REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NYAMIRA

CIVIL APPEAL NO. 9 OF 2021

(FORMERLY AT ENVIRONMENT AND LAND COURT AT KISII APPEAL CASE NO. 1 OF 2019)

KENNEDY MOKUA ONGIRI.....APPELLANT

-VERSUS-

JOHN NYASENDE MOSIOMA.....1ST RESPONDENT

FLORENCE NYAMOITA NYASENDE.....2ND RESPONDENT

(Being an Appeal against the ruling of honourable L.K. Gatheru Resident Magistrate, Keroka dated 26th day of October 2018 and delivered on the 14th day of December 2018 by Hon. S.K. Arome (Senior Resident Magistrate) in the original Keroka SRMCC civil case no. 142 of 2014)

RULING

This is an Appeal emanating from the Ruling dated 26/10/18 by the Honourable L.K. Gatheru, Resident Magistrate in Keroka SRMCC No. 142 of 2014 which was delivered on the former's behalf by Honourable S.K. Arome – Senior Resident Magistrate on 14/12/2018. The main issue raised in the Memorandum of Appeal is that this Ruling followed an application dated 5/10/17, which was similar to an earlier one dated 19/2/15 both seeking similar orders of stay of execution and setting aside a default Judgment, the earlier one having been dismissed.

The latter Application whose only ground that was not similar to the earlier one was the issue of forgery which had not been considered in the previous Application and on which ground the second Application was allowed almost 3 years down the line.

In the Application dated 19/2/15, the Respondent by way of Notice of Motion sought for the following orders: -

1. Spent.

2. Pending the hearing and determination of this Application, the Honourable court be leased to grant an order of stay of execution of the Decree entered against the Defendant/Applicant herein together with all consequential orders.

3. THAT, the Honourable court be pleased to let aside the Judgment entered against the Defendant/applicant herein.

4. THAT, the annexed defence herein be deemed on duly filed upon payment of court fees and the matter do proceed for hearing on merits.

5. Costs.

The Grounds relied upon were that the Applicant had a Defence that raised triable issues and that his failure to file Defence was occasioned by the Applicant's (now Respondent's) former Advocates. John Masinde Mosima further proceeded to depone that the firm of Rogit Isaboke & Co. Advocates failed to enter appearance and file Defence on his behalf in spite of him having instructed Advocates to do so and that he had never been served with the 10 Days' Notice of entry of Judgment as required by law. He concluded by saying that he had a strong Defence with triable issues and even a counterclaim.

It is important to note that in the Draft Defence attached to the said Application, there is no counterclaim. The Applicant (now Respondent) denies everything vehemently in the Draft Defence. Save his name and description. Although the Affidavit in support of that Application was sworn on 19th February, 2015 and both filed on 20/02/2015, the Application was dated 19/12/2015 long after it had already been filed. I

would excuse this on the hangover between an ending year and the incoming year. I believe it must have been drawn on 19/12/2014. But I would not excuse the casual manner in the wording of the application which does not even talk of the date of the Decree save in the certificate of urgency.

In the Ruling dated 29/04/2015 read in open court in the presence of Mr.Ochoki for Defendant/Applicant and Mr. Gisemba for the Plaintiff/Respondent, Honourable N. Kahara (Resident Magistrate) dismissed the Application dated 19/2/2015 with costs to the Plaintiff/Respondent on the ground that the Defendant was all along ready to pay the Decretal amount but his otherwise late denial was an afterthought meant to delay the Plaintiff's entitlement to refund his money and the enforcement of a contract they both entered into willingly. There was even part payment of the decretal amount which was only disclosed to the trial court when the Plaintiff's counsel informed the court of the same.

Later, the Defendant even told the court on 29/6/2015, that he was ready to transfer the land which was the subject of the dispute to the Plaintiff and by 15/7/2015 he had already filed the mutation forms in furtherance of the transfer. This never bore fruits.

