Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021)
[2022] KEHC 10416 (KLR) (26 May 2022) (Judgment)

Neutral citation: [2022] KEHC 10416 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT KAJIADO

CIVIL APPEAL E009 OF 2021

SN MUTUKU, J

MAY 26, 2022

BETWEEN

PETER MUTUURI MAUMBWA ..... 1ST APPELLANT

SIMON KAMAU ..... 2ND APPELLANT

OUTGOING TOUR AND TRAVELLERS LIMITED ..... 3RD APPELLANT

KEZIAH WANJIKU ..... 4TH APPELLANT

AND

LEKUTEN MOLOI KISEMEI ..... RESPONDENT

(Being an appeal from the whole of the Ruling of the Honourable Senior Resident Magistrate B. Cheloti (SRM) delivered on the 23rd February, 2021)

JUDGMENT

Introduction

1. The Respondent filed a suit in the lower court seeking general damages for pain suffering and loss of amenities, special damages in the sum of Kshs 76,850 and costs of the suit. Interlocutory judgment was entered for failure by the Appellants, who were the defendants in the lower court, to enter appearance and file defence. The defendants, being dissatisfied with the turn of events filed an application through the firm of Kairu & McCourt Advocates filed the application dated 13th September 2017 seeking to have the interlocutory judgment set aside and leave to defend the suit. The application was dismissed by the trial court through a Ruling delivered on 29th October 2019 thereby upholding the interlocutory judgment.

2. The Appellants changed advocates and instructed the firm of Kimondo Gachoka & Co. Advocates. This firm of advocates filed the application dated 11th January 2021 which was dismissed by the trial

court in a ruling delivered on 23rd February 2021. It is this ruling that has aggrieved the Appellant and which is the subject of this appeal.

The Memorandum of Appeal

3. By a Memorandum of Appeal dated 25th February 2021, the Appellants have raised the following grounds of Appeal:

   (i) The Learned Magistrate erred in law and fact in dismissing the Appellants application dated 11th January, 2021.

   (ii) The Learned Magistrate erred in law and fact in dismissing the Application without according the Appellants a hearing on merit.

   (iii) The Learned Magistrate erred in law and fact in dismissing the Appellants Application dated 11th January, 2021 without considering the repercussions it would do to the Appellants and without giving due consideration to the legal question thereby arriving at a wrong decision.

   (iv) The Learned Magistrate erred in law and fact in finding that the Applications dated 13th September, 2017 and 11th January, 2021 have glaring similarities and revolve around the issue of service, when the application dated 11th January, 2021 raises different issues with regards to service.

   (v) The Learned Magistrate erred in law and fact in upholding the Respondent's preliminary objection of res judicata and dismissing the Appellant's Application.

   (vi) The Learned Magistrate erred in law and fact in failing to find that the prayer to cross-examine process server was dealt with by the trial court when that was not true and the prayer did not exist in the Application dated 13th September, 2017.

   (vii) That the Learned Magistrate erred in law and fact in finding that the issue of service had been properly/completely determined by the trial court in the Ruling delivered on 29th October, 2019 by the trial court.

   (viii) That the Learned Magistrate erred in law and fact in failing to find that the doctrine of res judicata did not apply.

   (ix) That the Learned Magistrate erred in law and fact in failing to give due consideration to the Applicant's oral submissions and list of Authorities.

   (x) That the Learned Magistrate erred in law and fact by failing to observe sections 1A,1B of the *Civil Procedure Act* and Article 159 of *the Constitution* of Kenya 2010 thereby arriving at a wrong decision.

   (xi) That the Learned Magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision.

   (xii) That the Learned Magistrate erred in law and fact by wholly misapplying her judicial discretion in the circumstances obtaining in this case.

4. The Appellants are seeking to have the Appeal allowed with costs; that the Ruling of 23rd February, 2021 be set aside and the Appellants be allowed to prosecute their Application dated 11th January, 2021; that they be allowed to cross-examine the process server; that the exparte judgement delivered on 15th September, 2020 be set aside; that they be allowed to file their memorandum of appearance and

defence documents; that they be accorded a fair trial and that this court grants such further orders as may be deemed fit.

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

6. The Appellant filed his submissions dated 17th February, 2022. The Appellant, through his counsel, has submitted on two issues: firstly that they have satisfied the conditions for setting aside an ex parte judgment. They cited the case of *John Mukuha Mburu v Charles Mwenga Mburu* [2019] eKLR where the court held that the conditions to be met are whether there is a defence on merit, secondly whether there would be any prejudice and thirdly whether there is the explanation for the delay as was set by the Court of Appeal in *Mohammed & Another v Shoka* [1991 KLR463]. They also cited Order 10 Rule 11 of the *Civil Procedure Rules*.

