



Burihabwa v Kencom Sacco Society Limited (Environment & Land Case 155 of 2018) [2022] KEELC 15585 (KLR) (31 October 2022) (Ruling)

Neutral citation: [2022] KEELC 15585 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 155 OF 2018
JO MBOYA, J
OCTOBER 31, 2022**

BETWEEN

VICTOR BURIHABWA APPLICANT

AND

KENCOM SACCO SOCIETY LIMITED RESPONDENT

RULING

1. Vide Notice of Motion Application dated the 26th May 2022, the Plaintiff/Applicant herein has approached the court seeking for the following Reliefs;
 - i. The Partial compromise of the suit reached between the parties on 26th September, 2019 pursuant to the Chamber Summons dated 24th May,2018, be and is hereby recorded and judgement entered in favor of the Plaintiff/Applicant as against the Defendant/Respondent in the sum of Kshs.6,300,000/- paid by the Defendant/Respondent in installments between 23rd February, 2016 and 26th November,2019.
 - ii. Pursuant to the orders given in the Ruling dated 7th October,2021 by Honourable Justice Oguttu Mboya, the Plaintiff be and is hereby awarded Interests at Court rates with effect from 23rd February,2016 to 26th November 2019 when the principal amount was paid in full.
 - iii. Pursuant to the orders given in the Ruling dated 7th October,2021 by Honourable Justice Oguttu Mboya, the Plaintiff be and is hereby awarded costs of the suit.
2. The subject application is premised and anchored on the basis of various grounds which have been enumerated at the foot thereof and same is further supported by the affidavit of one Beril Anyango ouma sworn on even date.
3. Despite service of the application, there does not appear to be any response that has been filed or lodged by the Defendant/Respondent.



4. Nevertheless, despite there being no response to the subject application, it is trite and established law that the Applicant must still canvass and prove the reliefs sought at the foot of the Application.

SUBMISSIONS BY THE PARTIES:

a. PLAINTIFF'S/APPLICANT'S SUBMISSIONS:

5. The subject application came up for hearing on the 13th October 2022, when same was canvassed and disposed of vide oral submissions. For clarity, counsel for the Applicant, raised and amplified two issues for considerations.
6. First and foremost, learned counsel for the Plaintiff/Applicant submitted that the Plaintiff/ Applicant and the Defendant/ Respondent had entered into a contract for sale and purchase of a designated Property. For clarity, counsel pointed out that the contract related to purchase of Unit No. 11 situate on L.N 12825/141, within Runda Area in the City of Nairobi.
7. Further, counsel for the Applicant submitted that despite having entered into and executed the contract for sale/purchase of the designated units, the Applicant herein experienced financial difficulties and thereafter intimated to the Defendant his difficulties to proceed with the impugned transaction.
8. It was the further submissions of counsel for the Plaintiff/ Applicant that thereafter the Defendant wrote back and confirmed and acknowledged the termination of the Contract by and at the instance of the Applicant
9. In any event, counsel for the Applicant further added that the Defendant thereafter failed, refused and neglected to refund the entire stakeholder sum to the Plaintiff in accordance with the Provisions of Clause 7 of the Letter of offer.
10. Nevertheless, counsel further added that despite the process which was undertaken to refund the stakeholder sum/deposit in accordance with clause of the letter of offer, the Defendant/Respondent failed to do so.
11. Owing to the failure by the Defendant/Respondent to refund the stakeholder sum either in accordance with Clause 7 of the Letter of offer or at all, the Plaintiff/ Applicant was constrained to and indeed mounted the subject suit.
12. However, counsel for the Plaintiff/ Applicant added that upon the filing of the subject suit, the Defendant/Respondent made various payments vide installments resting with a Final installments being paid on the 26th November 2019.
13. The Second issue that has been raised and amplified by counsel for the Plaintiff/Applicant relates to the duration for which Interests ought to be computed, reckoned and paid.
14. In this respect, Learned Counsel for the Plaintiff/Applicant has added that Interest ought to be paid for the entire duration, upto and including the date when the last installment was remitted, or paid to the Plaintiff/ Applicant.
15. For coherence, counsel reiterated and underscored that the last installment was paid on the 26th November 2019.
16. Premised on the foregoing, counsel for the Applicant thus implored the Honourable court to find and hold that the subject application is meritorious and thus ought to be granted.



