



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**HCCA. NO. 54 OF 2014**

**EALINGDALE RENDAL LTD.....APPELLANT**

**- VERSUS -**

**VILLACARE MANAGEMENT LTD.....RESPONDENT**

*(Formerly Milimani Commercial Courts CMCC 118 of 2013).*

**JUDGMENT**

**(TO APPLY TO HCCA 55/2014)**

**INTRODUCTION**

1. In a Complaint dated 17/01/2013, the Plaintiff/Appellant lodged CC 118/2013 in CM's Court Milimani claiming Kshs. 140,000/=, costs and interest on 07/03/2013. A defence dated 06/03/2013 was lodged on 07/03/2013 denying the claim in total.
2. On 03/05/2013 the Appellant/Plaintiff lodged Notice of Motion dated 26/04/2013 seeking for entry of judgment on admission. The same was prompted by a letter dated 11/02/2013 which enclosed a cheque of Kshs. 140,000/= amount claimed in plaint being forwarded to the Appellant/Plaintiff. Same was rejected as it never contained costs of the suit.
3. Subsequently on 28/02/2013 (vide letter of same date), the claim was settled by payment of Kshs. 166,130/= as demanded by Plaintiff/Appellant vide letter dated 14/02/2013.
4. Thus during the hearing of the motion, the Appellant sought formal entry of judgment. After hearing the motion the trial court dismissed the same with costs to the Defendant/Respondent as it found it to be an abuse of court process.
5. By another motion dated 25/09/2013 Plaintiff/Appellant filed another application on 01/10/2013 seeking the striking out of the defence and entry and judgment against Defendant/Respondent.
6. After hearing same Notice of Motion the court delivered ruling on 05/02/2014 dismissing the same for being *res judicata* and an abuse of court process.
7. The same order was to apply to CC No. 117/2013 which gave rise to appeal No. 54/2014 which is being heard together with this appeal.
8. This is because on 05/06/2013 CC 118/2013 and CC 118/2013 were consolidated. Thus the impugned ruling is the one of 05/02/2014 which applied to both suits.
9. As far CC 117/2013, the claim was for Kshs. 154,000/= costs and interest. The same was denied vide defence dated 06/03/2013 filed on 07/03/2013. On 03/05/2013 the Appellant had filed Notice of Motion for judgement on admission dated 26/04/2013.
10. On 11/02/2013, the Respondent/Defendant paid Kshs. 154,000/= claimed in plaint via a cheque which was returned by Appellant via letter dated 14/02/2013 as it did not contain costs. The Appellant demanded Kshs. 180,830/=.
11. On 28/02/2013 the Respondent paid Kshs. 180,830/= demanded via a cheque to the Appellant being full and final amount owed containing court fees, Advocate fees and court collection fees.

12. However the Notice of Motion for judgment on admission proceeded for hearing and ruling was made on 10/07/2013 dismissing the same with costs for being an abuse of court process.

13. However on 25/09/2013 another motion to strike out defence was lodged on 01/10/2013 was dismissed by orders of 05/02/2014 in CC 118/2012.

14. The Appellant being aggrieved by the aforesaid ruling of 05/02/2014, lodged Appeals herein HCA 54/2014 and HCA 55/014 set 5 grounds of appeal which are common in the two appeals namely;

#### **GROUND OF APPEAL**

***1. That the Learned Magistrate erred in law and in fact in failing to appreciate the issues raised in the Appellant's Notice of Motion Application dated 25<sup>th</sup> September 2013 and in dismissing the same with costs to the Respondent.***

***2. That the Learned Magistrate erred in law and in fact in failing to appreciate the issues raised in the Appellant's oral submissions made in court in respect to Appellant's Notice of Motion Application dated 25<sup>th</sup> September 2013 and disregarding the same which resulted in dismissing the same with costs to the Respondent.***

***3. That the Learned Trial Magistrate erred in law and in fact in holding that the Appellant's Notice of Motion Application dated 25<sup>th</sup> September 2013 was res judicata.***

