Kenya Orient Insurance Company Limited v Kamwira (Civil Appeal E021 of 2021) [2023] KEHC 4132 (KLR) (24 April 2023) (Judgment)

Neutral citation: [2023] KEHC 4132 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL E021 OF 2021

G MUTAI, J

APRIL 24, 2023

BETWEEN

KENYA ORIENT INSURANCE COMPANY LIMITED .... APPELLANT

AND

REGINA KAWIRA KAMWIRA .... RESPONDENT

JUDGMENT

Introduction

1. The appeal before me arises from the dismissal of an application for review dated 17th March 2021. The ruling being appealed against was delivered on 13th May 2021 by the Hon Caroline Ndumia, RM in Loitokitok RMCC 38 of 2019.

2. Being aggrieved by the decision of the Court below the Appellant filed the instant appeal. The appeal is premised on 4 gounds to wit:-

   a. That the learned magistrate erred in law by dismissing the application for review despite clear evidence of insurance fraud and abuse of court process perpetrated by the Respondent and failing to consider the wealth of evidence place before it by the Appellant

   b. That the learned magistrate failed to observe that the declaratory suit laid its foundation on the primary suit being Loitoktok CMC No. 38 of 2018 and thus erred in saying that the same was not bad for duplicity.

   c. That the learned magistrate failed to appreciate that there was clear evidence of duplicity of suit and that court had inherent jurisdiction to declare the same.

   d. That the learned magistrate erred in failing to exercise its inherent jurisdiction by allowing the respondent to benefit from hoodwinking both the honourable court and the appellant to gain unlawfully to the detriment of the Appellant.

3. The basis of the application before the subordinate court was that the Appellant discovered that there was another suit, filed by the Respondent in respect to which the Appellant had already settled. The said suit had been settled by consent. The said suit was Kajiado CMCC 457 of 2014. This latter suit arose from an accident involving motor vehicle registration number KBF012A that occurred 16th September 2014. The suit in respect of which the declaratory judgment was sought in the court below also involved the same accident and parties.

4. The two courts below entered judgment in the respective matters before them. The Appellant annexed evidence of payment in satisfaction of the Kajiado judgment. In the instant matter the court below entered judgment on 29th January 2021. It found against the Appellant. Subsequently, the appellant filed HCCA E006 of 021. The appeal was withdrawn on 15th March 2021, with Mwita, J reportedly endorsing the withdrawal on 16th March 2021.

5. Application for review was made a day later before the Subordinate Court. In her response to the said application the Respondent denied knowledge of the advocate who filed the suit in Kajiado. Curiously she did not deny knowledge of the existence of the said suit.

6. The application was heard and the court perfunctorily dismissed the same for lack of merit. This appeal arises out of the court's said decision.

Duty of the 1st Appellate Court

7. This being a first appeal this Court is under a duty to re-evaluate and assess the evidence and make its own conclusions.

8. This was aptly stated in the case of *Peters vs Sunday Post Limited* [1985] EA 424 where the court therein rendered itself as follows: -

> " It is a strong thing for an appellate court to differ from the findings on a question of fact, of the judge who had the advantage of seeing and hearing the witnesses...But the jurisdiction to review the evidence should be exercised with caution: it is not enough that the appellate court might have come to a different conclusion..."

9. In *Selle & Another vs. Associated Motor Boat Co. Ltd & Others* [1968] EA 123, this principle was enunciated as follows: - :

> " ...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect..."

10. The court therefore will defer to the court below on finding or conclusion of facts in areas where the court exercised discretion. However, where discretion is not judiciously exercised, or where the court is plainly wrong, this court is bound to set aside such a finding.

11. The court did not decide any of the issues placed before her. She lamented that no nexus was drawn between the former suit and the suit before her. I don't know which nexus was to be drawn.

Remit of Review Applications

12. Appeals from applications for review are circumscribed. Section 80 of the *Civil Procedure Act* provides as follows: -

“ 80. Review

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.”

13. Order 45, Rule 1 provides as follows: -

“ 1. Application for review of decree or order

(1) Any person considering himself aggrieved—

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

Doctrine of Res Judicata

14. In *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, the court had this to say on res judicata: -

> " The substantive law on Res Judicata is found in Section 7 of the *Civil Procedure Act* Cap 21 which 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".

15. 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..."

16. A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

17. The court, in *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende*(*Supra*) stated as follows: -

In order therefore to decide as to whether an issue in a subsequent Application is res judicata, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

i. what issues were really determined in the previous Application;

ii. whether the issues are the same in the subsequent Application and were covered by the decision.

iii whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

18. Kuloba, J (as then he was), in the case of *Njangu versus Wambugu & 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....."

Issues for Determination

19. The issues herein are: -

i. what issues were determined in the previous suit?

ii. whether what was determined in the previous suit is the same as what was determined in the suit giving rise to the appeal;

iii whether the parties are the same or are litigating under the same Title and that the previous suit was determined by a court of competent jurisdiction; and

(iv Whether the appeal ought to be allowed

20. For the doctrine of res judicata to apply the case ought to have been between the same parties, litigating under the same title and over the same subject matter.

