



Showcase Properties Limited v Kenya Commercial Bank Ltd & another (Commercial Case 305 of 2013) [2023] KEHC 24601 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 24601 (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 LTD 1ST DEFENDANT

BAMBURI SPECIAL PRODUCTS LTD 2ND DEFENDANT

RULING

1. The application before me is a Notice of Motion dated 18th October, 2022 filed under the provisions of Order 18 Rule 11 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The plaintiff seeks the following orders -
 1. Spent;
 2. That this Honourable Court do carry out a site visit and inspection of the suit property known as L.R. No. 2/61, Kirichwa Road, Nairobi prior to the public auction scheduled for 9th November, 2022 and make observations on the existence of honeycombs and exposed steel on block No. 2 of the structures constructed on the suit property;
 3. That in the alternative to prayer No. 2, above this Honourable Court do order the Executive Director of the National Construction Authority or his duly appointed representative to visit the suit premises and carry out a site visit and inspection of the suit property known as L.R. No. 2/61, Kirichwa Road, Nairobi prior to the public auction scheduled for 9th November, 2022 and make observations on the existence of honeycombs and exposed steel on block No. 2 of the structures constructed on the suit property;



4. That the Court do allow redundancy safety system video recording of the Court site visit at the plaintiff's expense;
 5. That the notes and observations recorded in the videos and transcriptions do comprise evidence in the hearing of the main suit; and
 6. That the costs of this application be provided for.
2. The application is brought on the grounds on the face of the Motion and is supported by affidavits sworn on 18th October, 2022 and 7th November, 2022, respectively, by Francis Muhoro Gachanja, the Managing Director of the plaintiff Company. In opposition thereto, the 2nd defendant filed grounds of opposition dated 25th October, 2022 raising the following issues –
- i. That the application is scandalous, frivolous and vexatious. Paragraphs 31, 34, 40, 42, 79, 80 to 82, 88, 98 to 99 of the affidavit of Francis Muhoro should be struck out;
 - ii. That this Honourable Court lacks the jurisdiction to consider and/or determine the issues of fraud raised in respect of the judgment in HCCC No. 577 of 2011 dated 29th June, 2020. The plaintiff ought to raise his complaints with the legal bodies with the jurisdiction to investigate the said issues;
 - iii. That the orders sought have no legal basis and in addition have no connection with the claim;
 - iv. That this Honourable Court lacks the jurisdiction to determine the issues relating to the 2nd defendant as the issues are res judicata having been previously determined in HCCC No. 577 of 2011 and subjudice on account of HCCC No. 577 of 2011, currently being the subject of an appeal before the Court of Appeal in Civil Appeal No. E420 of 2020; and
 - v. That the application is incompetent, devoid of merit and an abuse of the Court process. Consequently, this Honourable Court ought to dismiss the application with costs to the defendants on an indemnity basis on account of the vexatious litigation.
3. The 1st defendant on the other hand filed a Notice of Preliminary Objection dated 27th October, 2022 in opposition to the instant application, raising the following grounds –
- i. This Honourable Court lacks jurisdiction to hear and determine the application because it offends the provisions of Section 7 of the *Civil Procedure Act* this Honourable Court having delivered its judgment in HCCC No. 577 of 2011- Showcase Properties Limited versus Bamburi Special Products – in which proceedings the Court visited the site;
 - ii. This Honourable Court, being functus officio, lacks the jurisdiction to issue orders in respect of a dispute/subject matter that it has already been heard and determined; and
 - iii. The application is an abuse of Court process as it seeks to disrupt the 1st defendant's exercise of its statutory right after the Court declined to issue an injunction in the ruling delivered on 10th June, 2022.
4. On 24th July, 2023 this Court gave directions that the application herein would be canvassed by way of oral submissions on 27th July, 2023. Mr. Mungai, learned Counsel for the plaintiff contended that the judgment issued by Hon. Lady Justice Grace Nzioka on 29th June, 2020 in HCCC No. 577 of 2011 was obtained by fraud. He submitted that for the said reason, the plaintiff has the right to challenge the said judgment pursuant to the provisions of Section 47 of the *Evidence Act*, Cap 80 Laws of Kenya. He further submitted that a fraudulent judgment can only be challenged in a fresh suit and not through an



appeal since evidence can be tendered afresh in a fresh suit, whereas the Court of Appeal is a Court of record that looks at evidence tendered in the lower Court. He stated that the Court of Appeal cannot handle a matter brought pursuant to the provisions of Section 47 of the *Evidence Act*, Cap 80 Laws of Kenya.

