



**Ndegwa v General & 2 others (Civil Case 209 of 2012)
[2022] KEHC 419 (KLR) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 419 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE 209 OF 2012
FN MUCHEMI, J
APRIL 28, 2022**

BETWEEN

FRANCIS JAMES NDEGWA PLAINTIFF

AND

ATTORNEY GENERAL 1ST DEFENDANT

COMMISSIONER FOR CO-OPERATIVE DEVELOPMENT 2ND DEFENDANT

CHAIRMAN, TETU DAIRY FARMERS CO-OPERATIVE SOCIETY

LTD 3RD DEFENDANT

RULING

1. The plaintiff filed this suit through a plaint dated September 26, 2012 seeking for general damages for malicious prosecution and unlawful arrest as well as loss of profits due to grounded transport for 57 days. The defendants filed their defences denying the claim. It is important to note that the defence of the 3rd defendant was filed under protest.
2. The objection dated August 2, 2021 filed by the 3rd defendant was based on the following grounds:-
 - a. That the plaint is defective, incompetent and bad in law as there is no such known party as the 3rd defendant.
 - b. That the party sued as the 3rd defendant is in contravention of Section 12 of the *Co-operative Societies Act* Cap 490 Laws of Kenya;
 - c. That there is nothing new to adjudicate by this Honourable court, the subject matter of this suit having been fully determined by a court of competent jurisdiction in Co-operative Tribunal No. CTC 209 of 2006 Tetu Dairy Farmers' Co-operative Society vs Francis James Ndegwa and the current suit is not an appeal from the decision of the Co-operative Tribunal.



- d. That the plaintiff filed an appeal being Civil Appeal No. 74 of 2008 before the High Court in Nyeri and which was dismissed by Justice Asike Makhandia (as he then was) on 29th January 2019.
 - e. That the plaintiff's suit is res judicata in that the issues he is raising in this suit have previously been raised in other senior and competent courts which had the advantages of listening to the parties in several suits on the same subject matter as follows:-
 - I. Constitutional Application No. 2 of 2011;
 - II. Judicial Review Application No. 431 of 2009 Nyeri (dismissed)
 - III. Court of Appeal Civil Appeal NAI 167 of 2009 Nyeri (withdrawn)
 - IV. High Court Civil Appeal No. 74 of 2008 (dismissed)
 - V. Several applications dismissed by the Co-operative Tribunal.
 - VI. Court of Appeal Civil Appeal No. 61 of 2016 Francis James Ndegwa vs Tetu Dairy Co-operative Society Ltd
3. Parties hereby agreed to dispose of the preliminary objection by way of written submissions. However, the plaintiff failed to file his submissions.

The 3rd Defendant's Submissions

4. The 3rd defendant refers to Section 12 of the *Co-operative Societies Act* and submits that a co-operative society is an independent legal entity from its members and thus the 3rd defendant does not have the legal capacity to be sued in his individual capacity as the Chairman of Tetu Dairy Farmers Co-operative Society Limited. As such, the 3rd defendant submits that the plaintiff is in contravention of section 12 of the *Co-operative Societies Act* as the 3rd defendant cannot be sued on behalf of the society and the 3rd defendant submits that the suit ought to fail on this ground alone.
5. The 3rd defendant further relies on Section 7 of the *Civil Procedure Act* and the case of *Independent Electoral & Boundaries Commission vs Maina Kiai & 5 others* [2017] eKLR and submits that the plaintiff by repetitively litigating on the same issues is grossly abusing the court process. The 3rd defendant further submits that the bone of contention emanates from the decision of the Co-operative Tribunal Case No. 209 of 2006 where the plaintiff was sued by Tetu Dairy Farmers Co-operative Society and judgment entered against him for the sum of Kshs. 1,230,495/-. In execution of the decree, the decree holder obtained a warrant of arrest from the tribunal to have the plaintiff arrested to show cause why he should not be committed to civil jail having failed to satisfy the decretal sum. The plaintiff thereafter moved the High Court in Nyeri vide Constitutional Application No. 2 of 2011 asking the court to quash the warrant of arrest issued against him in Co-operative Tribunal Case No. 209 of 2006 on the basis that it contravened his fundamental rights and freedoms. The court dismissed the plaintiff's petition on the basis that he cannot argue that his right to liberty was violated because a valid court decree was issued by a competent court and it was not set aside and thus the execution was proper against the plaintiff. At the same time, the plaintiff appealed the decision of Justice Ngaah in Nyeri Civil Appeal No. 170 of 2017 and the same was dismissed.
6. The 3rd defendant further submits that the plaintiff filed a Judicial Review Application No. 431 of 2009 alongside a Constitutional Application against a surcharge and subsequent arrest that followed the judgment of the Co-operative Tribunal Case in CTC Case No. 209 of 2006.



