



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL & ADMIRALTY DIVISION - MILIMANI**  
**CIVIL SUIT NO. 545 OF 2013**

**NICHOLAS MAKUYU LUMBI..... PLAINTIFF**

**VERSUS**

**HENRY MUSYOKI KILONZI..... DEFENDANT**

**RULING**

**Introduction**

1. This suit was instituted by the filing of the Plaint on 16<sup>th</sup> December 2013. The summons was dated 20<sup>th</sup> December 2013. The Defendant entered an appearance by filing the appropriate Memorandum of his Advocates on 30<sup>th</sup> January 2014. The Defence was filed on 12<sup>th</sup> February 2014. The Matter was fixed for pre-trial on 11<sup>th</sup> July 2014. The Parties filed their documents, as ordered, on 5<sup>th</sup> August 2014. It was fixed for pre-trial again on 19<sup>th</sup> December 2014 and the matter was fixed for Hearing of the Suit on 2<sup>nd</sup> March 2015.

2. On 2<sup>nd</sup> March 2015 the Defendant asked for an adjournment. He was unwell, his Advocate said. It seems he suffers from a pre-existing heart condition and Type II Diabetes. He produced a “*sick- note*” to excuse his attendance but there is no medical report on file. It appears it was his Advocate and not the Defendant himself who thought that he should go to the doctor. In any event the hearing of the suit was adjourned to be heard on 22<sup>nd</sup> April 2014.

3. Refreshingly, on 22<sup>nd</sup> April 2015 both Parties were ready to proceed. The Plaintiff opened his case and the Plaintiff’s first witness gave evidence in Chief and Cross-examination had begun. The matter was adjourned part heard to resume on 21<sup>st</sup> May 2015. On 20<sup>th</sup> May 2015, that is the day before the hearing was to resume the Defendant filed two documents. The First was a Notice of Change of Advocates. It seems that from 19<sup>th</sup> May 2015 the Defendant had instructed Messrs Kivuva & Omugi & Co. Advocates to act for him instead of S.K. Muendo & Co. Advocates. The second Application was brought under a Certificate of Urgency, although there was nothing in it that demonstrated its urgency.

4. The Advocate appearing for the Defendant felt that notwithstanding the interruption to the proceedings, the application was made at the opportune time. It seems that the Application was not triggered by the facts of the case appearing in the pleadings nor arising from the evidence, but by a Court of Appeal decision in Civil Appeal No. 223 of 2013 where Judgment was delivered on 6<sup>th</sup> March 2015. The Defendants Advocate argued that it was necessary to raise the issue at this stage because the Court of Appeal (according to him) said that the proceedings will become a nullity if the res judicata issue is

raised. Putting urgency in context. The Judgment of the Court of Appeal was delivered on 6<sup>th</sup> March 2015. The Hearing of the Suit commenced nearly a month later on 28<sup>th</sup> April 2015. There was no mention of the issue. In particular there was no mention of this ground breaking judgment on that day.

5. The Orders sought in the Notice of Motion are:

1. *That the Application be certified as urgent.*
2. *That the suit be struck out with costs to the Defendant for being res judicata and an abuse of the process of Court.*
3. *That the cost of this application be provided for.*

The Grounds relied upon by the Defendant are that:

- (a) *This Court lacks jurisdiction to hear and determine this suit.*
- (b) *This matter is now scheduled for hearing on 21<sup>st</sup> May 2015 and the issue of jurisdiction has never been raised.*
- (c) *The Plaintiff instituted HCCC Number 905 of 2009 in which the same contract and issues raised in this matter were directly and substantially in issue between the current parties who were, litigating under the same title who were litigating before this court which was of competent jurisdiction.*
- (c) *That since the matter is in issue was substantially in issue in HCCC No. 905 of 2009, this court lacks the power to hear and give determination on the same.*
- (d) *That this suit amounts to an abuse of process of court.*
- (e) *That the issues raised in this current suit ought to have been raised in HCCC NO. 905 of 2009.*
- (f) *That it is in the interest of Justice that this application be heard in the first instance since it would amount to an illegality for this matter to proceed to full determination if the matter is res judicata.*
- (g) *That it would be unnecessarily to subject this matter to full hearing if this matter can be determined at the interlocutory stage.*
- (h) *That it is in the interest of justice that this application be heard and determined.*

The Supporting Affidavit sets out the background. It also sets out the legal advice succinctly. It says:

- (1) *That on 30<sup>th</sup> July 2009, I purportedly entered into an agreement with the Plaintiff which agreement was the subject of **HCCC 905 of 2009** (marked "HMK 1")*
- (2) *The suit was determined, Judgment entered and warrants issued against me in **HCCC 905 of 2009** has final orders and was based on the same facts, the same subject matter and similar issues to this matter.*
- (3) *The issues giving rise to this suit and **HCC 905 of 2009** are all contained in the said agreement dated 30<sup>th</sup> July 2009.*
- (4) *That in **HCCC 905 of 2009** the Plaintiff and I were litigating under the same heading. It had a*

final determination and was filed before this court which is a court of competent Jurisdiction.

