REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

Civil Appeal 150 of 2001

HARON MOHAMED ……..…….…… APPELLANT

VERSUS

KENYA SHELL LTD. …….. RESPONDENT

J U D G MENT

This is an appeal from the ruling of the Senior Principal Magistrate given on 8th October, 2001 in Mombasa CMCC No. 4806 of 1998 dismissing the Appellant's claim in that case as being res judicata. Res judicata, though only a common law doctrine whose policy objective is the prevention of repetitive litigation, has in Kenya been put on firm statutory basis by Section 7 of the Civil Procedure Act which enacts that:-

"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."

How was this doctrine raised in the case giving rise to this appeal? To answer this question an examination of the pleadings in the two cases is imperative. In Mombasa CMCC No.3634 of 197 the Appellant in this appeal had sued the Respondent claiming a mandatory injunction, damages and costs. It was alleged in that case that the Respondent had dug a well or a pit on its piece of land which abuts that of the Appellant for purposes of collecting storm water which was flowing to the Respondent's petrol station. The well was inadequate to hold the large volume of water diverted to it from the petrol station.

The overflow broke the Appellant boundary wall, flooded his land and destroyed his guards' house. The Appellant therefore sought a mandatory injunction directing the Respondent to abate the nuisance by closing and refilling up the well and damages for the loss occasioned. The Respondent did not enter appearance or file a defence in that case. The Appellant after obtaining interlocutory judgement formally proved his case and the court issued an order directing the Respondent to close the said well and award the Appellant Shs.100,000/= "in general damages for inconvenience and damage done to the plaintiff's wall."

In a subsequent case by the Appellant against the Respondent the Appellant pleaded that having obtained the injunction order against Respondent the Respondent "delayed in executing the works for a period of 3 ½ months and further more did not perform the works in a competent and diligent manner and consequently the plaintiff has suffered damage and loss." The particulars of the fresh damage were given as follows:- "(a) The Defendant agents (sic) excavated the soil supporting the boundary wall of the plaintiff and the same is now weak at the foundation and is liable to collapse any time.

(b) The pit which was to be filled up was not properly filled up and it has come (sic) a menace to the plaintiff and his family and it requires further works including materials, labour and transport. (c) The private road was constructed by the plaintiff and his family and much money was invested. The defendant's agents have destroyed the same. The road is on the business side of the plot." To rectify the above matters [and] avert the damages and injury he is suffering", the plaintiff claimed Shs.500,000/= plus interest and costs. When this latter case went for hearing before the Senior Principal Magistrate counsel for the Respondent raised a preliminary objection arguing that the claim was res judicata, the same having been decided in Mombasa CMCC No.3634 of 1997. The court upheld the objection and dismissed the suit with costs provoking this appeal. As is clear from Section 7 of the Civil Procedure Act reproduced herein above, for the plea of res judicata to succeed the matter in the subsequent suit must have been directly and substantially in issue in the former suit. Commenting on the same point the court of Appeal for Eastern Africa in Javda Karsan – vs- Harman Singh Mbogal [1953] 10 EACA 74 stated that "the subject matter of the subsequent suit must be covered by the previously instituted suit…."

Looking at the pleadings in the two suits which I have summarised herein above it is clear to me that the claims are not the same. In the first suit the Appellant claimed for damages for the loss already suffered although he did not quantify it. In the second case the claim is for subsequent damage and nuisance. In Canadian case of Toronto General Trusts Corp. –vs- Roman [19620] 37 DLR (2d) 16 (Ontario CA) where, notwithstanding a judgement against him in an action for detinue for the return of shares, the defendant nevertheless failed to return them for a considerable period of time. A second action for damages for that detention was allowed.

A continuing nuisance therefore gives rise to a fresh cause of action each time damage occurs as a result of it, and accordingly successful actions can be brought. In this matter the second case was for a continuing nuisance and I find that the Appellant's claim in Mombasa CMCC No. 4806 of 1998 was not res judicata. I therefore allow this appeal with costs here and in the court below to the Appellant.

DATED and delivered this 29th day of April, 2005.

D.K. MARAGA

JUDGE