



Silverspoon Restaurant Limited v Gohl & 2 others (Environment and Land Appeal 12 of 2021) [2023] KEELC 20760 (KLR) (18 October 2023) (Judgment)

Neutral citation: [2023] KEELC 20760 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT AND LAND APPEAL 12 OF 2021
SM KIBUNJA, J
OCTOBER 18, 2023**

BETWEEN

SILVERSPOON RESTAURANT LIMITED APPELLANT

AND

VRJAKUMAR MANILAL GOHL 1ST RESPONDENT

RAJNIKANT MANILAL GOHL 2ND RESPONDENT

**KAMAL MANILAL GOHL T/A VRK GOHL INVESTMENTS 3RD
RESPONDENT**

*(Being an appeal on the Ruling delivered on 11th February 2021 by
Hon. Nabibya PM in Mombasa CMC Land Case No. 51 of 2018)*

JUDGMENT

1. The appellant commenced this appeal through Memorandum of Appeal dated the 19th February 2021, and amended on 22nd December 2021 setting out seven (7) grounds that:
 - a. The impugned ruling was delivered secretly to the defendants in the absence of the plaintiff, and without supplying via email a soft or hard copy of the court's decision, in contravention of the natural justice doctrine of audi alteram partem and the Rules of Court.
 - b. The appellant does not know what the decision of the trial court is.
 - c. The proceedings and incognito ruling challenged on appeal herein are a travesty of justice.
 - d. The learned magistrate erred in law by holding that the suit was res judicata the decision in Mombasa CMC No. 1106 of 2013 of 4th April 2019 in which the appellant was not a party.



- e. The learned trial magistrate erred in giving judgement without regard to the factors governing the doctrine of res judicata. The learned trial magistrate erred in law by failing to consider the plaintiff's grounds of opposition filed, served and acknowledged by the court and defendants on the 27th May 2019.
 - f. The learned trial magistrate erred in law by condemning the appellant for a misfiling of the grounds of opposition, if a misfiling it was, on the part of the court.
2. In the said appeal, the appellant seeks from this court for:
- a. An order allowing the appeal and ex debito justitiae calling up for the record of the proceedings before the trial court and the impugned ruling for revision or setting aside.
 - b. The matter be remitted for retrial of the two applications before another magistrate, other than Hon. Nabibya.
 - c. [Spent]
 - d. The costs of the appeal and the mistrial before Hon. Nabibya be borne by the respondents in any event.
 - e. The court to allow the appeal and set aside the ruling and decree of 11th February 2021 and order a re-hearing of the case by a magistrate other than Hon. Nabibya [SPM].

The appellant also filed the undated Record of Appeal on the 25th January 2022 and Supplementary Record of Appeal dated the 25th October 2022.

3. The court on the 27th June 2022 directed the appeal to be canvassed through written submissions. The learned counsel for the appellant and respondents filed and exchanged their submissions dated the 20th October 2022 and 17th May 2023 respectively, which the court has considered.
4. That from the seven [7] listed grounds of appeal, the court is of the view that the issues for determinations are as follows:
 - a. Whether the Hon. Trial Magistrate erred in law in finding that the suit before it was res judicata.
 - b. Whether the Hon. Trial Magistrate delivered the impugned ruling in secrecy.
 - c. Whether the appellant has made a reasonable case for the orders made by the Hon. Trial Magistrate to be set aside and an order of retrial before a different magistrate to be issued.
 - d. Who should pay the costs in this court and the court below.
5. The court has carefully considered the grounds on the Amended Memorandum of Appeal, the Record of Appeal, the Supplementary Record of Appeal, submissions by both learned counsel, superior courts decisions cited and come to the following determinations:
 - a. That this being a first appeal, this court is obligated to consider the evidence presented before the trial court afresh, and come to its own conclusions. In the case of *Barnabas Biwott versus Thomas Kipkorir Bundotich* [2018] eKLR, in which the case of *Selle & Another versus Associated Motor Boat Co. Ltd* [1968] EA 123 was cited the court held that;

“...this court is not bound necessarily to accept the findings of fact by the court below. An appeal to this court ... is by way of retrial and the principles upon which this court acts in such an appeal are well settled. Briefly put they are that this court must



reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect...”

The main ground in this appeal is whether the Hon. Trial Magistrate erred in finding that the appellant’s suit was *res judicata*. The determination on this issue will definitely have a strong bearing on the other issues.

- b. The doctrine of *res judicata* is set out under section 7 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya that provides that;

“7. 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 superior courts have pronounced themselves on this in many decisions including the Court of Appeal case of [Kivanga Estate Ltd versus National Bank of Kenya Ltd](#) [2017] eKLR, cited in the submissions by both counsel, where it was held that;

“The court will look closely at the conduct of the party bringing subsequent proceedings in respect of the same matter in order to prevent abuse of its process and it has the power, in case of abuse of its process to *ex debito justitiae* prevent it. There is no greater duty for the court than to ensure it maintains the integrity of the system of administration of justice and ensure that justice is not only done but is seen to be done by, amongst other measures, stopping litigations brought for ulterior and extraneous considerations.”

- c. From the factual materials presented to this court through the Record of Appeal, the impugned ruling of 11th February 2021 dealt with three applications dated the 6th May 2019, 20th January 2020 and 7th September 2020. I have perused the notice of motion dated and filed on the 6th May 2019 and confirmed that it sought at prayer 1 for the;

“plaint dated the 26th September 2018 and filed on 1st October 2018 be struck out.”