(5) The matters directly and substantially in dispute in **HCC 905 of 2009** and the current suits are quite similar. This suit is based on the same set of facts as in **HCCC No. 905 of 2009**.

(6) That I am advised by my current advocates, which information I verily believe to be true, that should this matter *res judicata* the proceedings of this honourable Court would amount to a nully.

(7) That under the circumstances of this suit it is just and in the interest of Justice that this Honourable Court be relieved of the burden of hearing this matter to full determination only to find that the proceedings are a nully.

(8) That I have also been advised by my Advocates, which information I verily believe to be true that it was not open for the Plaintiff to choose what to enforce in **HCCC 905 of 2009** and to leave the rest for determination in this Honourable Court.

(9) That litigation must come to an end and it is therefore in the interest of Justice that this application be determined in the first instance before the matter is heard and finally determined.

6. Dealing with the points that arise, it is the Defendant/Applicant's position that there was an earlier suit between the same parties having the same subject matter. That was **HCCC No. 905 of 2005**. It is said the suit was determined, judgments entered and warrants issued. The Supporting Affidavit is very carefully drafted not to provide a single date for any of the events alleged.

7. The Supporting Affidavit does not exhibit a copy of the Plaintiff in **HCCC 905 of 2009**, what is exhibited as **HNK I** is a copy of the Plaintiff in this suit **HCCC 545 of 2013** filed on 16<sup>th</sup> December 2013. Whether that is deliberate or inadvertent does not matter. The Court can only decide on application on the facts before it. The earlier plaintiff is not therefore before the Court.

8. If the Defendant is seeking to show that this suit is an abuse of process or an attempt to mislead the Court as to the facts, that is not correct. In fact at paragraph 5 of the Plaintiff, the Plaintiff states that:

*"The defendant failed to honour the agreement mentioned in paragraph 4, (that is the agreement in 1992 for the sale of 20 acres of land in Athi River) following which the Plaintiff sued him in this Court vide **HCCC No. 905 of 2009** for the monetary part of the contract. The decree in this suit has been satisfied".*

For the last phrase to make sense, it must be a reference to **HCCC 905 of 2009**.

9. Paragraph 6 then states, "After satisfying the decretal sum in **HCCC NO. 905 of 2009** the Plaintiff tried to pursue the part of the agreement for exchange of another ten acres in vain. The Defendant later agreed to compensate the plaintiff for the ten acres at a price of Kshs.9,000,000.00.

It is clear and obvious therefore that the earlier suit was for the monetary part of the contract for the monetary sum of Kshs.9,000,000.00. The Current suit relates to the second half of the agreed acreage in the contract of sale. Paragraphs 6 and 7 of the Plaintiff set out that the Plaintiff was willing to accept the sum of Kshs.9,000,000.00 but the defendant only paid Kshs.1,647,000/- leaving a balance of Kshs.7,353,000/-. The Defendant has failed to pay that, it is alleged.

10. In response to paragraph 6 & 7 of the Plaintiff, paragraphs 5-7 of the Defence states:

*"5.The Defendant does not admit the contents of Paragraph 6, and aver that **High Court Case No. 905 of 2009** is similar to the present case, and based on the contract dated 30<sup>th</sup> July 2009 which concluded the dispute between the Plaintiff and the Defendant and the Defendant puts the Plaintiff to strict proof."*

6. *The Defendant has no knowledge and does not admit the contents of paragraph 6 and denies offering to compensate the Plaintiff with Kshs.9,000,000 or at all and invites the Plaintiff to strict proof.*

7. *The Defendant denies the contents of paragraph 7 to the extent of the allegation of payment of Kshs.9,000,000/- and states that the sum of Kshs.1,647,000/- is a friendly loan advanced to the Plaintiff and invites the Plaintiff to strict proof.”*

The wording used in paragraph 5 is that the earlier suit was similar to the current. The word similar is not the equivalent to the phrase “*the same as*” or “*exactly the same as*” which is what the Defendant is now alleging. It is clear from the Plaintiff that the Plaintiff is drawing a distinction between the two halves of the 20 acres purchased but never transferred. The Defendant has produced no evidence to show they are the same transaction. The Plaintiff admits the contract is the same and the original timescales were the same but he has set out that the subject matter of the two suits though associated are not the same. The Defendant has not put forward any evidence to demonstrate “*double recovery*” for the loss.

