**REPUBLIC OF KENYA**

**IN THE HIGH COURT**

**AT MOMBASA**

**Civil Appeal 60 of 2009**

**POSTAL CORPORATION OF KENYA..……..APPELLANT**

**-AND-**

**1. PETER ACHAR**

**2. ATHMAN TSAMA.....…….RESPONDENTS**

*(Being an appeal from the Ruling on the Preliminary Objection dated 5th February, 2009 by Senior Resident Magistrate Ms. M.K. Mwangi in*

*SRMCC No. 1224 of 2008)*

**JUDGMENT**

When Mombasa SRM Civil Suit No.1224 of 2008 came up before the trial Court, the appellant filed a Notice of Preliminary Objection. The objection was on the ground that the suit was "*res judicata, time-barred, and fatally defective."* It was contended that the case was *res judicata* because there had been two other cases which had been heard and determined:

*(i) Mombasa CMCC No. 2140 of 2002,* ***Peter Achar v. Postal Corporation of Kenya & Att-Gen*** *– judgment delivered on* ***4th May, 2006****, and settled by the defendant on* ***31st August, 2006****;*

*(ii) Mombasa CMCC No.2141 of 2002,* ***Athman Tsama & Peter Achar v. Postal Corporation of Kenya & Attorney-General*** *– judgment delivered on* ***4th May, 2006*** *and settled by the defendant on* ***31st August, 2006.***

The objector had contended that "*the issues and the cause of action in [the] suit are the same as in the [earlier] suits…"*

The objector also contended that the suit offended the provisions of s.24(a) and (b) of the Postal Corporation Act, 1998, (Act No.3 of 1998), which relates to notice period before filing suit.

In the Ruling delivered on ***5th February, 2009*** the learned Senior Resident Magistrate held as follows:

***"It is clear from the record that the plaintiffs herein sued the defendant and obtained judgment in their favour for malicious prosecution. The instant claim is one that arises from the plaintiff's contract of employment…I find that the filing, prosecution and determination of the previous claims arising in tort cannot [operate] as a bar [to] the institution of a claim in contract."***

The learned Magistrate, after considering the other grounds for the objection, dismissed the same.

The appellant states in the Memorandum of Appeal, that the learned Magistrate *"erred in law and in fact and failed to sufficiently appreciate the grounds for [the] objection"; "erred in law and fact by failing to find the suit…to be res judicata and in contravention of ss.6 and 7 of the Civil Procedure Act...."; "erred in law and in fact by finding that the previous claims arose in tort and cannot….bar a claim in contract…"*

Learned counsel for the appellant called in aid a decision of the High Court (***Kasango, J***), ***Dr. Perez Malande Olindo & Another v. Dr. John Karungai Nyamu & 4 Others*** Nairobi M.C.C. Civ. Suit No. 246 of 2006, in which, on similar facts, a determination was made as follows:

***"Having looked at this suit there is good reason…why the plaintiffs left the other subsisting suit, HCCC No. 1230 of 1999, and filed this present suit, which suit is based on issues relating to the plaintiffs' three…properties and to matters relating to the loan granted by the 4th defendant to the plaintiff, which loan resulted in the sale of one property to the 1st and 2nd defendants. It was open, after all, for the plaintiff to seek to appropriately amend the previous suit…, so as to accommodate the new issues that arose…The filing of this suit is a blatant disregard of s.6 of the Civil Procedure Act, which prohibits the filing of a fresh suit where the issues are substantially [the same as] in the previous suit. The present suit is an abuse of Court process. To allow it to continue.…could possibly lead the Courts to reach two different decisions…."***

Counsel, next, relied on the Court of Appeal decision in ***Pop-In (Kenya) Ltd & 3 Others v. Habib Bank AG Zurich*** [1990] KLR 609, for the principle that (p.609):

***"The plea of*** *res judicata* ***applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce 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."***

On the point that the current suit offends the provisions of the Postal Corporation Act, 1998, and with regard to the period of notice required to precede lodgment of suit, counsel relied on a decision of the High Court (***Mwera, J),*** in ***Bisai & Another v. Kenya Commercial Bank Ltd & Others*** [2002] 2 EA 346, wherein the relevant finding is thus set out (p.348):

***"In sum this Court finds this suit [untenable] against the third defendant as it was laid without due compliance with the mandatory statutory provision. Non-obtaining of the said leave, in this Court's mind, is of a ….fundamental nature – not merely procedural. It went to the jurisdiction of the Court and so the suit herein is struck out with costs***."

Relying on the foregoing reasoning, the appellant asked that the requirement as to *notice before filing suit*, contained in s.24 of the Postal Corporation Act, be upheld.

