



REPUBLIC OF KENYA

High Court at Eldoret

Civil Appeal 119 of 2012

BEATRICE JEMAIYO APPELLANT

VERSUS

EUNICE CHEPTOO MOSONIK RESPONDENT

(Being an appeal from the ruling of Hon. Nzyoki (SPM) delivered on 8th November, 2012 in Eldoret Chief Magistrate's Court Civil Case No. 542 of 2009)

RULING

By way of Notice of Motion dated 9th November, 2012 brought under Sections 3, 3A, 63(e) of the Civil Procedure Act, Order 42 of the Civil Procedure Rules and all other enabling provisions of the law, the Appellant/Applicant prays for a stay of execution and/or enforcement of the ruling delivered on 8th November, 2012 in **ELDORET CHIEF MAGISTRATE'S COURT CIVIL CASE NO. 542 OF 2009** and all prior and/or consequential proceedings pending the hearing and determination in Eldoret High Court Civil Appeal No. 119 of 2012 and for costs of the application.

The application is based on grounds that:-

- (i) THAT Ruling was delivered on 8th November, 2012 dismissing the Applicant's application dated 19th September, 2012 and the Applicant/Appellant is aggrieved with same and she has filed an appeal challenging the trial court's decision.
- (ii) THAT the appeal is yet to be heard.
- (iii) THAT the Appellant's main appeal known as Eldoret High Court Civil Appeal No. 46 of 2012 arising from the Judgment delivered on 19th April 2012 is also yet to be heard.
- (iv) THAT both appeals have high chances of success.
- (v) THAT the Applicant/Appellant will suffer substantial loss if execution is levied and/or proceedings prior and/or consequential to the said Ruling and Judgment proceed while the appeals are pending.
- (vi) THAT the appeals filed will be rendered nugatory.
- (vii) THAT no prejudice will be suffered by the Respondent if this application is allowed.
- (viii) THAT the Applicant/Appellant is ready and willing to provide security in the sum of Kshs..

518,405/= which is the decretal amount in Eldoret CMCC No. 542 of 2009 or any other security as shall be ordered by this Honourable Court.

It is also supported by the affidavit of Beatrice Jemaiyo, the Appellant herein sworn on 9th November, 2012. In summary, it is desposed that a ruling was delivered in favour of the Respondent on 8th November 2012 in an application dated 19th September, 2012 in Eldoret Chief Magistrate's Civil Suit No. 542 of 2009. In the application, the Appellant had sought an injunction to restrain Eshikhoni Auctioneers from attaching, collecting and/or selling by public auction her immovable property attached by the said auctioneers, or any in way dealing with the said proclaimed property in a manner prejudicial to the applicant and for costs of the application. This application was dismissed thus giving rise to this appeal No. 119 of 2012.

The Appellant argues that if a stay of execution is not granted, she stands to lose immensely as the auctioneers would proceed to auction her properties, and that in any event the appeal would be rendered nugatory. She also states that she is willing to furnish security in the sum of Ksh. 518,405/=, being the decretal sum awarded in the Judgment of the Subordinate court.

The Respondent vehemently opposes the application vide a Replying Affidavit sworn by herself on 22nd November, 2012. Her Counsel, in submissions reiterated what is deposed in the said affidavit which in summary is that this application is Res Judicata. She submitted that a similar application dated 14th May, 2012 was filed in the main appeal, Appeal No. 46 of 2012. Upon hearing of this application, court ordered the Appellant to deposit Ksh. 200,000/= within two weeks and a balance of Ksh. 440,000/= within six (6) months. That the Appellant failed to comply with the orders of the lower court and instead filed this appeal. That therefore the application has no merit and should be dismissed with costs.

I have carefully considered the submissions that were made before me. My first duty is to determine whether this application is Res Judicata or not as this gives the direction that the application will take. That is to say, if the question is determined favourably, the application is disposed of automatically.

This issue was raised by the Counsel for the Respondent who in my view did not provide court with sufficient information to support her arguments. I would have expected her to furnish the court with both the application and the order in which similar orders were sought and granted respectively. Her submissions are to the effect that the conditional order for stay of execution was granted in the subordinate court. The conditions stipulated thereon being that, out of the decretal sum, Ksh. 200,000/= was to be deposited within two weeks and Ksh. 440,000/= within six weeks. What was also not clear is the date when this order was granted.