On 5/10/2017, the Defendant again filed another Application dated the same day which was word for word similar to the earlier Application of 19/2/2015 save Grounds 6, 7, 8, 9 and 10 which had been added to the new Application as follows:-

> **"*6.* THAT**, the court on its own motion did cause the CID to investigate the signature of the agreement the basis of this suit and the report of the document examiner was clear that the Applicants never executed the agreement.
>
> ***7. THAT,*** the Judgment was obtained by fraud or deceit.
>
> **8.THAT,** *the court has inherent powers to review any of its Judgments, Rulings or Orders in exceptional circumstances so as to meet the ends of justice.*
>
> ***9. THAT,*** *this case is exceptional.*
>
> **10. THAT,** *the Respondent had made payments to the Applicants but has not completed making them."*

The Supporting Affidavit of John Nyasende Mosioma, the 1st Defendant of even date emphasized these grounds. Of great importance in the said Application is the ground that in the latter Application, the Defendant says that ***"there exist special circumstances to set aside the court's judgment since it has now emerged that judgment herein was obtained by fraud."***

The issue of Res Judicata was raised.

The same was finally heard by way of written submissions and on 19/9/2018, almost a year after the same was filed. The Ruling was delivered on 14/12/2018 by Honourable L.K. Gatheru.

The Trial Magistrate pointed out that he was aware that a similar Application had been heard and dismissed and orders of setting aside the Defendant's Judgment denied. The court then went to explain its understanding of the doctrine of Res judicata, that it is a prohibition from dealing with a similar issue already dealt with finality by a court of competent jurisdiction. The Court said that the matter was still pending in court and no final orders had been made in the file. The court rightly said that to deal with the Application by the Honourable Magistrate, the same would have meant reviewing earlier orders, which is not what was before the court. The Honourable Magistrate however held that there was something peculiar in the Application distinguishing it from the earlier Application, the issue of fraud. Therefore, that ''issue'' was not Res Judicata. The Application was consequently allowed and the 1st Defendant given 14 Days to file his Defence. This is the Ruling that offends the Appellant.

The substantive law on *Res Judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

> **"*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"**

The **Black's law Dictionary 10th Edition defines *"res judicata"*** *as*

> **"An issue that has been definitely settled by judicial decision…the three essentials are (1) an earlier decision on the issue, (2) a final Judgment on the merits and (3) the involvement of same parties, or parties in privity with the original parties…"**

A person may not commence more than one action in respect of the same or a substantially similar cause of action and the Court must attempt to resolve multiple actions involving a party and determine all matters in dispute in an action so as to avoid multiplicity of actions.

In order therefore to decide as to whether an issue in a subsequent Application is *res judicata*, a court of law should always look at the Decision claimed to have settled the issues in question and the entire Application and the instant Application to ascertain;

i. what issues were really determined in the previous Application;

ii. whether they are the same in the subsequent Application and were covered by the Decision.

iii. whether the parties are the same or are litigating under the same Title and that the previous Application was determined by a court of competent jurisdiction.

Kuloba J., *in the case of* ***Njangu vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported),*** *held that:*

'If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata….."

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In the Court of Appeal case of ***Siri Ram Kaura – Vs – M.J.E. Morgan***, ***CA 71/1960 (1961) EA 462*** the then EACA stated that: -

"The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit."

Hon. Justice G.V. Odunga *in* ***Republic – Vs – Attorney General and Another Exparte James Alfred Koroso***, expressed himself thus on the issue of access to justice: -

"Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others."

In Uhuru ***Highway Development Ltd – Vs – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni*** the court in an earlier Application ruled that the Application before it was *Res Judicata* as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined ***"thrice by the High Court and twice by the Court of Appeal",*** it could not be resuscitated by another Application.

The Court of Appeal further stated that:

"That is to say, there must be an end to Applications of similar nature, that is to further, under principles of Res judicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be mandated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of or Civil Procedure Act caters

for."

A Decision of the court must be respected as fundamental to any civilised and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.

A Decision of the court, unless set aside or quashed in a manner provided for by the law, must be accepted as incontrovertibly correct. These principles would be 'substantially undermined' if the Court were to revisit them every time a party is dissatisfied with an Order and goes back to the same Court particularly when there is a change of a Judicial Officer in the Court station.

Whether a claim is allowed or dismissed by consent, default or after a contested hearing, the need for finality is the same in each instance. The need for finality is the reason why such an Application as was before Court dated 5/10/2017 must be refused. In determining whether **res *judicata*** had arisen, there was no purpose to be served in inquiring into the reasons given or not given in the earlier Application prior to the Application being rejected. To permit such a broad inquiry is effectively to require a trial on the correctness of the earlier Decision, directly undermining the principle of finality and allowing an Appeal on one's or colleague's Decisions.

