



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS**

Civil Case 81 of 2007

**CHRISTOPHER KINYUUTI MAOUNDU
(T/A MASAKU EAST END SERVICE STATION)PLAINTIFF**

VERSUS

SHELL & BP (MALINDI) KENYA LIMITED DEFENDANT

RULING

The doctrine of **res judicata** is set out in **section 7** of the **Civil Procedure Act, Cap 21** (the Act). The main part of 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.”

Section 7 aforesaid contains various **“Explanations”** to elaborate this doctrine. **Explanations (3) and (4)** are as follows:

“(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.”

“(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.”

The test of **res judicata** was stated as follows in the case of **KAMUNYE AND OTHERS VS THE PIONEER GENERAL ASSURANCE SOCIETY LTD. (1971) E.A 263:-**

“The test whether or not a suit is barred by **res judicata seems to me to be-is the plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action, a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of **res judicata** applies not only to points upon which the**

first court was actually required to adjudicate 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 *Greenhalgh v. Mallard*, (1947) 2 All E.R 255. The subject matter in the subsequent suit must be covered by the previous suit, for res judicata to apply *Jadva Karsan v. Harnam Singh Bhogal* (1953), 20 E.A.C.A 74.”

This court has held in the case of **Nairobi HCCC No. 1576 of 1999, Benjo Amalgamated Ltd. & Another –vs- Kenya Commercial Bank Ltd** (Lenaola, J) (unreported) that a consent order that puts to rest all issues in dispute between parties in a suit will uphold a plea of res judicata. That holding was upheld by the Court of Appeal in the case of **Benjo Amalgamated Ltd. & Another –vs- Kenya Commercial Bank Ltd [2006] eKLR**.

In the present suit the Defendant has applied by **chamber summons dated 10th January 2008** for an order to strike out the plaint for being frivolous, vexatious and an abuse of the process of the court on account of the suit being barred by the doctrine of res judicata. It is contended that the Plaintiff’s claim in the present suit ought to have been contemplated and should have been brought in two previous suits between the same parties. Those two previous suits are **Machakos SPMCC No. 526 of 2003** and **Machakos CMCC No. 562 of 2004**.

It is further contended that the present suit, just as the two previous suits, is premised upon the same Dealer Licence Agreement between the parties, the same property, and the same circumstances. It is pointed out that one of the two previous suits was settled by consent upon terms while the other one went to full trial and the Plaintiff got a judgment for money, which judgment was paid. The pleadings in the two previous suits have been exhibited in the supporting affidavit.

The application is brought under **Order 6, rule 13 (1) (b) & (d)** of the **Civil Procedure Rules** (the Rules).

The Plaintiff has opposed the application as set out in his **replying affidavit filed on 29th May 2008**. The replying affidavit is sworn by his counsel. It is contended that the issues raised in the present suit are substantially different from those raised in the previous suits. It is also pointed out that SPMCC No 526 of 2003 was not heard but was settled by the parties as a compromise after the Defendant admitted the debt owed to the Plaintiff. It is further pointed out that CMCC No. 562 of 2004 was heard and decided on the issue of wrongful eviction only and damages awarded to the Plaintiff. It is thus the case of the Plaintiff that the doctrine of res judicata does not apply.

On 7th October 2009 the court (Lenaola, J) ordered that the application be heard by way of written submissions. Both parties eventually filed their submissions. I have considered those submissions, including the authorities cited. I have also perused the pleadings in the three cases, particularly the plaints. In SPMCC No. 526 of 2003 (hereinafter

called the first case) the background of the Plaintiff's claim is pleaded as follows in the re-amended plaint dated 13th October 2004:-

“3. THE Defendant was at all material times the owner and legally entitled to possession of the premises known as Machakos town/block 909/410. THE Defendant is a multi-national corporation dealing in the business of marketing, distribution and sale of petroleum and petroleum products throughout Kenya.

3A. AT all material times, the Defendant was the Registered owner of premises known as Machakos Town block 909/410 – situate in Machakos Town-and used as a service station and allied retailing business and facilities, particularly, marketing, distribution and sale of petroleum and petroleum products carrying the Defendant's own trademarks and name.

