Shikundi v Lumula & another (Civil Appeal 20 of 2023)
[2023] KEHC 24581 (KLR) (26 October 2023) (Judgment)

Neutral citation: [2023] KEHC 24581 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAKAMEGA

CIVIL APPEAL 20 OF 2023

SC CHIRCHIR, J

OCTOBER 26, 2023

BETWEEN

BRIAN MUSINA SHIKUNDI ..... APPELLANT

AND

JOIHN KOVETI LUMULA ..... 1ST RESPONDENT

AUSTINE UNGAYI ..... 2ND RESPONDENT

(Being an appeal from the ruling of Hon. Caroline Cheruiyot - Resident Magistrate delivered on 27th day of January 2023 in Kakamega Small Claims Court Claim No. E139 of 2022)

JUDGMENT

1. The Appellant sued the Respondents in the small claims court at Kakamega, seeking for damages against the respondents for injuries sustained as a result of an accident which occurred on 16th July 2022.

2. In response, the 2nd respondent filed a Notice of preliminary objection to the effect that the court lacked Jurisdiction to hear and determine the suit as it was Res Judicata and thus offends the provisions of section 7 of the *Civil Procedure Act* .

3. This preliminary objection was premised on the fact that the respondent had previously filed another suit ,being SCCC E1039 of 2022 which suit had been dismissed for non- attendance by the Appellant.

4. In its ruling delivered on 27th January 2023, the trial court upheld the preliminary objection and dismissed the Appellant's suit, prompting this Appeal.

5. The appeal was heard by way of written submissions.

Appellant's submissions

6. The Appellant submitted that the trial Magistrate misapprehended the provisions of Order 12 Rule 6 (2) of the Civil Procedure Rules, 2010 and it failed to appreciate the intent and purport of the use of the word "may" which the Appellant argues , is permissive, and that it donates a right to a party affected by the provision to file a fresh suit.

7. They further submitted that the trial magistrate offended the provisions of Article 159(2) (d) of *the Constitution* on technicalities and Article 50 of *the constitution* on the right to fair hearing.

8. The Appellant further argues that dismissal for non-attendance or for want of prosecution do not give rise to a judgment on merit and therefore the doctrine of res judicata cannot apply. They relied on the case of Mrombo Moka Vs. cooperative Bank of Kenya Ltd & Another (2018) eKLR in this regard.

Respondent's submissions

9. The Respondent submits that the Appellant suit was dismissed under Order 12 Rule 3 and pursuant to the provisions of Order 12 Rule 6 the Appellant was barred from filing a fresh suit.

10. The Respondent further relies on section 8 of the *civil procedure Act* which bars a party from instituting a suit where the civil procedure Rules bar him/her/ it

11. The Respondent contends that the order of dismissal for non- attendance amounted to a final judgment and consequently the doctrine of Res judicata applies. The Respondent has relied on the case of Margaret Wanjiku Henry vs Road Touch services (2022) e KLR in this regard.

12. The Respondent further argues that the Appellant option to file a fresh suit, instead of applying to set aside the dismissal order, amounted to an abuse of the court process.

13. It is further pointed out that prior to the dismissal, there had been delays in prosecution of the suit which delays were caused by the Appellant.

14. The Respondent contends that Article 159 (2) (d) of *the constitution* and Article 50 which the respondent has invoked cannot cure the appellant's failure to follow the correct procedure. In this regard, the respondent has relied on the case of Jaldesa Tuke Dabelo versus IEBC (2015) eKLR.

Determination

15. The issue in this matter is brief and straightforward. What need to be determined is whether the suit was res judicata or not.

16. Section 7 of the *civil procedure Act* sets out the principle of Res judicata. It provides 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 can 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." This is the principle of Res judicata

17. In Black's Law Dictionary, (9th Edition), the principle of Res judicata is defined as:

> " (i) an issue that has been definitively settled by judicial decision;

(ii) An affirmative defence barring the same claim or any other claim arising from the same transaction, or series of transactions and that could have been- but was not-raised in the first suit".

18. The doctrine was expounded In Henderson –vs.- Henderson (1843-60) ALL E.R. 378, cited with approval in the case of Thomas Sambu vs paul k Chepkwony (2008) e KLR where the court stated 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 the 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 case, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a Judgment, 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".

