



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

**AT MOMBASA**

**Civil Appeal 18 of 2006**

**EVELYN KOWIDO DELPHINE MACHARIA t/a EVEDEL ENTERPRISES.....APPLICANTS**

**VERSUS**

**BAMBURI SUPERMARKET LTD. ....RESPONDENT**

**J U D G M E N T**

This appeal is against the decision of Mr. H.K. Adika, the Learned Resident Magistrate, of 24<sup>th</sup> January 2006 in which the learned Resident Magistrate dismissed the suit and the application before him vide Mombasa SRMCC No. 4044 of 2005.

On appeal, the appellants put forward two main grounds in their memorandum of appeal namely:

- (1) The learned trial magistrate erred in law and in fact when he ruled that the suit before him was *res judicata*.
- (2) The learned Trial Magistrate erred in law and in fact in upholding the Preliminary Objection.

It is now convenient at this stage to state the brief history of this dispute before delving into the arguments on appeal. The record shows that on the 21<sup>st</sup> day of March 2005, Evelyn Kowido and Delphine Macharia trading as EVEDEL Enterprises, the Appellants herein, entered into a tenancy agreement with Bamburi Supermarket Ltd, the Respondent herein. The lease agreement was in respect of shop No. 3 comprised in premises standing on plot No. 3413 MN Nyali, owned by the Respondent. The lease was for a period of 5 years 3 months with effect from 1<sup>st</sup> April 2005. It would appear the Appellants embarked on the business of wines and spirits after obtaining the necessary licenses.

In a notice dated 1<sup>st</sup> September 2005, the Respondent gave the appellants three (3) months notice to terminate the tenancy. Being aggrieved by the turn of events the appellants filed Mombasa S.R.M.C.C.C. No. 4044 of 2005 in which they sought for interalia:

- (a) An order of declaration that the tenancy agreement was a controlled tenancy under the Landlord and Tenant (Shops, Hotels and Catering Establishments Act Cap.301 Laws of Kenya.
- (b) An order of injunction to restrain the Respondent from terminating the tenancy or evicting the appellants from the demised premises pending the hearing and determination of Mombasa B.P.R.T. case No. 164 of 2005.

It is now apparent that in response of the quit notice the appellants filed a reference before the Business Premises Rent Tribunal on 2/12/2005 to challenge the notice.

At the time of filing the suit, the appellants also filed an application by way of a motion under Sections 4,6 and 12 of Cap.301 Laws of Kenya and under Sections 3A and 63(c) and (e) of the Civil Procedure Act whereby they sought for temporary orders of injunction to restrain the Respondent from evicting the appellants pending the hearing and determination of the suit.

The Respondent filed a defence against the plaint. He also filed a replying affidavit and a notice of Preliminary Objection to resist the motion. When the motion came up for hearing the Preliminary Objection was heard first. The end result of that preliminary objection is that the entire suit plus the motion were dismissed hence this appeal.

I have already set out the grounds of appeal stated in the memorandum of appeal. The Respondent raised one preliminary point before the learned Resident Magistrate, that is, that the suit was res judicata. The objection is spelt out the notice of preliminary objection dated 9<sup>th</sup> January 2006 and in paragraphs 6 and 7 of the defence of the same date. Let me now reconsider and analyze the arguments put to the learned Resident Magistrate. It was the argument of Mr. Nyabena advocate for the Respondent before the trial Resident Magistrate the suit and the motion before that court should be dismissed because the issues had been settled by a court of concurrent jurisdiction in Mombasa S.R.M.C.C.C. No. 3522 of 2005 in its ruling of 29<sup>th</sup> November 2005. In that ruling the appellants were given limited order of injunction to maintain the status quo upto 1<sup>st</sup> January 2006. It was the submission of Mr. Nyabena that the issues, parties and the pleadings in S.R.M. C.C.C. No. 3522 of 2005 were essentially the same as those raised in S.R.M.C.C.C. No. 4044 of 2005.

Mr. Sangoro advocate for the appellants held the view that the suit was not res judicata because the issues, parties and pleadings were not similar. He attempted to differentiate the two suits in a classical case in which one can easily say that Mr. Sangoro engaged in an hair splitting exercise. The learned trial Resident Magistrate considered the issues and gave a brief ruling in which she agreed with the submissions of Mr. Nyabena for the Respondent and proceeded to dismiss the entire suit. Fortunately the same parties with their advocates who participated in the case before the learned Resident are now before me. They argued near similar grounds as they did before the learned Resident Magistrate. Though the appellants have raised two grounds of appeal in their memorandum of appeal, in my view, it is essentially one ground of appeal, that is to say that the trial Resident Magistrate erred when he upheld the preliminary objection on the basis that the suit was resjudicata. I have reconsidered the arguments and pleadings placed before the trial Resident Magistrate. The facts laid before the subordinate court in Mombasa S.R.M.C.C.C. No. 4044 of 2005 are similar to those raised in Mombasa S.R.M.C.C.C. No. 3522 of 2005. This fact can be illustrated by comparing the Notice of Motion dated 19<sup>th</sup> December 2005 filed with Mombasa S.R.M.C.C.C. No. 4044 of 2005 and the Chamber Summons dated 25<sup>th</sup> October 2005 filed in Mombasa S.R.M.C.C.C. No. 3522 of 2005.