5. Counsel stated that the plaintiff's application seeks an order for a site visit to the suit premises before it is sold by way of public auction to a third party since after the suit property is sold, the plaintiff will not have access to it. Mr. Mungai submitted that the instant application cannot be res judicata on account of the judgment delivered in HCCC No. 577 of 2011 on 29th June, 2020 for the reason that a judgment procured by fraud cannot be protected by the doctrine of res judicata. He stated that no site visits have been done in the present suit, the site visits referred to by the 1st and 2nd defendants were conducted by Judge Ogola and Lady Justice Nzioka in HCCC No. 577 of 2011. Counsel for the plaintiff submitted that a site visit is crucial as it is meant to confirm the evidence on record so as to enable the plaintiff to prove fraud in the judgment that was delivered in HCCC No. 577 of 2011.
6. Mr. Biko Angwenyi, learned Counsel for the 1st defendant submitted that there have been previous site visits to the suit property and the Court has already delivered a judgment in respect to how far the construction has gone. He stated that re-opening the case after judgment has been delivered will be against the doctrine of res judicata. He also stated that although the plaintiff contends that the fraudulent judgment can only be challenged through a fresh suit, there has been no amendment in this suit to challenge the judgment delivered in HCCC No. 577 of 2011 on 29th June, 2020.
7. Counsel stated that the application herein is an abuse of the Court process having been filed after the plaintiff filed an application seeking orders for valuation of the suit property. He submitted that this Court is being asked to conduct a site visit for the third time when the plaintiff can visit the site, collect evidence using experts and adduce the said evidence in Court. Mr. Biko Angwenyi concluded his submissions by stating that the instant application has no bearing hence it should not be used to impede the 1st defendant's rights.
8. Ms. Kithinzi, learned Counsel for the 2nd defendant submitted that there is no connection between the site visit and the fraud allegations and that a site visit on the suit property was conducted by Hon. Lady Justice Nzioka. Counsel further submitted that this Court has no jurisdiction to investigate and hear allegations of fraud against a Judge as Article 168 of *the Constitution* of Kenya, 2010 provides for removal of a judge on grounds of misconduct or corruption. She stated that Section 47 of the *Evidence Act* can only be invoked after a fresh case has been instituted to challenge the judgment delivered in HCCC No. 577 of 2011 on 29th June, 2020.
9. She pointed out that the plaintiff has filed an appeal and the 2nd defendant has filed a cross-appeal against the judgment delivered in HCCC No. 577 of 2011 on 29th June, 2020. Counsel contended that this Court cannot make inquiries as to the allegations of fraud since the High Court and the Court of Appeal do not have concurrent jurisdiction and the Court of Appeal Rules provide for additional evidence. She stated that the particulars of the alleged fraud have not been pleaded by the plaintiff for consideration by this Court.
10. In a rejoinder, Mr. Mungai submitted that issues of fraud in procurement of the judgment delivered in HCCC No. 577 of 2011 on 29th June, 2020 cannot be addressed by the Court of Appeal in Civil Appeal No. E420 of 2020 which is an appeal against the said judgment, as the appeal is based on the High Court record. He further submitted that Section 29 of the Court of Appeal Rules is in regard to additional evidence relating to the conduct of the hearing leading to the judgment, but it cannot come to the aid of a litigant moving the Court under Section 47 of the *Evidence Act*, Cap 80 Laws of Kenya.



11. It was stated by Counsel that the evidence is a concrete slab attached and affixed to the property thereby necessitating a site visit. He expressed the view that photographs would be sufficient if they were to be agreed on by all the Advocates.

Analysis and Determination.