7. The 3rd defendant makes reference to the case of *John Florence Maritime Services Limited & Another vs Cabinet Secretary for Transport and Infrastructure & 3 Others* [2015] eKLR and submits that the plaintiff has been repetitively litigating the same issues that were already decided and some of which the 3rd defendant has no knowledge of their outcome.
8. The 3rd defendant submits that the plaint dated 26th September 2012 is defective as it contravenes Section 12 of the *Co-operative Societies Act* and it also contains a duplicate of issues that have already been adjudicated in different court forums. To support his contention, the 3rd defendant relies on the case of *Matiba vs Attorney General Nairobi H.C. Misc. Application No. 790 of 1993*. Whilst the plaintiff's suit is based on malicious prosecution, the 3rd defendant states that the plaintiff has not proved the elements of malicious prosecution. The 3rd defendant relies on the case of *Murunga vs Attorney General* (1979) eKLR 138 to support his contention. Moreover, the 3rd defendant submits that the execution of the judgment has not been set aside.
9. The 3rd defendant states that the facts pleaded and the prayers sought are not in tandem and are thus contradictory and therefore the plaintiff's suit should be dismissed as vexatious and lacking in both substance and merit. The 3rd defendant thus prays that the court ought to exclude and strike out the plaint as against him.

The 1st & 2nd Defendant's Submissions

10. The 1st & 2nd defendants are in support of the 3rd defendant's preliminary objection and submit that the suit lacks substance and has no foundation as the plaintiff's claim is baseless. To support this contention, the 1st & 2nd defendants rely on the case of *Mercy Nduta Mwangi t/a Mwangi Keng'ara & Co. Advocates vs Invesco Assurance Company Limited* [2019] eKLR. Additionally the 1st & 2nd defendants argue that the plaintiff is in contravention of Section 12 of the *Co-operative Societies Act* as a co-operative society can sue and be sued in its own capacity and thus the 3rd defendant possesses no legal capacity to be sued as the chairman of Tetu Dairy Farmers Co-operative Society Limited. In light of the foregoing, the 1st & 2nd defendants submit that the suit is frivolous and vexatious and an absolute abuse of the court process which renders the suit devoid of merit.
11. The 1st & 2nd defendants rely on Section 7 of the *Civil Procedure Act* and the case of *Invesco Assurance Company Limited & 2 Others vs Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company Advocates & Another (Interested parties)* [2020] eKLR and submit that the matter is res judicata. The 1st & 2nd defendants state that the plaintiff raised the same issues in Constitutional Application No. 2 of 2011, Judicial Review Application No. 431 of 2009 Nyeri which was dismissed, Court of Appeal Civil Appeal No. 167 of 2009 Nyeri which was withdrawn, High Court Civil Appeal No. 74 of 2008 which was dismissed, several applications dismissed by the Cooperative Tribunal and at the Court of Appeal in Civil Appeal No. 61 of 2016 Francis James Ndegwa vs Tetu Dairy Cooperative Society Ltd. The 1st & 2nd defendants submit that the plaintiff is forum shopping which wastes the courts time and resources. The need to have an end to litigation is vital as the plaintiff should not be entertained over the same matter severally. As such, the 1st & 2nd defendants submit that the matter is frivolous, vexatious, res judicata and a waste of the court's time and resources and ought to be dismissed with costs to the defendants.

Issues for determination

12. The two main issues for determination herein are:-



- a. Whether the suit is defective, incompetent and bad in law as it contravenes Section 12 of the [Co-operative Societies Act](#);
- b. Whether the matter is res judicata.

The Law

Whether the plaint is defective, incompetent and bad in law and whether it contravenes Section 12 of the Co-operatives Societies Act

13. Section 12 of the [Co-operative Societies Act](#) provides:-

Upon registration every society shall become a body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold moveable and immovable property of every description, to enter into contracts, to sue and to be sued and do all things necessary for the purpose of, or in accordance with its by-laws.

