



**Chege v Meka (Suing as the Legal Representative of the Estate of Muthini Meka - Deceased)
(Civil Appeal E037 of 2021) [2022] KEHC 17241 (KLR) (1 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 17241 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KAJIADO
CIVIL APPEAL E037 OF 2021
SN MUTUKU, J
DECEMBER 1, 2022**

BETWEEN

OLIVER CHEGE APPLICANT

AND

**CHRISTOPHER WAITA MEKA (SUING AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF MUTHINI MEKA - DECEASED) RESPONDENT**

RULING

Notice of Motion

1. Oliver Chege, the Applicant, has brought this Notice of Motion (the Application) dated 25th August 2021 under various provisions of the law as shown on the face of the Application seeking the following orders:
 - i. Spent.
 - ii. Spent.
 - iii. That this honourable court be pleased to grant a stay of execution of the judgment and/or decree issued by Mulochi E. (RM) in Kajiado CMCC No. 227 of 2016 delivered on 21st October, 2019, as follows: general damages for pain and suffering – Kshs 100,000, loss of expectations of life – Kshs 100,000, loss of dependency – 2,400,000, special damages – Kshs 33,500 totaling to Kshs 2,633,500 pending the hearing and determination of this application.
 - iv. That this honourable court be pleased to grant stay/set aside the Ruling delivered by Mulochi E. (RM) on 4th August, 2021 dismissing the Appellant/Applicant's Application dated 18th February, 2021 pending hearing and determination of this Application.
 - v. That this honourable court be pleased to grant a stay of execution of the judgment and/or decree issued by Mulochi E. (RM) in Kajiado CMCC No. 227 of 2016 delivered on 21st



October, 2019, as follows: general damages for pain and suffering – Kshs 100,000, loss of expectations of life – Kshs 100,000, loss of dependency – 2,400,000, special damages – Kshs 33,500 totaling to Kshs 2,633,500 pending the hearing and determination of this Appeal.

- vi. That this honourable court allow the Appellant/Applicant to furnish the court with security in the form of a Bank Guarantee from the DTB Bank.
 - vii. That the Application be heard inter partes on such a date and time as this Honourable Court may direct.
 - viii. That the costs of this Application abide the outcome of the appeal.
 - ix. That this Honourable Court be pleased to issue any other order and/or direction it deems fit to grant in the circumstances.
2. This application was supported by an Affidavit sworn by Anerita Salinder Gulenywa. She stated that she is an advocate of the High Court of Kenya with the firm of Kimondo Gachoka & Company Advocates with the conduct of this suit on behalf of the Applicant.
 3. It is the case for the Applicant that judgment in the lower court was delivered on 21st October, 2019; that the Applicant was dissatisfied with the judgement and filed an appeal being Civil Appeal No. E002 dated 23rd January 2020 and filed the same on 26th January, 2020; that the Applicant filed, at the trial court, an application seeking stay of execution but the said application was dismissed on 4th August 2021; that the Applicant's appeal has high chances of success and that the Applicant is reasonably apprehensive that the Respondent will execute the said judgment
 4. It is further stated that the Applicant is apprehensive that the judgment is of substantial amount and that the Respondent may not be in a position to refund the money should the appeal succeed. It is stated that the Respondent has not disclosed or furnished the court with any documentary evidence to demonstrate his financial standing; that the appeal will be rendered nugatory leading to substantial loss by the Applicant; that the Applicant's insurer is ready and willing to furnish the court with Bankers Guarantee as security and that the application is not prejudicial to the Respondent.
 5. The Application is opposed by the Respondents through a Replying Affidavit dated 31st October, 2021, sworn by Christopher Waita Meka. It is the case for the Respondent that the Applicant failed to honour the judgment delivered on 21st October, 2019, and filed several applications dated 10th July 2020 and 21st October 2020, for stay of execution of the said judgment in the High Court; that the above applications have been compromised by consent of the parties and therefore the issue of stay of execution pending appeal is therefore res judicata.
 6. It is deposed that the Applicant filed similar application in the lower court which was dismissed; that there has been inordinate delay in filing this application given that the judgment was delivered on 21st October, 2019 and the Applicant has failed to demonstrate how he stands to suffer substantial loss if the orders sought are not granted.

