



**Bwana v Mohamed; Charo (Interested Party) (Civil Case 8 of 2022)
[2023] KEHC 23096 (KLR) (28 September 2023) (Judgment)**

Neutral citation: [2023] KEHC 23096 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL CASE 8 OF 2022
SM GITHINJI, J
SEPTEMBER 28, 2023**

BETWEEN

SAID BWANAADI BWANA PLAINTIFF

AND

SAAD ABUD MOHAMED DEFENDANT

AND

LENA JANET CHARO INTERESTED PARTY

JUDGMENT

1. The plaintiff instituted this suit vide a plaint dated 23rd September 2022 seeking the following;
 - a. A declaration that the defendant having purchased and taken possession of M/V KBF 948W from the plaintiff on 20th June 2015 and paid in full purchase price and received executed transfer documents as per agreement he is the owner of the said motor vehicle and is liable for the accident that occurred 3 years later on 7th April 2018.
 - b. Consequently, the defendant be ordered to settle the decretal sum as awarded in SPMCC No. 103 of 2019 Kilifi in favour of the interested party Lena Janet Charo (the plaintiff in the primary suit).
 - c. Costs of the suit.
2. The plaintiff's case is that the interested party herein filed a suit being SPMCC 103 of 2019 in Kilifi between herself as the plaintiff and Aziz Mohamed Lali, Josephat Simiyu and Said Bwanaad Bwana as defendants respectively for compensation of injuries the interested party sustained following a RTA on 7th April 2018 involving Motor Vehicle Registration No. KBF 948W. It was averred that judgment was consequently entered in favour of the interested party on 21st April 2021 and execution proceedings ensued against the plaintiff herein on 20th June 2022 for the sum of Kshs. 1,465,201.



3. It was stated that the plaintiff sold the suit motor vehicle to the defendant herein on 20th June 2015 for a consideration of Kshs. 400,000/= and that the defendant took possession on the same date. That at the time of the occurrence of the accident on 7th June 2018, the suit motor vehicle was in possession and ownership of the defendant herein having executed transfer and registration instruments in respect of the said motor vehicle. Thus, the plaintiff is not liable for the accident.
4. The interested party filed Notice of Preliminary objection dated 14th October 2022 on the following grounds;
 - a. That the matter filed between the plaintiff and the interested party is *res judicata* as it was heard and determined on merit and cannot be reopened or litigated again.
 - b. That the interested party has no conceivable interest in the matter between the plaintiff and the defendant. It is a matter between them and has no bearing on the interested party judgment.
 - c. That the issue of liability between the plaintiff and the interested party was heard and determined with finality and cannot be re-litigated.
 - d. That the liability between the plaintiff and the defendant has no bearing on the judgment delivered in SPMCC No. 103 of 2019 at Kilifi as any issue of indemnity has been overtaken by event and or cannot involve interested party.
 - e. That the enjoining of the interested party to these proceedings without leave of court is illegal and unlawful, and is an abuse of the court process.
 - f. That the interested party has not consented to be enjoined in this proceedings as such she should be struck off the proceedings and or the plaint.
5. The defendant filed a statement of defence dated 14th December 2022 denying the plaintiff's claim in its entirety.
6. The plaintiff testified at the hearing while the defendant closed his case without testifying nor calling a witness.
7. Pw1 Said Bwanaad Bwana the plaintiff adopted his witness statement dated 23/9/2022 as his evidence in chief and produced as PEX 1-26 a bundle of documents as per the list of documents of even date. He added that the defendant approached him with a view to buying a van and he sold to him motor vehicle registration number KBF 948W for a consideration of Kshs. 400,000/= vide a sale agreement dated 20/06/2015. He then handed over the motor vehicle and all necessary documents to the defendant to facilitate transfer. He added that the motor vehicle was involved in an accident which was the subject of SPMCC No. 103 of 2019 in Kilifi wherein he was sued as the 3rd defendant. Judgment was consequently entered in favour of the plaintiff in the lower court suit which the plaintiff herein states he is not liable to paying the decretal sum.
8. Upon cross examination by Mr. Mutugi, he told the court that he did not participate in the lower court case though he signed a statement stating that he had sold the motor vehicle. Further that he did not testify in the matter.

Determination

9. I have considered the pleadings by the parties, the submissions as well as the authorities relied upon by counsel for the parties.



10. The plaintiff's case is anchored on the ownership of the suit motor vehicle. The question therefore is whether this issue was determined by the trial court rendering the instant suit *res judicata*.
11. 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”

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...”

12. 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 endeavour to resolve multiple actions arising from the same cause to all the parties and determine all issues in dispute so as to avoid multiplicity of actions.
13. 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 parties and issues in the matter at hand in order to ascertain;
 - i. what issues were really determined in the previous suit;
 - ii. whether they are the same in the subsequent suit and were therefore determined.
 - iii. whether the parties are the same or are litigating under the same Title and the matter was determined by a court of competent jurisdiction.
15. The test in determining whether a matter is *res judicata* as stated was summarized in [Bernard Mugo Ndegwa -vs- James Nderitu Githae and 2Others](#) (2010) eKLR, as follows that:
 - i. The matter in issue is identical in both suits;
 - ii. The parties in the suit are the same;
 - iii. Sameness of the title/claim;
 - iv. Concurrence of jurisdiction; and
 - v. Finality of the previous decision.
16. Like I have aforesaid, the plaintiff's case is anchored on the ownership of the subject motor vehicle. The plaintiff states that he sold the vehicle to the defendant way before the accident and ceded the ownership and use. Further, that he handed over the documents to the defendant for purposes of transfer which did not happen.



17. I have looked at the judgment of the lower court delivered on 21st April 2021. In paragraph 16, the learned magistrate opined as follows;

“...however, in the absence of proof by the 3rd Defendant that he had since sold the motor vehicle as at the time of the accident, it is only safe to reach the conclusion that the 1st and 3rd defendants owned the motor vehicle jointly, in one or the other forms of ownership of a motor vehicle: actual or beneficial.”

18. I have weighed the evidence before me. The plaintiff filed a joint defence alongside his codefendants in the lower court suit. He also filed a statement but did not testify in the suit. It is only logical to reach a conclusion that he was represented at the trial and the issues he is raising in the instant suit ought to have been raised in the trial court. The court addressed itself and more specifically to the issue of ownership of the said motor vehicle. In my view, if dissatisfied with the decision of the trial court, the plaintiff ought to have sought post judgment remedies available including a review or an appeal. That said, I find no merit in the plaintiff's suit as it's *res judicata*, and the same is hereby dismissed with costs.

JUDGMENT READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 28TH DAY OF SEPTEMBER, 2023.

S.M. GITHINJI

JUDGE

In the Presence of; -

1. Mr Opolu for the Plaintiff
2. Mr Mwangi for the Respondent

Court; - Leave to appeal requested by the Plaintiff is hereby granted.

S.M. GITHINJI

JUDGE

SEPTEMBER 28, 2023

