



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CIVIL CASE NO. E198 OF 2020

SWANYA LIMITED.....1ST PLAINTIFF

SEED GROUP LIMITED.....2ND DEFENDANT

-VERSUS-

NATIONAL BANK OF KENYA LIML.....1ST RESPONDENT

SILLOAH INVESTMENTS LIMITED.....2ND RESPONDENT

RULING

INTRODUCTION

1. Vide Notice of Motion Application dated the **27th November 2020**, the 1ST Defendant/ Applicant herein sought for the following Orders:

a. The Suit filed by the 1st & 2nd Plaintiffs via the Plaint dated 7th October 2020 and filed on 29th October 2020, be struck out in its entirety with costs for being a blatant abuse of the Court and/or being Res-Judicata.

b. This Suit be struck out for being Statute barred under Section 4(1) of the Limitation of Action Act, Chapter 22, Laws of Kenya.

c. The costs of this application be provided for

2. The Subject Application is premised on the Grounds contained on the face thereof and same is supported by the affidavit of one, Paul K Chelanga, sworn on the 27th November 2020, in respect of which the deponent has substantially alluded to the fact that the Plaintiffs herein had hitherto filed Civil Suit Number 371 of 2002 at Mombasa, which was thereafter transferred to Nairobi and same was re-numbered as Nairobi HCC No. 756 Of 2003.

3. Upon being served with the subject Application, the Plaintiffs filed a Replying affidavit sworn on the 28th October 2021, deponed and/or sworn by one Victor Ogeto and in respect of which the deponent has contested and/or essentially disputed the claims made at the foot of the subject Application.

4. On the other hand, the 2nd Respondent herein filed a Replying affidavit sworn by one Suku Sherwin, sworn on the 22nd June 2021 and in respect of which, same has essentially supported the Application by and/or on behalf of the 1st Defendant.

DEPOSITION BY THE PARTIES:

5. On behalf of the 1st Defendant/Applicant, one Paul K Chelanga has sworn the Supporting Affidavit and same has averred as hereunder;

6. The 1st & 2nd Plaintiffs herein filed and/or lodged HCC NO. 756 of 2003, against the 1st Defendant herein and which case arose out of the same facts as in the subject case. For clarity, it is averred that the subject matter in the previous case concerned the loan which was advanced by the 1st Defendant to the 1st Plaintiff herein and which was secured by various titles, including Land Reference number 2951/434, original number 2951/22/11.

7. Further, it is averred that the said previous suit, just as the subject suit touched on and/or concerned the loan facility, its liquidation, as well as the levying and charging interest thereon.

8. Similarly, it has been averred that the said suit was compromised between the Parties and the compromise was duly adopted and ratified as the Judgment of the court by Honourable Justice Warsame, on the 31st October 2007.

9. It has been averred that following the entry into and execution of the compromise, no Appeal was ever filed and/or mounted and the entire dispute, which arose between the Plaintiffs herein and the 1st Defendant, was therefore effectively settled.

10. Owing to the foregoing, it is therefore averred that the PlaintiffsR herein cannot now come back to court and seek to revive and/or re-agitate the same dispute arising out of the loan facility, the charging and levying of interests and the consequential realization of the securities which were charged to and/or in favor of the 1st Defendant, either under the pretext of forensic accounts or re-Duplum Principle or at all.

RESPONSE BY THE PLAINTIFFS:

11. Vide Replying Affidavit sworn by Victor Ogeto, the Plaintiffs herein have responded as hereunder;

12. It is true that the Plaintiffs herein filed and/or lodged a Plaint dated the 30th September 2002, against the 1st Defendant herein and in respect of which same sought the following Reliefs;

a. An Injunction restraining the Defendant by itself, its officers, employees, agents and/or servants from advertising for sale, selling, alienating, interfering and/or in any manner whatsoever interfering with the properties known as L.R No's 12948/207, 12948/59, 12948/54, 1160/44 and 2951/434.

b. A Mandatory injunction directed at the 1st Defendant to separate loan accounts of the Plaintiffs.

c. An Order directing the 1st Defendant to render a true and accurate Accounts of the Plaintiffs and to apply the rate of interests specified in the charges and further charges.

d. A declaration that the levying of compound interests, penalties, penalties Interests on alleged arrears are in breach of the terms of the charges.

e. A declaration that the Charges are Null and Void and are Unenforceable

13. Premised on the foregoing, the deponent has further averred that though the subject suit arises out of the same banking facility, the Cause of action and the nature of Reliefs that are sought are separate and distinct and therefore the suit herein is not directly and substantially the same as the ones that were sought for in the previous suit.