19. The appellant's previous suit SCCC NO. EO94 of 2022 was dismissed for -non- attendance under order 12 rule 3(1) of the Civil procedure Rules, which provides as follows:

> Rule 3 (1) "if on the day fixed for hearing, after the suit has been called on for hearing outside the Court, only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the Court"

20. The contention herein is whether dismissal of a suit for non- attendance under the provisions of Order 12 Rule 3 constituted a final judgment so as to allow the respondent plead res judicata.

21. The court of appeal in Thomas K. Sambu (supra) cited with approval the case of Salem Ahmed Hasson Zaidi versus Faud Hussein Humeidan where the predecessor of the Court construed and applied Rule 178 of the rules of the Court as it was then, and held that an order of dismissal for non-attendance was final in nature and therefore amounted to a final Judgment of the court. It held: "We have considered the decision in the Salem Ahmed Hassan Zaidi case (supra) in the light of the provisions of order 12 Rule 3 (1) (CPR), and are in agreement that order 12 Rule 13(1) is couched in similar terms as Rule 178 as it was then. It therefore follows that the Judge after considering the record before him in the light of order 12 Rule 3(1) which was couched in similar terms as Rule 178 of the rules of the court, as it was then arrived at the correct conclusion that an order of dismissal for non-attendance is in the nature of a final Judgment."

22. The Appellant has cited the decision in Mrombo Moka Vs. cooperative Bank of Kenya Ltd & Another (2018) eKLR . However this was a decision of the high court which went to the court of Appeal and on appeal in Cooperative Bank of Kenya vs Cosmas Mwambo Moka & Ano (2019) e KLR the court overturned the decision of the high court and held: " As stated hereinbefore , this court has already addressed its mind as to whether a matter dismissed for want of prosecution could be resuscitated through a fresh suit and the categorical answer was that it could not as doing so would offend the doctrine of res judicata .....in our considered view the , the former suit having been dismissed for want of prosecution , the later suit was res judicata and cannot stand . The Respondent filed a suit which he neglected to prosecute , it cannot be proper for him to wake up again and decide to start the same process again. We agree with the appellant that this would be contrary to public policy that

litigation must come to an end and the best the respondent could do was to invoke the appellate process and not filing a fresh suit....."

23. From the decision of the court of appeal, the dismissal of the suit for non-attendance constituted a final judgment.

24. Further Order 12 Rule 6(1) & (2) of Order 12 provides as follows:

> " (1) Subject to sub rule (2) and to any law of limitation of actions, where a suit is dismissed under this order, the plaintiff may bring a fresh suit.
>
> (2) When a suit has been dismissed under rule 3, no fresh suit may be brought in respect of the same cause of action." (Emphasis added)

25. The provisions of Order 12 Rule 6(2) are unambiguous. Where the suit has been dismissed for non-attendance within the provisions of order 12 rule 3, the plaintiff cannot bring a fresh suit.

26. The appellant submitted that the trial court's action offended the provisions of Article 159 (2) (d) of the Kenya Constitution on the one hand and Article 50 on fair hearing on the other hand.

27. In the case of Jaldesa Tuke Dabelo versus IEBC & Another [2015] eKLR, cited by the Respondent it was held: "rules of procedure are hand maidens of justice and where there is a clear procedure for redress of any grievance, prescribed by an Act of Parliament that procedure should strictly be followed as Article 159 of *the Constitution* was neither aimed at conferring authority to derogate from express statutory procedures for initiating a cause of action".

28. Also in Patricia Cherotich Sawe versus IEBC & 4 Others [2015] eKLR it was stated that: "Article 159(2) (d) of *the Constitution* is not a panacea for all procedural short fall as not all procedural deficiencies can be remedied by it."

29. As for the alleged denial of the right to be heard under Article 50 of the Kenya Constitution, 2010, there is no infringement on the record. The record is clear that the appellant filed the initial claim and was served with the defence. The suit was dismissed due to default of his own. Further for failure to follow the correct procedure to redress his default this claim equally fails. That, in my view, does not amount to a denial of a fair hearing in the spirit and tenor of Article 50 of the Kenya Constitution.

29. The upshot of the above is that I find no merit in this Appeal. The trial court's finding is upheld and the Appeal is hereby dismissed with costs to the Respondent.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAKAMEGA THIS 26TH DAY OF OCTOBER, 2023

S. Chirchir

.....

Judge.

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

In the presence of :

E. Zalo- Court Assistant

No appearance by the parties.