Co-operative Bank of Kenya Limited v Adidi (Civil Appeal E012 of 2022)
[2023] KEHC 26802 (KLR) (18 December 2023) (Judgment)

Neutral citation: [2023] KEHC 26802 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KISUMU

CIVIL APPEAL E012 OF 2022

RE ABURILI, J

DECEMBER 18, 2023

BETWEEN

CO-OPERATIVE BANK OF KENYA LIMITED ..... APPELLANT

AND

SOLOMON ONYANGO ADIDI ..... RESPONDENT

(An appeal arising out of the Ruling and Order of the Honourable Beryl Omollo in the Chief Magistrate's Court at Kisumu delivered on the 25th January 2022 in Kisumu CMCC No. 640 of 2017)

JUDGMENT

Introduction

1. The appellant herein vide an application dated April 15, 2021 sought to have the respondent's suit struck out for being *res judicata*.

2. It was the appellant's case that the respondent had previously filed a suit being Kisumu CMCC No. 24 of 2009 in which he sought various orders against the appellant and which suit was compromised by a consent filed in court on the 6.8.2015 marking the entire suit as settled.

3. In response, the respondent contended that he had filed the previous suit, Kisumu CMCC No. 24 of 2009, against the appellant and Sportlight Intercepts Kenya Limited seeking to stop the appellant's intended sale of land parcel No. Kisumu/Kasule/1874, a permanent injunction against the appellant as well as elaborate accounts from the appellant on how it had used the payments so far received. The respondent denied seeking a refund of Kshs. 120,000 from the bank stating that the same was never an issue raised and substantially discussed and determined.

4. The trial magistrate in her ruling held that that Kisumu CMCC No. 24 of 2009 having been compromised vide the consent filed in court on the August 6, 2015, the same amounted to a judgment

of the said matter on merits and thus the issues in the suit before her were not the same as the issues previously concluded and thus the suit was not *res judicata*. The trial magistrate went on to find that as a result, th appellant's application dated April 15, 2021 lacked merit and thus dismissed it.

5. Aggrieved by the said decision, the appellant filed a memorandum of appeal dated 24th February 2022 and filed on the even date raising the following grounds of appeal:

    a. The learned magistrate erred in law and in fact in dismissing the appellant's application seeking to strike out the respondent's suit for being *res judicata*, when it was evident from the respective pleadings in the two separate suits that the parties litigating in the previous suit and the suit before her court, were th same, and the cause of actions in each of the suits, arose from th same facts relating to his dispute on same loan facility granted to the respondent by the appellant, in circumstances in which there was no reasonable explanation or any explanation at all, as to why the respondent had not made the new ground of attack or defence constituted in the subsequent suit , to have been included in the previous suit, and determined I that previous suit as contemplated under the mandatory provisions of Section 7 Explanation 4 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

    b. The learned magistrate erred in failing to acknowledge that the effect of the consent by the parties in Kisumu CMCC No. 24 of 2009, was to preclude the parties from raising any new ground of defence or attack, in any subsequent suit, arising from the same facts constituting that previous cause of action, and as such, she ought to have struck out the subsequent suit.

    c. The learned magistrate erred in law and in fact in considering the law on striking out suits as a discretionary power yet the nature of the application before her being one of *res judicata*, constituted an issue of challenge to the jurisdiction of the court to hear such a new suit, which would not be subject to the discretion of the court, because where it is determined that the court lacks jurisdiction , it must down its tools , and not even the consent of the parties, or the acquiescence of the parties to such jurisdiction would confer the court with such jurisdiction.

    d. The learned magistrate erred in law and in fact when she failed to make a determination on the application before her which was anchored on Section 7, Explanation 4 of the *Civil Procedure Act*.

6. The parties filed written submissions to canvass the appeal.

The Appellant's Submissions

7. The appellant submitted that the cause of action in either suits filed by the respondent related to the loan facilities granted to the Respondent which he claimed he did not receive yet it formed part of the monies he repaid to save his property from being sold by the Bank in its exercise of the statutory power of sale.