Counsel also attributed invalidity of pleadings to the fact that the verifying affidavit to the amended plaint was defective: *"The verifying affidavit to the amended plaint herein is sworn by 1st plaintiff/respondent on his own behalf and on behalf of 2nd plaintiff"; "however, there is no evidence of a filed authority to act by the 2nd plaintiff/respondent…, thus contrary to Order 1, Rule 12 and Order 7, Rule 1(2) and (3)."*

Counsel, again, relied on the Ruling of ***Kasango, J*** in the ***Perez Malande Olindo Case,*** in which

the following passage appears: "*a verifying affidavit ought to be sworn by each plaintiff who appears or pleads….*" The Court of Appeal, in ***Research International East Africa Ltd. v. Julius Arisi & 213 Others***, Civil Appeal No. 321 of 2003 [2007] eKLR, thus stated the rule:

***"Had this been a representative suit, then, there would be no doubt that Julius Arisi would be perfectly entitled to take any action in the suit on behalf of the other interested persons. Rather, the suit is filed by all the 214 persons through their advocate authorized by Order 1 rule 1, [Civil Procedure] Rules. In that case, each of the plaintiffs is personally responsible for the conduct of his own suit. In our view, none of the 214 plaintiffs has any right to take any steps in the suit on behalf of any other plaintiff without an express authority in writing. Thus, Julius Arisi cannot take any step in the suit on behalf of all the other plaintiffs including filing a verifying affidavit unless he has been expressly authorized by any of the plaintiffs to so act as provided by Order 1 rule 12 (1) of the Civil Procedure Rules."***

The appellant asked that the suit be struck out and/or dismissed, as only one of the plaintiffs had sworn a verifying affidavit and without the authority to swear the same on behalf of the other.

Learned counsel, ***Mr. Weloba*** for the respondents, submitted that whereas the appellant's case was that the issues in the instant case are substantially similar to those in Mombasa CMCC No.2140 and 2141 of 2002, this was not the case; for in the earlier suits the respondents were "claiming damages for malicious prosecution and false detention and/or imprisonment," whereas the present suit "*seeks to enforce the employment contract and/or code between the applicant and the respondents."*

Counsel urged that "*the issue of [terms of employment] between the parties herein were never canvassed in the former suits and could not have arisen as it could only accrue upon the respondents' request to be reinstated in accordance with the terms of the employment contract."*

Counsel urged that the authorities cited by the appellant, on *res judicata* are not in all cases applicable, and that a window of discretion had been left open by the Court in ***Pop-In (Kenya) Ltd. & 3 Others v. Habib Bank AG Zurich*** [1990] KLR 609. The Court of Appeal, in that case, had relied on a passage in the old English case (p.612), ***Henderson v. Henderson*** (1843) ***Hare*** 100, at 115 (*per* ***Wigram, VC***):

***"Where a given matter becomes the subject of litigation in, or adjudication by, a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident omitted part of their case. The plea of*** *res judicata* ***applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce 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."***

Counsel urged that the correct construction of s.7 of the Civil Procedure Act is that issues in the earlier suit "*must be substantially or directly the same as those in the present suit";* and on that basis he submitted that "*the issues relating to the employment contract raised in the present suit have never been alleged in any suit between the parties nor has the appellant denied them and/or admitted them in the former suits."* It would not have been possible in any event, counsel submitted, for the issues in the present suit to be raised in the previous suits, even with the exercise of all due diligence, because "*the [cause] of action in the instant suit had not arisen at the time of filing, hearing and [determining] the [earlier] suits"* – and hence *"the matter is not res judicata***."**

As regards the limitation of action under s.24 of the Postal Corporation Act (Cap.411, Laws of Kenya), counsel submitted that it is inapplicable to "*matters relating to contracts between the Corporation and its employees."* The said provision [in s.24(b)], it was submitted, deals with acts done in execution of the Act; and so one needs to identify the *functions* of the Corporation, as laid down in s.5 of the Act: and those functions include the rendering of postal services, financial services, and other

functions or duties as may from time to time be prescribed by the Minister. Counsel submitted that s.24(b) of the Act "*applies to actions or other proceedings commenced against the Corporation in respect of claims [associated with] functions of the Corporation [in the terms of] s.5 of the Postal Corporation Act, [but] not to employment contracts between the Corporation and its employees."*

Counsel took the alternative position that the cause of action in the instant suit is to be seen in the context of s.24(b) of the Postal Corporation Act, which has the proviso that where a continuing injury or damage is alleged, action may be filed within six months after cessation thereof. It was submitted that the appellant had committed a continuing breach, by failing to reinstate the respondents in employment.

