



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 126 OF 2012**

**SYNERGY GASES (K) LIMITED ..... PLAINTIFF**

**V E R S U S**

**JAK ENTERPRISES COMPANY LIMITED ..... DEFENDANT**

**RULING**

1. Plaintiff filed this claim seeking judgment against Defendant for Kshs. 144,380.80. I have however noted Plaintiff has a pending application to amend its Plaint where the amendment shows it claims for Judgment for Kshs. 12,144,380.80.
2. The Plaintiff's Notice of Motion dated 19<sup>th</sup> February 2014 is for orders-
  - **THAT pending the hearing and determination of this suit, this Honourable Court be pleased to stay proceedings in Msa CMCC No. 867 of 2012, Jak Enterprises Company Limited =Vs= Synergy (K) Limited.**
  - **THAT this Honourable Court be pleased to issue any other order or directions as it deems fit for the ends of justice to be met.**
3. Defendant's suit in the Chief Magistrate's Court was filed before the present suit. Plaintiff deponed in support of its application-
  - **THAT on 7<sup>th</sup> June 2012, the Applicant filed its defence in the said suit, but could not include in its defence a counterclaim against the Respondent as the value of the counterclaim of about Kshs. 12,144,380 surpassed the Chief Magistrate's Court's maximum pecuniary jurisdiction of Kshs. 7,000,000/-. Annexed hereto and marked "MM-2" is a copy of the defence filed in the said proceedings.**
  - **THAT thus situated, the Applicant's only recourse was to file this suit, which it did on 29<sup>th</sup> June 2012, to secure its interest in the amount it would have counterclaimed from the Respondent hereto from the transaction in issue.**
  - **THAT as is discernible from the Plaint exhibited hereto above, the matter in issue in this suit is directly and substantially in issue in Msa CMCC No. 867 of 2012, Jak Enterprises**

**Company Limited =Vs= Synergy (K) Limited, between the same parties.**

- **THAT by a Notice of Motion Application dated 14<sup>th</sup> January 2013, filed in the said suit, the Applicant sought for orders to stay proceedings in the said matter pending the hearing and determination of this matter. (I annex hereto and mark as ‘MM-3’ a copy of the said Application).**
  - **THAT by his Ruling rendered on 20<sup>th</sup> June 2013, the learned Magistrate declined to grant the orders sought.**
  - **THAT the said matter had been listed for hearing on 14<sup>th</sup> December, 2014 when the same was adjourned to the 16<sup>th</sup> May 2014, for lack of witnesses. Annexed hereto and marked “MM-4” is a true copy of the Hearing Notice.**
  - **THAT the cause of action in the said suit and in the instant suit is similar, between the same parties, save for the fact, that the Applicant seeks judgment for an amount beyond the Magistrate’s Court jurisdiction.**
4. Defendant opposes the application on the ground that such stay shall not serve any interest because the determination of this suit will not determine the suit before the Chief Magistrate’s Court and on the ground that the Plaintiff made a similar application in the Chief Magistrate’s Court case which application was determined by the dismissal of that application. Defendant submitted and it was not denied that the Chief Magistrate found that his Court had jurisdiction to hear and determine the case before him and thereby declined to stay it. On that ground Defendant argued that this application is *res judicata*.
5. The last submission of Defendant is where I start in my consideration. The Plaintiff filed an application before the Chief Magistrate to stay the suit in that Court and having failed to get the stay, indeed that application on being dismissed, the Plaintiff was not entitled, as it has done to try “its luck” before this Court. To do so is contrary to the provisions of Section 7 of the Civil Procedure Act Cap 21. That Section provides-

**“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.”**

Defendant filed a replica of the present application before the Chief Magistrate’s Court. The suit before the Chief Magistrate is between the Plaintiff and Defendant in this suit save that in the Chief Magistrate’s Court the Plaintiff herein is the Defendant and the Defendant herein is the Plaintiff. Finally the issue of staying the Chief Magistrate’s Court case was finally determined when it was dismissed and if the Plaintiff was aggrieved by that determination the Plaintiff should have appealed against the decision. It was not open for the Plaintiff to file a fresh application in this Court seeking the same orders. To allow parties to file applications or suits already determined would mean that there would not be an end to Litigation. The need to have an end in Litigation was discussed in the case **MBEU KITHAKWA –Vs- PHILLIP MUCHIRI MUGO CIVIL CASE No. 87 OF 2007** as follows-

**“However, much more than that, it should by now be clear that the Plaintiff in filing this case replicated the lower Court’s case. Section 7 of the Civil Procedure Act forbids the Court from entertaining an action in which the matter directly or substantially had been directly and substantially in issue in a former action which has been heard and finally determined by a competent Court. The doctrine of *res judicata* related to a matter adjudicated upon or a matter upon which a judgment has been pronounced.**

The Plaintiff in opposing the Defendant's argument that the application is caught by that doctrine was heard to say that since the High Court in its judgment in the appeal of the lower Court case found that the lower Court suit was incompetence for having been initiated by way of miscellaneous application, that the Plaintiff was entitled to file this fresh action. Such an argument goes contrary to the practice of law and public policy, that is there must be finality of litigation. The question whether or not the decision in the previous action was right or erroneous has no bearing on whether it operates as *res judicata* or not. The converse would take legal practice to a ridiculous heights because every decision would be impugned as erroneous and there would be no finality of cases. The doctrine of *res judicata* contains the rule of conclusiveness of judgment based on maxim or Roma jurisprudence "*interest reipublicae ut sif finis litium*" (that is, it concerns the state that there be an end to law suits). See Mulla The Code of Civil Procedure 16<sup>th</sup> Edition."

6. The doctrine was discussed by the Court of Appeal in the case NICHOLAS NJERU –Vs- ATTORNEY GENERAL AND 8 OTHERS (2013)eKLR as follows-

"[27] This doctrine has been applied in a number of cases including; Reference No. 1 of 2007, James Katabazi and 21 Others –Vs- The Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply:

- The matter must be 'directly and substantially' in issue in the two suits,
  - The parties must be the same or parties under whom any of them claim, litigating under the same title; and
  - The matter must have been finally decided in the previous suit (See Uhuru Highway Development Ltd –Vs- Central Bank & 2 Others – Civil Appeal No. 36 of 1996).
7. The conditions discussed in the above case are in my view fulfilled in this case. Both parties confirm that.
8. For the above reasons the Plaintiff's Notice of Motion dated 19<sup>th</sup> February 2014 is dismissed with costs.

**DATED and DELIVERED at MOMBASA this 26<sup>TH</sup> day of JUNE, 2014.**

**MARY KASANGO**

**JUDGE**