8. The appellant further submitted that it was evident that the only thing that the Respondent did in the second suit was to remove one party, being Spotlight Intercept Kenya Limited which was in the previous suit and then brought the very same cause of action disguised under the said suit as a claim for refund.

9. It was submitted that had the Respondent exercised reasonable diligence, he would have brought this part of his claim in the previous suit for the simple reason that he is the owner of the property known as Kisumu /Kasule /1874 and that he signed the letter of offer and acceptance and ought to have known from as far back as 1996 that he did not receive that part of the loan.

10. The appellant submitted that the trial magistrate erred in law and in fact in considering the law on striking out suits as discretionary yet the application before her challenged the validity of the suit on grounds of *res judicata* which, by its nature, if established, ousted the jurisdiction of a court automatically in the mandatory terms of Section 7 of the *Civil Procedure Act*.

11. Further, it was submitted that where a court finds that it lacks jurisdiction, it must down its tools and not even a judicious exercise of discretion can confer such jurisdiction as was held in the case of *Seven Seas Technologies Limited v Eric Chege* [2014] eKLR where Justice Makau relied on the celebrated decision of the Court of Appeal in *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR 1 where the superior court expressed itself on the necessity of jurisdiction for a court to entertain anything presented before it.

The Respondent's Submissions

12. It was submitted that in the plaint dated 28th January 2009, the only subject in issue was the challenge of the appellant's exercise of its statutory power of sale over the property Kisumu/Kasule/1874 for the recovery of the loan balances for the loan amount of Kshs. 70,000/= previously advanced to the respondent and that this issue was settled by consent between the parties vide the consent filed in court on the 6/8/2015 and the appellant moved to discharge the charge registered on the property.

13. The respondent submitted that it was the sum of Kshs. 120,000 that was the basis of the plaint dated 1/12/2017 and which he sought a refund from the appellant and that he learnt of this further charge of Kshs. 120,000/= at the point of discharge of the title by the appellant, after the suit dated 28/01/2009 had long been settled by the consent filed on the 6/8/2015.

14. The respondent submitted that the issue of the non—disbursement and refund of Kshs. 120,000 could not have formed an issue of discussion during the negotiations that took place leading to the repayment of the outstanding loan amounts before the title was released to the respondent since the charge was only noted in the title deed which was kept by the appellant until at the point of discharge in September 2015 when the title deed was released to the respondent.

15. It was submitted that therefore, the suit Kisumu Civil suit no. 640 of 2017 was not *res judicata* Kisumu Civil suit No. 24 of 2009 and that the court ought to dismiss the appeal with costs.

Analysis and Determination

16. I have considered the memorandum of appeal and the grounds thereof, as well as the parties' respective submissions. I have also considered the pleadings in both suits in the lower court and the application, response and the ruling rendered by the trial court.

17. This being a first appeal, this court is under a duty to re-evaluate and re assess the evidence and make its own conclusions. It must, however, keep in mind that a trial court, unlike the appellate court, had the advantage of observing the demeanour of the witnesses and hearing their evidence first hand. In *Abok James Odera T/A A.J Odera & Associates v John Patrick Machira T/A Machira & Co. Advocates* [2013] eKLR, the court stated as follows-

> "This being a first appeal, we are reminded of our primary role as a first appellate court namely, to re-evaluate, re-assess and reanalyze the extracts on the record and then determine whether the conclusions reached by the learned trial Judge are to stand or not and give reasons either way."

18. The ruling in the lower court was based on affidavit evidence. The substantive law on 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."

19. 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..."

20. Thus, 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.

21. Therefore, in order 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 they 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.

22. Kuloba J., in the case of *Njangu v Wambugu and 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*...."

23. The Court of Appeal in the case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 stated that: -

> " The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...
>
> The law with regard to *res judicata* is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which

> that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of *res judicata* by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

24. In *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni*, the court in an earlier Application ruled that the Application before it was *res judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined "thrice by the High Court and twice by the Court of Appeal", it could not be resuscitated by another Application.