12. I have considered the instant application, the grounds on the face of it, and the affidavits filed in support thereof, the Preliminary Objection and the grounds of opposition by the 1st and 2nd defendants, respectively, together with the oral submissions made by Counsel for the parties. The issues that arise for determination are –
 - i. Whether this Court has the requisite jurisdiction to determine issues of fraud raised by the plaintiff in respect to the judgment delivered on 29th June, 2020 in HCCC No. 577 of 2011;
 - ii. Whether the application herein is res judicata and/or sub judice; and
 - iii. Whether this Court is functus officio.
13. In the affidavit filed by the plaintiff, it deposed that the instant application is for this Court to visit the plaintiff's construction site to make and note observations which the Trial Judge in HCCC No. 577 of 2011 did not capture in the proceedings of the hearing held on 29th November, 2018. The plaintiff averred that on 12th October, 2022, it was served with a 21 days' notice from its financiers that the suit evidence (suit property) is scheduled to be auctioned on 9th November, 2022.
14. It was stated by the plaintiff that the instant application has been made pursuant to the provisions of Section 47 of the *Evidence Act* and it is extremely necessary for this Court to conduct a site visit before the suit property is sold at a public auction so that it can make an independent record of what was observed but left out by the Trial Court in HCCC No. 577 of 2011, when it conducted a site hearing.
15. The plaintiff agreed that indeed a site visit was conducted on the suit property by Hon. Lady Justice Nzioka on 29th November, 2018, which visit was captured on video recording, and later in Court certified video transcripts. The plaintiff however claimed that the evidence captured during the site visit which was material in determining if the plaintiff's workmanship was the cause of the cracks as alleged by the 2nd defendant, was suppressed and/or concealed from the judgment.
16. The plaintiff contended that as a result, it and the 2nd defendant were greatly prejudiced since the videos and the transcripts do not capture what the Trial Judge saw, as they only capture the contrasting observations of the parties' experts namely, PW4 and DW1 with the judgment prejudicing the plaintiff for the benefit of the 2nd defendant. He expressed the view that the plaintiff and the 2nd defendant will both require the evidence of the notes of observation made by this Court on the contested visual assessments to support or disprove the plaintiff's cause of action that the 2nd defendant benefited from fraud and/or collusion in the judgment that was delivered on 29th June, 2020 in HCCC No. 577 of 2011.
17. The plaintiff contended that blocks 1, 2, 3, 4, 5 & 6 on the ground floors or the basement have spots with inconsequential honeycombs but absolutely no evidence of cracks, which observation was made by the Court on 28th January, 2014 when Judge Ogola visited the suit property as can be seen from the site visit report. The plaintiff averred that it will be catastrophic for this Court not to have the benefit of physical observations to corroborate or controvert the physical observations in the 2nd defendant's, DW1's fictitious South African report.



