



REPUBLIC OF KENYA



Showcase Properties Limited v Kenya Commercial Bank Limited & another (Commercial Case 305 of 2013) [2023] KEHC 24550 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 24550 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 305 OF 2013
MN MWANGI, J
SEPTEMBER 29, 2023**

BETWEEN

SHOWCASE PROPERTIES LIMITED PLAINTIFF

AND

KENYA COMMERCIAL BANK LIMITED 1ST DEFENDANT

BAMBURI SPECIAL PRODUCTS LIMITED 2ND DEFENDANT

RULING

1. The 2nd defendant/applicant has filed a Notice of Motion application dated 20th August, 2021 brought under the provisions of Sections 1A, 1B, 3A, 6 & 7 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 2 Rule 15(1) (d) & Order 51(1) of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the law. It seeks the following orders -
 - i. That this Honourable Court be pleased to strike out the amended plaint dated 19th July, 2021 as against the 2nd defendant;
 - ii. That this Honourable Court lacks jurisdiction to adjudicate the dispute herein; and
 - iii. That the costs of the application be in the cause.
2. The application has been brought on the grounds on the face of the Motion and is supported by an affidavit sworn on 20th August, 2021 by Waeni Ngea, Head of Legal & Compliance of the 2nd defendant company herein. In opposition thereto, the plaintiff filed a replying affidavit sworn on 8th August 2022 by Francis Muhoro Gachanja, the Managing Director of the plaintiff Company.
3. The instant application was canvassed by way of written submissions which were highlighted on 12th June, 2023. The 2nd defendant's submissions were filed by the law firm of Kaplan & Stratton Advocates



on 20th July, 2022, whereas the plaintiff's submissions were filed on 19th August, 2022 and on 28th August, 2023 by the law firm of Mungai Kalande & Company Advocates.

4. Mrs. Opiyo, learned Counsel for the 2nd defendant submitted that pursuant to an amended plaint dated 14th November, 2014, the plaintiff instituted HCCC No. 577 of 2011-Showcase Properties Limited -v- Bamburi Special Products Limited against the 2nd defendant herein for breach of a sale of goods contract for the supply of ready mix concrete. The 2nd defendant filed its amended statement of defence denying the allegations contained in the said amended plaint. She stated that HCCC No. 544 of 2011 then proceeded to full hearing and it was ultimately decided vide a Judgment dated 29th June, 2020 delivered by Hon. Lady Justice Grace Nzioka, who found that the 2nd defendant had not breached its contract with the plaintiff and dismissed the plaintiff's claims in respect of interest, penalties and other related matters arising from the loan facility. That the Judge further found that the plaintiff was negligent for failure to mitigate its own losses and awarded the plaintiff general damages for breach of contract reduced by 50% as a result of the plaintiff's contributory negligence.
5. Being dissatisfied with the said judgment, the plaintiff and the 2nd defendant filed an appeal at the Court of Appeal, in Civil Appeal No. E420 of 2020, where the plaintiff filed its Memorandum of Appeal and Record of Appeal on 30th October, 2020 and the 2nd defendant filed its Notice of Cross-Appeal on 14th October, 2021. Counsel indicated that on 11th November, 2021, the plaintiff filed an application seeking to join the 2nd defendant to the suit before this Court without disclosing about the existence of HCCC No. 577 of 2011.
6. Mrs. Opiyo cited the provisions of Section 7 of the *Civil Procedure Act* and stated that the suit against the 2nd defendant is res judicata having been conclusively dealt with, in HCCC No. 577 of 2011. She relied on the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR, where the Supreme Court of Kenya set out the factors to be considered in determining if the doctrine of res judicata should be invoked. She contended that the matter in issue herein was directly and substantially in issue in HCCC No. 577 of 2011, the facts and grounds relied on by the plaintiff in the said suit are the same set of facts and grounds relied on by the plaintiff in the suit herein, the proceedings in this suit and in HCCC No. 577 of 2011 are both brought by the plaintiff against the 2nd defendant, and that the reliefs sought by the plaintiff against the 2nd defendant in this suit are similar to the ones that were sought in HCCC No. 577 of 2011.
7. Mrs. Opiyo referred to the Court's holding in the case of *Car Importers Association of Kenya v County Government of Mombasa* (Constitutional Petition 47 of 2021) [2022] KEHC 8 (KLR) and submitted that the presence of the 1st defendant and the introduction of an alternative prayer against the 2nd defendant in this suit does not by itself render the doctrine of res judicata inapplicable. Counsel stated that at paragraph 16A of the plaintiff's amended plaint, the plaintiff admits that there has been a similar suit between itself and the 2nd defendant being HCCC No. 577 of 2011 touching on the same subject matter as this suit, which matter is now an appeal at the Court of Appeal.
8. It was stated by Mrs. Opiyo that the plaintiff has not disclosed a reasonable cause of action against the 2nd defendant in its pleadings filed before this Court. She relied on the case of *JTG Enterprises Ltd v China Gezhouba Group Company* HCCOMM No. E679 of 2021 and the Court of Appeal's holding in the case of *Kenya National Capital Corporation Ltd v Albert Mario Cordeiro & another* [2014] eKLR and submitted that the dispute between the plaintiff and the 1st defendant in this suit revolves around the existence of a loan facility which the 2nd defendant is not a party to. For this reason, the 2nd defendant is not privy to the terms and conditions of the said loan facility and no liabilities and/or obligations arising from the said loan facility can be enforced against it. She opined that it is evident that plaintiff's cause of action against the 2nd defendant is not sustainable.