***4. That the Learned Trial Magistrate erred in law and in fact in failing to strike out the Respondent's statement of defence from the court record whereas the Respondent had admitted the Appellant's claim and made payment after the suit was filed.***

***5. That the Learned Trial Magistrate erred in law and in fact in holding that the Respondent was entitled to the costs of the Appellant's Notice of Motion Application dated 25<sup>th</sup> September 2013 payable by the Appellant.***

15. On 06/09/2018 the parties agreed to canvass appeals via written submissions and agreed on timeline .The submissions were filed and exchanged presumably as agreed. The parties also agreed the judgement in instant appeal to apply to HCA No. 55/2014.

#### **APPELLANT'S SUBMISSIONS**

16. The Appellant submits that, the Respondent having admitted the claim and still proceeded to defend the claim the only issue left for determination by the court was whether the costs of the suit were payable on the lower scale or the higher scale.

17. It is argued that, defence having been filed containing mere denials, the same ought to have been struck out with costs payable on a higher scale.

18. Thus the trial Magistrate therefore erred in failing to appreciate the issues raised in the application dated 25<sup>th</sup> September 2013 and in dismissing the same with costs to the Respondent.

19. It is contended that, the factors to consider in an application to strike out pleadings have been set out by courts through judicial precedents.

20. The Appellant relies on the case of **D.T. Dobie & Co. Ltd –Vs- Muchina & Anor (1982) KLR 1** where the court held that the test for striking out a pleading is;

**a. If the pleading does not disclose any reasonable cause of action or defence;**

**b. That the pleading may prejudice, embarrass or delay the fair hearing of the suit, or**

**c. That it is an abuse of the process of the court, and then it ought to be dismissed.**

21. The Appellant submits that the Defences filed raised no triable issues worthy of wasting precious judicial time by conducting a trial. The Respondent merely denied in its statement of defences.

22. It is contended that, under Order 2 Rule 6 (1) of the C P Rs it states that a party is bound by his own pleadings. This means that if a party moves the court with certain information then that is what the court will rely on.

23. The Appellant relies on **Peeraj General Trading and Contracting Company Limited and Another –Vs- Mumias Sugar Company Limited Civil Case No. 192 of 2015** while quoting the decision in **Mugunga General Stores –Vs- Pepco Distributors Ltd [1987] KLR 150, Platt, Gachuhi and Apaloo JJA** where the high court expressed the following view;

***“.....a mere denial is not a sufficient defence in this type of case. There must be some reason why the defendant does not owe the money. Either there was no contract or it was not carried out and failed. It could also be that payment had been made and could be proved. It is not sufficient therefore to simply deny liability without giving some reason. A mere denial was not a***

*sufficient defence in this type of case.....”*

24. Further the appellant cited the case of Equatorial Commercial Bank Ltd –Vs- Jodam Engineering Works Ltd & 2 Others (2014) eKLR where court stated;

*“A statement of defence is said to raise reasonable defence if that defence raises a prima facie triable issue.”*

25. See also, the case of Olympic Escort International Co. Ltd & 2 Others –Vs- Parminder Sigh Sandhu & Another (2009) eKLR, the court of appeal held that for an issue to be triable, it has to be *bona fide*. The court stated as follows;

*“It is trite that, a triable issue is not necessarily one that the Defendant would ultimately succeed on. It need only be bona fide.”*

*“In the same case it is further stated that a mere denial or general traverse is not sufficient defence and that a defence that has no merit is for striking out.”*

26. The Appellant also relied on the provisions of Order 2 Rules 15(1) a, b, c, and d and Order 51 Rule 1 of the Civil Procedure Rules 2010 which mandates court to strike out any pleading that is frivolous or scandalous at any stage of the proceedings that is a sham and an abuse of the process of court.

