



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

COMMERCIAL DIVISION

CIVIL SUIT NO. 18 OF 2017.

QAYRAT FOODS LIMITED.....PLAINTIFF

-VERSUS-

1. SAFIYA AHMED MOHAMED

2. AWEYS AHMED MOHAMED

3. ZEIN AHMED MOHAMED

4. ABDIFATAH HASSAN MOHAMED

5. KAAB INVESTMENTS LIMITED

6. MIDDLE EAST BANK LIMITED

7. THE REGISTRAR OF COMPANIES.....DEFENDANTS

RULING

1. The 6th Defendant, who is the Applicant in the instant application, seeks of the dismissal of the amended plaint as well as the Plaintiff's/Respondent's suit for failure to comply with the courts order made on 16/03/2019. The application is brought under Sections 1A (1) &1B (1) of the Civil Procedure Act, Order 2 Rule 16, Order 9 Rule 1, Order 4 Rule 1(4) and Order 25 Rule 1 of the Civil Procedure rules.

2. It is based on grounds 1 to 11 on its face and further supported by the affidavit sworn on 22/6/2018 by **Elizabeth Ongare**, the Applicant's Assistant Credit Manager. She deposes that the Plaintiffs failed to file an amended plaint in accordance with the directions of the court as per the ruling delivered on 16/3/2018 and the suit remains an abuse of the process of the court. That the filing of the suit had not been authorized by the only two directors who were initially the first plaintiff and the second defendant respectively or any other officer duly authorized under the seal of the Plaintiff Company. The deponent further flaunts the suit as being incurably bad for misjoinder of causes of action or misjoinder of parties. The whole of the allegations therein sum up to the conclusion that the Plaintiffs have failed to regularize the anomalies in their pleadings despite having been given a carte Blanc to do so by this court.

3. In a replying affidavit sworn on 11/9/2018 by **Omar Dine Mohamed**, the Plaintiff terms the present application wholly misconceived and an attempt to waste the court's time. Mr. Omar deposes that the Applicant had filed a similar application dated 27th March, 2017 raising not only similar grounds as in the instant application but also seeking the same prayers. It argued that the vide a ruling dated 16/3/2018, the applicant's application dated 27/3/2017 was dismissed hence the instant application is res judicata and ought to be dismissed pursuant to Section 7 of the Civil Procedure Act.

4. According to the deponent, the correct path for the applicant would be filing an appeal if they were aggrieved by the judgment delivered on 16/3/2018. To that a notice to appeal and record of appeal filed by the applicant on 3/4/2018 and 4/7/2018 was annexed to the replying affidavit as ODM2.

5. Lastly, it is the Plaintiff/Respondent's case that the appeal filed by the Applicant herein was scheduled for case conferencing on 4/12/2018 and parties were directed to dispose the same by way of written submissions. It is averred that this court has no jurisdiction to overturn its earlier decision on the issues raised herein whilst at the same time the Applicant is still pursuing an appeal.

6. On 12/11/2013, the court directed that the instant application be disposed of by way of written submissions. However, at the time of writing this ruling only the Plaintiff/Respondent had complied. There were no submissions on record by the 6th Defendant/Applicant.

7. The Plaintiff's submissions are dated 4/12/2018 and filed on 11/12/2018. The submissions reiterate the grounds in the replying affidavit. Nonetheless, it is the Plaintiff's submission that in the ruling dated 16/3/2018, the court noted that although the Plaintiff raised triable and factual issues, the 6th Defendant had neglected to file a supporting affidavit to counter the issues. Therefore according to the Plaintiff, using the instant application, the 6th Defendant is not only trying to re litigate its application dated 27/3/2017 but also trying to cure its defect which was the lack of a supporting affidavit.

8. In response to the applicant's contention that the suit was filed without the proper authorization, the Plaintiff submitted that it is a requirement that the board of directors to pass a resolution authorizing filing of a suit but where the directors cannot agree, the majority shareholders are entitled to make the decision and pass such a resolution as the case here. It is further argued that a suit commenced without proper authority can subsequently be ratified by the shareholders. To buttress this line of argument, reliance is placed on the cases of; **Nairobi HCCC No. 391 of 2000 Assia Pharmaceuticals –vs- Nairobi Veterinary Centre Ltd** and **the Court of Appeal at Nairobi Civil Appeal No. 42 of 2007, East African Safari Air Ltd-vs-Anthony Amnaka Kegode & Another**.

9. The Plaintiff further submits that its directors could not come to an agreement to pass a resolution since one of its directors is a defendant herein accused of defrauding the Plaintiff. By a meeting held on 23/5/2018 the Plaintiff's other director and the majority shareholders ratified the filing of the present suit facts which the 6th Defendant/Applicant failed to rebut. It is submitted that the case herein has been duly ratified as required by the law hence the instant application and the grounds therein cannot hold water and only amount to abuse of court process and waste of judicial time.

10. Lastly, the Plaintiff submits that the application herein raises triable issues and serious allegations of fraud which can only be dispelled by the defendants at the full hearing of the suit. It is further averred that the dismissal of a case is a drastic measure which should only be exercised with caution, in the clearest of circumstances and where the court can breathe a breathe life into a suit even via an amendment, then it should do so and avoid the dismissing of the suit as held in the case of **D.T Dobie Kenya Limited-vs-Joseph Mbaria Muchina & Another, Nairobi Court of Appeal Civil Appeal No. 37 of 1978**.