9. Mrs. Opiyo cited the provisions of Section 6 of the *Civil Procedure Act* and stated that the suit herein as against the 2nd defendant is sub judice in view of the ongoing proceedings before the Court of Appeal in Civil Appeal No. E420 of 2020 a fact which is admitted by the plaintiff at paragraph 16A of its amended plaint. Counsel relied on the case of *Republic -v- Paul Kihara Kariuki, AG & 2 others ex parte Law Society of Kenya* [2020] eKLR, where the Court outlined the principles to be considered in determining whether a suit is subjudice. She submitted that the issues in the present proceedings are directly and substantially the same as the issues in dispute before the Court of Appeal thus the suit as against the 2nd defendant herein should be struck out.
10. It was stated by Counsel that there is no correlation between the suit herein and the proceedings before the Court of Appeal since the proceedings before the Court of Appeal relate to an appeal in respect of a judgment delivered in HCCC No. 577 of 2011 whose cause of action arose as a result of breach of contract for the sale of ready mix concrete under the *Sale of Goods Act*, Cap 31 Laws of Kenya, whereas the suit before this Court relates to the validity of statutory notices issued by the 1st defendant to the plaintiff and a loan facility between the plaintiff and the 1st defendant.
11. Counsel submitted that since the plaintiff's suit as against the 2nd defendant is not only res judicata but also sub judice in light of the judgment delivered in HCCC No. 577 of 2011 and the ongoing proceedings in Civil Appeal No. E420 of 2020 at the Court of Appeal respectively, this Court is functus officio having pronounced itself with finality in HCCC No. 577 of 2011 thus it does not have the requisite jurisdiction to entertain the plaintiff's suit as against the 2nd defendant. To this end, Mrs. Opiyo relied on the holding by Judge Mabeya in *Africa Management Communications Limited v Airtel Networks Kenya Limited* [2021] eKLR. She urged this Court to strike out paragraphs 104 to 111 of the plaintiff's replying affidavit as they contain allegations on judicial fraud which are scandalous to the Court and the 2nd defendant.
12. Mr. Mungai, learned Counsel for the plaintiff submitted that the 1st defendant was not on the verge of realization of the suit property to recover the outstanding loan amount during the pendency of HCCC No. 577 of 2011 necessitating a cause of action against the 2nd defendant on the loan account. He further submitted that the cause of action against the 2nd defendant as averred under paragraph 17(g) of the amended plaint dated 19th July, 2021 arose way after HCCC No. 577 of 2011 was concluded and as such, the cause of action against the 2nd defendant herein is a new cause of action that could not have been brought forth in HCCC No. 577 of 2011 even with exercise of due diligence, as the threat of foreclosure had not materialized. Counsel contended that the plaintiff is also alleging fraud against the 2nd defendant in this suit and relied on the case of *Uburu Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR. He stated that particulars of fraud are new facts that have arisen after the determination of HCCC No. 577 of 2011 and that the cause of action against the 2nd defendant in this suit is a continuing wrong and a new wrong that has arisen after determination of HCCC No. 577 of 2011.
13. It was stated by Counsel for the plaintiff that the cause of action and the issues in this suit are different from the issues and cause of action in HCCC No. 577 of 2011 hence the suit herein as against the 2nd defendant is not res judicata. He further stated that in HCCC No. 577 of 2011, the plaintiffs claim against the 2nd defendant was for general damages for breach of contract for the supply of ready mix concrete and special damages for lost income while in the suit herein, the plaintiff's claim against the 2nd defendant is for compensation of property at market value as a result of the foreclosure proceedings that have been instituted by the 1st defendant against the plaintiff. Mr. Mungai cited the provisions of Section 7 of the *Civil Procedure Act* which provides for the doctrine of res judicata and the Supreme Court case of *John Florence Maritime Services Limited & another v Cabinet Secretary Transport and*