27. The Appellant cites the case C.A No. 85/2002 Fremar Construction Co. Ltd –Vs- Minakshi Navin Shar, where the court of appeal while dismissing an appeal against an order to strike out a Defence expressly stated that;

*“Trials are not merely held to glorify the hallowed principle that disputes ought to be heard and determined on oral evidence in open court. Unless a trial is on discernible issues, it would be to waste judicial time on it..... A defence which is a sham should not be left to remain on the record otherwise it will cause undue delay and expense in the determination of the suit.”*

28. Also relied on is the case of The International Air Transport Association – IATA –Vs- Mercantile Life & General Assurance Company Ltd & Anor and the case of The Co-operative Merchant Bank of Kenya Ltd –Vs- Benson W.K. Muigai where the court held that a defence which merely denies averments in the plaint is not serious defence and a defence which is not serious is frivolous and a defence which is frivolous is annoying and therefore vexatious and both defences were struck out.

29. Further it is submitted that, law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that;

*“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.”*

30. There has never been a previous suit between the same parties in another competent court touching on the same issues that also dealt with the issue as to striking out of the defence and payment of costs to higher scale. The issue of *res judicata* does not therefore arise.

31. It is contended that, the Respondent having paid the principal amount after the suit was filed the trial court ought to have addressed the issue as to whether the costs are payable on a higher scale or lower scale.

## **RESPONDENT’S SUBMISSIONS**

32. The Respondent submits that, the respondent was served with summons to enter appearance. However, in the spirit of Article 159 of the Constitution of Kenya, 2010 and being desirous of settling the matter without going through the rigorous and expensive court process, the Respondent initiated out-of-court negotiations.

33. Respondent submits that, before a Defence was filed, the claim was settled by payment of a cheque for the sum of Kshs. 180,830/= being the entire amount claimed inclusive of the Plaintiff’s/Appellant’s costs on the lower scale as no defence or denial of liability had been filed in the matter yet. The cheque was duly accepted and acknowledged by the Appellant’s Advocate.

34. It is contended that, on 6<sup>th</sup> March 2013, a court clerk in the Respondent’s Advocates Chambers stumbled upon an unfiled Defence in the file and mistakenly assumed that the same had been overlooked. He immediately went ahead to file it not knowing that the claim had been settled.

35. This is termed as an inadvertent clerical mistake and was explained to the Appellant’s Advocate by way of a letter after the Advocate had written a letter demanding further legal costs of Kshs. 8,400/= following the inadvertent filing of a defence after settlement. The Respondent explained clearly that the Defence was inconsequential as it had been filed by mistake after the matter had been settled by parties.

36. Further it is argued that, that despite the explanatory letter, the Appellant went ahead to file an application for judgment on admission.

37. An application filed in bad faith and greed as the Appellant was demanding further legal costs for a matter which had been fully resolved.

38. It is submitted that, the Appellant was fully aware that the matter had already been settled and the next step was for parties to inform court to mark the matter as such. However, the Appellant lodged an application for judgment on admission while in reality they were only seeking their legal costs on the higher scale in light of the irregular defence on record.

39. It is submitted that, there must be a closure to matters and any attempt by the Plaintiff's and/or its Advocates to keep litigating is a violation of the provision of Section IA & IB of the Civil Procedure Act which places a duty upon court, the parties before it and their counsels to facilitate the just, expeditious, proportionate and affordable resolution of justice.

40. The respondent cites the case of **William Koross (legal Personal Representative of Elijah C.A. Koross) –Vs- Hezekiah Kiptoo Komen & 4 Others [2015] eKLR** which stated that;

*“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives. It is meant to provide rest and closure, for endless litigation and agitation does more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”*

41. For justice to be said to have been done, then a party must not be subjected to a multiplicity of suits especially if the matter has been resolved to finality. This is what the Appellant is trying to do by filing an application seeking judgment on admission because a defense was erroneously filed.

42. The Appellant's filed a suit seeking to recover the sum of Kshs. 154,000,000/= plus the costs of the suit. This was the foundational question upon which the entire claim rested.

