



REPUBLIC OF KENYA

IN THE HIGH COURT

AT BUNGOMA

CIVIL APPEAL NO. 14 OF 2020

PATRICK SIMIYU KWOMA.....APPELLANT

VERSUS

CEDRICK MUNIALO WEKULO.....1<sup>ST</sup> RESPONDENT

MOSES WAMALWA WAKAPE.....2<sup>ND</sup> RESPONDENT

ROBSON MUSAMBAI SIFUMA.....3<sup>RD</sup> RESPONDENT

(Being an appeal from the Ruling and Order of Hon. G.A Ollimo R.M in Kimilili SPMCC No. 157/2019 delivered on 17/1/2020)

#### JUDGEMENT

The appellant herein (plaintiff in the Subordinate Court) in a plaint dated 13<sup>th</sup> November, 2019 sued the respondents seeking *inter alia* Kshs 55,988/= being his shares payable to Namirambi Farmers & Traders Self Help Group, interest thereon at the rate of 14 % p.a from the year 2006-2012 as well as profits and interest as per the financial year report of 2012. The defendants were sued in their capacities as the Chairman, Secretary and Treasurer of the aforesaid Self-Help Group where the appellant was a member up and until 2012.

The respondents entered appearance through the firm of J.W Sichangi and filed their Statement of Defence on 5<sup>th</sup> December, 2019 denying the claim and that the suit is *res judicata* as well as statutorily barred by virtue of the Limitations of Actions Act.

The defendants by a Notice of Preliminary Objection dated 4<sup>th</sup> December, 2019, stated;

- a. **The entire dispute was heard and finally determined in a previous suit where both parties were litigants being Kimilili SPMCC 85/2014.**
- b. **The matter is now *res judicata* as the current issues are substantially and effectually the same as were in the previous suit being Kimilili SPMCC 85/2014**
- c. **The suit is a total abuse of the court process as it purports to emanate from dismissal of the defendants claim in former suit as basis to seek damages.**
- d. **The suit is bad in law as the law envisages that all issues be canvassed in the same suit hence the plaintiff herein who was the defendant in Kimilili SPMCC 85/2014 could have lodged a counterclaim if at all he had any claim.**
- e. **The action by the plaintiff is statute barred by virtue of Limitations of Actions Act as he voluntarily resigned in the year 2011 which is over Eight Years ago and cannot sustain any valid action for breach of contract.**

The defendant's Preliminary Objection was heard on 7<sup>th</sup> January, 2019. The respondents submitted that the suit emanated from the same facts and same issues that were before court in Kimilili SPMCC 85/2014 where the dispute was the same; involving shares of Namirambi Self Help Group where the plaintiff was a member. The plaintiff was the defendant in the former suit and the now-defendants were plaintiffs. That the matter was substantially heard and a judgement delivered on 13<sup>th</sup> September, 2019.

Counsel submitted that the plaintiff resigned from the group in 2011 and when he was sued by the officials in 2014, it was within the 6 year period provided by law. That the appellant silently litigated without claiming against the officials. Counsel sought dismissal of the suit for

being time barred.

On his part, the appellant confirmed being the defendant in Civil Suit 85/2014 however he did not know that he was required to file a counterclaim. That he filed the suit to recover his savings as he had forgotten to file a counterclaim. That he had been involved in an accident in 2010 and only recovered in 2013 thus his inability to file suit to recover his savings.

In a ruling delivered on 17<sup>th</sup> January, 2020, the Learned Trial Magistrate allowed the Preliminary Objection and consequently struck out the suit for being *res judicata* and statutorily barred.

The appellant being aggrieved, preferred this appeal raising the following grounds:-

- 1. That the learned trial magistrate erred both in law as she was in hurry without going through the claims in Civil case No. 85/2014 whereby the defendants had sued me and later on their case was dismissed as to costs to me and my Civil Suit No. 157 of 2019 which I had just filed in the Honourable court with different prayers from the previous suit.**
- 2. That the trial magistrate erred in law for not giving me a fair hearing hence she did not instruct me to reply the preliminary objection as being a lay man. As per the constitution of Kenya requires and/or indicates in Chapter 4 Bill of rights in paragraph 50 sub section 2(a), (b), (g), (k) and (m).**
- 3. That the trial magistrate erred in law for not going through Namarambi farmers Group constitution which states very well in Article 4 item (c).**
- 4. That the honourable court failed to understand that I was acting in person and could have required time and also never referred me to the civil registry for further explanation what it meant by Preliminary Objection and if was to put in my response.**
- 5. That it is my humble request that you consider my appeal and reinstate my civil suit No. 157 of 2019 and be given a fair hearing.**

