REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL APPEAL NO. 317 OF 2013

WELCO SERVICES INTERNATIONAL

T/A CAJETAN PHIDELIS OMBERE.....APPELLANT

VERSUS

DR RAJPAL SINGH JABAL.....RESPONDENT

JUDGMENT

The appellant **CAJETAN PHIDELIS OMBERE** filed proceedings before the Chief Magistrate's Court in civil suit no 3924 of 2012 claiming a joint tenancy with the respondent **DR RAJPAL SINGH JABAL**. The appellant claimed that he was paying his rent to the main landlord through the respondent who was supposed to remit the rent to the landlord. The appellant further claimed that the respondent received the rent from him and did not dispatch it to the landlord prompting the landlord to raise a demand note. The appellant blamed the respondent for unlawfully proclaiming the appellant's property for rent.

Vide a certificate of urgency, the appellant moved to court seeking an injunction against the respondent and an order that the payment receipt made to the landlord be made available. The court granted a temporary injunction and ordered for interpartes hearing. On 22/ 3/2013 the court ordered the appellant to deposit the rent in court within 3 working days.

The appellant then filed the application dated 25/3/2013 which was dismissed in the ruling dated 30/4/2013. The appellant again filed another application dated 2/5/2013 which sought to review the order made on 22/3/2013 and the ruling of 30/4/2013. The court dismissed the application in the ruling dated 4/6/2013. It is the latter ruling that is the subject of the current Appeal.

The appellant challenges the ruling of the trial court made on 4/6/2013 on the following grounds:

> *1. The learned magistrate erred and misdirected himself in law in failing to appreciate the fact that the whole sub-tenancy arrangement between the appellant and the respondent was not recognizable in law as such been declared so by the managing agent M/S Regent Management Ltd (the Landlord) and further, failing to consider the cogent evidence on record against the objective of cape 21 and provisions of sections 1A and the rules of natural justice.*
>
> *2. The learned magistrate erred and misdirected himself in law and in his finding through erroneous interpretation of the legal term res judicata in dismissing my application dated and file on 2nd May 2013.*

3. The learned magistrate erred and misdirected himself in law and in fact in failing to stop illegal and unlawful but rather plainly fraudulent transaction visited upon the appellant by the respondent herein against all such non contested exhibits and evidence on record contrary to the rule of law and rules of natural justice.

4. The learned magistrate erred and misdirected himself in law in failing to consider in his findings the appellant's sole written submission on record which filed on the 8th may 2013 in total breach of section 3A of the civil procedure Act cap 21 laws of Kenya.

5. The learned magistrate erred and misdirected himself in law in lending a hand to the respondent to continue committing the illegality but also allowing him the privilege to conduct unlawful but rather fraudulent demands with full knowledge that the respondent is not the landlord nor the agent and even a servant of either and one without authority whatsoever to deserve rent proceeds thereof in total violation of the rules of natural justice.

The appellant prays that the appeal be allowed and the ruling and the order dated 4th June 2013 and its findings be set aside. The appeal was prosecuted by way of written submissions which were dutifully filed by the appellant as a *pro se* litigant. The respondent did not file any submissions.

The appellant submitted that on the eve of hearing of the application dated 25/3/2013 the appellant was heard but that the respondent did not enter appearance and therefore he did not oppose the application which the trial magistrate dismissed. The appellant submitted that under order 51 Rule 14 of the CPR the respondent who wishes to oppose an application may file a notice of preliminary objection or replying affidavit or a statement of grounds of opposition. He further submitted that the said documents should be filed not less than three days before the date of hearing. The appellant stated that the record shows that the application was unopposed but in the ruling the learned magistrate relied on a replying affidavit which was never filed or served upon him.

The appellant further submitted that the court did not disclose the amount to be deposited in court. He denied that there was consent requiring him to deposit money in court. He stated that the only consent was that requiring him to pay rent directly to the landlord and not to the respondent.

The appellant further argued that the court failed to consider that the defendant's act to withhold rent and or to enjoy rent proceeds as exhibited from his receipts as disputed yet it proceeded to award him the liberty to levy distress for rent. According to the appellant this was a clear attempt to determine the suit on its merits without hearing the parties.

The appellant submitted that the application seeking review was not *res judicata*. The appellant argued that the court was still seized of the issue sought for review and the findings of the main application dated 13thJuly 2012 had not been pronounced, as such no matter or issue touching on the suit had been substantively tried and determined by the court as explained under section 7 of the Civil procedure Act. The appellant further stated that the application seeking review was filed two days after the ruling. The appellant stated that there was an error apparent on the court record since the application was not opposed and the orders sought were not final. The appellant submitted that the issue under dispute had not been tried and if the court allows the respondent to execute the distress order then it would render the entire suit void. The appellant submitted that his case pending in the lower court should not be dispensed with or rendered futile and or be annulled instead it be allowed to go on merit.