14. It has further been averred that the gravamen in this matter is the legality of the purported sale of the suit property to the 2nd Defendant who was not even a Party to Nairobi HCC 756 of 2003.

15. On the other hand, it has further been averred that the Sale of the suit property to and in favor of the 2nd Defendant, arose in the year 2015 and that this occurred long after the compromise, which is alluded to by the 1st Defendant.

16. In answer to the averment that the suit herein is barred by the limitation of actions, the Plaintiffs have responded by averring that the impugned sale having accrued and/or occurred in the year 2015, time for commencing suit for recovery of the suit property started to run from the year 2015 and not otherwise.

17. In a nutshell, it has been averred that the claim that the subject suit is res-judicata as well as barred by the limitation of actions act, are not only misconceived, but are legally untenable.

RESPONSE BY THE 2ND DEFENDANT:

18. Vide Replying Affidavit sworn on the 22nd June 2021, one Suku Sherwin, has averred that the 2nd Defendant herein established and/or ascertained that the 1st Defendant/Applicant was in the process of exercising her Statutory power of sale over and in respect of the Property known as L.R No. 2951/431, Ngecha Road, Nairobi and in this regard same developed an interest and thereafter engaged the 1st Defendant.

19. It is further averred that the 1st Defendant/Applicant and the 2nd Defendant thereafter entered into an Agreement, whereupon the 1st Defendant, in exercise of her Statutory power of sale, sold and thereafter transferred to the 2nd defendant the entire of the suit property herein.

20. Further, it has been averred that prior to entering into the sale agreement, it was not incumbent upon the 2nd Defendant to ascertain and/or authenticate whether the 1st Defendant's Statutory Power of sale had arisen and/or accrued. For clarity, the 2nd Defendant assumed and believed that the 1st Defendant had the right to exercise her Statutory Power of Sale.

21. Be that as it may, it has been averred that the 2nd Defendant herein gathered and/or established that the Plaintiffs and the 1st Defendant herein have been involved in a previous litigation vide Nairobi HCC No. 756 of 2003 and in respect of which the Parties thereafter entered into and recorded a compromise.

22. It was further averred that arising from the compromise, the 1st Defendant was allowed to proceed and realize the various securities, towards recovery of the monies that have been advanced to and/or in favor of the Plaintiffs. Consequently, it is the deponent's position that the issues being raised from the subject suit are issues which were germane to the previous suit and were dealt with therein.

23. Other than the foregoing, the 2nd Defendant has also averred that having purchased and/or acquired the suit property from the 1st Defendant, who was exercising her statutory power of sale, the 2nd Defendant's title to the Suit property is therefore indefeasible. In this regard, the 2nd Defendant has invoked and relied on the provisions of Section 99 of the Land Act, 2012.

24. Finally, the deponent on behalf of the 2nd Defendant has also averred that the suit Property herein, which was hitherto bought and/or acquired by the 2nd Defendant on the 10th June 2013, has since been transferred to and is registered in the name of a third Party. In this regard, the 2nd Defendant contend that same is non-suited.

SUBMISSIONS:

25. The Notice of Motion Application dated the 27th November 2020, came up for hearing on the 19th October 2021, on which date the advocates for the Parties proposed to have the said Application to be canvased and/or disposed of by way of written submissions. Consequently, the court proceeded to and issued directions that the Parties do file and exchange written submissions.

26. Pursuant to and in line with the directions given by the court, the 1ST Defendant/Applicant filed her written submission on th 23rd July 2021, whereas the Plaintiffs/Respondents filed their Submissions on the 20th February 2022.

27. For completeness, the three set of written submissions, which have been filed by the 1st Defendant/Applicant, the 2nd Defendant as well as the Plaintiffs are on record and the contents thereof, as well as the authorities relied upon have been considered and taken into account.

28. Suffice it to note, that the borne of contention is whether or not the current suit namely Milimani ELC NO. E198 OF 2020, raises similar or near similar issues as the issues that were canvased and/or dealt with vide Nairobi HCC NO. 756 OF 2003, which was admittedly filed by the 1st and 2nd Plaintiffs herein albeit against the 1st Defendant.

29. Whereas on the part of the 1st Defendant/Applicant, it is contended that the Doctrine of Res-judicata is too fold, namely, not it covers the issues that were directly canvased and dealt with, but, also issues that ought to have been raised and dealt with. In this regard, the 1st Defendant has therefore emphasized that Res-judicata is both actual and constructive, in nature.

