Juja Coffee Exporters Limited & another v National Bank of Kenya Limited & another (Civil Case E032 of 2021) [2022] KEHC 11833 (KLR) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11833 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE E032 OF 2021

OA SEWE, J

AUGUST 12, 2022

BETWEEN

JUJA COFFEE EXPORTERS LIMITED ..... 1ST PLAINTIFF

LAMU GINNERIES LIMITED ..... 2ND PLAINTIFF

AND

NATIONAL BANK OF KENYA LIMITED ..... 1ST DEFENDANT

AWEYS MOHAMED ..... 2ND DEFENDANT

RULING

1. Before the court for determination are two applications. The 1st application is the 1st defendant's notice of motion dated April 7, 2021. It was filed under certificate of urgency pursuant to sections 1A, 1B, 3A, 6 and 7 of the *Civil Procedure Act*, chapter 21 of the laws of Kenya for orders that:

   (a) Spent

   (b) Spent

   (c) The notice of motion dated March 29, 2021 filed by the plaintiffs on March 30, 2021 be struck out on account of being *res judicata* and for being an abuse of the process of the court;

   (d) This suit commenced by the plaintiffs on March 30, 2021 by way of a plaint dated March 29, 2021 be struck out for being an abuse of the court process;

   (e) In the alternative to prayer [d] above, the suit commenced by the plaintiffs on March 30, 2021 by way of a plaint dated March 29, 2021 and all consequent proceedings be stayed for being *sub judice* Malindi ELC Case No 90 of 2017: Juja Coffee Exporter Limited v National Bank of Kenya Limited;

   (f) The costs of the suit and of the application be awarded to the 1st defendant.

2. The application was premised on the grounds that there is another suit between the same parties pending before the Environment and Land Court at Malindi in respect of land Title No Lamu/Block IV/2, being Malindi ELC No 90 of 2017: Juja Coffee Exporters Limited v National Bank of Kenya Limited. It was the contention of the 1st defendant that, in both suits, the plaintiffs are seeking to challenge the right of the 1st defendant to realize its security by way of sale of the suit property. The 1st defendant therefore asserted that the plaintiffs are guilty of material non-disclosure by failing to disclose the existence of Malindi ELC No 90 of 2017 and the interlocutory appeal that arose therefrom to the Court of Appeal, namely, Malindi Court of Appeal Civil Appeal No 39 of 2019. The 1st defendant therefore asserted that the 1st application is *res judicata*; and that, in the alternative, the court be pleased to find that the entire suit is *sub judice*.

3. The 1st application was premised on the affidavit of Eustace Nyaga, the 1st defendant's Head of Credit, Remedial and Collections & Recoveries, sworn on April 7, 2021. Mr Nyaga reiterated the grounds raised by the 1st defendant in the 1st application and provided the history of the dispute between the parties. He annexed to his affidavit copies of the plaint filed by the 1st plaintiff in Malindi ELC No 90 of 2017; a copy of the notice of motion dated April 19, 2017 filed in the Malindi suit on behalf of the 1st plaintiff, as well as a copy of the order issued by Hon Olola, J on April 24, 2017. The 1st defendant also exhibited a copy of the judgment of the Court of Appeal dated March 5, 2021 in Civil Appeal No 39 of 2019: *National Bank of Kenya Limited v Juja Coffee Exporters Limited*, among other documents and prayed that the entire suit be struck out for want of jurisdiction.

