



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT NAIROBI (MILIMANI COMMERCIAL COURTS)**

**Civil Case 1190 of 1994**

**PANCRAS T. SWAI .....PLAINTIFF**

**VERSUS**

**KENYA BREWERIES LTD..... DEFENDANT**

**RULING**

On 7<sup>th</sup> March 2005, the Defendant filed a Chamber Summons pursuant to the provisions of Order 25 rules 1, 5, 6 and 7 of the Civil Procedure Rules, as read together with Section 3A of the Civil Procedure Act.

In a nutshell, the defendant was asking the court to dismiss the plaintiff's suit, for the reason that the plaintiff had failed to provide security for costs as ordered by this court on 10<sup>th</sup> December 2004.

The plaintiff's first line of response to that application was a "Notice of Preliminary Objection and/or Supplementary Grounds of Opposition" dated 26<sup>th</sup> October 2005. When the application came up for hearing on 27<sup>th</sup> October 2005, the plaintiff raised his said preliminary objection. In that regard, although the plaintiff had set out a total of six issues in his Notice, he limited himself to only one ground.

Mr. Kyalo, advocate for the plaintiff, first pointed out that the application dated 3<sup>rd</sup> March 2005 was seeking to dismiss the suit for the plaintiff's failure to provide security for costs, as ordered by the court on 10<sup>th</sup> December 2004. It was his submission that the application dated 3<sup>rd</sup> March 2005 was res judicata, as the relief sought was also in the earlier application dated 27<sup>th</sup> July 2004, which was determined by the Hon. Njagi J. on 10<sup>th</sup> December 2004.

It was contended that the doctrine of res judicata made it incumbent on every party in a court case to urge his whole case at one go, instead of urging it in bits.

The plaintiff also submitted that the said doctrine served to prohibit a party from either re-opening a subject matter which had already been dealt with or one which could have been dealt with. In that regard, there is no doubt that the following ruling by WIGRAM V. C., in **HENDERSON –VS- HENDERSON [1843 – 60] ALL E.R. 378 at 381**, is still good law;

**"...where a given matter becomes the subject of litigation in, and of 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 a 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 case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, 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."**

Bearing those words in mind, the plaintiff submitted that the applicant ought to have either exhaustively argued its application, or alternatively, if it had wished to leave out any part thereof, for the future, it should have formally withdrawn the said part. In this instance, it is said that the defendant had presented and argued its application dated 27<sup>th</sup> July 2004 as if it was arguing the whole application. Therefore, the plaintiff holds the view that the defendant should not be permitted to urge a matter which was already before the court, in the earlier application.

But, do the principles of res judicata apply to only suits, or also to applications, one might ask.

In the case of **MBURU KINYUA –VS- GACHINI TUTI [1978] KLR 69 AT 81**, the Hon. LAW J. A. held that res judicata did not only apply to suits, but also to applications. A similar view was expressed by the Hon, WAMBUZI J. A., in that case.

More recently, the Court of Appeal unanimously restated the legal position, even more forthrightly in the case of **UHURU HIGHWAY DEVELOPMENT LTD. –VS- CENTRAL BANK OF KENYA & 2 OTHERS, CIVIL APPEAL NO. 36 OF 1996**, at page 10 thereof, where they said;

**"... there must be an end to applications of similar nature; that is to say further, wider principles of res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation."**

For those reasons, the plaintiff feels that the defendant is seeking to re-agitate a matter which was decided by the Hon. Njagi J.; and it should thus be stopped from doing so. The court was therefore invited to dismiss the application dated 3<sup>rd</sup> March 2005, as it was res judicata.

In response to the preliminary objection, the defendant emphasized that it was not seeking to re-agitate any issue which had been determined by the court. It was pointed out that on 10<sup>th</sup> December 2004, the court had ordered the plaintiff to provide security for costs, in the sum of U.S. \$40,000 within twenty-one days. In his ruling the learned judge did further order that each of the parties was at liberty to apply.

Indeed, the plaintiff is said to have filed an application dated 4<sup>th</sup> March 2005, through which he is seeking the enlargement of time to deposit the security. He is also seeking a review of the order dated 10<sup>th</sup> December 2004.

As far as the defendant was concerned, the plaintiff filed his application on the strength of the court's order granting leave to each of the parties to apply. The application was determined on 1<sup>st</sup> August 2005, and the court did allow the plaintiff a further thirty days to deposit the security.

In the light of those developments, the defendant holds the view that the plaintiff should not seek to benefit from the leave granted by the court, whilst at the same time, standing in the defendant's path when it wished to pursue its own application.

The plaintiff's reaction to that submission is that when the learned judge granted liberty to each party to apply, the parties could only make applications which were consequential to the orders of 10<sup>th</sup> December 2004. The leave did not, in the plaintiff's understanding, extend to asking the court to determine an issue which had already been determined.

I have given due consideration to all the submissions made. First, it is clear that the defendant's

application is founded on the court orders dated 10<sup>th</sup> December 2004. As I understand it, the defendant is saying that the plaint should be dismissed because the plaintiff failed to comply with the order requiring him to raise the security for costs.

There was no way whatsoever that the defendant could have known, prior to 10<sup>th</sup> December 2004, that the court would definitely direct the plaintiff to raise a deposit sum of U.S. \$40,000; or that the court would direct that the deposit be raised within twenty-one days. Also, the defendant could not have known that the plaintiff would thereafter fail to raise the deposit amount within the prescribed period of time, or even within the extended period of time. Therefore, in my considered opinion, there was no way that the matters now raised in the application dated 3<sup>rd</sup> March 2005 could have been already determined by the court, before the very foundation thereof was in place.

LAW J. A. held as follows, at page 81 of the case of MBURU KINYUA –VS- GACHINI TUTI (supra)

**"It was held as long ago as 1932 by the Court of Appeal for Eastern Africa that it is only when the facts on which the party is relying in second proceedings were not known to him at the time of the former proceedings that the defence of *res judicata* cannot be sustained."**

Consequently, as I have already held that the defendant could not have known, prior to the ruling of 10<sup>th</sup> December 2004, that the plaintiff would fail to comply with the order to deposit the security within the time specified by the court; the plea of *res judicata* herein cannot be sustained. Accordingly, the Preliminary Objection is hereby overuled. The costs of the said preliminary objection are awarded to the defendant.

Finally, as I conclude this ruling, I do wish to tender my most sincere apologies to the parties herein, for the delay in delivering this ruling. As the Executive Officer, Mr. J. M. Ngila, did notify you on 8<sup>th</sup> May 2006, the court file has been missing since last November. Therefore, it was only after the file was traced in the Registry that it was made available to me, to write this ruling.

Dated at Nairobi this 19<sup>th</sup> day of May 2006.

**FRED A. OCHIENG**

**JUDGE**