7. They submitted that the magistrate erred in dismissing their application to set aside the ex parte judgment. They relied on the Court of Court of decision]*James Kanyiita Nderitu & another v Marios Philotas Ghikas & another* [2016] eKLR where the court analysed the issue of regularly and irregularly entered default judgments. They argued that they contested the issue of proper service upon themselves therefore rendering the ex parte judgment irregular. They submitted that they stand to suffer immense prejudice if denied a chance to defend the matter and that their defence raises triable issues as to whether indeed the accident occurred on 18th March, 2015, who should bear liability, how much damages should be paid and which costs are payable.

8. The Appellants further argued that the award of Kshs 3,576,850 was too high in light of the injuries suffered. They submitted that the Respondent does not stand to lose in any case as he can be compensated by way of damages and that they have now provided adequate security by depositing a bank guarantee in the amount of Kshs.3,000,000/-.

9. On the second issue, they submitted that the application dated 11th January, 2021 cited clear reasons for contention against the exparte judgment with the Defendants/Appellants disputing that there was proper service of summons. That the application included a prayer to cross-examine the process server but this wasn't present in the application dated 13th September, 2017 on whose basis the latest application was termed res judicata. That the Application dated 11th January, 2021 raises new issues that have never been adjudicated before. They urged this court to allow their appeal as prayed.

10. The Respondent's submissions are dated 23rd February, 2022. He has identified one main issue for determination, whether the impugned decision rendered on 23rd February, 202, was sound and valid under the law. He It was his contention that the application dated 11th January, 2021 was indeed res judicata and an abuse of court process. He relied on the case of *Chairman Co-operative Tribunal & 8 others Ex-parte Management Committee Konza Ranching & Farming Co-Operative Society Ltd* [2014] eKLR, where the court cited with approval the case of *Stephen Somek Takwenyi & Another v David Mbuthia Githare & 2 Others* Nairobi (Milimani) HCC No. 363 of 2009 in which the court discussed the issue of the inherent powers of the court to prevent abuse of the process of court.

11. On the issue of res judicata they relied on section 7 of the *Civil Procedure Act* and the case of *Pangaea Holdings LLC & another v Hacienda Development Ltd & 2 others* [2020] eKLR. They argued that the application was indeed res judicata as it was similar in nature to the application dated 13th September, 2017 whose net effect was the same; that the parties in both applications are the same and that they were before a competent court which should have determined the issues in question. It is their submission that the issue of res judicata was upheld in the Court of Appeal decision in *Accredo AG & 3 others -vs- Steffano Uccelli & another* [2019]eKLR and urged this honorable court to dismiss the appeal as it lacks merit.

Determination

12. This is a first appeal. I have reminded myself of my duty as the first appellate court to re-evaluate and re-consider the evidence tendered in the lower court and arrive at my own independent conclusion.

13. I have read the entire record of the lower court including the Memorandum of appeal, rival submissions and authorities cited. To my mind, the central issue for determination is whether this matter is res judicata. Finding the answer to that central issue will determine whether the learned trial Magistrate erred in dismissing the appellant's application dated 11th January, 2021 on the grounds that it was res judicata because the issues it was raising had been raised in a similar application dated 13th September 2017.

14. For purposes of setting the record straight, I have noted the chronology of events that culminated in filing of this appeal. The record shows that the Respondent filed a suit in the subordinate court via Plaint dated 19th May, 2016 and served it on the Defendants. an interlocutory judgement was entered on 31st May, 2017, in favour of the Respondent as against the Appellants as a result of failure by the defendants to enter appearance and file defence. The Appellants being dissatisfied filed the application dated 13th September, 2017 seeking to set aside the interlocutory judgement and be permitted to defend the suit on grounds inter-alia that they were not served and that service was irregular. The trial court in its ruling dated 29th October, 2019 found that service was properly effected to the Appellants and upheld the interlocutory judgement.

15. The Appellants did not appeal this ruling but filed another application dated 11th January 2021 seeking to set aside the exparte judgement entered on 15th September, 2020 and all consequential orders. The Respondents in turn filed a Preliminary Objection, on the issue that the application was res judicata and an abuse of court process. The trial court in its ruling delivered on 23rd February, 2021 held that the application was indeed res judicata since the issues raised therein had been subsequently raised, heard and finally decided on.

16. I have read both the applications. I have noted that the application dated 13th September 2017 sought stay the interlocutory judgment entered on 31st May 2017 against the Appellants and to set the said judgment aside. They also sought to be allowed to file documents in defence of the case. The application dated 11th January 2021 sought to stay and set aside the same judgment and leave to the Appellants to file their defence defend the suit against them. The only difference between the two applications is that they are filed by different firm of advocates.

17. Section 7 of the *Civil Procedure Act* 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 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.

18. The doctrine of res judicata has been a subject in many authorities, locally and elsewhere. In the English case of *Henderson v Henderson* [1843-60] ALL E.R.378, the Court observed that:

> "...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 that 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. In the Court of Appeal case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 [1961] EA 462 the Court that:

> " ..... 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."

20. By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

21. The result of that finding is that this appeal lacks merit and cannot stand. It is hereby dismissed with costs to the Respondent. Orders shall issue accordingly.

DATED, SIGNED AND DELIVERED THIS 26TH MAY 2022.

S. N. MUTUKU

JUDGE