REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO 2222 OF 1999

AFAB ESTABLISHMENTS LIMITED ……. 1ST PLAINTIFF

GANICON LIMITED ……..……. 2ND PLAINTIFF

CHEMTECH PRODUCTS LIMITED ……...…… 3RD PLAINTIFF

INSTRUMENTATION AND ALLIED

ELECTRONICS LIMITED ……..……... 4TH PLAINTIFF

GLASS EAST AFRICA LIMITED ……. 5TH PLAINTIF

AFRO-LANKA LIMITED ……...…… 6TH PLAINTIFF

MINES OF AFRICA LIMITED …….. 7TH PLAINTIFF

VERSUS

NAJMUDIN JIWAJI GANIJEE ……..…… 1ST DEFENDANT

ANDREW DOUGLAS GREGORY ……. 2ND DEFENDANT

ABDUL ZAHIR SHEIKH……..…….. 3RD DEFENDANT

RULING

In their Plaint dated 22nd November, 1999, the Plaintiffs averred that they were tenants of the 1st Defendant having occupation and possession of several portions of Land Reference Number 12464 (hereinafter referred to as “the Property”) which is owned by the 1st Defendant with another person who is not a party to this suit. At the time of filing the suit, the Plaintiffs also filed an application substantially under Order XXXIX Rules 1, 2, 3 and 9 of the Civil Procedure Rules (hereinafter referred to as “the Rules”) seeking, interlocutory injunctions. I heard that application and decided it against the Plaintiffs on

4th December, 2001. There is no evidence that the Plaintiffs appealed against that decision.

On 16th May, 2003 the Honourable Mr Justice Mwera in another suit filed by Ganijee Glass Mart Limited (GGM), Pan African Glass Industries Limited (PAGIL) and the 1st Defendant against First American Bank of Kenya Limited (the Bank) declared as invalid, inter alia, the charge over the property which had been created by its proprietors in favour of the Bank. That was in Milimani HCCC No 1821 of 1999.

How did the suits arise?

From the affidavits sworn earlier on behalf of the contending parties and the decision of Judge Mwera, it is clear that GGM, PAGIL and another company charged their properties by way of a debenture to the Bank. The Debenture also required the execution of charges over certain properties as collateral. So the Property was among others, charged by the 1st Defendant and his co-proprietor to the Bank as collateral to the Debenture. In exercise of its powers under the Debenture and The Statute, the Bank appointed the 2nd and 3rd Defendants as Receivers and Managers of all the properties and assets of GGM and PAGIL charged to it by and under the Debenture.

One of the steps the Receivers took was to take possession of the Property where GGM and PAGIL operated principally. The Plaintiffs, claiming to be tenants of portions of the Property, were aggrieved by that action and brought this suit together with the application I have alluded to earlier. I made a Ruling dismissing the Plaintiffs' application for interlocutory injunction. As I pointed out in that Ruling, the contending parties had filed numerous affidavits (more than 20) and which were quite voluminous (ranging in the region of a thousand pages). It did not help matters that those affidavits were contradictory in many aspects. Faced with that situation, I was of the view that a visit to the Property would assist the court in the resolution of the contest between the parties. On 31st July, 2000, I visited the Property in the presence of Counsel for the Parties and from what I saw, I did not believe the Plaintiffs' claim that they were indeed tenants of the Property. On that occasion, it was clear to me that most of the Property on the premises belonged to the debtors under the Debenture. I then formed an opinion that the Plaintiffs' claim was a fabrication designed to defeat the Receivers' powers under the Debenture.

Now that the charge over the Property has been invalidated, the 5th and 6th Plaintiffs have filed a new application under Order XXXIX Rule 7 (1) (a) and (b) of the Rules, Section 3A of the Civil Procedure Act (Cap 21) and all other enabling provisions of the law in which they seek the following orders:

> ***"1. THAT this Honourable Court do authorize the 5 th and 6 th 7th (sic) Plaintiffs (Actually, the application is by the 5 th and 6 th Plaintiffs only) to enter upon and in spect the business premises on L R No 12464 …***
>
> ***2. THAT this Honourable Court do issue a mandatory injunction compelling the 2 nd and 3 rd Defendants to vacate the suit premises and to hand over possession thereof to the 5 th and 6th Plaintiffs …***
>
> ***3. (Costs)".***

In response to the application, the 2nd and 3rd Defendants filed a Notice of Preliminary Objection on the following grounds:

> ***(a) The issues raised in the Notice of Motion were considered and rejected by this Honourable Court in a Ruling dated 4 th December, 2001. This Honourable Court has no jurisdiction to adjudicate the same issues within the purview of the Notice of Motion***
>
> ***(b) The issues raised in the Notice of Motion were considered and rejected by this Honourable Court in the aforestated Ruling and are therefore res judicata***

(c) The jurisdiction of this Honourable Court has been invoked unprocedurally and this Honourable Court therefore lacks jurisdiction to grant the orders sought."