- Infrastructure & 3 others* (Petition 17 of 2015) [2021] KESC 39 (KLR) and asserted that the doctrine of res judicata is not an absolute bar to subsequent litigation as there are exceptions to the said doctrine such as where there exist special circumstances.
14. Counsel for the plaintiff submitted that in determining if there are special circumstances, it is necessary to ask whether taking into account all the circumstances, the application of the principle of res judicata would occasion an injustice. He cited the case of *Housing Finance Company of Kenya v J.N. Wafubwa* [2014] eKLR, where the Court described subsequent developments after institution of a suit as constituting special circumstances within the exception of special case. Mr. Mungai submitted that where there is bound to be an injustice, Courts should not deprive a party of his or her constitutional right of access to the Courts by the doctrine of res judicata as is the case herein. He contended that the doctrine of res judicata is not applicable in this case. He cited the case of *TSS Investment Limited & another v KAAB Investments Limited & another* [2022] KEHC 11 (KLR) where the Court held that fraud if pleaded overrides all pleadings, admissions including the doctrine of res judicata and asserted that the application of the doctrine of res judicata in this case occasions an injustice against the plaintiff rather than promoting the orderly administration of justice as intended.
 15. He stated that the doctrine of sub judice cannot form a basis for the striking out of a suit. He referred to the case of *Francis Ndahabwa Twala v Ben Nganyi* [2018] eKLR and argued that if this Court finds that the suit against the 2nd defendant is sub judice, it can only stay the same but not strike it out. He submitted that the plaintiff's suit as against the 2nd defendant discloses a cause of action against the said defendant as it is based on fraud perpetrated by the 2nd defendant. Further, that the Court in HCCC No. 577 of 2011 having found that the 2nd defendant was liable for supplying defective ready mix concrete, a breach that occasioned the plaintiff to default in its loan repayment, a valid cause of action against the 2nd defendant exists.
 16. Mr. Mungai referred to the Court of Appeal case of *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* [1980] eKLR where the principles of striking out a pleading were laid down and submitted that striking out of the suit against the 2nd defendant will be a drastic action and a wrong exercise of discretion by this Court. He further submitted that the judgment in HCCC No. 577 of 2011 was procured by way of fraud and the only way to prove that is by way of a new case as evidence has to be tendered, as it cannot be done by way of an appeal since fresh evidence cannot be tendered at the Court of Appeal. He explained that is the reason why the 2nd defendant was joined in these proceedings.
 17. Mr. Biko Angwenyi, learned Counsel for the 1st defendant submitted that the said defendant supports the 2nd defendant's application dated 20th August, 2021 since the amended plaint is afflicted by legal impediments of sub judice because of the existence of an appeal against the judgment delivered by the Court in HCCC No. 577 of 2011.
 18. In a rejoinder, Mrs. Opiyo submitted that the plaintiff can raise the issue of fraud at the Court of Appeal pursuant to the provisions of the Court of Appeal Rules. She expressed the view that the plaintiff cannot escape the doctrine of res judicata.