In respect of the motion the main prayer is as follows:

*“That this court be pleased to issue a temporary injunction to the applicant to restrain the respondent whether by itself, its servants, employees, staff, Director, Manager, agents or any person or persons whatsoever or whomsoever from locking the door or the doors or window grills of the shop or from evicting the applicants or from otherwise interfering with the applicants quiet enjoyment pending the hearing and determination of the tribunal case No. 104 of 2005 before the Business Premises Rent Tribunal.”*

The main prayer in the chamber summons may be reproduced as follows:

*“That this court do issue a temporary injunction against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants jointly and severally to restrain them by themselves their agents, servants or employees from breaking the tenancy agreement dated 21.3.2005 whether by issuing a notice or notices to terminate the tenancy or from*

terminating the tenancy, from sending the 3<sup>rd</sup> defendant or its guards or employees or other guards or persons whatsoever or whomsoever or dogs to the plaintiffs premises known as shop No. 26 situated in plot No. 3413 MN/Nyali, hereinafter called "The premises" under the tenancy agreement or from harassing, intimidating or otherwise interfering with the plaintiffs or their employees and customers in any manner whatsoever pending the hearing and determination of this suit."

The bottom line of the many long winding words in the above prayers is that the appellants were seeking an order of injunction to maintain the status quo pending either the hearing of the suit or the case filed at the Business Premises Tribunal otherwise the rest is a question of language semantics and polemics which is not the concern of courts of Law. It has been argued that there are different parties who are involved in the two cases. I have perused the pleadings, the affidavits plus the annexures attached thereto. The backbone of the two cases is the tenancy agreement of 21.3.2005 over premises standing in plot no. 3413 MN Nyali. The tenancy agreement is between Evelyn Kowido, Delphine Macharia t/a Evedel Enterprises on one hand and Bamburi Supermarket Ltd on the other hand. Whatever parties are added, in my view, are peripheral otherwise the above named trio are core to this dispute.

I have not had the advantage of perusing the plaint in Mombasa S.R.M.C.C.C.No.3522 of 2005. The record presented to this court does contain that pleading. I have also perused the file that was before the subordinate court and I have not seen one. I am convinced the parties and the learned Resident Magistrate only relied on the chamber summons and the supporting affidavit annexed to the affidavit of Prem Gupta sworn on 3<sup>rd</sup> day of January 2006. In the end I cannot fault the finding of the learned Resident Magistrate in respect of the Motion. It is evident that the application before that court had earlier been decided on the basis of a near similar application on 29<sup>th</sup> November 2005. That order has not been appealed against though as of now the same has lapsed. The cardinal point is that a court of concurrent jurisdiction had made findings on the issues raised. Those findings have not been faulted. He should have however struck out their suit but not to dismiss.

Though the plaint in Mombasa S.R.M.C.C.C. No. 3522 of 2005 was not availed to the court below and to this court, it is not denied that the main suit is still pending for hearing before the subordinate court. The trial Magistrate therefore erred when he dismissed the entire suit. He misdirected himself in the matter because the suit is still pending hence the principle of res-judicata did not apply to the main suit. It only affected the interlocutory application for injunction. Had he seriously considered the material placed before him he would not have dismissed the suit but he would have come to the conclusion that the matter was res-subjudice hence he should have stayed the suit instead under section 6 of the Civil Procedure Act. The doctrine of res-judicata differs from res-subjudice in that firstly, the former relates to a matter already adjudicated upon while the latter relates to a matter pending judicial inquiry. Secondly, section six (6) bars the trial of a suit in which the matter directly and substantially in issue is pending adjudication in a previously instituted suit, section 7 bars the trial of a suit or an issue in which the matter directly and substantially in issue has already been adjudicated upon a previous suit. The doctrine of res-judicata is based on three maxims:

First, that no man should be vexed twice over the same cause.

Secondly, it is in the interest of the state that there should be an end to litigation and thirdly, that a judicial decision must be accepted as correct. In this matter the appellants have attempted to litigate in installments. If well advised, the appellants would not have wasted their time and resources and that of the subordinate court in filing a new suit. The available remedy was anticipated in law in the rules governing amendments. Unfortunately I am not allowed to advise litigants but I am only enjoined by law to state and interpret the law and the rules on the basis of evidence, precedents, submissions, pleadings and so on.

In the final analysis this appeal partially succeeds. The same is allowed in the following terms:

(a) The preliminary objection is sustained in that the order dated 24<sup>th</sup> January 2006 is set aside and substituted with an order striking out the motion dated 19<sup>th</sup> December 2005.

(b) The suit is re-instated and the proceedings in Mombasa S.R.M.C.C. No. 4044 of 2005 are stayed on the basis that the same is res-subjudice.

(c) The appellants have partially succeeded hence they are entitled to half the costs of the appeal.

**Dated and delivered at Mombasa this 24<sup>th</sup> day of March 2006**

**J.K. SERGON**

**J U D G E**

In open court in the presence of

Nyabena for the Respondent and

Mr. Sangoro for the Appellant.