18. The plaintiff in response to the 1st defendant's Preliminary Objection stated that the issue of *functus officio* does not arise because the issue in HCCC No. 577 of 2011 was defective concrete supplied to the plaintiff by the 2nd defendant, whereas the issue in this matter is that the 2nd defendant benefited from a fraudulent judgment in HCCC No. 577 of 2011, which is now the cause of the 1st defendant foreclosing on the plaintiff's project.
19. It further stated that the instant application will not disrupt the 1st defendant's exercise of its statutory right as the site visit can be carried out before or after the scheduled auction of the suit property but before certification of the eviction orders. The plaintiff deposed that seeking this Court's assistance to collect evidence of proof of fraud upon the Court does not clog the 1st defendant's right of redemption. The plaintiff asserted that time is of the essence as material evidence will be out of the plaintiff's reach once eviction orders have been certified by the Court.
20. In response to the 2nd defendant's grounds of opposition, the plaintiff deposed that if the 2nd defendant had nothing to hide, it would not incessantly oppose the site visit as it has always done. The plaintiff averred that the 2nd defendant's grounds of opposition do not disclose the legal bodies with jurisdiction to investigate the allegations of fraud levelled against the Court and the 2nd defendant, where the plaintiff ought to raise its complaint of fraud in respect to the judgment delivered on 29th June, 2020 in HCCC No. 517 of 2011.
21. The plaintiff stated that a claim of fraud can be made to a variety of legal institutions but only a Court of competent jurisdiction has the power to provide legal remedies to the plaintiff from the consequences of fraud upon the Court once proven in a civil Court as is the case herein. It averred that in line with the provisions of Article 160(5) of *the Constitution* of Kenya, 2010, redress from any harm on the plaintiff on account of a fraudulent judgment can only be claimed in a Court of law from the 2nd defendant who is a beneficiary of the fraud that forms the cause of action in this suit.
22. It contended that it has approached this Court which has unlimited jurisdiction in civil matters for determination of whether the plaintiff's rights have been denied, violated or infringed by the 2nd defendant on account of it being a beneficiary of a fraudulent judgment delivered in HCCC No. 577 of 2011 on 29th June, 2020 and thereafter, obtain redress for a claim against damage suffered on account of the said fraud.
23. The plaintiff deposed that it has no other way of preserving the evidence currently at the suit property which was fraudulently suppressed by the Trial Judge in HCCC No. 577 of 2011. It further deposed that the Court of Appeal has held that it is clear where a judgment is obtained by fraud, another suit has to be brought to set aside the said judgment.
24. It was stated by the plaintiff that HCCC No. 577 of 2011 was a claim on defective ready mix concrete and not fraud on the Court, and if fraud on the Court was not pleaded in HCCC No. 577 of 2011, it cannot be in the Record of Appeal so as to form the subject of Civil Appeal No. E420 of 2020. It averred that evidence has not been tendered to the effect that allegations of fraud on the Court are subject in Civil Appeal No. E420 of 2020 thus the issue of sub judice does not arise.
25. The plaintiff also averred that the appellate Court is still not precluded from making a determination as to the character of the judgment being fraudulent if and when the plaintiff will demonstrate that character. The plaintiff averred that the 2nd defendant bears the burden of proving that the elements of *res judicata* which bar a second suit. It deposed that there can be no question of *res judicata* if the judgment in HCCC No. 577 of 2011 had been realized by rehearsing misrepresentation or fraud on



the Court. It was stated that res judicata cannot extinguish claims that did not exist, thus the claims could not possibly have been raised in a prior law suit.

Whether this Court has the requisite jurisdiction to determine issues of fraud raised by the plaintiff in respect of the judgment delivered on 29th June, 2020, in HCCC No. 577 of 2011.

26. This Court has already dealt with this issue in its ruling No. 1, in respect to the 2nd defendant's application dated 20th August, 2021. This Court held thus -

“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.”

27. Further to the above, the plaintiff has to first demonstrate and/or prove the allegations of fraud against the judgment delivered on 29th June, 2020 at the Court of Appeal for the setting aside of the said judgment, and order for a re-trial before a different Judge other than Lady Justice Grace Nzioka. It is only then that this Court or any other Court of concurrent and competent jurisdiction can re-open the issues litigated on in HCCC No. 577 of 2011 and determine them on their merits after the parties have adduced evidence afresh.

28. I concur with the Counsel for the 1st and 2nd defendants that this Court lacks the requisite jurisdiction to determine issues of fraud raised by the plaintiff in respect to the judgment delivered on 29th June, 2020 in HCCC No. 577 of 2011.

Whether the application herein is res judicata and/or subjudice.

29. The doctrine of subjudice is provided for under the provisions of Section 6 of the [Civil Procedure Act](#), Cap 21 Laws of Kenya which states that –

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

30. The rationale behind the doctrine of subjudice is to prevent situations of having conflicting orders emanating from two or more different Courts over the same subject matter. A five-judge bench in the case of David Ndi & others versus Attorney General & others 2021 eKLR, had this to say in regard to the doctrine of subjudice –

“The rationale behind this provision (Section 6 of the [Civil Procedure Act](#)) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are



two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”