Lastly, counsel contested the remaining grounds of appeal on the basis that they were merely invoking technicalities; and in relation to these, he urged the principle expressed by the Court of Appeal in ***Lt. Col. Joseph Mweteri Igweta v. Mukuria M'Ethare & Attorney-General***, Civil Application No. Nai 270 of 2001:

***"If I were to dismiss this application there would be one*** *bona fide* ***litigant who will blame the system for relying on procedural technicalities to deny him justice. Whilst I do not condone errors on [the] [part of counsel, I must consider the interest of a Kenyan seeking justice in our courts. He is bewildered at the twists and turns the hearings of appeal [have] taken. He has no other forum to go to if he is shut out there…. [It] should not be possible in the year 2002 for a*** *bona fide* ***litigant in the highest court in Kenya to be defeated by any mere technicality, any mere slip, any mistaken step in his litigation."***

Counsel called for such a delicate sensation of the litigant's hardship by invoking the opinion of ***Madan, JA*** in ***Murai v. Wainaina*** (No.4) [1982] KLR 38, at pp.47-48:

***"A mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel though in the case of a junior counsel the court might feel compassionate more readily. A blunder on a point of law can be a mistake. The door of justice is not closed because a mistake has been made by a person of experience who ought to have known better. The court may not forgive or condone it but*** *it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate****"*** [emphasis supplied].

Learned counsel, for effect, invoked recent changes to the law of civil procedure, notably the Civil Procedure Act (Cap.21) and the Appellate Jurisdiction Act (Cap.9), which now state expressly that the overall purpose of such law is to facilitate the just, expeditious, proportionate and affordable resolution to matters in contention.

The perceptions of the substantive and procedural law, by counsel, are in my view, to be set against the broad but imperative guiding principle of judicial process, which is proclaimed in Article 159 of the **Constitution of Kenya, 2010**, the relevant clauses being as follows:

***"(1) Judicial authority is derived from the people….***

***"(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles –***

***……..***

***(d) justice shall be administered without undue regard to procedural technicalities; and***

***(e) the purpose and principles of this Constitution shall be protected and promoted."***

It is within such broad principles of the Constitution and of the ends of justice, that the Court will apply the detailed rules of the procedural law the importance of which in creating an orderly, effective and respectable mechanism, however, cannot be played down. Even as individual litigants must conduct their

matters on the premise that the rules, on all plain interpretation, are obligatory, a vital *discretion* is reposed in the Court to appraise the conformance of these rules, in any particular case, with the broader principles aforesaid.

Is the instant suit *res judicata* on account of past Judgments in Mombasa CMCCC No. 2140 of 2002 and Mombasa CMCC No. 2141 of 2002?

It is not doubted that the earlier proceedings were in respect of alleged malicious prosecution; and the respondents herein successfully prosecuted their cases. ***Mr. Weloba*** has submitted that the earlier cause of action could not have been annexed to the claim for breach of contract, which is the cause of action in the instant suit; for such breach of contract had not yet come to pass. To this contention, I find no answer; and, being guided by the persuasive authority in ***Handerson v. Henderson*** (1843) ***Hare*** 100, I do hold that there are *special circumstances* for not linking the two causes of action, at the time of the earlier suits. I hold, therefore, that *res judicata* is inapplicable in this case.

The appellant urged that the respondents had not complied with the law of limitations, under the Postal Corporation Act (Cap.411). In the submissions, the most serious contention, in my opinion, is that the relevant law of limitation looks to the statutory activities of the Corporation, rather than to the Corporation's in-house relations with those in its employ who, therefore, may resort to the normal obligations of the contract of employment. In case I am wrong on this point, I will be guided by the broader principle of rendering justice, in the terms of Article 159 of the Constitution of Kenya, 2010: the objection raised in this regard is more of a technicality than the broader question of justice in employment contract. I hereby exercise the Court's discretion to sustain the instant suit, drawing inspiration also from past judicial practice, as in the Court of Appeal decision in ***Lt. Col. Joseph Mweteri Igweta v. Mukuria M'Ethare & Attorney-General,*** Civil Application No. Nai 270 of 2001; and ***Murai v. Wainaina*** (No.4) [1982] KLR 38.

The foregoing assessment leads me to set out the content of a decree in the following terms:

***(1)The appeal is dismissed.***

***(2)The respondents shall, within 14 days of the date hereof, rectify the defect in the verifying affidavit.***

***(3)The appellant shall bear the respondents' costs of this appeal, the same to bear interest at Court rates as from the date of filing the appeal.***

***(4)This matter shall be listed for mention and directions within 21 days of the date hereof.***

**SIGNED** at **NAIROBI** …….

**J.B. OJWANG**
**JUDGE**

**DATED** and **DELIVERED** at **MOMBASA** this 13th day of February, 2012.

…….……

**M.A. ODERO**
**JUDGE**