Analysis and Determination.

19. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof, the replying affidavit by the plaintiff and the written and oral submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether the suit as against the 2nd defendant is res judicata;



- ii. Whether the suit as against the 2nd defendant is sub judice in view of the existence of Civil Appeal No. E420 of 2020 filed at the Court of Appeal; and
 - iii. If the plaintiff's suit against the 2nd defendant discloses a reasonable cause of action against the said defendant.
20. In the affidavit filed by the 2nd defendant, it deposed that in HCCC No. 577 of 2011, the plaintiff sought for orders that the 2nd defendant be held liable to pay all the accrued interest and other related matters arising from the plaintiff's default in repaying a loan facility advanced to the plaintiff by the 1st defendant.
 21. She averred that on 29th June, 2020, the Court delivered its judgment in HCCC No. 577 of 2011, whereby it dismissed the plaintiff's claims in respect to interest accruing and other related matters from the loan facility. The Court further found the plaintiff to have been negligent for its failure to mitigate its own losses.
 22. The 2nd defendant further averred that in this suit, the plaintiff alleges at paragraph 10A of the amended plaint that as a result of the 2nd defendant's breach of the contract, it defaulted in its repayment of the loan facility to the 1st defendant thus the 2nd defendant should be held liable to pay all the accrued interest, penalties and costs arising from the said default.
 23. It was stated by the 2nd defendant that the subject matter of this suit pertaining to the 2nd defendant's liability to pay the plaintiff for all the accrued interest, penalties and costs arising from its default in repaying the loan facility were fully heard and determined in HCCC No. 577 of 2011. It stated that the reliefs sought by the plaintiff in paragraph (g) of its amended plaint ought to have been litigated in HCCC No. 577 of 2011.
 24. The 2nd defendant urged this Court not allow the plaintiff to file multiple proceedings in respect of the same subject matter and the same issues since if it is allowed to do so, there will be an imminent risk of conflicting Court decisions in parallel concurrent proceedings at the Court of Appeal and the High Court.
 25. The 2nd defendant stated that in the event the instant application is disallowed, it will be greatly prejudiced and inconvenienced since it will be required to defend multiple suits pertaining to similar issues resulting in the breach of its constitutional right to a fair hearing under Article 50(1) of the [*Constitution*](#) of Kenya, 2010.
 26. The plaintiff in its replying affidavit deposed that the judgment in HCCC No. 577 of 2011 was a sloppily executed fraud perpetrated on the Court. It averred that it is impractical and irrational to expect the plaintiff to state its cause of action in this suit without exposing naked the fraud and corruption in the drafting of the judgment delivered in HCCC No. 577 of 2011.
 27. The plaintiff further averred that it has sought a continuous harm relief in Civil Appeal No E420 of 2020, a claim that involves one wrongful act that results in continuing damages to the plaintiff such as supply of defective ready mix concrete and the consequences thereafter. The plaintiff stated that a continuous wrong on the other hand involves repeated wrongful conduct such as fraud, collusion and corruption as against the plaintiff whose relief is sought in the suit herein.
 28. It contended that the relief sought in paragraph (g) of the amended plaint is a cause of action brought about by a continued wrong by the 2nd defendant and it could not have been litigated in HCCC No. 577 of 2011 since the damage had not crystallized. The plaintiff stated that the doctrine of res judicata does not apply to claims that were not ripe at the time HCCC No. 577 of 2011 was being heard and



determined and it does not bar new action based on alleged acts that occurred after HCCC No. 577 of 2011 had been filed.