4. The 2nd application is the plaintiff's notice of motion dated September 13, 2021. It was filed under the provisions of section 5 of the *Judicature Act*, chapter 8 of the laws of Kenya, section 36 of the *High Court (Organization and Administration) Act*, 2015, sections 1A, 1B, 3, 3A and 63 of the *Civil Procedure Act*, chapter 21 of the laws of Kenya and order 40 rules 1 and 3 of the *Civil Procedure Rules*, 2010. It seeks the following orders:

    a. Spent;

    B. Spent;

    C Spent;

    d. That the 1st defendant's Managing Director, Paul RushdieRusso, Director of Legal Services, Samuel Mundia, and Head of Credit, Remedial, Collections & Recoveries, Eustace Nyaga, all be adjudged to be in contempt of the injunctive orders issued on March 30, 2021 and April 24, 2017;

    (e) That upon the finding in [d] above, the 1st defendant's Managing Director, Paul Rushdie Russo, Director of Legal Services, Samuel Mundia, and Head of Credit, Remedial, Collections & Recoveries, Eustace Nyaga, be sentenced to civil jail for a period of six (6) months, or for such shorter period as the court may deem just;

    (f) That, without prejudice to [d] and [e] above, the transfer of title No Lamu/Block IV/2 in favour of the interested party, Miqdad Enterprises Limited, be nullified and the register be rectified to expunge entries number 10, 11 and 12 in the proprietorship section so as to reflect the 2nd plaintiff as the registered owner and the 1st defendant as the chargee.

    (g) That costs of this application be borne by the 1st defendant in all events.

5. The application is premised on the grounds that the plaintiffs were apprehensive that the suit property would be sold by the 1st defendant and therefore they filed this suit along with the notice of motion dated March 29, 2021 seeking for an injunction; that on the March 30, 2021, the court (Hon

Chepkwony, J) granted a temporary injunction restraining the 1st defendant or its agents from further advertising for sale, selling, transferring or in any other way interfering with the suit property; and that the said order was duly served on the 1st defendant on April 1, 2021.

6. The plaintiffs further contended that, upon being served, the 1st defendant purported to sell and transfer the suit property to the interested party on April 8, 2021; and upon learning of the sale, the plaintiffs obtained copies of the land records and noted more blatant violations of court orders by both the 1st defendant and the interested party. They asserted that, to protect the rule of law, the dignity of the court and confidence in the judicial system, it is imperative for the respondents to be accordingly punished for their disobedience.

7. The application was supported by the affidavit of Nurein Tahir Sheikh Said, one of the directors of the 1st plaintiff to which were annexed copies of the orders given on April 24, 2017 and March 30, 2021 as well as a copy of the certificate of official search date August 20, 2021, among other documents.

8. Although Mr Gikandi for the 1st defendant urged that the 2nd application be canvassed first, directions were given on November 2, 2021 that the two applications be canvassed simultaneously, considering that the 1st application raised the all-important issue of jurisdiction. Needless to say that jurisdiction is primordial; and that whenever it is raised, it must be given priority. The words of Hon Nyarangi, JA in the *Owners of Motor Vessel "Lillians" v Caltex Kenya Ltd* [1989] eKLR are apposite in this instance, that:

> ... a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction..."

9. In the premises, whereas the general principle is that an application for contempt be prioritized, where, as in this case, there is a competing application raising the question of jurisdiction, the latter application ought to be given priority. In this regard, I am persuaded by the stance taken by Hon Ibrahim, J (as he then was) in *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] eKLR that:

> ...due to the gravity with which the law and the court deems any contempt of court or allegations thereof, the court is usually under an obligation that it has taken place. This is in particular where the alleged contemnor is a party in proceedings and is affected by the orders granted by the court. Where an application for committal for contempt of court orders are made the court will treat the same with a lot of seriousness and urgency and more often will suspend any other proceedings until the matter is dealt with... This is the general rule which must be applied strictly... Be that as it may... the contempt is yet to be proved. It is still an allegation at this stage, however grave it is. The case of jurisdiction or that the order made was in excess of jurisdiction of the court must be distinguished from the case of an order which, although it is within jurisdiction of the court, ought not to have been made or granted. As a result, I do hereby hold that the application by the 2nd respondent must in essence be heard first, thus before that of committal."