Directions were given for the disposal of this appeal by way of written submissions. The appellant filed his submissions on 14<sup>th</sup> October, 2020 and the respondents on 26<sup>th</sup> October, 2020. This court has carefully considered the submissions and the evidence on record and it is the court's considered opinion that the sole issue for determination is whether the striking out of the appellant's suit was proper and merited. The main reason advanced for striking out is on the grounds of the suit being *res judicata* and statutory limitation.

Both parties freely admit that before the appellant instituted Civil Suit No. 157 of 2019, Civil Suit No. 85 of 2014 had been heard and determined on merit by the same court and a judgment delivered on 13<sup>th</sup> September, 2019. It is also admitted that the parties were similar save that the plaintiff was a defendant in the former suit and the respondents the plaintiffs.

As relates the reliefs sought in the former suit, the plaintiffs sought; the sum of Kshs 16,517/= in outstanding loan, interest thereon and costs. From the record, this suit was dismissed.

In the suit giving rise to this appeal, the appellant sought Kshs 55,988/= being his shares, interest as well as profits.

It is no doubt that the cause of action arose from a relationship where the appellant was a member of a Self-Help Group where the respondents are officials until the appellant resigned thus the former suit by the officials to recover the outstanding loan and the latter by the appellant to recover his shares.

The respondents contend that the appellant should have filed a counterclaim in the former suit to recover his shares if any. The appellant contends that he did know that he was bound to file a counterclaim as he is a layman who did not understand his rights.

The principle of *res judicata* is found in Section 7 of the Civil procedure Act, Cap 21. The Section states;

**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."**

The doctrine was explained in the case of *The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, (2017) eKLR*, where the Court of Appeal held:-

**Thus, 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 raise**

The Court explained the role of the doctrine 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 commonsensical 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 favorable 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.**

Applying the above principles to the present appeal, this court comes to the irresistible conclusion that Civil Suit Number 157 of 2019 is *res judicata* as the issues raised therein are directly and substantially the same as the issues raised in Civil Suit Number 85 of 2014 and there is no fault in the learned magistrates finding on the point.

The appellant submits that he did not understand the term counterclaim and he was not advised by the court that he ought to file a counterclaim. The appellant in essence wanted the court to advise him on his rights. Our legal system is an adversarial one; it is the duty of every litigant to prepare and present his case as he deems fit and the trial court only takes the evidence as presented.

Even if that be the case, the record does not show that the appellant sought assistance from the trial magistrate in any way. The presumption therefore was and should be; he knew what he was doing.

The other reason why courts don't render advice to litigants is because of the constitutional calling that requires judges and magistrates to be impartial. If the court descends into the arena of advising one litigant to the exclusion of the other, the adverse party will be disadvantaged hence the court will lack the impartiality required of it and public confidence in the institution will be lost.

The appellant's predicament was aptly captured by the Court of Appeal (**Platt, Gachuhi & Apaloo JJA**) in **Chalicha Farmers Co-operative Society Limited v George Odhiambo & 9 others [1987] eKLR** where they observed;-

**In my judgment, that is a wholly indefensible order. A court is governed by principles of law, not the hardship of any individual case. The judge's feeling of sympathy, cannot be an acceptable substitute for the law. There is justice to a plaintiff as well as to a defendant and it would, in my judgment, be an intolerable negation of justice, if a judge were free to inject his own subjective feeling of sympathy for a party in defeasance of his opponent's legally proven right. ....**

After considering the applicable law and the submissions, I come to the conclusion that this appeal is devoid of merit and is hereby dismissed with costs to the respondents.

It is so ordered

**DATED AND DELIVERED AT BUNGOMA THIS 23<sup>RD</sup> DAY OF JUNE, 2021**

**S. N RIECHI**

**JUDGE**