29. It was stated by the plaintiff that it warned the 2nd defendant in the amended plaint dated 14th November, 2014 that it reserves the right to claim damages for loss of the project in the event the 1st defendant ends up foreclosing on the same. It further stated that its amended plaint in this suit specifically pleads its losses in paragraphs 29 to 32 of the said plaint. It claimed that the loss of the plaintiff's project was not and could not have been pleaded as it was a wrong that had not ripened.
30. The plaintiff deposed that the doctrine of res judicata and sub judice are inapplicable where fraud has been practiced upon the Court by an Officer of the Court and as such, the said defences will be a non-starter as an affirmative defence. It further deposed that liability under prayers (f) and (g) only attaches if it is determined that the 2nd defendant caused or precipitated the losses and eventually the said foreclosure by its conduct in HCCC No. 577 of 2011 and if the 2nd defendant is innocent on the allegations levelled against it by the plaintiff, it will be paid costs.
31. It was stated by the plaintiff that the fraud on the Court by the learned Judge cannot be corrected by the Judicial Service Commission whose functions do not include setting aside or correcting judgments based on intentional fraudulent conduct specifically directed at or perpetrated upon the Court by Officers of the Court. The plaintiff further stated that pursuant to the provisions of Section 47 of the *Evidence Act*, it may show that the judgment that was delivered in HCCC No. 577 of 2011 was obtained by fraud or collusion.
32. The plaintiff deposed that the presence of fraud practiced on the Court by a Judicial Officer in a judgment lifts the bar on re-litigation which would otherwise exist.
33. Before I delve into the merits and demerits of the instant application, I note with concern that the plaintiff in its replying affidavit in opposition to the instant application has attempted to submit on the merits and/or demerits of the instant application and of Civil Appeal No. E420 of 2020 filed at the Court of Appeal, instead of limiting itself to averments of facts which are within its own knowledge or from disclosed sources. It is trite that a replying affidavit is a pleading that should contain issues of fact within the deponent's knowledge and not the law.

Whether the suit as against the 2nd defendant is res judicata

34. The doctrine of res judicata is provided for under Section 7 of the *Civil Procedure Act*, which states 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 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.”

35. The doctrine of res judicata was discussed extensively by the Court of Appeal in the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR as follows -