43. A claim which was finally resolved after the Respondent forwarded a cheque for Kshs. 180,830/= being the entire amount claimed plus the costs of the suit on the lower scale as no defence had been filed.

#### **ISSUES, ANALYSIS AND DETERMINATION**

44. After going through the pleadings, parties documents on record and submissions, the only singular issue in the matter is;

- *Whether court erred in law and fact in dismissing application dated 25/09/2013?*
- *What is the order as to costs?*

45. By a letter dated 14/02/2013 the Appellant Advocate sought payment of Kshs. 166,130/= as a settlement of debt and costs.

46. On 28/02/2013 the Respondent Advocate paid the entire amount demanded being full and final settlement of amount owed to the Appellant that settled entire claim in CC 118/2013. The Appellant did not reject or protest such payment as full amount due.

47. Earlier Appellant had rejected payment of Kshs. 140,000/= and returned cheque as it did not include the costs. Similarly in CC 117/2013 the Respondent had paid Kshs. 154,000/= which was declined as it did not include entire amount. Thus on 28/02/2013 the Respondent paid Kshs. 180,830/= being full and final amount owed to the Appellant.

48. The Appellant did not return as it had done to Kshs. 154,000/= earlier paid. It did not protest that the same amount was not full and final. It is in the circumstances obtaining above that the Appellant sought judgement on admission as prayed.

49. The Trial Court in rejecting the application, it found the application to be an abuse of the court process. Thus dismissed same with costs.

50. The Appellant did not tire as by an application dated 25/09/2013 it sought to strike out defence filed on 07/03/2013 and stated that in address to court that, the claimed amount in plaint plus costs in the lower scale was paid.

51. In opposition the Respondent stated that on 10/07/2013 the claim was settled though by clerical error defence was filed thereafter. The defence was filed by mistake. The claim was already settled and Appellant was trying to re-open it.

52. The ruling was agreed by the parties to apply to both CC 117/2013 and CC 118/2013. By ruling of 05/02/2014, the court held that the matter was *res judicata* and an abuse of the court process and dismissed application with costs.

53. What is apparent herein is that the parties opted to negotiate and settle matter voluntarily in the spirit of **Article 159 2(1) Constitution of Kenya**. The same provision obligates court to promote Alternative Disputes Resolution.

54. The fact that defence were filed after settlement and payment of the claims does not negate that the matter was finally settled by the parties and any attempt to reopen it on the technicalities that defence was filed would not negate that the matter was *res judicata ie settled in finality..*

55. In the case of **William Koross (legal Personal Representative of Elijah C.A. Koross) –Vs- Hezekiah Kiptoo Komen & 4 Others [2015] eKLR** the court stated that;

***“The philosophy behind the principle of res judicata is that there has to be finality; litigation must come to an end. It is a rule to counter the all too human propensity to keep trying until something gives.***

***It is meant to provide rest and closure, for endless litigation and agitation does more than vex and add to costs. A successful litigant must reap the fruits of his success and the unsuccessful one must learn to let go.”***

56. The claim was determined by consent of the parties and the best court could do is just expunge the defences filed after settlements and mark the claims as finally settled.

57. The provisions of **Article 159 2(d) of constitution of Kenya**, dictates that that justice is to be administered without undue regard to procedural technicalities.

58. The court thus finds that the Trial Court was justified to decline to re-open the matter as it was finally settled. It would not be fair nor would it augur well with provisions of **Section 1A & 1B of the CPA on overriding objectives**. Litigation has to come to an end.

59. Thus the court orders that;

***1) The appeal has no merit.***

***2) The lower court defences in CC 117/2013 & CC 118/2013 are hereby expunged from the records.***

***3) To close the mater once and for all, no costs will be paid to either party in both lower court and this court and the settlement adopted by parties to obtain in full and final settlement.***

SIGNED, DATED AND DELIVERED THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2018 IN OPEN COURT.

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**C. KARIUKI**

**JUDGE**