Synthesis of the Law and the Facts

21. I have the advantage of reading the plaints in both matters. In both cases the suits are between, Regina Kawira Kamwira and Nderitu Theuri Apolo. The accident giving rise to the claim is stated in both suits to have occurred on 16th September 2014.

22. The Motor vehicle involved was registration number KBF 012 F. In both cases the Plaintiff therein was a passenger. The injuries are also similar. It is therefore safe to conclude that the cases involved same parties over the same cause of action. The parties were litigating under the same title.

23. I don't think that the Respondent's defence of not knowing the other advocate useful. The suit was instituted by the Plaintiff. A consent judgment was entered. The decretal sum was paid to the Advocates acting for the Plaintiff. It is therefore clear beyond peradventure that the Appellant is not bound to pay the claim, having paid for the same. This is not because there was no policy, but because it had already paid the same party.

24. The liability of the appellant is set out in the law. Under Section 5 (b) (iv) of the *Insurance (Motor Vehicle Third Party Risks) Act* Cap 405, which provides as follows: -.

> " In order to comply with the requirements of section 4, the policy of insurance must be a policy which
>
> (a) is issued by a company which is required under the Insurance Act, 1984 (Cap. 487) to carry on motor vehicle insurance business; and
>
> (b) insures such person, persons or classes of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the death of, or bodily injury to, any person caused by or arising out of the use of the vehicle on a road:

25. This liability is not infinite. The appellant having paid the advocates for the appellant the Respondent cannot file another suit and claim the same damages. If it is true that the advocate who filed the other claim did so without instructions and did not remit the damages she was awarded by the court to her then the Respondent has a cause of action against the advocate.

26. In *Kilonzo & Azizi Company Advocates versus The County Government of Kilifi* [2021] eKLR, the court stated as follows: -

    18. Having filed the Memorandum of Appearance on behalf of the Applicant, there was no doubt that Ms Wasi was on record for the Applicant. There was nothing to imply even remotely or otherwise that the said Counsel on record would require authority from the County Attorney

before taking any course or direction in the matter before the Court. As Harris J stated in *Kenya Commercial Bank Ltd v Specialised Engineering Company Ltd* (1982) KLR 485: -

> "A duly instructed advocate has an implied general authority to compromise and settle the action and the client cannot avail himself of any limitation by him of the implied authority to his advocate unless such limitation was brought to the notice of the other side."

19. Considering a similar matter in *Kuwinda Rurinja Company Ltd v Andikuwinda Holdings Ltd & 13 Others* (2019) eKLR, the Court of Appeal quoting the decision of the Supreme Court of South Africa in *Stand 242 Hendrik Potgieter Road Ruimsig Pty v Gobel* (No 246/10) (2011) ZASCA 105 (June 2011) observed that:-

> "The rule, in essence, is that a person dealing with a company in good faith is entitled to assume that the company has complied with its internal procedures and formalities."

27. In *Flora N. Wasike versus Destimo Wamboko* (1988) eKLR, Hancox JA citing *Setton on Judgments and Orders* (7th Edition) Vol. 1 page 124, reiterated that: -

> " Any order made in the presence and with the consent of Counsel is binding on all parties to the proceedings or action, and those claiming under them.... and cannot be varied or discharged unless obtained by fraud or collusion or by an agreement contrary to the policy of the Court...; or if the consent was given without sufficient material facts, or in general for a reason which would enable a Court set aside an agreement."

27. In the case of *National Bank of Kenya Ltd v Otieno Ragot & Company Advocates* (2020) eKLR, the Court of Appeal delivered itself as follows: -

> " As regards whether this Court can set aside a consent Judgment, the *Advocates Act* provides the procedure for the recovery of advocates costs after taxation of bill of costs and a Certificate of taxation issued. All that a party is required to do is to seek entry of Judgment based on the certificate of costs after which a decree is issued for execution. Section 51(2) of the *Advocates Act* provides that: -
>
> "The certificate of the taxing officer by whom any bill has been taxed shall, unless it is set aside or altered by the Court, be final as to the amount of the costs covered thereby, and the Court may make such order in relation thereto as it thinks fit, including, in a case where the retainer is not disputed, an order that Judgment be entered for the sum certified to be due with costs".
>
> Consent Judgment has contractual effect and can only be set aside on such grounds as would obtain in a contract. By lodging this appeal, the appellant is basically asking this Court to set aside orders which it consented to and were adopted as orders of the Court and a decree issued......"

28. I have said enough to show that the Appeal is merited. I therefore allow the same with costs.

Determination

29. Having made the above findings, I give the following orders: -

a. I allow the appeal herein, set aside the ruling of the court below, allow the Application for review and dismiss the suit in the court below as the Respondent has already been compensated;

b. I declare that the appellant is not bound to settle the matter in the court below as the same is res judicata;

c. The Appellant will have costs of the appeal of Kes.65,000.00 and costs of the suit in the court below to be agreed or assessed by that court;

d. This file and subordinate court file be closed subject to execution on costs only;

e. The trial court be served with the judgment herein.

DATED, SIGNED AND DELIVERED AT MOMBASA VIRTUALLY THIS 24TH DAY OF APRIL, 2023.

....

GREGORY MUTAI

JUDGE

In the presence of:-

Winnie Migot – Court Assistant

No appearance for the Appellant

No appearance for the Respondent