



Kenya Orient Insurance Ltd v Mumo & another (Suing as the legal administrator of the Estate of the Late Serah Ndunge Muasya (Deceased) (Civil Appeal E215 of 2023) [2024] KEHC 4865 (KLR) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4865 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL APPEAL E215 OF 2023
RN NYAKUNDI, J
APRIL 25, 2024**

BETWEEN

KENYA ORIENT INSURANCE LTD APPLICANT

AND

AUGUSTINE MUASYA MUMO & JOSEPHINE SYOMBUA MUASYA (SUING AS THE LEGAL ADMINISTRATOR IF THE ESTATE OF THE LATE SERAH NDUNGE MUASYA (DECEASED) RESPONDENT

RULING

1. What is pending before this court is a preliminary objection dated 19th February 2024 raised by the Respondent to the application dated 1st February 2024. The same is promised on the following grounds;
 1. The application is *res judicata* as the matters raised had already been determined by a court of competent jurisdiction in a similar application in Eldoret CMCCC NO 772 of 2017.
 2. The application is filed contrary to section 7 of the *Civil Procedure Act* and therefore the honourable court lacks jurisdiction to grant die orders prayed for.
 3. In any case, the application is bad in law, vexatious and an abuse of the court process to entertain this suit herein as it is vexatious and an abuse of the Court process.

Applicant's case

2. The applicant did not file submissions on the preliminary objection.



Respondent's case

3. Learned counsel for the respondent opposed the preliminary objection and filed submissions to that effect. He urged that the principles that relate to issues of Stay are well settled as per the provisions of Order 42 Rule 6 (1) of the [Civil Procedure Rules](#). He stated that the provision clearly allows the Appellant/Applicant to file the application dated 1.2.2023 seeking the orders of stay of execution pending appeal despite a similar application having been determined by the Lower Court. He cited the case of [Benjamin Momanyi v Joash Nyakaru Mayieka & another \(suing as the legal representative of the estate of Benesensia Nyangweso Ondieki\)](#) [2022] eKLR in support of this submission.
4. Counsel urged that this court has original jurisdiction to hear and determine this application as provided for under Order 46 Rule 6(1) of the [Civil Procedure Rules](#), regardless of the fact that a similar application was heard and determined by the trial Court. Further, that the Appellant/Applicant has given sufficient reason for the Court to entertain this application; first, that the total sum ordered by the trial court to be deposited in the joint interest earning account plus the amount to be paid to the Respondent exceeds the maximum insurance statutory limit of Kshs. 3,000,000/= as provided for under Section 5 of the [Insurance \(Motor Vehicle Third Party Risks\) Act](#) Cap 405 Laws of Kenya. Secondly, the Court in Eldoret CMCC 846 OF 2013 *vide* an order dated 15.11.2018, issued a declaration that the Appellant/Applicant is not liable to indemnify its insured and/or pay any claim arising from the accident which occurred on 20.9.2012 along Eldoret-Nakuru Road involving motor vehicle registration No. KBM 421G, which was the subject of the primary suit, Eldoret CMCCC NO. 115 OF 2016 and therefore, it only fair that no payment is made to the Respondent before the appeal herein is determined.
5. Counsel cited the case of [Patrick Kalava Kulamba & another v Philip Kamosu and Roda Ndanu Philip \(Suing as the Legal Representative of the Estate of Jackline Ndinda Philip \(Deceased\)\)](#) [2016] eKLR and [Equity Bank Ltd -vs- West Link MBO Ltd](#) [2013] eKLR Civil Application No. 78 of 2011 in support of this submission.
6. It is the respondent's case that Order 2 Rule 15 of the [Civil Procedure Rules](#), 2010 further provides that a pleading will be struck out where the Court is of a view that it is an abuse of the Court process. Further, that abuse of the Court process was defined in the case of [Madison Insurance Company Limited v Augustine Kamanda Gitau](#) [2020] eKLR.
7. It is the Appellant/Applicant's submissions that the application dated 1.2.2024 is not an abuse of the Court process for the reason that the same is based on law, specifically Order 41 Rule 6(1) of the [Civil Procedure Rules](#) as illustrated above. Further, the application is filed in good faith with the main purpose of preserving the subject of this appeal and in the interest of both parties. The Respondent's allegation that the application dated 1.2.2024 is an abuse of the Court is misguided without proof and/or basis. The application dated 1.2.2024 discloses all the issues at stake in the event the order of stay of execution pending appeal is not granted. The Appellant/Applicant has also demonstrated that they will suffer irreparable loss and damage in the event the orders sought are not granted and therefore the same cannot be termed as an abuse of the Court process.
8. Counsel urged the court to dismiss the preliminary objection with costs.



Analysis & Determination

9. The issue of what constitutes a page 6 was addressed by Sir Newbold in the *Mukisa Biscuits v West End Distributor* (1969) EALR when he stated;

“A Preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised, if any fact has to be ascertained or if what is sought in the exercise of judicial discretion.”

10. The preliminary objection is premised on the point that the application is *res judicata*. The principles on *res judicata* are set out in 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 can 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.”

11. The *Civil Procedure Act* Section 7 also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

“Explanation. (1)—The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2)—For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3)—The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.”

12. The principle was well explained in the case of The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR) in which the Court of Appeal held that:

“Thus, for 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) 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.”



13. The impugned application dated 1st February 2024 seeks stay of execution pending the hearing and determination of the appeal which the objection contends was already determined by the trial court. Order 42 Rule 6 of the Civil Procedure Rules provides as follows;

1. No appeal or second appeal shall operate as a stay of execution or proceedings under a decree or order appealed from except in so far as the court appealed from may order but, the court appealed from may for sufficient cause order stay of execution of such decree or order, and whether the application for such stay shall have been granted or refused by the court appealed from, the court to which such appeal is preferred shall be at liberty, on application being made, to consider such application and to make such order thereon as may to it seem just, and any person aggrieved by an order of stay made by the court from whose decision the appeal is preferred may apply to the appellate court to have such order set aside.

The impugned ruling dated 23.1.2024 when testing it with Section 7 of the Civil Procedure Act and the instant application dated 19.2.2024 constitutes the following characteristics.

- i. The decision was judicial in the relevant sense under Order 42 Rule 6 of the CPR.
 - ii. The learned trial magistrate exercised the jurisdiction which I am being asked to revisit. That to me is a party who is desirous to have a second bite of the cherry. However, by way of estoppel such an application lacks the necessary locus to be entertained by this court.
 - iii. The learned trial magistrate had adjudicated over the parties and the subject matter
 - iv. The decision was final and on the merits.
 - v. It determined the very same question on stay of execution in the same spectrum in this instant application. The same issues were canvassed which if this court entertains such an application it will be against the doctrine of re-judicata as founded in Section 7 of the Civil Procedure Act.
13. Given the provision highlighted above, it is evident that an application for stay of execution in the appellate court cannot be considered res judicata. In the premises, it is my considered view that the preliminary objection is unmerited. The same is struck out with costs to the respondent.

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 25TH DAY OF APRIL 2024

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R. NYAKUNDI

JUDGE

info@omwengadvocates.com, bmmungata@yahoo.com

