



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

HCA NO.171 OF 2014

MBUGUA JOSPHINE.....APPELLANT

-VERSUS-

**VERONICA MUTHONI MBUGUA (suing as legal representative of
the estate of JOHN KAMA KARIUKI.....RESPONDENT**

JUDGMENT

BACKGROUND

1. This appeal arise from ruling delivered in the lower court in a suit filed by the Respondent/plaintiff on behalf of the estate of **JOHN KAMAU KARIUKI** who died following collision between motor vehicle registration number **KBD 095F** with the defendants' motor vehicle registration number **KAY 728Z** on 13th November 2014 along Nyahururu-Nakuru road.

2. The defendant filed application dated 22nd July 2013 seeking to strike out Nakuru CMCC No.336 of 2011 for being *res judicata* and an abuse of the court process.

3. The Appellants argument was that the respondent had filed **Nakuru CMCC No.211 of 2009** where the trial magistrate apportioned liability at 50:50 between the two drivers of motor vehicles KBD 095 F and KAY 095F. In CMCC No.211 of 2009 damages were assessed as follows:-

- i. Special damages..... kshs 5,800**
- ii. Pain and suffering.....kshs 10,000**
- iii. Loss of expectation of life.....kshs 100,000**
- iv. Loss of dependency.....kshs 1,694,560**
- v. 50% kshs 905,180**

4. The respondent filed Nakuru CMCC No.336 of 2011 to recover the remaining 50% from the respondents who were driver and owner of motor vehicle KAY 095 respectively. The respondents applied to strike out the said suit (336 of 2011) for being *res judicata*. By ruling delivered on 21st July 2014; the application was dismissed on ground that the appellant/defendant was not a party to the earlier suit.

5. The defendants/Appellants being aggrieved by the ruling of the court filed this appeal challenging the ruling on the following grounds:-

- i. The learned magistrate erred in fact and in law by failing to consider the clear provisions of the law as submitted by the appellant**
- ii. The learned magistrate erred in law and fact in holding that the suit is *res judicata* contrary to available evidence on record.**
- iii. The learned magistrate erred in law and in fact by misapprehending the clear meaning of the principles of *res judicata*.**

6. The appellant prayed that the ruling be set aside and the court allow the appellant's application that the suit is *res judicata* and the entire suit be struck out with costs of the suit and the appeal. The appellant filed a further record of appeal attaching proceedings of the application and the ruling.

7. Parties agreed to proceed by way of written submissions.

APPELLANT'S SUBMISSIONS

8. Appellant submitted that the trial magistrate erred in holding that the suit is not *res judicata* contrary to evidence on record. Appellant submitted that the respondent had filed Nakuru CMCC No.211 of 2009 seeking damages under Fatal Accident Act and Law Reform Act due to road accident involving motor vehicles registration number KBD 095F and KAY 728Z; however, in the said suit, the respondent sued only the owner of motor vehicle registration number KBD 095F for compensation.

9. Appellant further submitted that upon hearing the said suit, the trial magistrate made a determination on 6th April 2011 and decided that both vehicles were to blame and were to shoulder liability at 50% each; that the respondent duly recovered 50% of the court award from the owners of motor vehicle registration number KBD 095F.

10. That later on 10th May 2011, the respondent moved to court again vide CMCC No. 366 of 2011 seeking recovery of 50% from the other vehicle registration number KAY 095F which was not sued in the previous suit. 11. Appellant cited the case of **Handerson V Handerson**[1843]67 E.R 313 where the court held as follows:-

“

■ ■ ■ where a given matter becomes the subject of litigation in, and 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 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 for *res judicata* applies, except for special cases, not only to points upon which the court was actually required by 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.”

12. Also in the case of **George W M Omondi & Another V National Bank of Kenya Ltd** where the court held as follows:-

“

The doctrine of *Res judicata* would apply not only to situation where a specific matter between the same persons litigating in the same capacity has previously been determined by a court of competent jurisdiction, but also to situation where either the matters which could have been brought in were not brought in or parties who could have been enjoined were not enjoined. Parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in

a subsequent suit. They are bound to bring all their cases at once. They are forbidden from litigating in instalments.”

