Omar t/a Sabrin Shop v Highrise Commodities Ltd (Civil Appeal E291 of 2023) [2024] KEHC 6177 (KLR) (27 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6177 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E291 OF 2023

DKN MAGARE, J

MAY 27, 2024

BETWEEN

ABDI ISAAAC OMAR T/A SABRIN SHOP ..... APPELLANT

AND

HIGHRISE COMMODITIES LTD ..... RESPONDENT

RULING

1. Two applications are filed herein. The Respondent opposes them that they are res judicata. The first application is dated 13/12/23 which the 2nd is dated 26/4/2024.

2. The court gave. Interim orders of 1/5/2024 to reduce the number of applications as this ruling was being dealt with. The Applicant sought stay pending Appeal.

3. There is however nothing wrong for seeking stay in both the court and the court appealed to. Only disclosure is being required. The main issue for stay pending appeal, is determination of 3 questions: -

    a. Irreparable loss/nugatory

    b. Security

    c. Animus/good faith

4. In this matter is claim is for a sum of Kshs. 9,954, 2000/=. It is a claim for a Liquidated debt. The kind of loss to be suffered is known. There is absolutely no question on whether the defendant can refund. The question is usually useful when the Applicant raises the ability to refund. I therefore find that there is no irreparable loss to be suffered.

5. Secondly, acting in good faith is crucial in these kinds of Application. The Applicant did not disclose happenings in the lower court. The Applicant was stealing a match.

6. Thirdly, the order for stay was already granted. The Applicant does not indicate the difficulty they had complying with the same. Order 42 Rule 6 provides as doth: -

(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.

(2) No order for stay of execution shall be made under subrule (1) unless— (a) the court is satisfied that substantial loss may result to the applicant unless the order is made and that the application has been made without unreasonable delay; and

(b) such security as the court orders for the due performance of such decree or order as may ultimately be binding on him has been given by the applicant.

(3) Notwithstanding anything contained in subrule (2), the court shall have power, without formal application made, to order upon such terms as it may deem fit a stay of execution pending the hearing of a formal application.

(4) For the purposes of this rule an appeal to the Court of Appeal shall be deemed to have been filed when under the Rules of that Court notice of appeal has been given.

(5) An application for stay of execution may be made informally immediately following the delivery of judgment or ruling.

(6) Notwithstanding anything contained in subrule (1) of this rule the High Court shall have power in the exercise of its appellate jurisdiction to grant a temporary injunction on such terms as it thinks just provided the procedure for instituting an appeal from a subordinate court or tribunal has been complied with.

7. In the case of *James Wangalwa & Another v Agnes Naliaka Cheseto* [2012] eKLR, the court stated as follows: -

> " No doubt, in law, the fact that the process of execution has been put in motion, or is likely to be put in motion, by itself, does not amount to substantial loss. Even when execution has been levied and completed, that is to say, the attached properties have been sold, as is the case here, does not in itself amount to substantial loss under Order 42 Rule 6 of the *CPR*. This is so because execution is a lawful process. The applicant must establish other factors which show that the execution will create a state of affairs that will irreparably affect or negate the very essential core of the applicant as the successful party in the appeal ... the issue of substantial loss is the cornerstone of both jurisdictions. Substantial loss is what has to be prevented by preserving the status quo because such loss would render the appeal nugatory."

8. This is in line with the decision in *R WW v EKW* [2019] eKLR, where the court analysed the raison d'etre for stay of execution order pending appeal as doth: -

> " The purpose of an application for stay of execution pending an appeal is to preserve the subject matter in dispute so that the rights of the appellant who is exercising the undoubted

right of appeal are safeguarded and the appeal if successful, is not rendered nugatory. However, in doing so, the court should weigh this right against the success of a litigant who should not be deprived of the fruits of his/her judgment. The court is also called upon to ensure that no party suffers prejudice that cannot be compensated by an award of costs.

9. Indeed to grant or refuse an application for stay of execution pending appeal is discretionary. The Court when granting the stay however, must balance the interests of the Appellant with those of the Respondent."

9. In the circumstances the application dated 15/12/2023 and 26/4/2024.

10. Regarding resjudicata, I note that heavy weather was made of the same. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of *Res Judicata* in the following terms: -

> " 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."

11. The Civil Procedure Act also provides explanations with respect to the application of the res judicata rule. In the dicta *in re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the court stated as follows:

> " The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
>
> (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."

12. In the case of *Attorney General & another ET v* (2012) eKLR where it was held that;

> " The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & Others* (2001) EA 177 the court held that "parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit".

In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another Nairobi* HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

13. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All ER 378, observed thus:

> "...where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."

14. Res judicata applies to applications just like suits. In the case of *Julia Muthoni Githinji v African Banking Corporation Limited* [2020] eKLR the court stated thus:

> "14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was resjudicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

15. *Maumbwa & 3 others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

> "By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

16. I decline to find that the applications are res judicata as the concept is not applicable to stay in the lower court visavis the high court. Even Sub judice or does not apply to the applications under Order 42 by dint of Rule 6.

17. Nevertheless, the Application dated 13/12/2023 lack merit and are dismissed with costs of Ksh15,000/=. The application dated 26/4/2024 is equally dismissed with costs of 13,000/=.

Determination

18. I make the following orders.

    i. The application dated 13/12/2023 and 26/4/2024 are dismissed with cost of Kshs. 15,000/= and 13,000/= respectively.

    ii. The matter shall be mentioned on 3/7/2024 before the Deputy Registrar for further orders.

19. Interim orders issued hitherto are vacated.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 27TH OF MAY, 2024. JUDGEMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Mr. Kimathi for the Appellant/Applicant

No appearance for the Respondent

Court Assistant - Brian

M.D. KIZITO, J.