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of



suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

36. In the case of *Gladys Nduku Ntbuki v Letshego Kenya Limited; Mueni Charles Mainigi (Intended Plaintiff)* [2022] eKLR Odunga, J, (as he then was), in declining to invoke the doctrine of res judicata cited the case of *Abok James Odera v. John Patrick Machira* Civil Application No. Nai. 49 of 2001 where the Court stated that for one to rely on the defence of res judicata there must be-
- i. a previous suit in which the matter was in issue;
 - ii. the parties were the same or litigating under the same title;
 - iii. a competent court heard the matter in issue;
 - iv. the issue had been raised once again in a fresh suit.
37. The 2nd defendant submitted that the plaintiff's suit against it is res judicata since the issues raised herein were dealt with conclusively by the Court in HCCC No. 577 of 2011. It is not disputed that in HCCC No. 577 of 2011, the plaintiff's suit against the 2nd defendant was for breach of contract for the supply of ready mix concrete. The said suit proceeded to hearing and ultimately a judgment was delivered on 29th June, 2020. In the said judgment, the plaintiff's claims in respect of interest, penalties and other related matters arising from the loan facility were dismissed. The Court held that the plaintiff was negligent for failure to mitigate its own losses but proceeded to grant it general damages for breach of contract, which damages were reduced by 50% as a result of the plaintiff's contributory negligence. Dissatisfied by the judgment dated 29th June, 2020, both the plaintiff and the 2nd defendant appealed against it, at the Court of Appeal in Civil Appeal No. E420 of 2020.
38. On perusal of the amended plaintiff, it can be deduced that the plaintiff's cause of action still arises from the 2nd defendant's breach of contract for the supply of ready mix concrete. This can be seen at paragraph 10A of the amended plaintiff where the plaintiff avers that as a result of the 2nd defendant's breach of contract, it defaulted in its repayment of the loan facility to the 1st defendant thus the 2nd defendant should be held liable to pay all the accrued interest, penalties and costs arising from the said default. The plaintiff goes further to seek a relief in this regard at paragraph (f) of the amended plaintiff. At paragraph (g) of the said amended plaintiff, the plaintiff seeks an alternative to prayer (f) to the effect that should the 1st defendant proceed with realization of the suit property so as to recover the outstanding loan account, then the 2nd defendant should be held fully liable to compensate the plaintiff with the open market value of the property known as LR No. 2/61.
39. The plaintiff's response to the application herein and its written submissions, reveal that it does not deny the fact that there has been a similar suit between it and the 2nd defendant being HCCC No. 577 of 2011 touching on the same subject matter as in this suit, which matter is now an appeal to the Court of Appeal as can be seen at paragraph 16A of the amended plaintiff. The plaintiff's contention is that the 1st defendant was not on the verge of realization of the suit property to recover the outstanding loan amount during the pendency of HCCC No. 577 of 2011 necessitating a cause of action against the 2nd defendant on the loan account. It also claims that the cause of action against the 2nd defendant as averred under paragraph 17(g) of the amended plaintiff dated 19th July, 2021 had not yet crystallized by the time HCCC No. 577 of 2011 was heard and determined and as such, the cause of action against the 2nd defendant herein is new.



40. The plaintiff's case is that in HCCC No. 577 of 2011, its claim against the 2nd defendant was for general damages for breach of contract for the supply of ready mix concrete and special damages for lost income while in the suit herein, its claim against the 2nd defendant is for compensation of property at market value as a result of the foreclosure proceedings that have been instituted by the 1st defendant against the plaintiff. It was stated by the plaintiff that the judgment in HCCC No. 577 of 2011 was a sloppily executed fraud perpetrated on this Court and where there is presence of fraud practiced on the Court by a Judicial Officer in a judgment, the bar on re-litigation which would otherwise exist is lifted. The plaintiff further stated that it warned the 2nd defendant in the amended plaint dated 14th November, 2014 that it reserves the right to claim damages for loss of the project in the event the 1st defendant ends up foreclosing on the same.
41. After analyzing the plaintiff's and the 2nd defendant's case, it is this Court's finding that the matter in issue herein was directly and substantially in issue in HCCC No. 577 of 2011, in that the facts relied on by the plaintiff in HCCC No. 577 of 2011 are the same set of facts relied on by the plaintiff in the suit herein. It is also apparent that the proceedings in this suit and in HCCC No. 577 of 2011 are both brought by the plaintiff against the 2nd defendant and the reliefs sought by the plaintiff against the 2nd defendant in this suit are similar to the ones that were sought in HCCC No. 577 of 2011. In both suits, the plaintiff's cause of action against the 2nd defendant arose from breach of contract for supply of ready mix concrete.
42. I do not agree with the plaintiff that the relief sought in paragraph (g) had not crystallized by the time HCCC No. 577 of 2011 was heard and determined. This is because the suit herein was filed before judgment in HCCC No. 577 of 2011 was delivered. Furthermore, in order for this Court to make an order that the 2nd defendant compensates the plaintiff for the suit property at market value as a result of the foreclosure proceedings that have been instituted by the 1st defendant against the plaintiff, the plaintiff has to demonstrate that the 2nd defendant's breach of contract was the sole reason why the plaintiff defaulted in its loan repayment thus incurring additional costs and interest on the loan account. On perusal of the judgment delivered on 29th June, 2020 in HCCC No. 577 of 2011 this Court finds that the Trial Court dealt with the said issue conclusively and held that the plaintiff did not discharge its burden of proving its claim for additional interest charged by the 1st defendant and dismissed the said claim.
43. I am bound by the holding of the former East African Court of Appeal in the case of *Gurbachan Singh Kalsi v Yowani Ekori* Civil Appeal No. 62 of 1958 quoted by the Court in the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* (supra) where it was held as follows –