11. Both Parties filed Written Submissions. The Applicant filed his on 19<sup>th</sup> June 2015. Unfortunately it did not appear on the Court file and copy was provided. Reassuringly the original copy has been located and placed on the Court file. The Defendant has attached a number of English Authorities to his Written Submissions as well as filing a further list of Authorities. Both Parties have very helpfully provided copies of the Authorities on which they rely, surprisingly, there is no sign of the Court of Appeal Ruling delivered on 6<sup>th</sup> March 2015. However, the Court has considered it in coming to its decision.

12. I have read the Written Submissions and Authorities filed on behalf of each party. I will not quote from them extensively in the interests of brevity but note the salient features. Both Parties accept the facts in so far as they relate to the sale of 20 acres of land. Both accept that the first suit (905 of 2009) related only to the first 10 acres. The Defendant says “*In that agreement, the Defendant agreed to pay Kshs.9,000,000/- to the Plaintiff being compensation for 10 acres. There was no mention of the balance of the 10 acres from the initial agreement*”. (emphasis added).

13. The Defendant there clearly recognizes that the earlier suit relates only to 10 acres. In the Submissions the Defendant has relied on an additional argument that is not pleaded in the Notice of Motion. That is the reliance upon **Section 8** of the **Civil Procedure Act**. That is estoppel as well as **Section 7**.

***Section 6 - 8 of the Civil Procedure Act provides:***

Section 6: *No Court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.*

Section 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.*

Section 8: *Where a Plaintiff is precluded by rules from instituting a further suit in respect of any particular cause of action, he shall not be entitled to institute a suit in respect of that cause of action.*

14. The Plaintiff/Respondent, in the Written Submissions on his behalf accepts the proposition put forward by the Defendant but states that for a finding of res judicata, the Applicant must prove 4 things that is;

- (a) The Parties are the same as the earlier matter,
- (b) The parties were litigating under the same title,
- (c) That the matters in dispute are substantially the same as were in dispute in the former suit,
- (d) The issues were heard and determined on merit by a competent Court.

15. The first question to resolve is whether this dispute relates to the same subject matter. It is clear from the pleadings, the Application and the Submissions that the two 10 acre parts of the 20 acre property were treated separately and differently. That according to the Plaintiff was due to the Defendant's promises to provide the land after the first suit. That has not happened. The Defendant is now arguing that as a consequence of suing for only the first half, the Plaintiff is precluded from recovering the balance. That cannot be right and no justification is given for that reasoning. The current claim was not made in the earlier suit and nor is that claim and the payment therefore form any part of this suit. In this case, the subject matter of this suit is a different 10 acres than the subject matter in **HCCC No. 905 of 2013**

16. Next, is the Plaintiff bringing the second suit under the same title? The Plaintiff prays in and the deliberations of the Court of Appeal in **UKay Estate Ltd and Another Vs. Shah Hirji Manek Ltd & 2 others**. The Court adopted an earlier authority containing the now famous passage from **Talbot vs. Berkshire (1991) All ER9** ( the Applicant's authority). The Court of Appeal defined the phrase "the same title" as meaning " *a right to possession, a ground of claim, evidence of right, a cause of basis of acquiring a right and a right.*"

17. As to the estoppel argument the Defendant has not put forward any evidence of reliance forbearance on the part of the Defendant. Payments were made and it is for the Court to determine the purport of the payments after hearing evidence. It is interesting but not surprising that the Defendant, in another attempt to yet again delay these proceedings has brought this Application. The Defendant, when last before the Court, was Ordered to produce proof of the payments made to the Plaintiff whether by diary entries or otherwise. The Defendant has not complied with that Order.

18. The Plaintiff urges the Court not to consider this application due to the earlier default, however the Court takes a different view and the Application is considered on its merits.

19. The Application and Supporting Affidavit have failed to demonstrate that the subject matter of the two Suits was the same. The Plaintiff has not been awarded nor received compensation for the full 20 acres the subject of the Sale Agreement. To allow the Defendant's application would be tantamount to allowing him to benefit from his failure to perform the contract to sell and transfer 20 acres of land. The Defendant admits that never happened. Further the Court finds that the Parties were not litigating under the same heading.

20. For those reasons, I dismiss the Application with costs.

### **ORDER**

1. Defendant's Application is dismissed.
2. The suit to be heard- hearing to resume.
3. Defendant to pay the Plaintiff costs of the application.

**Order Accordingly,**

**FARAH S. M. AMIN**

**JUDGE**

**SIGNED AND DELIVERED this 21<sup>st</sup> DAY OF April 2016 AT NAIROBI**

In the Presence of:

Isaiah Otieno – Court Clerk

Wilfred Wambua (Clerk) – Plaintiff

No Appearance - Defendant