30. In support of her position, the 1st Defendant/Applicant has relied on various Decisions including the Decision in the case of **Omondi v National Bank Limited & 2 Others (2001) EA 177, IEBC v Maina Kiae & 5 Others (2017) eKLR and Mburu Kinywa v Gachini Tutu (1978) eKLR 69.**

31. On their part, the Plaintiffs herein have contended that the previous suit, namely, Nairobi HCC NO. 756 OF 2003 and the subject suit are separate and distinct and that the issues raised are neither directly nor substantially same, as the ones, which were dealt with in the previous suit.

32. According to the Plaintiffs, the issues of the Sale and disposal of the suit property to and/or in favor of the 2nd Defendant, allegedly in exercise of the 1st Defendant's statutory power of sale, was not dealt with in the previous suit.

33. Secondly, it has also been averred that the current suit also seeks various declaratory orders touching on and/or concerning the suit property and payment of damages, which were not part of the previous suit.

34. Thirdly, it has also been contended that the previous suit was only between the Plaintiffs herein and the 1st Defendant, as opposed to the current suit, which now has an additional Party, namely, the 2nd Defendant. In this regard, the Plaintiffs have thus contended that the suit cannot be deemed to be Res-Judicata.

35. Based on the foregoing arguments, the Plaintiffs have therefore implored the court to find and hold that the subject Application is misconceived and ought to be Dismissed.

ISSUES FOR DETERMINATION:

36. Having reviewed the Notice of Motion Application dated the 27th November 2020, the supporting affidavit thereto, the Replying affidavits filed by the Plaintiffs and the 2nd Defendant, respectively and having similarly considered the written submissions filed by the Parties, I come to the conclusion that there is only one issue for determination, namely;

a. Whether the subject suit is Res-Judicata and therefore barred by the provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

ANALYSIS AND DETERMINATION

ISSUE NUMBER 1

Whether the Subject suit is Res-Judicata and therefore barred by the Provisions of Section 7 of the Civil Procedure Act, Chapter 21, Laws of Kenya.

37. Before delving into the issue for determination, it is worthy to take cognizance of the relevant provisions of the law that underscores the scope and tenor of the Doctrine of Res-Judicata. In this regard, it is imperative to take note of the Provisions of Section 7 of Civil Procedure Act, which provides as hereunder;

7. **Res judicata:**

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.

Explanation. —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

38. From the foregoing provision, it is evident that the Doctrine of Res-judicata concerns itself with the issues and/or matters that were directly discussed and/or deliberated upon, during the previous proceedings and which the court rendered a determination thereof.

39. On the other hand, it is also important to note that there is a second limb to the Doctrine of Res-judicata, which touches on and/or concerns matters which is closely intertwined with those which were in dispute in the previous matter and which ought to have been made part of the statement of claim or defense in the previous suit.

40. In this regard, such matters and/or issues, are equally deemed to be Res-Judicata and this class of Res-judicata is popularly referred to as Constructive Res-Judicata.

41. For the avoidance of doubt, the cluster of Res-judicata that deals with matters and/or issues that ought to have been raised and/or ventilated in the previous suit are well delineated vide explanation 4 of Section 7, which provides as hereunder;

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

42. Other than the Cold letter law, it is also worthy to note that the said provision of the Law has received judicial interpretation and endorsement in various proceedings including the decision in the case of **Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR**, where the Court of Appeal observed as hereunder;

‘Cognizant of the above principles, the courts called upon to decide suits or issues previously canvassed or which ought to have been raised and canvassed in the previous suits have not shied away from invoking the doctrine as a bar to further suits. As was stated in Henderson v Henderson (1843) 67 ER 313, res judicata applies not only to points upon which the court was actually required by 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.’

43. Other than the fact, that the doctrine of Res-judicata deals with issues or matters which with reasonable or due diligent ought to have been ventilated in the previous suit, the doctrine of res-judicata cannot also be circumvented and/or eschewed by the addition of Parties and/or Party to a dispute that has hitherto been heard and disposed of.

44. Consequently, it does not lie in the mouth of the Plaintiffs herein to say that because the 2nd Defendant was not a Party to the previous suit, then her inclusion to the subject matter therefore takes the subject suit herein out of the purview of the doctrine of Res-Judicata. In my humble view, such an argument is stillborn and of no help to the Plaintiffs.

45. Nevertheless, it is sufficient to adopt and rely on the decision in the case of **E.T. v Attorney General & another [2012] eKLR**, where the court observed as hereunder;

In my view the addition of the Attorney General and the exclusion of the petitioner's mother, who was present in the first suit are merely cosmetic changes which do not affect my conclusions. The issue of paternity of the petitioner is the common thread running through both suits and it is the matter that was compromised by the Agreement endorsed by the court. It cannot be re-opened merely by elevating the issue to one of public law and packaging it differently as an enforcement action and thereafter adding the Attorney General as party to evade the general principle.