“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 cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every



fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved.”

44. Similarly, in *Mohamed Dado Hatu v. Dhadho Gaddae Godhana & 2 others* [2017] eKLR, the Court held as follows on the doctrine of res judicata -

“The law is thus clear on the principle of res judicata. Parties cannot litigate in instalments and cannot give their cases a cosmetic uplift by having new parties reopening issues that have already been heard and determined by courts of competent jurisdiction. ... The doctrine aims at bringing litigation to an end and affords parties closure and respite from the specter of being vexed by issues and suits which have already been determined by a competent court”.

45. The allegations of fraud leveled against the Court and the 2nd defendant are just mere allegations, as the plaintiff has not tendered any evidence in support of the same. In addition, the judgment delivered by Lady Justice Grace Nzioka on 29th June, 2020 in HCCC No. 577 of 2011 has not been varied and/or set aside by a Court of competent jurisdiction. As such, the judgment still stands. It is binding on the parties therein who are also the plaintiff and the 2nd defendant herein and the plaintiff cannot be seen to escape from the judgment by alleging fraud. In its replying affidavit, the plaintiff seems to be asking this Court to sit on appeal of a judgment and/or decision delivered by a Court of concurrent and competent jurisdiction. The allegations of fraud by the plaintiff should be raised before the Court of Appeal in Civil Appeal No. E420 of 2020 since the Court of Appeal is the only one that is properly suited to entertain the issues and to determine their veracity.

46. In the case of *E.T v Attorney General & another* [2012 eKLR, the Court stated thus on the need for Courts to be vigilant so that litigants do not try to circumvent the application of the doctrine of res judicata –

“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 a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and 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., in the case of *Njangu v Wambugu and another* Nairobi HCCC 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

47. Having found that the matter in issue herein was directly and substantially in issue in HCCC No. 577 of 2011, the facts relied on by the plaintiff in HCCC No. 577 of 2011 are the same set of facts relied on by the plaintiff in the suit herein, the proceedings in this suit and in HCCC No. 577 of 2011 are both brought by the plaintiff against the 2nd defendant, and the reliefs sought by the plaintiff against the 2nd defendant in this suit are similar to the ones that were sought in HCCC No. 577 of 2011, this Court finds that the plaintiff’s suit against the 2nd defendant herein is res judicata.



48. In view of the above finding, I find that the plaintiff's suit against the 2nd defendant is also sub judice since the issues raised by the plaintiff against the 2nd defendant herein are live in Civil Appeal No. E420 of 2020 at the Court of Appeal, which is an appeal against the judgment delivered by Lady Justice Grace Nzioka on 29th June 2020 in HCCC No. 577 of 2011, thus offending the provisions of Section 6 of the *Civil Procedure Act*.
49. The upshot is that the application dated 20th August, 2021 is merited and it is hereby allowed in the following terms –
- i. The amended plaint dated 19th July, 2021 is hereby struck out as against the 2nd defendant with costs to the 2nd defendant.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI ON THIS 29TH DAY OF SEPTEMBER, 2023. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:

Mrs Onyango h/b for Mrs Opiyo for the 2nd defendant/applicant

Mr. Masinde h/b for Mr. Mungai for the plaintiff/1st respondent

Mr. Biko Angwenyi for the 1st defendant/respondent

Ms B. Wokabi – Court Assistant.