The appellant claimed that he is poised to suffer irreparable loss, substantial damages , loss of business , injustice should the order being sought to be set aside is not granted together with an injunction as presently in place. The appellant stated there is eminent likelihood that the pending suit at the lower court may be rendered null and void if the respondent is not restrained to execute the unlawful distress order.

In conclusion, the appellant submitted that in the interest of justice that it is only fair and proportionate that the orders sought herein be granted together with an order of injunction protecting the business activities of the appellant till determination of the pending suit before the lower court.

Having set out the appellant's position, and having considered the lower court record including the lower court pleadings and the impugned ruling, I have also perused the written submissions before this court on the face of the grounds of appeal all of which carefully considered all the above documents.

This being a first appeal, this court is obliged to abide by the provisions of Section 78 of the Civil Procedure Act to evaluate and examine the lower court record and the evidence before it and arrive at its own conclusion. This principle of law was well settled in the case of **Selle – Vs – Associated Motor boat Co. Ltd (1968) EA 123** where **Sir Clement De Lesterig** stated that,

> ***"This court must consider the evidence, evaluate it itself and draw its own conclusions though in doing so it should always bear in mind that it neither heard witnesses and should make due allowance in this respect. However, this court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he had clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally (Abdul HammadSarif – Vs – Ali Mohammed Solan (1955, 22 EACA 270)."***

And in the case of **Mbogo – Vs – Shah & Another (1968) EA 93**,the court set out circumstances under which an appellate court may interfere with a decision of the trial court as follows:-

> ***"I think it is well settled that this court will not interfere with the exercise of discretion by the inferior court unless it is satisfied that the decision is clearly wrong because it has misdirected itself or because it has acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into account and consideration and in doing so arrived at a wrong conclusion."***

Applying the above principles to this appeal, the main issue for determination is whether the appeal herein has merit.

The Commencement point is to appreciate the nature of the application before the lower court and the applicable legal principles in dealing with that application. The impugned application generally sought for a review of the orders of the court made in the previous application whose ruling was delivered on 23rd March, 2013. The application for review by the appellant was brought under order 45 rule 1(1), 2(1) (2) of the CPR on the basis that there was an error apparent on the face of the record. The appellant in this appeal claims that respondent did not oppose his application for review in any way but the court went ahead and dismissed the application, relying on a replying affidavit that was never on the file.

My perusal of the impugned ruling reveals that the court stated that the respondent filed grounds of opposition stating that the application is *res judicata* since the same issues were raised in the previous similar application.

The Court of Appeal in the case of **Margaret Rwamba (Suing as legal representative of the estate of Moffat Kariuki Nyanga) v Mugambi Muketha & Another Civil Appeal no. 130 of 2012 [2014] eKLR** when describing an error or mistake apparent on face of the record observed that:-

> ***"In Nyamogo and Nyamogo v Kogo [2001] EA 174 this Court said that an error apparent on the face of the record cannot be defined precisely or exhaustively, there being an element of indefiniteness inherent in its very nature, and it must be left to be determined judicially on the facts of each case. There is real distinction between a mere erroneous decision and an error apparent on the face of record. Where an error on a substantial point of law stares one in the face, and there could reasonably be no two opinions, a clear case of error apparent on the face of the record would be made out. An error which has to be established by a long drawn process of reasoning or on points where there may conceivably be two opinions can hardly be said to be an error apparent on the face of the record. Again, if a view adopted by the court in the original record is a possible one, it cannot be an error apparent on the face of the record even though another view was also possible. Mere error or wrong view is certainly no ground for a review***

although it may be for an appeal. This laid down principle of law is indeed applicable in the matter before us."

The record shows that the respondent opposed the application dated 2/5/2013 by filling grounds of opposition dated 3/5/2013 and filed in court on 6/5/2013. At the time of the hearing of the application the grounds of opposition were in the court record. The appellant's application seeking review was therefore opposed. In that regard, the trial court was therefore correct in relying on the said grounds of opposition. I therefore find that there was no error apparent on the face of record based on the claim that the court elide on a affidavit which was not filed to warrant a review or setting aside of the ruling delivered on 30/4/2013.

On the issue of *Resjudicata* raised by the respondent, the court stated that the ruling of 30/4/2013 confirmed the orders of 22/3/2013 and required the appellant to comply failure to which the respondent was at liberty to execute. The learned magistrate explained that the orders issued on 22/3/2013 were to the effect that rent be deposited in court within 3 working days. The appellant send cheques to the management agent but they were later returned because there was no tenancy between the management agent and the appellant. The court ordered the rent to be deposited in court within three days. The court stated that the appellant did not comply and the application was therefore dismissed.

It is important to revisit the legal principles guiding the applicability of the doctrine of *res judicata*. In the case of **Lotta vs. Tanaki [2003] 2 EA 556** it was held as follows:

"The doctrine of res judicata is provided for in Order 9 of the Civil Procedure Code of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgment between the same parties or their privies on the same issue by a court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

The courts have also held that the doctrine of *res judicata* is important in adjudication of cases. The court of appeal in the case of **Nicholas Njeru v Attorney General & 8 others [2013] eKLR** observed that:

"The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely, that there must be finality to litigation and that the individual should not be harassed twice with the same account of litigation."