There is no doubt that a compromise was reached and that its effect was to bring the claim resulting to an end such that the attack on the Agreement is a collateral challenge. It is not permitted and amounts to an abuse of the court process which this court retains jurisdiction to stop.

46. Finally, I must say that I have contrasted the reliefs at the foot of the current Plaint dated the 7th October 2020 vis a viz the reliefs that were sought vide the Plaint dated 30th September 2002 and I must say that other than the choice of words and semantics, the meaning, import and tenor of the reliefs sought are one and the same.

47. On the other hand, it is also apparent that the subject dispute which anchored and/or underscored the previous suit, that is, the Banking facility, that was advanced to and/or in favor of the Plaintiffs, the manners in which interests was levied and charged, the legality of the charges and the exercise of the statutory power of sale by and/or on behalf of the 1st Defendant colors both suits. Simply put, the two suits are in respect of the same Subject matter.

48. Consequently, there is no gainsaying that the current suit is indeed Res-judicata and therefore same falls within the parameters that were ably described by the Court of Appeal in the case of **John Florence Maritime Services Limited & another v Cabinet Secretary for Transport and Infrastructure & 3 others [2015] eKLR**, where the honourable Court of Appeal observed as hereunder;

'The rationale behind res judicata is based on the public interest that there should be an end to litigation coupled with the interest to protect a party from facing repetitive litigation over the same matter. Res judicata ensures the economic use of court's limited resources and timely termination of cases. Courts are already clogged and overwhelmed. They can hardly spare time to repeat themselves on issues already decided upon. It promotes stability of judgments by reducing the possibility of inconsistency in judgments of concurrent courts.

It promotes confidence in the courts and predictability which is one of the essential ingredients in maintaining respect for justice and the rule of law. Without res judicata, the very essence of the rule of law would be in danger of unraveling uncontrollably.

In a nutshell, res judicata being a fundamental principle of law may be raised as a valid defence. It is a doctrine of general application and it matters not whether the proceedings in which it is raised are constitutional in nature.

The general consensus therefore remains that res judicata being a fundamental principle of law that relates to the jurisdiction of the court, may be raised as a valid defence to a constitutional claim even on the basis of the court's inherent power to prevent abuse of process under Rule 3(8) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

On the whole, it is recognized that its scope may permeate broad aspects of civil law and practice. We accordingly do not accept the proposition that Constitution-based litigation cannot be subjected to the doctrine of res judicata.

However we must hasten to add that it should only be invoked in constitutional litigation in the clearest of the cases. It must be sparingly invoked and the reasons are obvious as rights keep on evolving, mutating, and assuming multifaceted dimensions.

49. Based on the foregoing, I come to the conclusion that subject suit filed by and/or on behalf of the Plaintiffs and which seeks to revisit the same issues that had hitherto been addressed and/or dealt with vide Nairobi HCC NO 756 OF 2003, is Res-judicata.

50. Before disposing of this matter, there is one more issue that requires to be mentioned and which is pertinent. It is important for Parties and in this case, to have brought and litigated the entire Claim as against the Defendant or Defendants and where a Party omits to sue in respect of or relinquishes any portion of his/her claim, then such a Party cannot thereafter commence any proceedings and/or sue in respect of the portion that was so omitted or relinquished.

51. In this regard, I hasten to invoke and rely on the Provisions of Order 3 rule 4 (2) of the Civil Procedure Rules, 2010, which provides as hereunder;

4. Suit to include the whole claim [Order 3, rule 4.]

- (1) Every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action; but a plaintiff may relinquish any portion of his claim.**
- (2) Where a plaintiff omits to sue in respect of or relinquishes any portion of his claim, he shall not afterwards sue in**

respect of the portion omitted or relinquished.

FINAL DISPOSITION:

52. Having addressed and/or considered the issue for determination herein, I come to the conclusion that the Notice of Motion Application dated the 27th November 2020, is meritorious.

53. Consequently, the Application be and is hereby allowed and the Plaintiffs' suit be and is hereby struck out, on account of being Res-Judicata.

54. Costs of the suit, as well as those of the Application be and are hereby awarded to the Defendants.

55. It so ordered

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 25th DAY OF MARCH 2022.

HON. JUSTICE OGUTTU MBOYA

JUDGE

In the Presence of;

June Nafula Court Assistant

Miss Ashioya H/B for Dr. Mutubua for the Plaintiffs/Respondents

Miss Wanyonyi for the 1st Defendant/Applicant

No Appearance for the 2nd Defendant/Respondent