b. DEFENDANT’S/RESPONDENT’S SUBMISSIONS:

17. Though same was duly aware of the scheduled hearing date of the subject application, counsel for the Defendant/Respondent did not attend court or at all.
18. Consequently and in the premises, no submissions were offered or ventilated on behalf of the Defendant/Respondent.

ISSUES FOR DETERMINATION:

19. Having reviewed and evaluated the Application dated the 26th of May 2022, the Affidavit in support thereof and having similarly considered the oral submissions made on behalf of the Plaintiff/Applicant, the following issues are thus pertinent and worthy of determination;
 - i. Whether the instant Application is barred by the Doctrine of Res-judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
 - ii. Whether the Honourable court is Functus Officio.
 - iii. Whether the Ruling of the Honourable court rendered on the 7th October 2021 was explicit, unequivocal and devoid of ambiguity.

ANALYSIS AND DETERMINATION:

ISSUE NUMBER 1

Whether the instant Application is barred by the Doctrine of Res-judicata and by extension the provisions of Section 7 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.

20. It is common ground that upon the filing of the instant suit, the Plaintiff/Applicant and the Defendant/Respondent were involved in negotiations pertaining to and concerning the refund of stakeholder’s sum/ Deposit that had been paid by the Plaintiff at the foot of the Letter of offer dated the 21st day of August, 2015.
21. There is also no gainsaying that in the course of the negotiations and engagements, the Defendant/ Respondent agreed to refund and ultimately refunded the entire stakeholder sum, subject to the Clause on forfeiture of 10% of the said Deposit.
22. On the other hand, upon receipt, acknowledgement and confirmation that the entire stakeholder sum had been paid/ refunded by the Defendant, the Parties herein agreed that what remained outstanding and payable, was the issue of Interest and Costs of the suit.
23. Owing to the foregoing, the advocates for the respective Parties agreed to file and exchange written submissions on the twin Issues, namely, Interests and costs and thereafter, the honourable court was obliged to render a decision thereon.
24. Suffice it to point out that the honourable court thereafter considered the submissions filed by the respective Parties. For completeness, the Court thereafter rendered a ruling dated the 7th October 2021.
25. In this regard, it is appropriate to state and underscore that the honourable court found and observed that the Plaintiff herein was entitled to Interests at court rates from the 23rd February 2016, to date of full payment/refund. See paragraphs 13, 17, 20 and 31 of the ruling rendered on the 7th October 2021.



26. Other than the issue of Interests, the court also calibrated on costs and whether same were payable in favor of the Plaintiff/ Applicant.
27. Suffice it to point out that the Honourable court also addressed the issue of the payment of costs and ultimately came to the conclusion that costs were payable to the Plaintiff/Applicant.
28. Consequently and in the premises, this honourable court dealt with, addressed and adjudicated upon the issues of payments of Interests, the applicable Interests and the duration of payment, on one hand; and the issue of costs, on the other hand.
29. To my mind, having duly and suitably addressed the twin issues of payment of Interest and costs, which the court found to be payable to the Plaintiff/Applicant, it is surprising, nay saddening that the same Plaintiff/Applicant has now reverted to the Honourable court seeking similar reliefs which have since been awarded to and in favour of the Plaintiff.
30. In this regard, I beg to state and reiterate that the filing of the subject application is seriously misinformed and if anything, premised on misapprehension of the terms, implication and tenor of the Ruling of the court rendered on the 7th October 2021.
31. In my humble view, if counsel for the Plaintiff/Applicant had spared a minute, same would have found and established that the Honourable court spoke to Interests awarded to the Plaintiff at court rates reckoned from the 23rd February 2016, to date of full refund and not otherwise.
32. On the other hand, learned counsel for the Plaintiff/ Applicant would also have established, gathered and confirmed that the Honourable court also awarded costs of the suit, to the Plaintiff/Applicant.
33. Premised on the foregoing awards, it would not have been conscionable for the self-same Plaintiff/ Applicant to seek, or re-seek the same reliefs that now color the instant application.
34. Respectfully, the issues that cut across the subject application are indeed issues that this honourable court had dealt with, adjudicated upon and made pronouncements on. In the premises, I come to the conclusion that the subject application is barred by the doctrine of Res-judicata.
35. Without belaboring the point, it is appropriate to invite the attention of counsel for the Plaintiff/ Applicant to the holding in the case of *John Florence Maritime Services Limited & another versus Cabinet Secretary for Transport and Infrastructure & 3 others* [2015] eKLR, where the Court of Appeal held as hereunder;