10. It is imperative therefore that, before taking any further step in this matter, the issue of jurisdiction, as raised by the 1st defendant in its application dated April 7, 2021, be settled first. A response thereto was filed on May 18, 2021 vide the affidavit of Nurein Tahir sheikh Said, sworn on April 16, 2021. On

non-disclosure, it was deposed that the existence of Malindi ELC No 90 of 2017 and Malindi Court of Appeal Civil Appeal No 39 of 2019 was disclosed by the plaintiffs in grounds 1, 2, 4, 8 and 32 of the initial notice of motion dated March 29, 2021; at paragraphs 2, 3, 5, 9 and 33 of the supporting affidavit and at paragraphs 13, 14 and 22 of the plaint. The plaintiffs averred that, in addition, they annexed a copy of the judgment in Malindi Civil Appeal No 39 of 2019 as annexure NTS-1 to the supporting affidavit.

11. In response to the 1st defendant's assertion that this suit is res judicata, the plaintiffs averred that there are new facts that came to their attention which, even with the exercise of due diligence, could not have been known to them when the injunction application in Malindi ELC No 90 of 2017 and the appeal in Civil Appeal No 39 of 2019 were heard. They specifically mentioned the forensic reports by auditors and document examiners, as well as the admission by the 1st defendant's officers in Nairobi ELRC No 1906 of 2016: Farouk Sultan Hirani v National Bank of Kenya which support claims of fraud and illegality, as some of the documents that were never available to the plaintiffs as at the time of filing Malindi ELC No 90 of 2017.

12. The plaintiffs further deposed that, even though these new allegations of fraud and illegality could have been introduced in Malindi ELC No 90 of 2017 by way of an amendment, the plaintiffs could not go for that option, granted the decision of the Court of Appeal that disputes of this nature are within the jurisdiction of the High Court; and therefore that it was more efficacious to file a fresh suit before the High Court instead of seeking the transfer of Malindi ELC No 90 of 2017 to the High Court at Mombasa.

13. In the same vein, the plaintiffs countered the 1st defendant's averment that this suit is sub judice by deposing that Malindi ELC No 90 of 2017 was withdrawn vide a Notice of Withdrawal dated March 26, 2021 and filed on March 29, 2021. A copy thereof was annexed to the plaintiff's replying affidavit as annexure NTS-15(b). They therefore averred that there is nothing pending to render this suit *sub judice*.

14. The application dated April 7, 2021 was canvassed by way of written submissions and in that regard, Mr Munyao relied on his composite written submissions dated August 16, 2021. He reiterated the stance of the 1st defendant that the injunction application dated March 29, 2021 is *res judicata*; and therefore ought to be struck out along with the entire suit. He relied on *Muchanga Investments Limited v Safaris Unlimited Africa Ltd & 2 others* [2009] eKLR in urging the court to find that the entire suit was filed in abuse of the process of the court. He took the view that the allegations of fraud are all matters that ought to have been raised in Malindi ELC No 90 of 2017, either at the first instance or subsequently by way of an amendment. Counsel drew the attention of the court to certain documents introduced by way of a supplementary affidavit to the instant application to demonstrate that the plaintiffs were aware of the allegations of fraud well in advance, granted that the purported investigation report is dated September 7, 2017.

15. Thus, according to Mr Munyao, the plaintiffs only filed the instant suit with the sole intention of defeating the findings of the Court of Appeal in Malindi Civil Appeal No 39 of 2019. He consequently urged the court to find that the instant suit was filed in bad faith and therefore ought to be struck out with costs.

16. There appear to be no written submissions filed on behalf of the plaintiffs in respect of the notice of motion dated April 7, 2021. I have nevertheless taken into account all the pertinent averments set out in the affidavits filed by the parties in connection with that application in the light of the submissions made on behalf of the 1st defendant. A perusal of the plaint dated March 29, 2021 does confirm that the plaintiffs did disclose the existence of Malindi ELC No 90 of 2017. Their averments in that

regard, including disclosure of the existence of Civil Appeal No 39 of 2019, were set out at grounds 1, 2, 3, 4, and 8 of the grounds in support of the application dated March 29, 2021 as well as in their supporting affidavit. Indeed, a copy of the judgment of the Court of Appeal was annexed to the plaintiffs' supporting affidavit as annexure NTS-1. I therefore find untenable the argument by counsel for the 1st defendant that the plaintiffs are guilty of material non-disclosure.

