REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 151 of 2002

KINGSWAY TYRES & AUTOMART LTD...................................PLAINTIFF

VERSUS

ALSON RETREADING COMPANY LIMITED................. 1st DEFENDANT

ABDULMALIK FAZAL LAKHA.. 2nd DEFENDANT

SADRUDIN FAZAL LAKHA... 3rd DEFENDANT

AZIZUDIN FAZADIN LAKHA.. 4th DEFENDANT

RULING

The Plaintiff a limited liability company filed this suit against the 4Defendants on 22.11.2000 claiming a sum of Shs.23,640,451/- being theamount due and owing in respect of goods supplied by the Plaintiff andreceived by the Defendants through oral contract negotiated and enteredinto by the 2nd, 3rd and 4th Defendants for the 1st Defendant.

The 2nd, 3rd and 4th Defendants were directors, shareholders and/oragents of the 1st Defendant.

When the Defendants were served with summons, they each fileddefence denying the claim and at the same time filed applicationsseeking to strike out the suit.Mr. Otieno counsel for the 2nd and 3rd Defendants filed anapplication by way of Notice of Motion expressed to be brought underSection 7 and 3A of the Civil Procedure Act seeking to strike out the suitas against the 2nd and 3rd Defendants on the ground that there had beenan earlier suit NAIROBI-MILIMANI HCCC No. 56 of 1998 which had beenstruck out in the circumstances which render this suit res judicata andthat the Plaintiff had filed Notice of Appeal against the decision inNAIROBI-MILIMANI HCCC No. 56 of 1998 and is still pursuingproceedings for the purposes of the appeal and bringing of this suit is assuch an abuse of the process of the Court.

While Mr. Rachier, Counsel for the 1st and 4th Defendants also filedan application for orders: -

1. That the Plaint filed to commence the suit herein anddated 21.11.2000 be struck out for being scandalous,frivolous and vexatious

2. That the said Plaint be struck out for being otherwisean abuse of the process of the Court.

3. That the suit herein be struck out for being res judicata.

On 5.2.2002 it was agreed by consent that both applications be heardtogether and they came up for hearing on 19.3.2002. It was submitted onbehalf of the Defendants that this suit should be struck out for being res judicata. There was an earlier suit being HCCC No.56 of 1998 betweenthe parties and the same subject matter, which was struck out on20.6.2000.

The main ground for seeking to strike out this suit is that the suit is resjudicata. . It is not every matter decided in a former suit that can bepleaded as res judicata in a subsequent suit. To constitute a matter resjudicata the following conditions must concur: -

1. The matter directly and substantially in issue in thesubsequent suit or issue must be the same matter whichwas directly and substantially an issue either actually orconstructively in the former suit.

2. The former suit must have been between the sameparties or between parties under whom they or any ofthem claim.

3. The parties as aforesaid have litigated under the sametitle in the former suit

4. The Court which decided the former suit must have beena Court competent to try the subsequent suit in whichsuch issue is subsequently raised.

5. The matter directly and substantially in issue in thesubsequent suit must have been heard and finally decidedin the first suit.

The test whether or not a suit is barred by res judicata was stated by the Court of Appeal for East Africa in the case of KAMUNYE AND OTHERS V. THE PIONEER GENERAL ASSURANCE SOCIETY LTD. (1971) EA 263 in which SPRY AG P. stated at page 265:

"The test whether or not a suit is barred by res judicataseems to me to be: "Is the Plaintiff in this second suittrying to bring before the Court in another way and in the form of a new cause of action, a transaction which he has already put before a Court of competent jurisdiction inearlier proceedings and which has been adjudicated upon.If so the plea of res judicata applies not only to pointsupon which the first Court was actually required toadjudicate but to every point which properly belonged tothe subject of litigation and which the parties exercisingreasonable diligence might have brought forward at thetime."

