



Kitazi v Oloolaiser Farmers Coop Society Ltd & 2 others (Environment and Land Appeal 5 of 2023) [2023] KEELC 21341 (KLR) (2 November 2023) (Judgment)

Neutral citation: [2023] KEELC 21341 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO
ENVIRONMENT AND LAND APPEAL 5 OF 2023
LC KOMINGOI, J
NOVEMBER 2, 2023**

BETWEEN

NICHOLAS ILUMBE KITAZI APPELLANT

AND

OLOOLAISER FARMERS COOP SOCIETY LTD 1ST RESPONDENT

JOSMO CONSULTANTS LTD 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

(An Appeal from the Ruling and order of the Honourable P. Achieng' Senior Principal Magistrate in Ngong' SPMCC No. 4 of 2019 delivered at Ngong' on 19th November 2020)

JUDGMENT

1. This Appeal was first filed at the High Court in Kajiado *vide* a Memorandum of Appeal dated 18th December 2020 but was consequently transferred to this court through a decision dated 17th January 2023 for lack of jurisdiction to determine the matter.
2. The Appellant sought dismissal of the Preliminary Objection and setting aside of the Ruling/order dated 19th November 2020 on grounds that:
 1. The learned magistrate erred in law and in fact in finding that the Appellant's suit was caught up by the doctrine of res judicata.
 2. The learned magistrate erred in law and in fact in finding that since the Appellant never raised all the issues in dispute in the Business Premises Rent Tribunal case No. 55 of 2017, that by raising the issues in Ngong' SPMCC No. 4 of 2019, the same was res judicata.
 3. The learned magistrate erred in law and in fact by not appreciating that the issues raised in the tribunal were totally different issues from the matter before her.



4. The learned magistrate erred in law and in fact by failing to find that the suit before her was with regard to damages and loss of business and not the tenancy relationship between the Appellant and the 1st and 2nd Respondents as was the case in the Tribunal.
 5. The learned magistrate erred in law and in fact in making a lopsided ruling in favour of the Respondents contrary to the facts and evidence presented before her.
 6. The learned magistrate erred in law and in fact in not appreciating that the circumstances had changed from the period of filing the suit in the Tribunal and that the Appellant was within the law to file the subsequent suit.
 7. The learned magistrate erred in law and in fact in misapprehending the orders of the chairman of the Tribunal directing that any other dispute between the parties were to be dealt with by a civil court with competent jurisdiction.
 8. The learned magistrate erred in law and in fact in not exercising her discretion judiciously.
3. The Appeal was canvassed by way of written submissions.

The Appellant's submissions

4. Counsel for the Appellant in the submissions dated 15th December 2021 submitted that the suit was not res judicata because the lower court failed to appreciate that the issues raised with regard to damages and loss of business were different from issues raised at the Business Premises and Rent Tribunal (BPRIT) and had not been canvassed at the Tribunal and that the elements of res judicata had not been met. Reference was made to *Sammy Amutavi (suing as the Administrator of the Estate of Peter Amutavi) vs Daneva Company Ltd* [2016] eKLR which found that the BPRIT did not determine all issues raised in the suit. Counsel went on to submit on the Tribunal's jurisdiction to award damages as per Section 12(1) and (2) of the *Landlords and Tenants (Shops, Hotels and Catering Establishments) Act* indicating that the Tribunal downed its tools after determining the relationship between the parties and could not have conferred itself jurisdiction to determine an award of damages.
5. On whether the Appellant was entitled to reliefs sought, counsel submitted that since the suit at the lower court was not res judicata it ought to be reinstated and heard on merit and the Appeal be allowed with costs.

The 1st and 2nd Respondents' submissions

6. Counsel in the submissions dated 31st January 2022 submitted on the issue of res judicata stating that the Tribunal determined the issue of tenancy relationship between the parties and had the Appellant had any other issues to raise, then the same ought to have been ventilated at the Tribunal and thus the suit was res judicata and offended the provisions of Section 7 and 8 of the *Civil Procedure Act*. Reference was also made to *John Michael Wanjao vs George Kimetto and 2 others* [2014] eKLR where court held that "...if the issues raised could have formed the basis of an attack or defence in the previous suit, the statute provides that the issue shall be deemed to have been directly and substantially in issue in the previous suit, hence caught up by the doctrine of res judicata..."
7. The suit therefore being res judicata meant that the court had no jurisdiction to determine it and the lower court's ruling should be upheld with costs to the 1st and 2nd Respondents.



The 3rd Respondent's submissions

8. Counsel in their submissions dated 14th February 2022 submitted that the lower court suit was res judicata, because the issues raised were within the jurisdiction of the Tribunal to determine as espoused in Section 12 of the *Landlords and Tenants (Shops, Hotels and Catering Establishments) Act*. Reference was made to *Independent Electoral and Boundaries Commission vs Maina Kiai & 5 others* (2017) eKLR; *Jackson Juma Kenga vs Republic* (2019) eKLR and *Henderson vs Henderson* (1843) 67 ER 313. Thus the appeal was unmerited and should be dismissed with costs to the Respondent.