17. That said, the only issues for determination in respect of the 1st defendant's application dated April 7, 2021 are:

    (b) Whether the suit is *sub judice*; and,

    (a) Whether the application for injunction dated March 29, 2021 is *res judicata*.

18. On whether the suit is *sub judice*, section 6 of the *Civil Procedure Act* is explicit that:

> No court shall proceed with the trial of any suit or proceedings in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed."

19. Hence, in *Kenya Airports Authority v Anthony Mutumbi Wachira* [2015] eKLR, the Court of Appeal took the view that:

> We think, as a matter of policy of the law that finds expression in section 6 of the *Civil Procedure Act* for instance that no court should proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties where such suit or proceeding is pending in the same or any other court having jurisdiction to grant the relief claimed. The sound object behind that policy is to prevent courts of concurrent jurisdiction from simultaneously trying two parallel suits or proceedings in respect of the same subject matter in issue."

20. The plaintiffs relied on annexure NTS-15(b) of their supporting affidavit to injunction application to demonstrate that although they had filed Malindi ELC No 90 of 2017 over the same subject matter prior to the filing of the instant suit, that suit was withdrawn vide a notice of withdrawal date March 26, 2021. The annexure further confirms that the said notice was filed on March 29, 2021; a clear indication that by March 30, 2021 when this suit was filed, that matter had already been withdrawn. In the circumstances, I find no merit in the 1st defendant's argument that this suit is sub judice. In the circumstances, the plaintiffs are at liberty to prosecute this suit to its logical conclusion.

21. As to whether the application dated March 29, 2021 is *res judicata*, the starting point in the discussion is section 7 of the *Civil Procedure Act*, chapter 21 of the laws of Kenya, which provides that:

> No court shall try any suit or issue in which the matter 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...and has been heard and finally decided by such court."

22. Needless to mention that *res judicata* is as applicable to main suits as it is to interlocutory applications. Hence, in *Uhuru Highway Development Ltd v Central Bank of Kenya & 2 others* (Civil Appeal No 36 of 1996), the Court of Appeal held that:

> There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one intention on the part of the legislature in India and our *Civil Procedure Act*. That is to say, there must be an end to applications of a similar nature; that is to say further, wider 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 inundated 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..."

23. The question to pose, therefore, is whether in the circumstances hereof it can be said that the instant application is *res judicata*. In *Bernard Mugo Ndegwa v James Nderitu Githae and 2 others* [2010] eKLR the court distilled the applicable considerations to be as follows:

a. The matter in issue must be identical in both suits.

b. The parties in the suit must be substantially the same.

c. There is concurrence of jurisdiction of the court.

d. That the subject matter is the same and finally,

e. That there is a final determination as far as the previous decision is concerned.

24. The parties are in agreement that the subject matter herein is the same as the subject matter in Malindi ELC No 90 of 2017. The suit was filed by the 1st plaintiff to restrain the 1st defendant from exercising its statutory power of sale over the suit property, title No Lamu/Block IV/2. It is also common ground that the plaintiff's interlocutory application for temporary injunction dated April 19, 2017 was allowed and orders granted as prayed in a ruling dated January 31, 2019. Moreover, there is no dispute that the parties are the same. That was therefore a final merit decision as to the interlocutory reliefs sought by the plaintiffs.