As long ago as 1843 VIGRAM VC said in ANDERSON V ANDERSON (1843) 67 E.R. 313 at page 319:

"Where a given matter becomes the subject oflitigation by a Court of competent jurisdiction "theCourt requires the parties to that litigation to bringforward their whole case and will not (except underspecial circumstances) permit the same parties toopen the same subject of litigation in respect of thematter which might have been brought forward only because they have from negligence, inadvertence oreven accident, omitted part of their case". The pleaof res judicata applies except in special cases notonly to points upon which the Court was actuallyrequired by the parties to form the opinion andpronounce judgement, but to every point whichproperly belonged to the subject of litigation andwhich the parties exercising reasonable diligencemight have brought forward at the time."

It is conceded by all the Plaintiffs and the Defendants that thesubject matter and the issues in this suit were directly and substantiallythe same issues which were directly and substantially in issue inNAIROBI-MILIMANI HCCC NO. 56 of 1998 and the suit was between the same parties. It is also conceded that the parties litigated under thesame title and the claim was for a similar amount. In the former suit theDefendants had applied seeking orders to strike out the Plaint for beingscandalous, frivolous and vexatious or otherwise an abuse of the processof the Court. The applications were based on the grounds among othersthat the Plaint and summons thereof were drawn and signed and/or takenout by one P.K. CHEBEDA, an advocate who at the time of filing the suitwas unqualified person within the provisions of the Advocates Act in thathe did not have a current annual licence.

In her ruling of 16.2.2000 GACHECHE CA as she then was, foundas a fact that P. K Chebedo when he drew and signed the Plaint, he didnot have in force a current annual licence as required under Section 30A(1) of the Advocates Act and he was therefore an unqualified person asprovided for under that Section and she therefore struck out the Plaint asbeing invalid as it was instituted by an unqualified advocate contrary tothe provisions of both the Advocates Act and the Civil Procedure Rules.The suit was improperly before the Court. This being an incompetentand improperly constituted suit the Court had no jurisdiction to entertainit. What was struck out was not a competent suit so that a subsequentattempt to file a second suit would or ought to be met by a plea of resjudicata. As I see it, there is no res judicata here. I think the Plaintiffssecond suit is properly before the Court. As I have said, it is not resjudicata.

The second issue raised by the Defendants is the issue of Notice ofAppeal. It was submitted that the Plaintiff had preferred an appealagainst the decision of Gacheche CA as she then was, and had filedNotice of Appeal which has not been withdrawn nor has there been anapplication to strike it out. It was submitted that the Plaintiff havingchosen to appeal until that process goes to conclusion, the Plaintiff cannot re-approach the High Court again as this could amount to anabuse of the process of the Court.

But counsel for the Plaintiff submitted that there is no appealpending. All that there was, was the Notice of Appeal which was deemedwithdrawn by the operation of law at the expiry of 60 days after filing, forfailure to file record of appeal.

Speaking broadly, I would say that wherever possible the specificprocedure by way of appeal or review laid down under the rules shouldpreferably be followed. There may however, be a case like the presentone where it is considered inadvisable to pursue the ordinary procedureof appeal or review upon refusal of the first suit and it is better advise topresent to the Court a second suit with the defects in the first suit whichled to its downfall removed so as to obtain the relief which is wanted.The first suit having been struck out for being incompetent having beenfiled by an unqualified advocate, the appeal would definitely fail. So itwas better advise to file a second competent suit through a qualifiedadvocate. That was the only way open to the Plaintiff to file a competentsuit.

The other issue raised by the Defendants is that the suit is timebarred by the operation of the law of limitation. Under the provisions of Limitation of Actions Act, the cause of action having accrued in 1994when the contract was entered into, by the year 2000, it was over 6 yearsand therefore the suit is time barred.

But counsel for the Plaintiff submitted that the parties operated arunning account and the cause of action accrued in 1998 when theDefendants made payment by cheques which cheques were returnedunpaid. The time started running from the date of breach. The suit is stillwithin time.

In view of all these factors, in my view, the Plaintiff ought to begiven an opportunity to have the suit adjudicated on the merits.

In the result, the Defendants' applications are dismissed with costs.DATED at Nairobi this 20th day of June 2002.

J.L.A. OSIEMO

JUDGE