14. It therefore follows that the Cooperative Societies Act gives the power to a cooperative society to sue and to be sued in its own name.
15. In the instant suit, the 3rd defendant is the Chairman of Tetu Dairy Farmers Co-operatives Society Limited. In view of the provisions of Section 12 of the Act, the plaintiff erred in suing the 3rd defendant in his capacity as chairman. It suffices to sue the society which is a body corporate. Suing of the chairman of the society contravenes Section 12 of the Cooperative Societies Act.

Whether the matter is res judicata

16. The doctrine of res judicata is set out in Section 7 of the [Civil Procedure Act](#). The doctrine ousts the jurisdiction of a court to try any suit or issue which had been fully determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. Section 7 of the [Civil Procedure Act](#) provides:-

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.

17. This principle was enunciated in the Court of Appeal in the case of The [Independent Electoral and Boundaries Commission vs Maina Kiai & 5 Others](#) [2017] eKLR where the court held:-

For the bar of *res judicata* to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

- a. The suit or issue was directly and substantially in issue in the former suit.
- b. That former suit was between the same parties or parties under whom they or any of them claim.
- c. Those parties were litigating under the same title.
- d. The issue was heard and finally determined in the former suit.
- e. The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.



18. The Court further observed that:-

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 commonsensical protection against the wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and for a, 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 or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.

19. Consequently, the rationale for the doctrine of res judicata exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction.

20. In the suit before the Cooperative Tribunal, the plaintiff was sued by Tetu Dairy Farmers Co-operative Society and judgment was entered against him for the sum of Kshs. 1,230,495/-. The decree holder obtained a warrant of arrest from the tribunal to have the plaintiff arrested to show cause why he should not be committed to civil jail having failed to satisfy the decretal sum. The 3rd defendant submitted that the plaintiff then moved this court in High Court Constitutional Application No. 2 of 2011 seeking that the court quashes the warrant of arrest issued against the plaintiff in Cooperative Tribunal Case No. 209 of 2006 on the basis that it contravened his fundamental rights and freedoms. The court dismissed the plaintiff's petition on the basis that he cannot argue that his right to liberty was violated because a valid court decree was issued by a competent court and the same was not set aside and the execution was proper against him. The plaintiff appealed the decision of the court in Nyeri Civil Appeal No. 170 of 2017 but the same was dismissed.

21. The defendants further stated that the plaintiff filed a Judicial Review Application No. 431 of 2009 alongside a Constitutional Application against the surcharge and subsequent arrest that followed the judgment of the cooperative tribunal in CTC Case No. 209 of 2006. On perusal of the plaint it is noted that the plaintiff seeks general damages for malicious prosecution and unlawful arrest and the loss of profits due to the grounded transport for 57 days. The plaintiff states that his committal to civil jail was malicious, irregular and irregular as he was not given a chance to respond to the Notice To Show Cause which infringed on the rules of natural justice.

22. The plaintiff chose not to file any submissions in this preliminary objection although he was represented by a counsel who was present in court even as the ruling date was given.

23. Upon perusal of High Court Constitutional Petition No. 2 of 2011, I note that the plaintiff was arrested in execution of the decree and was subsequently released upon parties having entered a consent to the effect that he would deposit a sum of Kshs. 750,000/- with the respondent or his advocate and thereafter pay the balance by way of monthly instalments of Kshs. 100,000/- till payment in full. The warrants of arrest against the plaintiff were issued in the process of execution of judgement which was a lawful process as the court acknowledged in its judgement. The court held that the petitioner could not argue that his right to liberty has been violated simply because a valid court decree was being executed against him as the respondent is entitled to the fruits of its judgment as much as the petitioner is entitled to his liberty. I note that the issues raised in both cases are similar, touching on the arrest of the plaintiff, whereas the parties are the same and a court of competent jurisdiction has made a determination on the said issues.



Conclusion

24. Consequently, I find that the issues in this suit have been litigated upon in previous suits by courts of competent jurisdiction and this renders them res judicata.
25. In my considered view, the preliminary objection is merited and is hereby upheld.
26. This suit is hereby dismissed with costs for the foregoing reasons.
27. It is hereby so ordered.

DELIVERED, DATED AND SIGNED AT NYERI THIS 28TH DAY OF APRIL, 2022.

F. MUCHEMI

JUDGE

RULING DELIVERED THROUGH VIDEOLINK THIS DAY OF 28TH APRIL, 2022

