the Applicant failed to comply with the said conditions leading to the Respondent to execute the decree prompting the Applicant to lodge the present application. It is also not in dispute that the Applicant did not file the appeal within the time allowed by this court and hence the present Memorandum of Appeal has been filed out of time. Finally, it is not in doubt that the Applicant has not made a prayer for leave to lodge appeal out of time or the already filed memorandum of appeal be deemed as filed and served. That being the position, I find the two issues necessary for determination are firstly, whether the Applicant's application dated 15.12.2023 is res judicata and secondly; whether the Applicant's application dated 23.11.2023 has merit.
14. As regards the first issue, it is noted that the 1st Respondent raised a preliminary objection dated 15.12.2023 which is to the effect that the Applicant's application dated 13.12.2023 is Res judicata as a similar application had been filed by the Applicant and which was duly determined on merit. A preliminary objection has been described in the case of *Mukisa Biscuit Manufacturing Co. Ltd Vs. West End Distributors Ltd* [1969] EA 696 as one which raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and that it cannot be raised if any fact has to be ascertained or if which is sought is the exercise of judicial discretion. It was further held that the improper raising of points by way of preliminary objection does nothing but unnecessarily increase costs and on occasion confuse the issues and therefore the same should be discouraged. Learned counsel for the Applicant has taken issue with the preliminary objection and has contended that there is need to ascertain facts. It is noted that the 1st Respondent's preliminary objection has to do with the issue of res judicata in that he contends that the Applicant's application is a replica to the one that it had made vide Hc Misc. Application No. E046 of 2023 wherein the issues in controversy between the parties herein were determined. As the preliminary objection only relates to do with *res judicata*, it is necessary to look at the relevant legal provision.
15. The doctrine of Re judicata is established under section 7 of the *Civil Procedure Act* as follows:

“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 in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Res Judicata has been described in Black's Law Dictionary 10th Edition as an issue that has been definitely settled by judicial decision with the essentials being inter alia; that there is an earlier decision on the same; that there is a final judgement on the merits; that there is involvement of same parties or parties in privity with the original parties.



Going by the description aforesaid, the 1st Respondent who has raised the application of res judicata in the matter was under obligation to show that the present application dated 13.12.2023 is a replica of the one dated 20.7.2023. The 1st Respondent has averred that the two applications are similar as between the same parties and that the prayers sought are similar and which were determined by this court vide its ruling dated 19.10.2023. On the other hand, the Applicant maintains that the prayers sought are different and has pointed out to the court that there are new prayers that have been made and which militates the 1st Respondent's application of the principle of Res judicata. I have perused the Applicant's application dated 13.12.2023 and note that the same has two new prayers inter alia; that the Honourable court be pleased to set aside and/or discharge the warrants of attachment dated 7.12.2023 and proclamation notice dated 8.12.2023 issued by Armok Auctioneers; that the Honourable court be pleased to reinstate the orders issued vide the ruling delivered by Justice David Kemei on 19.10.2023 and further vary the said orders to the effect that the Applicant deposits the decretal sums in court within seven (7) days of the date of the order. These two prayers are completely different from those in the earlier application dated 20.7.2023 and have not been determined as between the parties herein. That being the position, I must agree with the Applicant's counsel's submission that the application dated 13.12.2023 is not Res judicata as claimed by the 1st Respondent.

16. As regards the second issue, it is noted that the Applicant was allowed to lodge appeal out of time and within ten (10) ten days from the date of the ruling namely 19.10.2023 and therefore the same ought to have been lodged latest by close of business on 29.10.2023. The Memorandum of Appeal lodged herein was filed on 31.10.2023 outside the stipulated period. It is noted that the Applicant in its application has not mentioned or even explained the reasons for the delay in lodging the appeal out of time. In fact, the Applicant has not even sought for leave to file it out of time or even seek to have the same be deemed as duly filed. The Applicant has concentrated on the issue that the 1st Respondent's counsel has delayed and frustrated the exercise of depositing the decretal sums into a joint interest earning account and that it now seeks the court to provide an alternative namely that the monies be deposited in court pending determination of the appeal. Whereas the Applicant might be having a genuine reason for review of the order on deposit of the decretal sums, it has failed to render an explanation as to why it did not file the Memorandum of Appeal within the period stipulated. It is instructive that the Applicant vide its application dated 20.7.2023 vide HC Misc. Application No. E046 of 2023 had annexed a draft copy of the Memorandum of Appeal and therefore there is no reason why it could not just proceed to file it within the stipulated ten (10) days as directed in the ruling dated 19.10.2023. It appears the Applicant has concentrated on its attempt at depositing the decretal sums without first ensuring that the appeal had been lodged on time. As matters stand, the appeal was lodged outside the stipulated period. As the Applicant has failed to render an explanation for the delay and its cavalier conduct in filing the Memorandum of Appeal while being fully aware that it was outside the stipulated period, I am satisfied that the Applicant's application dated 13.12.2023 is without any merit. As the appeal has been lodged out of time without leave of the court, the issue as to whether the 1st Respondent is responsible for the delay in having the decretal sums deposited into a joint interest earning account in the names of both Advocates becomes moot. The Applicant has expended so much energy on the 1st Respondent's failure to perform his part of the order on deposit of security and abandoned its obligation to lodge the appeal within the time stipulated by this court. It would appear that the Applicant is trying to urge the court to look at the log in the 1st Respondent's eyes yet it ought first to deal with the log in its eyes. As the Applicant has failed to render a plausible explanation as to why it filed the appeal out of time without leave of this court and also failed to seek for leave or in the alternative an order that the same be deemed as duly filed, the said Memorandum of Appeal is therefore improperly on record and must be struck out.s



17. Going by the observation in paragraph 16 above, it is my finding that the Applicant's application dated 13.12.2023 lacks merit and ought to be dismissed.
18. In the result, the Applicant's application dated 13.12.2023 is devoid of any merit. The same is dismissed with costs. Equally, the Memorandum of Appeal filed on 31.10.2023 is hereby struck out.

DATED AND DELIVERED AT BUNGOMA THIS 22ND DAY OF FEBRUARY 2024

D.KEMEI

JUDGE

In the presence of :

Macharia for Applicant

Shikhu for Musundi for 1st Respondent

Kizito Court Assistant