“See also *Kamunye & others v Pioneer General Assurance Society Ltd* [1971] E.A. 263. Simply put res judicata is essentially a bar to subsequent proceedings involving same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives.

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". Underlining supplied.

36. Other than the foregoing, the issues that are raised at the foot of the instant application would also constitutes and amounts to an abuse of the Due process of the court.
37. Clearly, counsel for the Plaintiff/Applicant ought not to invite the court to make a second pronouncement on issues that have hitherto been pronounced upon with the extreme and profound clarity.
38. In view of the foregoing observations, it is my finding and holding that the doctrine of *Res-judicata* is both relevant and applicable to the subject application. In a nutshell, the Application is barred by the Doctrine of *Res Judicata*.

ISSUE NUMBER 2

Whether the Honourable court is *Functus Officio*.

39. Other than the relevance and applicability of the doctrine of *Res-judicata*, there is also the issue of *Functus Officio*.
40. In my considered view, the Honourable court was hitherto called upon to speak to the issue of Interests, if any, payable to the Plaintiff/Applicant and also, to the issue of costs.
41. Subsequently, the honourable court in execution of its constitutional mandate, duly and appropriately made pronouncements on the twin issues, namely, the Issues of Interests and Costs of the suit, respectively.
42. In any event, there is no gainsaying that the pronouncements that was made by the honourable court, found and held that the Plaintiff/ Applicant, as the successful Party, was duly entitled to Interests and costs of the suit.
43. In view of the foregoing, the question is, having found and held that the Plaintiff was entitled to Interests at court rates, as well as costs of the suit, can the court be invited to have a second bite on the same issues.
44. Unfortunately and in my considered view, the rule of law deprecates and frowns upon the same court dealing with or handling a similar matter that same had hitherto pronounced itself on.



45. For coherence, it is imperative to take cognizance of the doctrine of *Functus officio* and in particular, the legal implications attendant thereto.
46. To amplify the meaning and tenor of the doctrine herein, it is sufficient to adopt and reiterate the holding of the Court of Appeal in the case of *Telcom Kenya Ltd versus John Ochanda* (Suing on behalf and on behalf of 996 former Employees of *Telcom K Ltd*) (2014) eKLR, where the court stated and observed as hereunder;

‘The Supreme Court in *RAILA ODINGA v IEBC* cited with approval an excerpt from an article by Daniel Malan Pretorius entitled, “The Origins of the *Functus Officio* Doctrine, with Special Reference to its Application in Administrative Law” (2005) 122 SALJ 832 in which the learned author stated;

...“The *functus officio* doctrine is one of the mechanisms by means of which the law gives expression to the principle of finality. According to this doctrine, a person who is vested with adjudicative or decision making powers may, as a general rule, exercise those powers only once in relation to the same matter...The [principle] is that once such a decision has been given, it is (subject to any right of appeal to superior body or functionary) final and conclusive. Such a decision cannot be reviewed or varied by the decision maker.”

The doctrine is not to be understood to bar any engagement by a court with a case that it has already decided or pronounced itself on. What it does bar is a merit-based decisional re-engagement with the case once final judgment has been entered and a decree thereon issued. There do therefore exist certain exceptions and these have been captured thus in *JERSEY EVENING POST LTD VS AI THANI* [2002] JLR 542 at 550, also cited and applied by the Supreme Court;

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling or adjudication must be taken to a higher court if that right is available.”