Analysis and Determination

9. I have considered the appeal, the rival submissions and the authorities cited. The issues for determination are:
- i. Whether the Lower Court erred in finding that the suit SPMCC No. 004 of 2019 was res judicata;
 - ii. Whether the Appeal is merited and the orders sought should be granted.
 - iii. Who should bear costs of the appeal?
10. The lower court in SPMCC No. 4 of 2019 dismissed the suit on grounds that was res judicata. The Appellant has thus appealed against the ruling and submitted that the issue of damages and loss of business was neither raised at the Tribunal nor did the Tribunal have jurisdiction to address it. It is his case that the suit was not res judicata. The Respondents on the other hand submitted that the issue of damages was well within the jurisdiction of the Tribunal and ought to have been ventilated at that forum.
11. This court has reviewed the Record of Appeal to determine whether the suit at the Lower Court is indeed res judicata.
12. In the Complaint dated 16th January 2019 at the Lower Court, the Appellant stated that he had been leasing a Stall at the 1st Defendant's premises from August 2012 until 12th April 2017 when the 2nd Defendant locked up his premises without notice on the ground of rent arrears. On 20th June 2017 the Defendants broke into the Appellants shop and confiscated his goods and upon making a report at Ngong' police Station and investigations carried out, he was informed that there were notices from the District Officer's Office. He had neither received the said notices nor summoned to attend any meeting regarding the issue. The Appellant then filed a claim at the Business Premises Rent Tribunal as Tribunal Case No. 55 of 2017 where the landlord was asked to refund him Kshs. 46,800 being rent. He therefore filed the suit seeking for damages of Kshs. 450,000 for loss of business, costs of the suit together with interest at Court rates.
13. The court has also perused the Tribunal's decision to determine whether this issue was raised and determined at the forum. In the proceedings before the Tribunal, it is noted that on 20th March 2018 the Appellant (therein Tenant) informed the Tribunal that he had collected all his properties but the Landlord owed him Kshs. 13,800 which was deposit of Kshs. 11,000 plus Kshs. 2,800 which was the amount of rent that had been paid before the premises was closed. The Tribunal ordered the landlord to refund the tenant Kshs. 13,800 within 14 days from the date of service and the Landlord to pay the tenant Kshs. 30,000 within 14 days. On 29th August 2018 the Chairman issued a ruling which reads: "The Tenant has vacated the premises and the tribunal has no further jurisdiction in the matter. Any other disputes between the parties shall be dealt with by a civil court of competent jurisdiction."



14. Section 7 of the [Civil Procedure Act](#) p as submitted by the parties provides as follows;

“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 (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.”

15. The Supreme Court of Kenya in [Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another](#) [2016] eKLR pronounced itself as follows on the issue of res judicata:

“The doctrine of res judicata, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to Court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.”

16. The SPMCC’s ruling of the Preliminary Objection dated 19th November 2020 on page 2 reads:

“... The same indicate that the dispute between the 1st and 2nd Defendants ventilated before the Business Premises Rent Tribunal and orders issued in favour of the Plaintiff. In the present suit the Plaintiff seeks the sum of Kshs. 450,000 loss of business, costs of the suit and interest. It is not clear why he did not seek the same before the Tribunal. In the case of *Henderson v Henderson* (1843) 67 ER 313 res judicata was described as follows:

“...where a given matter becomes the subject of litigation in, and adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward the whole case...”

The Plaintiff therefore ought to have presented the whole case before the Tribunal for all issues in dispute to be addressed. Sec 12(1)(l) of the [Landlords and Tenants \(Shops, Hotels and Catering Establishments\) Act](#) grants the Business Premises Rent Tribunal the powers to award compensation for loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord’s consent. The Tribunal was therefore seized with powers to grant the prayers sought by the Plaintiff herein. At page 6 of the proceedings of the Tribunal, the Plaintiff sought money



owed to him by the landlord and he was awarded the same. He ought to have made his whole claim at that point... Litigation must come to an end.

The upshot of the matter is I find merit in the preliminary objection raised and uphold the same. I find the present suit to be res judicata and it is dismissed with costs to the 1st and 2nd Defendants.”

17. Explanation 4 and 5 of Section 7 outlined above, articulate that any issue 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 and 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. Consequently, the question of damages and loss of business unequivocally falls within these parameters and should have been presented before the Tribunal. If this was not pursued, then the Appellant is precluded from initiating new legal proceedings to seek a second opportunity for redress.
18. I disagree with the Appellant’s submission that award of damages is not within the jurisdiction of the Tribunal. Under Section 12(1) (l) of the *Landlords and Tenants (Shops, Hotels and Catering Establishments) Act* the Tribunal has a mandate: “to award compensation for any loss incurred by a tenant on termination of a controlled tenancy in respect of goodwill, and improvements carried out by the tenant with the landlord’s consent..”
19. This Court associates itself with the Supreme Court decision and finds that from the foregoing analysis, there is no legal basis to overturn the decision rendered by the Lower Court, which is both legally and factually well-founded. The ruling issued by Hon. P. Achieng on 19th November 2020 is hereby upheld.
20. I find no merit in this Appeal and the same is dismissed with costs to the 1st and 2nd Respondents.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 2ND DAY OF NOVEMBER 2023.

L. KOMINGOI
JUDGE.