13. The appellant submitted that this is a well-established principle of law that litigation must be brought to an end to earn respect to the court process and to enable the decree holder realize fruits of its litigation; that the principle existed before promulgation of the overriding objectives of the courts that court's time as a resource be employed efficiently; and to file a suit over a finally adjudged matter is an abuse of the court process. 14. Appellant submitted that the statutory underpinning of this principle is

Section 34 of the Civil Procedure Act which provide as follows:

“

All questions arising between parties to the suit in which the decree was passed, or their representatives, relating to execution, discharge or satisfaction of the decree, shall be determined by the court executing the decree and not by a separate suit.”

15. Appellant submitted that no more than one action can be brought for the same cause of action; and the principle is, where there is one cause of action damages must be assessed once and prayed for the appeal to be allowed.

RESPONDENT'S SUBMISSIONS

16. Respondent submitted that the owner of motor vehicle KAY 728Z was not sued by the respondent in Nakuru CMCC No.211 of 2009. Upon hearing of the suit, the trial magistrate found that the driver of the said vehicle KAY 728Z was to blame 50% and the other vehicle 50% for the accident; that the respondent filed another suit against the owner of KAY 728Z to recover 50% compensation. Respondent submitted that the appellant was not party to CMCC No.366 of 2011 and the issues between the appellant and respondent were not therefore

litigated.

17. Respondent submitted that the principle of *res judicata* is found **In Section 7 of the Civil Procedure Act** which provide as follows:

”

No court shall try any suit 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 respondent cited the case of **The Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others, Nairobi civil Appeal No.105 of 2017 [2017] eKLR** where the court of appeal held that for a 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 finally heard and 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 was raised.

19. Further the court explained the doctrine of *res judicata* as follows:-

“

The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra 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 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.”

20. The respondent submitted that the ownership of the vehicle was never litigated upon and mended plaint sought to enforce judgment against the appellant. Appellant urged court to dismiss the appeal.

ANALYSIS AND DETERMINATION

21. Parties herein agreed to proceed with the appeal by way of written submissions. What is in issue is whether Nakuru CMCC No.336 of 2011 is *Res judicata*. The elements of *res judicata* were set out in the case of **Independent Electoral and Boundaries Commission Vs Maina Kiai & 5 others** as captured above. The question is, has the appellant proved the 5 elements to certify this matter claim herein as *res judicata*?

22. Record show that that the owner of motor vehicle KAY 728Z was not sued by the respondent in Nakuru CMCC No.211 of 2009.

23. The determination of the trial magistrate was that the driver of motor vehicle registration number KBD 095F was 50% liable for the accident and the other vehicle whose driver was not sued was to share 50% blame for the accident; he proceeded to enter judgment against the party who was before court.

24. Respondent's argument is that the appellant was not party to CMCC No.366 of 2011 and the issues between the appellant and respondent were not therefore litigated and the suit-giving rise to this appeal could not therefore be *res judicata*.

25. Section 7 of the civil procedure Act

“No court shall try any suit 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,... or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

26. It is not disputed that the appellant herein was not a party in CMCC No.366 of 2011. It is not also disputed that the court made a finding that the two vehicles were to blame 50:50 for the accident. The court made determination in respect to parties who were before court. The court could not enter judgment against the appellant herein as it was not a party to the suit. The issue between the respondent and the appellant herein was not therefore determined by the court. One cannot therefore say this matter was fully determined as against all the parties in the first suit.

27. Whereas I do agree that the subject matter in CMCC No. 366 of 2011 is the same as this matter, the parties were not the same. The matter was fully determined as between parties in that suit but no determination was made as between the plaintiff and the appellant herein.

28. In my view this suit is not *res judicata* as the second suit is not between the same parties and the issue between the appellant and respondent was not finally determined by trial magistrate in CMCC No.336 of 2011

29. FINAL ORDERS

1. Appeal is hereby dismissed

2. Costs to the respondent.

Judgment dated, signed and delivered via email at Nakuru This 30th day of April 2020.

TO:

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RACHEL NGETICH

JUDGE

E. M. Juma Advocates – Counsel for Appellant

Chuma Mburu - Counsel for Respondent