The substantive 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.

The test whether the matter is *res judicata* was re stated in **Nancy Mwangi T/A Worthlin Marketers v Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others [2014] eKLR** where Gikonyo J observed that:

"Is this case res judicata? Unless it is abundantly clear, when res judicata is raised, a court of law should always look at the decision claimed to have settled the issues in question and the

entire pleadings-of the previous case and the instant case- to ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction."

The appellant's grounds of appeal appear like they challenge the acts of the respondent that gave rise to the cause of action, and as if the court has already pronounced itself on the merits of the case. The court nonetheless appreciates that he is a self represented litigant and therefore his coherence and appreciation of legal issues is limited. The appellant however also claims that the ruling of the trial magistrate tended to have settled the issues in his ruling dated 30/4/2013 which addressed the Notice of motion dated 25/3/2013. In that notice of Motion the appellant who was the applicant sought the following orders:

1. …..Spent

2. That the court directive made on the 22nd March 2013 requiring the plaintiff /applicant to deposit unspecified amount of money in court be halted /stayed until it is determined as to whether there is rent owed in the first instance.

3. That the interim injunction issued on the 16th July 2012 be retained until determination of this application.

4. That the plaintiff be granted leave to file further affidavit in response to the defendants replying affidavit dated 27th August 2012.

5. That the outlawed sub tenancy being fronted by the defendant upon the plaintiff be declared illegal, unlawful, null and void.

6. That the defendant be compelled to facilitate and validate the plaintiff tenancy and in default the plaintiff be granted access to vacate from premises .

7. That the defendant be compelled to refund and or deposit to court all the money he received in form of the rent.

8. ,……..

In his ruling, the learned magistrate stated that the orders sought by the appellant in the application could not be granted at that stage because they were final in nature. The court also upheld the orders issued on 22/3/2012 in which the appellant was required to deposit rent in court within 3 working days. It also held that the latter application was Resjudicata the earlier application.

In the subsequent application, the applicant sought the following orders:

1. Spent

2. That pending the inter-parts hearing of this application, the defendant and through any other person be restrained from interfering with the business activities of the plaintiff/applicant.

3. That pending the inter-parte hearing of this application, this honourable court be pleased to vary and or stay all further proceedings in the matter, relating to the orders granted on 22/3/2013 and the subsequent ruling delivered by the honourable Mr Obulutsa on 30/4/2013 till determination of this application.

4. That this honourable court be pleased to review and or vacate the court order made on 22/3/2013 and subsequent ruling delivered in court on 30/4/2013.

From the foregoing I hold the view that the application was not *res judicata.* Not all the issues raised in the subsequent application were fully addressed by the ruling dated 30/4/2013. The court only addressed the order requiring the appellant to deposit rent in court within three days, which order the appellant had not complied with. On the other hand; prayers 2 and 3 were never dealt with as there was no mention of the fate of those prayers in the ruling. I therefore find that the trial court erred in law and fact in failing to address the appellant's application as a whole since the issue of Resjudicata only applied to one issue, which, in essence denied the appellant a fair trial.

In these circumstances, I find this appeal meritorious to the extent stated hereinabove. I allow the appeal, set aside the ruling and order of the trial magistrate dated 30/4/2013 and substitute it with an order for a rehearing of the application dated ***2/5/2013*** on its merits and before another magistrate other than the magistrate who heard the matter and delivered the impugned ruling.

In the end, I make the following orders:

1. Appeal is allowed to the extent that the ruling and order of the trial magistrate dated 30/4/2013 is set aside and substituted with an order for a rehearing of the application dated ***2/5/2013.***

2. The lower court file Milimani CMCC No. 3924 be and is hereby returned to the Chief Magistrate's court at Milimani, Nairobi for re hearing of the application dated 2/5/2013.

3. As the order of the trial magistrate did not specify the amount of rent to be deposited in court, the sums of money deposited in court at the rate of Kshs 10,000 per month shall be held by the court until the matter in the lower court is heard and determined or upon application. The appellant shall continue to deposit the rent as ordered by the trial magistrate until such order is reviewed and or varied by the trial magistrate on application as appropriate.

4. The Appellant shall move expeditiously and in any event, within 90 days of the date hereof, to secure a date for the hearing of the application pending in the lower court, which date shall be given on a priority basis; and failing to take such proactive steps the respondent/defendant will be at liberty to file an appropriate application in the matter.

5. The appellant shall bear his own costs of this appeal as the appeal was not defended /opposed by the respondent.

Dated, signed and delivered at NAIROBI this 22nd day of July, 2015.

R.E. ABURILI

JUDGE

22/7/2015

Coram: R.E. Aburili J

Court Assistant: Samuel

N/A for appellant

N/A for respondent

Court:

Judgment read and pronounced in open court as scheduled. The Deputy Registrar to inform the appellant and arrange to have the lower court file returned to the Chief Magistrates' Court at Milimani.

R.E.ABURILI

JUDGE