From the supporting affidavit sworn by the Counsel for the Appellant in the application dated 19th September, 2012 filed in the Subordinate court from which this appeal lies, the order for stay of execution was granted pending the hearing and determination of **ELDORET HIGH COURT CIVIL APPEAL NO. 46 OF 2012** – which is the main appeal against the Judgment of the Subordinate court. Under paragraph 3 of the said affidavit it is deposed that on 16th August, 2012, the Court directed the Applicant/Appellant to deposit the decretal amount of Ksh. 440,000/= plus costs of Ksh. 78,405 totaling to Ksh. 518,405 in a fixed joint interest earning account within 14 days. That by 24th August, 2012 the total sum had been deposited with Counsel for the Appellant. That on 28th August, 2012 he requested Counsel for the Respondent to forward to him documents necessary to facilitate the opening of the joint account with K-Rep Bank. However the Counsel for the Respondent requested that the account be opened in a reputable bank and proposed either Barclays or National or Housing Finance Corporation of Kenya or Kenya Commercial Bank. That on 30th August, 2012 Counsel for Appellant wrote to Counsel for the Respondent indicating that they had settled on Kenya Commercial Bank. On 31st August, 2012, Counsel for Respondent wrote back indicating that they would not execute the account opening documents as time within which the money was to be banked had lapsed. What is deposed in the said supporting affidavit is contained in annexures marked 1-6 respectively.

If the order of the court directing the Appellant to deposit the decretal sum was issued on 16th August, 2012, ultimately, by 30th August, 2012, the Respondent's Counsel was within time to open the account and get the money deposited therein. Even if the account were to be opened on either 31st August, 2012 or 3rd September, 2012, the delay would not be considered as inordinate and deliberate.

Counsel for the Appellant did not annex the order of the court that issued the conditional stay. For purposes of record and guidance, it is important to state that Counsel on record have a duty of making the work of the court as easy as possible. Had the court been provided with the various applications and/or orders my work would be easy in determining whether or not this application is Res Judicata.

Be that as it may, one thing is undoubted, an order for stay of execution was granted and the Appellant directed to comply with the conditions thereon. My guess is that this order was issued in the main appeal **No. 46 of 2012** but for the reasons given and reiterated herein above, could not be complied with. If the court of a concurrent jurisdiction gave a similar order of stay, it is most unlikely that the terms set to be satisfied in the order may be varied. That may end up confusing the parties as to which order to follow.

That notwithstanding however, this application seeks similar orders as those issued on 16th August, 2012. It is not true therefore to say that a prayer seeking stay of execution of the ruling delivered on 8th November, 2012 in the Subordinate court is different from the prayer for stay of execution of the Judgment of the Subordinate court. This is in view of the fact that, a stay of execution of the ruling will in effect stay the execution of the Judgment, which is to stay the recovery of the Judgment sum due to the Respondent. The differentiation given by Counsel for the Respondent in this respect is a matter of semantics and cannot hold.

It is clear therefore, that the issues raised in this application were ventilated elsewhere by a court of concurrent jurisdiction. So what is Res Judicata?

Judicial Hints on Civil Procedure, 2nd Edition by Richard Kuloba defines the term as:-

“No court shall try any suit or issue in which the matter 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.”

In applying the principle of Res Judicata court only declines to exercise its jurisdiction to allow the parties to relitigate a matter when it is satisfied that the issue before it is the same as that alleged to have been subject of adjudication in previous proceedings. The doctrine behind application of the principle of Res Judicata is that there must be an end to litigation. In this instance, the court shall be cautious at avoiding inconsistent ruling, thus undermining the dignity of the court.

I do therefore hold that this application is Res Judicata and a duplication of the one filed in the Civil Appeal No. 46 of 2012. What the Applicant should do is to seek remedy in the Civil Appeal No. 46 of 2012 by applying for a further stay of execution of the subordinate court's Judgment alongside extension of time within which the decretal sum should be deposited in the bank. Thus, whereas the Appellant has the right to appeal against the dismissal of the application dated 19th September, 2012 in the subordinate court, this application is misconceived and is without merit. Having found that it is Res Judicata, I need not delve into whether the provisions of the law under which it is brought have been met.

I accordingly dismiss it with costs to the Respondent.

DATED and DELIVERED at ELDORET this 27th day of February, 2013.

G. W. NGENYE – MACHARIA
JUDGE

Mr. Were for the Appellant/Applicant
Ms. Kipseii - absent for the Respondent