REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU

Civil Appeal 172 of 2002

RIFT VALLEY SPORTS CLUB….....APPELLANT

VERSUS

PATRICK JAMES OCHOLLA.....RESPONDENT

JUDGMENT

The respondent filed a suit against the appellant, his former employer, in **CMCC No. 1431 of 2002** alleging that his services were terminated unlawfully and claimed three months salary in lieu of notice, unpaid salary, retirement benefits and other dues, all amounting to **Kshs.2,637,850/-.** He then filed an application by way of a Chamber Summons praying for an injunctive order to restrain the appellant from evicting him from a house which he occupied in the appellant's compound pending the finalisation of the suit. He stated that the appellant had ordered him to vacate its premises when it had not paid him his dues under the contract of employment.

The respondent had earlier filed High Court Civil Suit **No. 133 of 2002** against the Chairman of the Board of Directors of the appellant and against the appellant wherein he challenged the termination and/or suspension of his services and in an interlocutory application sought *inter alia* an injunction to restrain the defendants therein from suspending and/or dismissing him from employment or interfering with performance of his duties. The said application was dismissed with costs on 31st July 2002. Immediately upon delivery of the said ruling, the parties agreed by consent that the plaintiff (respondent) could continue in occupation of the club house for the next seven days.

On 10th August, 2002 or thereabout the respondent filed **CMCC No. 1431 of 2002** together with the application to restrain the appellant from evicting him from the house which he occupied pending the finalisation of the suit. One of the grounds upon which the said application was resisted was that the matter had been dealt with by the High Court and was therefore res judicata. In a fairly short ruling, the trial magistrate stated as follows:-

> ***"I feel from the proceedings before this court that the claim is not the same. It is not true that this case is res judicata. The case before the High Court was terminated and was not heard fully. What the plaintiff seems to try is that pending the determination of this suit, the defendant be restrained from evicting him. It is not disputed that he had not been paid his dues and I feel it would be unfair to have him vacate the premises before the suit is determined. Having heard the application, I feel inclined to grant the orders".***

It is against that ruling that the appellant appealed. The appellant stated in its memorandum of appeal that the learned magistrate erred in law in failing to find that the plaintiff's application was res *judicata* by virtue of the proceedings and ruling in **HCCC No. 133 of 2002.** The appellant also stated that the learned magistrate erred in law and fact in finding that the injunction was merited on the grounds that the

respondent had not yet been paid his undetermined dues.

The appellant further stated that the respondent's claim was a liquidated one and damages would have been adequate. And lastly, the appellant faulted the learned magistrate for failing to consider binding decisions of the Court of Appeal on the same subject matter and giving a ruling which it considered to be unsustainable.

The respondent's counsel informed the court that the respondent had already vacated the appellant's house and so this judgment will not be of any consequence insofar as the respondent's expressed interest in the said house are concerned.

Both counsel for the parties herein addressed the learned magistrate at considerable length and cited various decisions from both the High Court and the Court of Appeal and in particular, ***OCHIENG NYAMOGO & ANOTHER VS KENYA POSTS & TELECOMMUNICATIONS Civil Application No. NAI 204 of 1993 and ERICK J. MAKOKHA & 4 OTHERS VS LAWRENCE SAGINI & 2 OTHERS*** Civil Appeal No. 20 of 1994.

The last decision was a five-Judge unanimous decision wherein the facts were in all fours with those that gave rise to this appeal. In the ***ERICK MAKOKHA'S*** case, the appellants were lecturers employed by the University of Nairobi whose services were terminated by their employer and they filed an application to restrain their employer from evicting them from the University residential houses which they were occupying by virtue of their employment pending the hearing and determination of their suit which was pending at the High Court. Their application was rejected and the court gave them a seven-day respite to enable them file an application to the Court of Appeal. The court of Appeal upheld the decision of the High Court and held that in the event that the appellants were successful in their suit for wrongful termination of their appointments, their proper legal remedy was only in damages.

The learned magistrate trashed such a forceful decision of the Court of Appeal by failing to give it any consideration at all and proceeded to grant an injunction in a ruling which was devoid of any legal reasoning. A judicial decision must be based on proper legal grounds but never on feelings alone, no matter how strong such feelings may be. The doctrine of ***stare decisis*** is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any reasons for doing so.

Secondly, the High Court had already made a determination on the respondent's application for an injunction to restrain the appellant from suspending and or dismissing him from employment and that decision was well known to the learned magistrate. The High Court had given the respondent a period of seven days to continue in occupation of the appellant's house. That order was made by consent. It was, in my view, an abuse of the court process for the respondent to go and file an application in the subordinate court seeking more or less the same orders that were rejected by the High Court.

In ***GREENFIELD INVESTMENTS LTD VS BABER ALIBHAI MANJI***, Civil Appeal No. 160 of 1997, Gicheru J. A. (as he then was) quoted a passage in ***GREENHALGH VS MALLARD*** [1947] 2 All E. R. 255 at Pg. 257 which I find to be apt in the matter. It stated as follows:-

> **"……res judicata for this purpose is not confined to the issues which the court is actually asked to decide, but it covers issues or facts which are so clearly part of the subject matter of the litigation and so clearly could have been raised that it would be an abuse of the process of the court to allow a new proceeding to be started in respect of them."**

Mrs. Odhiambo for the respondent contended that the matter that was before the magistrate was not ***res judicata*** by virtue of the High Court decision in that the parties were different. While in the High Court case the respondent had sued Mr. E. G. Njuguna as the Chairman of the Rift Valley Sports Club together with the club as opposed to the position in the Chief Magistrate's court where he had sued the club alone,

the two suits were based on the same facts and the reliefs sought were very similar.

However, irrespective of the minor differences between the parties in the two suits and the reliefs sought therein, what is important is that the issue of the respondent's occupation of the appellant's house was so central in both matters that it was or ought to have been clearly a subject of determination in the High Court matter and to bring it up in other proceedings in the subordinate court after the High Court ruling was clearly an abuse of the court process.

All in all, I find that the injunction that was granted was totally unmerited and I allow this appeal and set aside the orders of the learned magistrate. The appellant will have the costs of the appeal.

DATED, SIGNED & DELIVERED at Nakuru this 15th day of June, 2005.

D. MUSINGA

JUDGE

15/6/2005