25. Moreover, the decision was appealed by 1st defendant and on appeal, the Court of Appeal held thus vide its judgment dated March 5, 2021:

> 13. Based on the pleading and depositions in the affidavit by the borrower's own director acknowledging the borrowing and the security given to the bank for the same, we find that the learned judge misdirected himself in proceeding on the basis that there was contest, either as to the borrowing or the execution of the securities. The existence of the legal charge was expressly admitted.
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> 14. In restraining the bank from pursuing its remedies under the legal charge, the learned judge appears to also have been moved by the plea that one of the directors of the borrower, who was said to be the "mover" of the company and the principal director had died. Whereas the sympathy and compassion shown by the judge may be commendable, it was not a sound legal basis for exercising judicial discretion in the manner that he did.
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> 15. The claim that there was a contest as to the exact amount outstanding was also not a basis for restraining the bank. Authorities for the proposition that a dispute on the outstanding loan should not scuttle the exercise by the chargee of its power of sale go back many years. See for

instance Habib Bank AG Zurich v Pop-In (Kenya) Ltd & 3 others [1995] eKLR and also John Nduati Kariuki t/a Johester Merchants v National Bank of Kenya Ltd [2006] eKLR."

26. The Court of Appeal proceeded to hold that:

> Satisfied as we are that the borrower did not meet the threshold in Giella v Cassman Brown Co Ltd (above) for the grant of interlocutory relief and persuaded as we are that the learned judge misdirected himself in proceeding on the wrong basis that the legal charge was disputed, we need not address the other issues raised by counsel in their respective submissions. We allow the appeal. The ruling and orders granted by the Environment and Land Court at Malindi on January 31, 2019 is hereby set aside and substituted with an order dismissing the respondent's notice of motion dated April 19, 2017 with costs to the appellant. The costs of the appeal are awarded to the appellant."

27. In the premises, it is manifest that a final decision was taken by the Court of Appeal on the merits of the plaintiff's interlocutory application for injunction; and therefore that it was not open for them to bring another similar application in respect of the same subject matter and the same facts as they purported to do herein. Indeed, the Court of Appeal made the point in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 others* [2017] eKLR thus:

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

28. It matters not that issues of fraud have been introduced in the instant suit, for res judicata applies, not only on the basis of facts expressly pleaded, but also those that ought to have been pleaded. Accordingly, I agree entirely with the position taken by Hon Majanja, J in *ET v Attorney General* [2012] eKLR that:

> The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi v National Bank of Kenya Limited and others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba J, in the case of Njangu v Wambugu and another Nairobi HCCC No 2340 of 1991 (unreported) where he stated,
>
> > '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*..."

29. Hence, in *Lali Swaleh Lali & others v Stephen Mathenge Wachira & others* Civil Application No 257 1994 Nairobi (unreported), the Court of Appeal held that:

> On the issue of res judicata, it would, in our view, require, the skills of a spin doctor to say that the judge was wrong." The learned judge in the trial court had held that an application for interlocutory injunction having been decided on the principles laid down in the Giella v Cassman Brown, a similar application cannot be brought once again even in a subsequent suit when a former suit, in which the application was dismissed, stood struck out on account of the proceedings therein being incontestably bad."

30. It is therefore my resultant finding that the application dated March 29, 2021 is indeed res judicata and was therefore filed in utter disregard of the decision of the Court of Appeal dated March 5, 2021. Having come to that conclusion it would follow that that application is incompetent, and is hereby struck out with costs. The inescapable effect thereof is that the orders dated March 30, 2021 on which the contempt application was premised are equally null and void, seeing as they were premised on an incompetent application.

31. As aptly put by Lord Denning in *Mcfoy v United Africa Company Limited* [1961] 3 AllER 1169:

> ...if an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse..."

32. In the result, the 1st defendant's application dated April 7, 2021 is hereby allowed and orders granted as follows:

    (a) That the notice of motion dated March 29, 2021 filed by the plaintiffs on March 30, 2021 be and is hereby struck out on account of being *res judicata*;

    (b) The plaintiffs' notice of motion dated September 13, 2021 is likewise incompetent and is hereby struck out with no order as to costs;

    (c) The rest of the 1st defendant's prayers in the application dated April 7, 2021 are hereby declined.

    It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF AUGUST 2022.

OLGA SEWE

JUDGE