Submissions

7. The matter proceeded by way of written submissions. The Applicant filed his submissions on 18th August, 2022 and raised 4 issues for determination as follows:
 - i. Whether or not this honourable court has jurisdiction to grant the orders sought?
 - ii. Whether or not the appeal or intended appeal is arguable?



- iii. Whether or not the appeal, were it to succeed, would be rendered nugatory if the application is not granted.
 - iv. Whether or not Bankers Guarantee is an appropriate security?
8. On the issue of jurisdiction, it was submitted that the application is premised on Order 42 of the [Civil Procedure Rules](#) which specifies the circumstances under which either the trial court or an appellate court may order stay of execution of a decree or order pending an appeal and therefore this court has jurisdiction to entertain this application. The Applicant relied on Global Tours & Travels Ltd Nairobi H.C Winding Up Cause No. 43 of 2000 where the court stated that to grant or not to grant stay of execution is a matter of judicial discretion, which discretion should be exercised in the interest of justice.
 9. On whether the appeal raises arguable issues, it was submitted that both the appeal against the Ruling of the lower court Civil Appeal E037 of 2021 and Civil Appeal E002 of 2021 against the Judgment of the lower court raise triable issues with high chances of success.
 10. It was submitted that the appeal would be rendered nugatory if the orders sought are not granted and further that the Appellant would suffer irreparable damage as the Respondents may proceed to execute and relied on various cases on the face of their submissions including Butt-vs- Rent Restriction Tribunal [1982] KLR 417.
 11. On whether or not the Bank Guarantee is an appropriate security, they argued that the decree is for a substantial amount of money and if paid to the Respondent the Applicant is apprehensive that he would not be able to recover the whole sum; that the ability to furnish security should not give an unfair advantage to the Respondent as Article 27(1) of [the Constitution](#) provides for equality of all persons before the Law. They relied on the case of [Water Resources Management Authority -vs- Krystalline Salt Limited \[2018\]](#) eKLR to emphasize this point.
 12. The Respondent filed his submissions on 6th October, 2022. He has submitted that Order 42 rule 6(1) and (2) sets out the conditions for stay of execution of the judgment pending an appeal one of which is that the application must be brought without unreasonable delay. It is the Respondent's case that though Judgment was delivered on 21st October, 2019 the applicant filed the application for stay in the lower court on 18th February, 2021; that this delay was no explained and has not been explained even in filing the application before this court; that the delay ought to be explained satisfactorily for the court to exercise its discretion on the matter. The Respondent relied on [Congress Rental South Africa-vs- Kenyatta International Convention Centre; Co-operative Bank of Kenya Limited & Another \(Garnishee\) \[2019\]](#) eKLR where the court held that a delay of even one month ought to be satisfactorily explained failure to which an application of a nature before the court cannot stand.
 13. He has submitted that the application is an afterthought and is aimed at frustrating the Respondent from the enjoyment of the fruits of the judgement.
 14. On substantial loss, the Respondent submitted that the Applicant has not demonstrated that he will suffer substantial loss should the application for stay of execution be denied; that it is not enough to just state that substantial loss will be suffered without an applicant giving details and particulars of such loss as was stated in the case of [Antoine Ndiaye -vs- African Virtual University \[2015\]](#) eKLR.
 15. It was further argued that the mere fact that a Decree holder is not a man of means does not necessarily justify him being barred from benefitting from the fruits of his judgement. Where the above facts are alleged, the burden is upon the applicant to prove that this is the position. To emphasize this issue, they relied on the case of [Caneland Ltd Malkit Singhpandhal & another-vs- Delphis Bank Ltd \[2000\]](#) eKLR.



and submitted that the applicant has failed to demonstrate that the Respondent is not in a position to refund the decretal sum if it is paid and that he will, for that reason, suffer substantial loss.