47. Similarly, it is my considered view that this honourable court is also bound by the doctrine of *functus officio* and hence barred from having a second shot on the issues of Interests and Costs, as highlighted at the foot of the current application.

ISSUE NUMBER 3

Whether the Ruling of the Honourable court rendered on the 7th October 2021 was explicit, unequivocal and devoid of ambiguity.

48. It is important to recall and observe that after the Parties herein duly informed the court that what was due and outstanding was the question of Interests and costs, the court complied with and abided by the advice.
49. Subsequently and in pursuance to the advice of the Parties, the court crafted a comprehensive ruling clarifying the entitlement of the Plaintiff to both Interests and costs of the suit.
50. For coherence, the Honourable court made the following observation in the body of the Ruling rendered on the 7th October 2021.



51. For convenience, same are reproduced as hereunder;

Having been aware that same was obliged to refund the deposit within 7 days of the termination or withdrawal from the transaction and having failed to comply with the terms of clause 7, which ipso facto constituted a breach, it is my finding and holding that the Plaintiff is entitled to interests on the deposit, which was withheld and or delayed, as a result of the intransigence on the part of the Defendant.

Having found and held that the Plaintiff is entitled to interests, the next issue that arises is the duration for which the interests ought to be paid and or computed. In this regard, the provisions of Section 26 of the *Civil procedure Act*, Cap 21 Laws of Kenya become relevant.

In a nutshell, it is my finding and holding that the Defendant herein is liable to pay Interest reckoned and or computed from the 23rd February 2016, same being the 7th day (sic) after receipt of the Notice of termination of the contract.

Having considered the relevant provisions of the law and having taken into account various decisions that have been rendered over the years, pertaining to the twin issues of interests and costs, I now make the following orders;

- i. The Plaintiff shall be and is hereby entitled to Interests at court rates with effect from the 23rd February 2016 until the date when the principal sum was paid
- ii. The Plaintiff be and is hereby awarded costs of the suit

52. Arising from the foregoing reproduction, what becomes clear is that the court pronounce itself, both on the Plaintiff entitlement to the issue of Interests, the applicable Interests rate, as well as the duration for which the interest was payable.

53. Perhaps, if the plaintiff was not properly comprehending the meaning, import and implication of the orders of the court, then what counsel for the Plaintiff ought to have done was to invoke the provisions of Section 99 and 100 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, and essentially seek any clerical, arithmetical or such incidental clarification/ interpretation, if any.

54. To my mind, it was not open for counsel for the Plaintiff to re-agitate or regurgitate the same issues and imagine that the Honourable court would blindly re-issue similar orders or otherwise.

55. In my humble view, the orders that were issued by the honourable court vide ruling rendered on the 7th October 2021, were precise, concise and succinct. For clarity, no ambiguity can be imported therein.

Final disposition:

56. Having reviewed the issues that were outlined, highlighted and amplified in the body of the Ruling herein, it is evident that the subject application, ought not to have been filed in the first place.

57. On the other hand, the filing of the instant application was informed by misapprehension on the part of counsel for the Plaintiff/Applicant to appreciate and understand the import and tenor of the ruling of the court.

58. Consequently and in the premises, the impugned application dated the 26th May 2022, is devoid/bereft of merits. In this regard, same be and is hereby Dismissed.



59. Nevertheless, to avoid any back and forth, it is hereby clarified that the Plaintiff/Applicant is entitled to Interests at court rates with effect from the 23rd February 2016 up to date of full payments. For clarity, the date of full payment is hereby certified to be the 26th November 2019.

60. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 31st DAY OF OCTOBER 2022.

OGUTTU MBOYA,

JUDGE

In the Presence of;

Kevin Court Assistant

Ms. B A Ouma for the Plaintiff/Applicant

Mr. Otenyo for the Defendant/Respondent