At the hearing of the Preliminary Objection, the main argument advanced was that the application under reference was res judicata .

The matter of ***res judicata*** is dealt with under Section 7 of Cap 21. That Section provides as follows:

"No court shall try any suit or issue in which the matter directly and substantially in i ssue 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."

What are the main ingredients of res judicata? The Judges of Appeal in Uhuru Highway Development Limited vs Central Bank of Kenya & Others Civil Appeal No 36 of 1 996 set them out as follows:

(a) there must be a previous suit in which the matter was in issue

(b) the parties in the former suit must be the same or litigating under the same title as the parties in which the plea is raised

(c) the matter in issue must have been heard by a competent court

(d) the issue must have been raised once again in a fresh suit.

Having listened to the Counsel for the parties, it appeared to me that there was no dispute that the parties to the former application are the same as the ones to the application against which the plea of res judicata is raised. There is also no dispute that the court which heard the earlier application was competent to do so. Although the Act refers to the word "suit" there was no argument that the principle of res judicata also applies to a fresh application in the same suit. This was, in fact, settled in the Uhuru Highway case. The only question raised by the Preliminary Objection for my decision is, therefore, in respect of ingredient (d) above: Is the issue (or issues) raised in the application objected to similar to the issue (or issues) raised in the application which I decided on 4th December, 2001?

Mr Nthiga, for the 5th and 6th Plaintiffs, and whose application was the subject of the Preliminary Objection, argued that his clients' application could not be said to be res judicata since it was brought under different provisions of the law and sought different prayers from the earlier application. With most profound respect, I do not think that Mr Nthiga's argument appreciates the real scope of res judicata. Res judicata looks at not only the form but also (and more so) at the substance, at the real issues raised earlier. As Mr Ngatia for the 2nd and 3rd Defendants pointed out, the main issue which formed the basis of my earlier decision was whether the Plaintiffs were tenants of the 1st Defendant. In my view, that would have entitled them to the orders which they sought. I found that they were not. The resolution of the application which is challenged, it would appear to me, will also depend substantially on the same issue. This would have concluded this matter but in fairness to Mr Nthiga who opposed the objection with much vigour, I would wish to say more on this subject.

According to Mr Nthiga this court did not make any conclusive finding on the issue of tenancy. His view was supported by the following authorities:

(a) In ***Uhuru Highway*** case the Judges of Appeal did not dispute that opinions expressed on the merits of a case at the stage of interlocutory proceedings for the issuance of a temporary injunction are not binding on the trial court.

(***b) In Mrao Limited vs First American Bank of Kenya Limited Civil Appeal No 39 of 2002*** it was suggested that in interlocutory proceedings the court should not express itself conclusively on matters of fact.

Referring to the case of ***Kibogy vs Chemweno (1981) KLR*** 35 Mr Nthiga argued that since the issue of tenancy had not been finally decided, it could not constitute res judicata. However, the facts in ***Kibogy case*** were different from the facts here. In that case, the Court of Appeal held that there was no res judicata in respect of the second application since the Judge who heard the first did not hear it on merit having held that he did not have jurisdiction to do so. In this case, I heard the first application on merit and came to the conclusion that I did. My decision was interlocutory and what I found then cannot bind the trial court. However, one cannot apply the same reasoning to sneak in a new application raising the same issues. Having found that res judicata applies to applications, it follows that interlocutory findings on matters of fact will constitute res judicata where a similar application is filed in the future. This is what the Court of Appeal had in mind when it said as follows in ***Uhuru Highway***

: "There is not one case cited to show that an application in a suit once decided by courts of competent jurisdiction can be filed once again for rehearing. This shows only one in tention on the part of the legislature …. That is to say, 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."

The ratio of that decision is obvious. If there was no bar to filing of similar applications, the courts would be inundated with similar applications, or applications raising same or similar issues. There would be no end to this, defeating the cardinal principle of justice that there must be an end to litigation. In the result, and for reasons that I have outlined, I find the Preliminary Objection dated 3rd February, 2004 by the 2nd and 3rd Defendants merited and I uphold the same with costs.

Dated and delivered at Nairobi this 10th day of August, 2004.

ALNASHIR VISRAM

JUDGE