16. On the issue of furnishing security, they submitted that the same is provided under Order 42 Rule 6(1) (2) of the *Civil Procedure Rules*. It is their case that from the evidence before court, the Bank Guarantee relied on by the Applicant is for 30 million and that it is for a period of 12 months expiring on 6th November, 2021 and therefore it is apparent that the Bank Guarantee is not a suitable security given the circumstances. They further submitted that the Bank Guarantee as presented is too general and not specific to this case.
17. It was the Respondent's case that the intended appeal lacks merit and should be dismissed. However, in the event this Court allows the application the same should be conditional where half the decretal sum be paid to the Respondent and the rest to be deposited in a joint interest earning account of both advocates.

Determination

18. I have noted that the Respondent has raised the issue of res judicata in his Replying Affidavit but has not submitted on the issue. The Respondent has argued that Applicant filed similar applications in the High Court. I have seen a Notice of Motion dated 10th July 2020 brought under Certificate of Urgency in Misc. Application No. 40 of 2020 seeking leave to file appeal out of time and stay of the judgment of the lower court delivered on 21st October, 2019 in CMCC No. 227 of 2016.
19. There is also another Notice of Motion brought under Certificate of Urgency dated 21st October, 2020 in the same Misc. Application No. 40 of 2020. The latter application seeks stay of execution of the same judgment of the lower court pending hearing of the application inter partes and enlargement of 7 days from 2nd October, 2020 within which to file Memorandum of pending the hearing and determination of that application.
20. It would appear from these two applications that the present application is not the first one before the High Court at Kajiado. I do not understand why the Respondent did not submit on it or the Applicant respond to the issue after the Respondent raised it in his Replying Affidavit. It is the duty of the parties to disclose to the court any fact or issue that may be relevant to the issue under determination. As I write this ruling, I am not aware of what the outcome of the two applications mentioned by the Respondent and copies of those pleadings attached to the Replying Affidavit was.
21. Section 7 of the *Civil Procedure Act* Cap 21 provides that:

“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”
22. The *Black's Law Dictionary 10th Edition* defines “res judicata” as

“An issue that has been definitely settled by judicial decision...the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties...”
23. The court in Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported), held that:



- ‘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 on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....’
24. In this instant case the Respondent has brought to the court’s attention the existence of Misc. Application 40 of 2020. The applications in the said case have been attached as annexures in the Replying Affidavit. I have gone through the first application dated 10th July, 2020 and noted that it seeks leave to file an appeal out of time and stay of execution of the Judgment by Hon E. Mulochi in Kajiado CMCC 227 of 2016 pending the hearing and determination of the intended appeal. This application was allowed in terms that the Memorandum of appeal be filed within 7 days.
 25. The Applicant, having failed to comply with the orders mentioned above filed another application dated 21st October, 2020 seeking orders to stay the execution of the judgment delivered in CMCC 227 of 2019 and that the orders to file the Memorandum of appeal within 7 days be enlarged, pending the hearing and determination of the application.
 26. In this instant application the orders being sought are for stay of execution of the judgment delivered in CMCC 227 of 2019 pending hearing and determination of the appeal and an order to set aside and or stay the Ruling delivered by Mulochi E. Resident Magistrate (RM) on 4th August, 2021 dismissing the Appellants/Applicants Application dated 18th February, 2021 pending hearing and determination of this Application.
 27. Looking at the 3 applications and being guided by the above authorities on this issue, the question therefore is whether the matters are similar and whether the parties in these matters are the same.
 28. In *Siri Ram Kaura – Vs – M.J.E. Morgan*, CA 71/1960 (1961) EA 462, the court stated that:
“The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact.”
 29. After careful consideration of the application before me and the previous applications whose copies are attached to the Replying Affidavit, it is my view that this matter falls squarely under the ambit of Section 7 of the *Civil Procedure Act* in that this matter directly and substantially in issue has been directly and substantially in issue in the former applications 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. The application before me is therefore res judicata.
 30. I will therefore not entertain an application similar to earlier applications before this court. Consequently, the Notice of Motion dated 25th August, 2021 is hereby dismissed for being res judicata. The Applicant shall pay costs for this application.
 31. It is so ordered.

Dated, signed and delivered this 1st December, 2022.

S. N. MUTUKU

JUDGE