Analysis and Determination

11. I have duly considered the grounds set out in the Motion and affidavit in support thereof, the replying affidavit together with the submissions by the Respondent. Before delving into the substantive prayers sought, I deem it necessary to address the res judicata issue raised by the respondent.

12. It is the Respondent's submissions that the instant application reflects a similar application dated 27/3/2017 filed by the 6th Defendant/Applicant. That the issues raised therein were among other things, whether the Plaintiff was defective; whether suit was bad in law for not being sanctioned by the Plaintiff company's two directors and lastly whether there was a cause of action against the 6th Defendant.

13. It was argued that the court applied its mind on the issues and dismissed the application on the grounds that the Plaintiff raises triable issues and any defect thereof cured through an amendment.

14. In that regard, **Section 7 of the Civil Procedure Act** defines the doctrine of Res Judicata as applying to a suit or issue in which a matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties. The said section is mandatory in its provision and provides that:

“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.”

15. In essence therefore, the doctrine implies that for a matter to be *res judicata*, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a Court of competent jurisdiction. The Court in the English case of **HENDERSON VS HENDERSON (1843-60) ALL E.R.378**, observed thus:

“...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.”

16. The court of Appeal in the case of **Kamunye and Others –vs- Pioneer General Assurance Society Ltd [1971] EA 263 at 265**, stated as follows:

"The test as to whether or not a suit is barred by Res Judicata seems to me to be - is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon? If so, the plea of Res Judicata

applies not only to points upon which the first court was actually required to adjudicate but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for Res Judicata to apply?”

17. The conditions for the application of the doctrine of Res Judicata were further authoritatively laid down in the case of the Estate of **James Karanja alias James Kioi (Deceased) [2014] eKLR** as follows:

“For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show:-

a) That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.

b) The matter in issue in the latter suit must have been directly and substantially in issue in the former suit.

c) That a court competent to try it had heard and finally decided the matters in controversy between the parties.”

18. On the foregoing, it cannot go without saying that the plea of Res Judicata applies not only to points which the court was actually required by the parties to form opinion and pronounce judgment of, but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence, might have been brought forward at the time.

19. The Applicant in the instant application seeks for an order dismissing the amended Plaint and the whole suit against it be dismissed with costs. I find that the prayers sought by the applicant in the instant case are identical to the prayers he had sought for in the earlier application dated 27/3/2017 which had been heard and determined. The grounds relied on in the instant application are similar to the ones on the face of the application dated 27/3/2017. In essence, the issue of whether the Plaintiffs’ suit should be dismissed and whether there was an actionable cause against the 6th Defendant/Applicant were substantially and directly in dispute between the same parties as in the instant application.

20. The Applicant did not file a further affidavit or any submission on the issue of the application being res judicata. I find that all the issues raised in the instant application being whether the application raises triable issues and whether there is a cause of action against the 6th Defendant/Applicant were exhaustively dealt with and decided upon by Hon. Lady Justice Njoki Mwangi in her ruling of 16th March 2018. Any dissatisfaction with the said ruling would automatically call for an appeal to the Court of Appeal. Indeed the Applicant filed an appeal being Civil Appeal No. 85 of 2018. However, this court cannot tell the current position of the appeal. What the instant applicant has done is akin to a losing party filing a fresh suit against the same party over the same subject matter in which it/he/she has lost in a different court in the hope that it/he/she would get a different outcome.

21. The only issue which this court should consider is whether the Plaintiff complied with the directions issued by the court on the Ruling dated 16th March 2018. It is the finding of this court that the plaint was amended as directed by the court. Whether there is an actionable cause of action against the Applicant, this court agrees that the issue can be only be dispensed with at full hearing. Nonetheless, by virtue of Article 159(2)(d) of the Constitution a Court of Law should not pay undue attention to procedural requirements at the expense of substantive justice.

22. Having already enumerated the meaning of Res Judicata and having analyzed the ruling of the court on 16th March 2018 I agree with the Plaintiff/Respondent that indeed the matters raised by the applicant in the present application have already been dealt with in the said ruling. In a nutshell, I find that the applicant’s instant application offends the rules of Res Judicata and therefore amounts to an abuse of court process.

23. With that said, I dismiss the application dated 22nd June 2018 with costs to the Plaintiff/Respondent.

That is the ruling of the court

Delivered, Signed and dated this 28TH day of May, 2020

D.O CHEPKWONY

JUDGE

In view of the declaration of measures restricting court operations due to the COVID-19 pandemics, and in light of the directions issued by His Lordship, the Chief Justice, on 15th March 2020. This ruling/judgment has been delivered to the parties online with their consent. They have waived compliance with Order 21 rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159 (2) (d) of the Constitution which requires the court to eschew technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of Section 18 of the Civil Procedure Act, Cap 21, Laws of Kenya, which impose on this court the duty to use, inter alia, suitable technology to enhance the overriding objective, which is to facilitate just, expeditious proportionate and affordable resolution of civil disputes