REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC MISCELLANEOUS CASE NO. E3 OF 2020

MONICA WAMBUI KANGANGI.....1ST APPLICANT

ELIZABETH MUTHONI WAMBU.....2ND APPLICANT

VERSUS

JOHN MAINA MUGO.....RESPONDENT

RULING

Summary of facts

The Applicants herein are judgement-debtors in Civil Suit No 57 of 2010 filed at the Senior Resident Magistrate Court Kerugoya, in which the Respondent herein successfully moved the court and was awarded a refund of Ksh. 750,000/= plus interests at 30% per annum in a transaction involving the sale of land, which transaction had gone sour.

Aggrieved by the decision of the trial court, the Applicants appealed against the decision in ELC Appeal No. 11 of 2017. Vide a judgement dated 14th March 2018, the Appeal was dismissed for lack of merits. The court however varied the award given by the trial court in the following words:

> ***'….The trial Magistrate's judgement is varied to the extent that judgement be entered for the sum of Ksh. 750,000/=. The Respondents shall also be entitled to costs of the suit and interest at Court Rates."***

About a year after the judgement was delivered, the Applicants had only refunded the Ksh.750, 000/= and nothing more. The Respondent herein thus filed a Notice to Show Cause on 12th February 2019 why the Applicants should not be committed to civil jail. On 30th May 2019, the Applicants filed a Preliminary Objection, with the main ground being that the Judgement did not grant interest on the principal amount of Ksh. 750,000 but only costs. The Respondent herein opposed the Applicant's objection averring that the objection was aimed at delaying execution of the decree and unjustly denying him interest at court rate as clearly decreed by the Court.

0n 31st December 2019, a Ruling on the Applicant's objection was delivered, with the court noting that the judgement was explicit that the interest rate applicable was at court rate and that the Applicants had selectively read the judgement and concluded that there was no order as to interest. The Preliminary Objection was thus dismissed with costs. Following the ruling, the Respondent and judgement creditor filed an application for execution of decree on 28th January 2020 and a Notice to Show Cause directed at the Applicant judgement debtors on the following day. On 19th February 2020, the Applicants swore a joint supporting affidavit contesting the Ruling delivered on 31st December 2019 on the basis that the ruling was delivered in the absence of both parties and their advocates, a fact which deprived them of the opportunity to appeal the ruling within the required timeframe. They aver that they only came to learn of the Ruling upon receipt of the Respondent's show cause letter dated 29th January 2020. They disagree with the amount captured in the Respondent's application for execution, wherein the decretal amount is indicated as Ksh. 1,135,975.00 and they instead hold that it ought to be Ksh. 750,000.000. They further contest the inclusion of Ksh. 10,000 indicated as subsequently incurred, holding that the only outstanding amount is Ksh. 159,036, being the interest accrued.

On 12th October 2020, the Applicants filed the present Miscellaneous Application praying for leave to appeal out of time against the ruling and orders made on 31st December 2019. The application is supported by the 1st Applicant's affidavit and a certificate of urgency. The 1st Applicant's position is that the Applicants intend to raise a very weighty matter on appeal, that is, whether interest can be levied on the principal amount during the period when the amount is already deposited in court. She avers that

the Applicants are aged 80 and 96 years old and would suffer irreparable harm if committed to civil jail. The Applicants thus prayed for the matter to be certified as urgent and for a stay of further proceedings to be granted pending the hearing of the application.

On 13th October 2020, the Court certified the Applicant's application as urgent, fixed the matter for the inter-partes hearing on 22nd October

2020 and granted a temporary stay of proceedings and execution pending the inter-partes hearing. On 19th October 2020, the Respondent herein filed a notice of Preliminary Objection on the grounds that the Court lacks jurisdiction to entertain the Applicants' application, having determined the issue of costs and interest in its judgement dated 14th March 2018. The Respondent's application is supported by a replying affidavit. In it, he states that it is now more than 10 years since the trial court judgement but the Applicants are yet to make good the decretal amount. He avers that the multiplicity of applications filed by the Applicants are designed to delay satisfaction of the decretal amount and also notes that the present application is bad in law by reason of operation of the doctrine of Res judicata.

Submissions

The Applicants filed their submissions on 11th November 2020 seeking leave to appeal the 31st December 2019 ruling out of time. The submissions reiterate the averments made in the 12th October 2020 application and supporting affidavit. The Applicants argue that the issue of whether or not they are liable to pay interest on a principal amount deposited with the court is not affected by res judicata as it had not come up before court at any time. They additionally pray for stay of further proceedings pending the outcome of the intended appeal.

The Respondent filed his submissions on the 24th November 2020. The submissions raise a Preliminary Objection that the Applicant's application cannot be entertained by the court on operation of the doctrine of res judicata. The Respondent submits that the decision in ELC Appeal No.11 of 2017 decided conclusively on the matter of costs and interest and as such, the application has no merit. He submits that the application ought to be dismissed and costs awarded to the respondent.