25. The Court of Appeal in the above case further stated that:

> " That is to say, there must be an end to Applications of similar nature, that is to further, under principles of *res judicata* apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or *Civil Procedure Act* caters for."

26. A Decision of the court must be respected as fundamental to any civilized and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court, or which ought to have been litigated in the previous suit.

27. A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be 'substantially undermined' if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.

28. Whether a claim is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each instance.

29. In the instant case, the respondent had previously filed a suit being Kisumu CMCC No. 24 of 2009 in which he sought orders to stop the appellant's intended sale of land parcel no. Kisumu/Kasule/1874, a permanent injunction against the appellant as well as elaborate accounts from the appellant on how it had used the payments so far received. The said suit was compromised by a consent filed in court on the 6.8.2015 marking the entire suit as settled.

30. The respondent subsequently filed another suit vide plaint dated 18th December 2017 in which he sought refund of Kshs. 120,000 plus interest being funds that he alleged were to be advanced to him after applying for a further charge in 1997 but that the same were not advanced despite his allegation that he had repaid the same.

31. In his response to the application by the appellant before the trial court in which the appellant raised the issue of *res judicata*, the respondent denied seeking a refund of Kshs. 120,000 from the bank stating that the same was never an issue raised and substantially discussed and determined in Kisumu CMCC No. 24 of 2009.

32. I have perused the record of appeal and note that in Kisumu CMCC No. 24 of 2009, the respondent in his plaint dated 28th January 2009 at paragraph 10 averred as follows:

> " The plaintiff avers that it did operate an account with the 1st defendant and pursuant to the said account the 1st defendant would grant the plaintiff financial accommodation to a sum not exceeding Kshs. 120,000. The plaintiff avers that he was never in debt in the said current account nor did he borrow therefrom."

33. It is clear from the pleading above that the issue of Kshs. 120,000 advanced or not advanced to the respondent was raised in Kisumu CMCC No. 24 of 2009 and subsequently, determined vide the consent filed in court on the August 6, 2015 marking the entire suit as settled, and which consent had not been set aside.

34. Accordingly, by seeking for a refund of Kshs. 120,000 from the bank in Kisumu CMCC 640 of 2017, the respondent was in my view seeking to have a second bite at the cherry in full disregard of the doctrine of *res judicata*.

35. It is my view that the respondent's suit in Kisumu CMCC 640 of 2017 was *res judicata* the suit Kisumu CMCC No. 24 of 2009 that had been settled and fully determined. This is so because, even if the trial court would have proceeded to entertain the suit in Kisumu CMCC 640 of 2017, as it intended to do, the same would have been an error as it would have been acting without jurisdiction. This is because the respondent's claim initiated by the plaint dated 18th December 2017 seeking refund of Kshs. 120,000 for a further charge entered into in 1997 was time barred under the *Limitation of Actions Act*. Twelve years had lapsed from the time the respondent claims that he repaid the money that he allegedly did not receive from the appellant.

36. Section 19(1) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides:

> " An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued."

37. Accordingly, then the respondent's suit for refund of Kshs. 120,000 in Kisumu CMCC 640 of 2017 was null and void ab initio as it should have been filed on or before the year 2009 which by coincidence was the year the respondent filed his initial suit against the appellant in Kisumu CMMCC No. 24 of 2009, which suit was compromised and settled as between the parties herein. From the demand letter 30th October, 2017, the respondent was claiming for the refund of kshs 120,000 plus interest at 25% from August 1997 to October, 2015. By that time, already, 18 years had lapsed.

38. The upshot of all the above is that the appeal herein is found to be meritorious. The ruling and order of the trial court in Kisumu CMCC No. 640 of 2017 is hereby set aside in its entirety and substituted with and order allowing the application dated 15th April, 2021. The said suit is hereby struck out and dismissed for being *res judicata* Kisumu CMCC No. 24 of 2009 and for being stale and statute barred.

39. Each party to bear their own costs in the lower court and in this appeal.

40. This file is closed. I so order.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 18TH DAY OF DECEMBER, 2023

R.E. ABURILI

JUDGE