31. For the doctrine of subjudice to be successfully invoked, the person seeking to invoke it has to demonstrate that the matter in issue in the subsequent suit is directly and substantially in issue in a previously instituted suit, proceedings must be between the same parties, or between parties under whom they or any of them claim, litigating under the same title and such suit or proceeding must be pending in the same or any other Court having jurisdiction in Kenya to grant the relief claimed.
32. In this case, it is not disputed that an application for the Court to carry out a site visit of the suit property was made in HCCC No. 577 of 2011. The application was allowed and the Court visited the said property not once but twice. Inasmuch as the judgment delivered on 29th June, 2020 in HCCC No. 577 of 2011 is the subject of an appeal in Court of Appeal Civil Appeal No. E420 of 2020, there is neither an appeal against the ruling allowing the application for a site visit that was made in HCCC No. 577 of 2011 nor is there any other application seeking orders for this Court to conduct a site visit on the suit premises that is pending before any other Court having jurisdiction in Kenya to grant the said relief.
33. It is therefore this Court’s finding that the instant application does not offend the doctrine of subjudice as provided for under Section 6 of the Civil Procedure Act, Cap 21 Laws of Kenya.
34. The doctrine of res judicata on the other hand is provided for under the provisions of Section 7 of the Civil Procedure Act, Cap 21 Laws of Kenya which states as hereunder –

“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. In the case of John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR, the Court of Appeal sitting in Malindi set out the ingredients of res judicata as follows:

“From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially be in dispute between the parties in the suit where the doctrine is pleaded as a bar. Secondly, that the former suit should be the same parties, or parties under whom they or any of them claim, litigating under the same title and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally (see Karia & Another v the Attorney General and Others [2005] 1 EA 83.”
36. In this case, it is not disputed that an application for a site visit of the suit property was made in HCCC No. 577 of 2011 in two instances and the application was allowed, and two Judges at different times proceeded to the suit property to view the said property and appreciate what was actually going on at the site. In the present application, the plaintiff is not alleging that there is new evidence that has come up that makes it necessary for this Court to conduct another site visit. The plaintiff actually admits having made two similar applications in HCCC No. 577 of 2011, which are similar to the application before this Court and the applications were allowed. The plaintiff however contends that the evidence captured during one of the said site visits, which was material in determining its workmanship was the cause of the cracks as alleged by the 2nd defendant, was suppressed and/or concealed from the judgment.



37. It is my finding that the issue in dispute in the applications for the site visits filed in HCCC No. 577 of 2011 between the plaintiff and the 2nd defendant herein, being whether it was necessary to conduct site visits on the suit property so as to determine whether the plaintiff's workmanship was the cause of the cracks as alleged by the 2nd defendant is directly and substantially in dispute between the parties in the application herein. In addition, the Court in HCCC No. 577 of 2011 determined the said issue in finality since the plaintiff's applications were allowed and a site visit on the suit property was conducted. Judgment was thereafter rendered by Lady Justice Grace Nzioka. As a result, this Court finds that the instant application is res judicata.
38. Notwithstanding the above finding, it is important to note that even if this Court was to find that the application herein was not res judicata, the plaintiff has not demonstrated that there is new evidence and/or special circumstances to warrant this Court to carry out another site visit on the suit premises be it at the plaintiff's expense or not. The plaintiff admits that the site visit that was conducted by Hon. Lady Justice Grace Nzioka on 29th November, 2018 on the suit property was captured on a video recording and later in Court certified video transcripts. It further avers that when Judge Ogola carried out a site visit on the suit property on 28th January, 2014, he observed that blocks 1, 2, 3, 4, 5 & 6 on the ground floors or the basement have spots with inconsequential honeycombs but absolutely no evidence of cracks. This observation can be seen from the site visit report that was prepared thereafter.
39. I am therefore inclined to make a finding that another site visit is not necessary since whatever has to be seen on the suit property can be found on the video recording and the Court certified video transcripts of the site visit conducted on 29th November, 2018 and the site visit report for the site visit conducted on 28th January, 2014. This Court however held in Ruling No. 1 that the suit as against the 2nd defendant is res judicata and struck out the amended plaint. In conclusion, a site visit will therefore be of no value addition to the suit between the plaintiff and the 1st defendant since the said suit is founded on a loan facility and not the quality of the work done.
40. In light of the foregoing, I find that the application dated 18th October, 2022 is not merited. I hereby dismiss it with costs to the defendants.

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:

Mr. Masinde h/b for Mr. Mungai for the plaintiff/applicant

Mr. Biko Angwenyi for the 1st defendant/1st respondent

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

Ms B. Wokabi – Court Assistant.

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