3B. THAT the premises in paragraph 3 A above are equipped with petrol pumps, storage tanks, pipes, fittings, accessories et cetera to be used in the business of the company aforesaid.

4. BY a dealer licence agreement entered into between the Plaintiff and the Defendant sometime during the year 2002 the Defendant granted to the Plaintiff a right and licence to enter upon LR NO. Machakos Town/Block 909/410 (aforesaid) and operate the Service Station together with its allied retailing business and facilities for consideration and upon terms and conditions contained in the said agreement.

5. ON 26/5/2003, notwithstanding the fact that the licence was still operational, the Defendant threatened in utter breach of the agreement to suspend the said licence without notice unless a purported debt of KShs. 1,045,725.03 owed by the Plaintiff to the Defendant was paid immediately. The Plaintiff avers that it is not aware of such debt and has been denied an opportunity to prove the non-existence of such debt.

6. NOTWITHSTANDING the fact that the alleged debt is non-existent and that the said licence is still valid, the Defendant threatens and intends, unless restrained by an order of this Honourable Court from so doing, to suspend the said licence, lock the station and suspend selling of its products dealt with at the station by the Plaintiff.

6A. AND the Plaintiff avers that, the Defendant has a right to suspend or terminate the agreement only upon giving a 30 days written notice detailing specific concerns of the company relating to the performance of the Defendants, and requiring the Defendant to take remedial steps to improve its performance and rectify any deficiency or shortcomings, and it is only after failure to take the necessary remedial measures that the notice would take effect.

6B. AND the Plaintiff states that no such notice has been served upon it by the Defendant.”

The Plaintiff then stated the particular claims in subsequent paragraphs. The main claims were as follows:-

1. **Injunction to restrain the Defendant from evicting the Plaintiff from the service station during the currency of the Dealer Licence Agreement.**

2. **Damages for breach of contract.**
3. **Refund of KShs. 2.4 million being a deposit on account of the Dealer Licence Agreement towards purchase of petroleum products.**
4. **Refund of KShs. 77,210/00 paid for supply of engine oils, which supply was never made.**

In CMCC No. 562 of 2004 (hereinafter called the second suit) the same background is pleaded before the particular claims are made. The main claims were:-

1. **A declaration that the Plaintiff's eviction from the service station was illegal and wrongful.**
2. **Damages for unlawful eviction.**
3. **Damages for conversion of the Plaintiff's property in the service station.**

Again in the present suit the same background is pleaded before the particular claims are set out in subsequent paragraphs. The main claims were:-

1. **Various sums of money on account of supply of fuels to matatus, government vehicles and to other persons pursuant to the Dealer Licence Agreement.**
2. **Refund of various sums of money on account of illegal debits from the Plaintiff's account with the Defendant maintained pursuant to the Dealer Licence Agreement.**

One thing is clear. The Plaintiff's claims in the three suits emanate from his Dealer Licence Agreement with the Defendant pleaded in detail in the three suits. All the claims could have been brought in one single suit, particularly the claims in the second and the present suit.

The doctrine of res judicata, as already seen, contemplates not only such claims as are before the court but also all other claims that could have and should have properly been brought before the court in the same action. When several claims accrue to a party out of the same cause of action, it is not open to him to bring multiple suits to pursue those claims. He ought to bring one single suit in which all those claims will be adjudicated. It is certainly an abuse of the process of the court to bring multiple suits where one single suit would have sufficed. The Plaintiff's claim in the present suit should have been brought in the second suit, Machakos CMCC No. 562 of 2004. The present suit is therefore barred by the doctrine of res judicata.

In the circumstances, I must allow the present application. The suit is bad in law and cannot be sustained. It is hereby struck out with costs to the Defendant. It is so ordered.

DATED AT MACHAKOS THIS 15TH DAY OF JULY 2010

H. P. G. WAWERU
JUDGE

DELIVERED THIS 16th DAY OF JULY 2010