Issues for determination

1. **Whether the Applicants application is barred by the operation of res judicata.**

2. **Whether the Appellants are entitled to leave to file their appeal out of time.**

Legal analysis and opinion

The Respondent raises a preliminary objection to the Applicant's application, to wit, that by operation of the doctrine of res judicata, the court has no jurisdiction to entertain the present application. His position is that the question of costs and interest was considered and determined conclusively in ELC Appeal No.11 of 2017. The court provided thus in relation to the question of cost and attendant interest at page 19 of the judgement:

> *'While policy consideration would bar a claimant from enforcing an illegal contract, the said consideration should not allow a defendant who has benefited from such a contract to keep what he has received from such a contract. The Respondent was therefore only entitled to a refund of the Ksh. 750,000 and not the 30% interest per annum from breach of the agreement.*
>
> *This appeal is therefore without merits. It is dismissed but the trial magistrate's judgment is varied only to the extent that judgment be entered for the Respondent for the sum of Ksh. 750,000. The Respondent shall also be entitled to costs of the suit and interest at Court rates.'*

The Respondent's position is that the Applicant's discontent with the judgement of the trial court and subsequent filing of appeal is what led to the present determination, which in fact varied the interest percentage given by the trial court, to interest at court rate.

The Applicants on the other hand submit that the question as to whether they are meant to pay interest on the principle sum already deposited with the court is novel and has not been deliberated or determined either by the trial or appellate courts.

After dismissing the grounds of appeal fronted by the Applicants, the Appellate Court isolated a single issue upon which it found fit to address its mind. The same is found at page 17 of the judgement:

> *'The only issue I need to consider is whether the Respondent was entitled to the interest of 30% per annum for breach of the sale agreement as ordered by the magistrate.'*

The outcome of this deliberation led the court to the determination set out above at page 19 of the Judgement, that the Respondent was not entitled to 30% per annum interest on the principal sum, but interest at the court rate. In short, the question upon which the court labored in determining was whether costs and interest was payable, and it did indeed find that costs and interest at court rate was in fact payable. ***Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya)*** provides as follows on the doctrine of res judicata:

> *"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"*
>
> *Explanation. — (1) The expression "**former suit**" means a suit which has been decided before the suit in question whether or not it was instituted before it.*
>
> *Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.*

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree

shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.

The Applicants and the Respondent are the same parties in both the ELC Appeal No. 11 of 2017 and the present Miscellaneous Case No. E3 of 2020. This satisfies the first limb of **Section 7.**

One of the matters in issue in the Appeal proceedings was whether, and to what extent the Respondent could be awarded interest. That question was determined positively and the rate of interest set at court rate. The main question now in the present application is whether the Applicants are still liable to pay interest, even when they had deposited the principal amount with the court.

The decision in ***Gurbacham Vs Yowani Ekori [1958] EA 450, the Court of Appeal of Eastern Africa,*** while considering the doctrine of res judicata, cited at ***page 453*** a passage from the Judgement of the ***Vice-Chancellor in Henderson Vs Henderson (1), 67 E.R.313 at page 319*** is instructive:

> *"In trying this question I believe I state the rule of the court correctly when I say that, 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 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 cases, 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."* (emphasis, mine).

See the decision in ***Omondi v National Bank of Kenya Limited & others [2001] EA 177*** it was stated that:

> **"…***Parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit*." (emphasis, mine).

The Applicants here note that they had deposited the principal sum with the court pending the hearing of the Appeal. In the trial court, an order had been given for refund of the principal amount plus 30% interest per annum. In setting out the grounds of appeal at the Appellate Court, the Applicants ought to have requested the court to pronounce itself on whether interest on the principal amount could still be awarded in light of their deposit of the principal amount. But they did not. Essentially, the Applicant's did not bring their whole case as is required by court. It is thus conclusive that the issue of interest had been canvassed, and a further question on interest cannot sustain a subsequent suit.

The Court in ***Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates Vs Salama Beach Hotel Limited & 3 others [2017] e KLR*** rationalized the doctrine of res judicata in the following words:

> *"The rule or doctrine of res judicata served the salutary aim of bringing finality to litigation and afforded parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that had already been determined by a competent court. It was designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata rested in the public interests for swift, sure and certain justice."*

Once a finding of res judicata has been identified, it operates as a complete estoppel against any suit that runs afoul of it, and there was no way of going around it, not even by consent of the parties because it is the Court itself that is debarred by a jurisdictional injunct from entertaining such suit.

See ***Christopher Orina Kenyariri t/a Kenyariri & amp; Associates Advocates Vs Salama Beach Hotel Limited & amp; 3 others [2017] e KLR.***

Once barred from entertaining a matter, the court is required to down its tool and not to take another step. The locus classicus on jurisdiction is the celebrated case of ***Owners of the Motor Vessel "Lillian S" Vs Caltex Oil (Kenya) Ltd [1989] KLR 1*** where **Justice Nyarangi** of the Court of Appeal held as follows:

> *"I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has*

no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

The Supreme Court decision in ***Samuel Kamau Macharia & Another Vs Kenya Commercial Bank Limited & 2 Others,*** is also instructive:

"……A court can only exercise that jurisdiction that has been donated to it by either the Constitution or legislation or both. Therefore, it cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

In the premises, I find and hold that the present application is tainted by the doctrine of res judicata thus removing the matter from the jurisdiction of the Court. It is instructive to note that while the Applicants are not contesting their liability to pay costs of the suit as ordered, they still have not done so 8 years later. That does not show good faith on their part.

It is clear that the Respondent has been very accommodative of the elderly Applicants but they cannot keep hiding behind applications delaying justice to the Respondent.

In the upshot, I find that the second issue for determination is now moot and cannot be entertained by the court. I therefore order that the Application be dismissed and the applicants ordered to pay the costs of this application.

READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 19th day of February, 2021.

……..…….

E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Ngigi Gichoya for Muriuki Muriithi for Respondent

2. Ms Kiragu for the Applicant

3. Kabuta, Court clerk