Prayer 2 is for costs. The application contains ten [10] grounds that it was premised on the grounds marked (a) to (j) and was supported by the affidavit of Rajnikant Manlal Gohil, the 2nd defendant in the trial court and now the 2nd respondent in this appeal, sworn on the 6th May 2019. In the ruling delivered on the 11th February 2021, the Hon. Trial magistrate at paragraphs 2 to 6 analysed the evidence presented by the parties before coming to her finding. She among others indicated at paragraph 3 that;

“I have had time and opportunity of going through the court file but failed to get any form of response to this application. This means that it remains unopposed notwithstanding the fact that parties submitted.”

The appellant has at page 104 of the Record of Appeal annexed Notice of Grounds of Opposition dated the 25th May 2019 which I have perused, and noted it was filed on the 27th



May 2019 under the receipt at page 106. There is no explanation tendered why the grounds of opposition were not on the trial court's record. The learned trial magistrate could not have considered that which was evidently not before her. I am of the view the best route for the appellant would have been to move the trial court for review or setting aside of the ruling so as to consider the form of grounds of opposition, before taking the appeal route. On the evidence available before the trial court then, I am of the view that even if the grounds of opposition were on the file, it is highly probable the decision of the court would have been the same. I have considered the grounds and affidavit evidence in support of the said application and I do not find any reasonable cause to fault the learned trial magistrate on her finding that the suit *res judicata*.

- d. The second application subject matter of the impugned ruling is the one dated the 20th January 2020 and filed on 22nd January 2020. It is at pages 143 to 146 of the Record of Appeal and sought for inter alia the return of all bank drafts and bank cheques sent to the defendants and their advocates by the plaintiff between March 2013 and April 2019; alternatively, defendants be ordered to file a claim with Unclaimed Financial Assets Authority for the amount or plaintiff be discharged from further obligation in respect to the same. At page 142 of the Record of Appeal is a Notice of Withdrawal of the said application by the plaintiff dated the 25th January 2021 and filed in court on the 1st February 2021. In the impugned ruling of 11th February 2021, the Hon trial magistrate observed at paragraph 7 that;

“the application dated 20th January 2020 was withdrawn through a notice filed on the 1st February 2021....”

I see no reasonable basis of faulting the trial court's observation on the effect of the notice of withdrawal had on the application dated the 20th January 2020. That in any case, the appellant has not disowned the said notice of withdrawal, and must have intended to be bound by it and the court to act on it.

- e. The third and last application subject matter of the ruling dated the 11th February 2021 is the one dated the 7th September 2020 that is exhibited at page 107 to 141 of the Record of Appeal. The application among others sought for a conservatory order to preserve the shop and restrain the defendants from dealing with it and mandatory injunction to reinstate the plaintiff to the said shop pending the determination of the suit. The Hon. Trial magistrate at the 7th paragraph of the ruling subject matter of this appeal indicated that the said application had been overtaken by events. The decree at page 177 of the Record of Appeal, arising out of the said ruling, captures the orders issued as follows;

- “ 1. That the plaint is struck out with costs to the defendants.
2. That the plaintiff's application dated 20th January 2021 was withdrawn and the application dated 7th September 2020 is overtaken by the ruling striking out the suit.”

It is needless to restate that once the suit was found to be *res judicata* and struck out as shown at paragraph 6 of the ruling, any application then pending in that suit, that was based on its existence, including the instant application, became null and void and hence a nullity.

- f. I have perused the certified copy of the trial court's proceedings at pages 168 to 174 of the Record of Appeal, and noted the coram of 10th December 2020 confirms that Waithera held



brief for S. M. Kimani for the plaintiff and Ondego for defendant was present. The last order of that day by the court is that;

“Ruling 11th February 2021. Submissions to be filed on or before end of 14 days from today.”

The ruling itself that is at page 175 of the Record of Appeal is dated the 11th February 2021 which I take to be the date it was delivered. As that date is the one fixed during the previous court appearance of the 10th December 2020, when all parties were represented by counsel, then I find no basis for the appellant to claim or allege that the ruling was delivered in secrecy, when it was indeed delivered on the date taken in the presence of their counsel’s representative.

- g. That the transcript of the trial court’s proceedings of 11th February 2021 that is in the Supplementary Record of Appeal confirms that at 1:48:43 the Hon Trial Magistrate had communicated as follows;

“Judgement not ready but I’ll deliver before the end of the day. I didn’t manage to get the files on good time, but I’ll endeavour to deliver before close of business today.”

The transcript does not contain details of whether counsel for the parties were present virtually or not, at that time or the subsequent development after that trial court’s communication. Whether or not the appellant was present or represented when the ruling was delivered, the fact that the appellant was able to file this appeal within time, vide the initial Memorandum of Appeal dated the 19th February 2021 on the 25th February 2021 is evidence enough that it did not suffer any prejudice by the manner of its delivery. It is important to note that the delivery of the ruling took place on the same date that had been fixed in the presence of all counsel for the parties. It is therefore surprising that the appellant alleged on ground 2 that it does not know the decision of the trial court, yet has filed this appeal on the same ruling.

- h. That there being no merit with the appeal, and in view of the provision of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, that costs follow the events unless otherwise ordered for good cause, the appellant will meet the respondents’ costs in this appeal and the lower court.

6. That the determinations set out above leads the court to find and order as follows:
- a. The appeal has no merit and is hereby dismissed.
- b. That the appellant will meet the costs in the appeal and trial court.

Orders accordingly.

DATED AND VIRTUALLY DELIVERED THIS 18th DAY OF OCTOBER 2023.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Appellant: M/S Kahariri for Kimani

Respondents: Mr. Ondego

Wilson – Court Assistant.

S. M. KIBUNJA, J.



ELC MOMBASA.