To this end, it is helpful to refer back to the reasons for the principle of finality including that decisions of the court, unless set aside or quashed, must be accepted as incontrovertibly correct. The principle is quite clear, and quite strict. The Court reaches this conclusion on an orthodox application of the principle. In the plea of ***res judicata*** only the actual record, that the issue has been decided upon, is relevant. Not what material was before the Court. Even if the reasoning given in the earlier Decision was wrong, the matter cannot be re-opened by way of a similar Application. There are only 2 other Avenues which I will address later**.** The binding force of such Orders depends upon the general principles of law. If it were not binding, there would be no end to litigation**."**. The principle of Res judicata applies to a matter decided in an earlier suit and upon its general principles it applies to proceedings in the same suit as well.

Article 159 (2) (b) of the Constitution mandates that justice ought not to be delayed. To take a successful litigant into a circular frolic expedition, when sufficient concessions have been availed to the Applicant to settle Decree would be to turn the legal process into a theatrical absurdity.

Having considered the pleadings and rival submissions by counsel for both parties, it is not in dispute, that there exists an Order in **Keroka Civil** Case No. 142 of 2014 dated 29/04/2015 wherein **the issue of stay and setting aside the Default Judgment was heard and determined by the court wherein the matters were directly and substantially in issue as those in the latter Application. Further, the process of execution had commenced before the offending Application was filed in court.**

What then should the Respondent have done after discovering new matters as he successfully persuaded the Court had happened.

Under Section 80 of the Civil Procedure Act (CAP 21 Laws of Kenya)

Any person who considers himself aggrieved—

(a) by a decree or order from which an appeal is allowed by this Act, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is allowed by this Act, may apply for a review of judgment to the court which passed the decree or made the order, and the court may make such order thereon as it thinks fit.

Under Order 45 rule 1

Any person considering himself aggrieved—

(1) (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

I don't therefore agree with the Learned Magistrate's reasoning that:

"However, there is something peculiar in the current application distinguishing it from the earlier application: The issue of fraud. As noted, the parties have attempted to compromise the case on common terms save for the fact that there was a dispute over the amounts paid by the respondent……..Hence, the issue of forgery arose. This was part of the proceedings and the record speaks for itself. It follows that that issue was not considered in the earlier application and the court cannot shut its eyes to that……..."

This is not the position in law. The learned Trial Magistrate erred in that the law did not allow the Trial Magistrate to reopen the case by way of entertaining a similar Application when his predecessor in the station had already dealt with the matter conclusively. The earlier Ruling would only have been overturned on Appeal or by way of Review. In an appropriate case. I believe the mischief that the Trial Magistrate should have noted is that the Applicant before the Court could not have succeeded on Appeal since time to appeal had lapsed and I doubt that

an Application for Review would have succeeded because of the inordinate delay, of more than 2 years.

The Respondent, by bringing application after application on the same issue at different times one after another is hell bent to frustrate the Appellant from realizing the judgment as awarded by the lower Court and unless something is done, the Appellant will forever be left babysitting his barren Decree. This state of affairs cannot be allowed to prevail under our current constitutional dispensation in light of the provisions of Article 48 of the Constitution which enjoins the state to ensure access to justice for all persons.

On the basis that pursuant to section 7 of the Civil Procedure Act Cap 21 Laws of Kenya the lower court lacked jurisdiction to deal with a matter which had already been decided by the same court earlier, the latter Application was therefore not only *res judicata* but also an abuse of the court process.

I therefore uphold the Appeal herein and overturn the Ruling of the learned Resident Magistrate in Keroka dated 26th October 2018 and delivered on 14th December 2018.

I award costs of this Application to the Appellant.

RULING DATED, SIGNED AND DELIVERED AT NYAMIRA THIS 8TH DAY OF FEBRUARY, 2022

MUGO KAMAU

JUDGE

In the Presence of: -

Court Assistant: Sibota

Appellant: Ms. Ochwal

Respondents: Ms. Shilwatso