Kwale Cement Factory Limited & 2 others v National Bank of Kenya (Civil Suit E062 of 2021) [2024] KEHC 1772 (KLR) (20 February 2024) (Ruling)

Neutral citation: [2024] KEHC 1772 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E062 OF 2021

DKN MAGARE, J

FEBRUARY 20, 2024

BETWEEN

KWALE CEMENT FACTORY LIMITED ..... 1ST PLAINTIFF

SHRIKE INVESTEMNT LIMITED ..... 2ND PLAINTIFF

RISING STAR COMMODITIES LIMITED ..... 3RD PLAINTIFF

AND

NATIONAL BANK OF KENYA ..... DEFENDANT

RULING

1. Wonders never cease. On 26/11/2021, the hon. Justice D.O. Chepkwony rendered Ruling in the following terms: -

    a. An injunction be and is hereby granted restraining the Defendant, its servants, agents, nominees, heirs, from in any manner disposing of by way of sell the following properties Mombasa/Block 1/261 Shimanzi, LR. No. MN/I/760/Nyali for a period of six (6) months only form the date of this order and the order of injunction pending Kwale/Shimoni Adjudication/352 and 376 is hereby lifted.

    b. The preliminary Objection dated 8th July, 2021 be and is hereby dismissed with no order as to costs.

    c. Application dated 7th July, 2021 is allowed in part to the extent that the order of injunction against Kwale/Shimoni Adjudication /352 and 376 is discharged.

    d. Each party to bear own costs.

2. The historical context of the matter was that pursuant to an application dated 24/6/2021 which had sought the following orders –

a. The application be certified urgent and service be dispensed within the first instance.

b. Pending the inter-parties hearing and determination of this application, there be an injunction restraining the Defendant, its agents, servants or employees from advertising for sale, selling by public auction or private treaty, transferring, disposing or in any other way alienating the parcels of land known as Mombasa/ Bock I/261 Shimanzi; LR No. MN/I/7601 Nyali; Kwale/ Shimoni Adjudication/352 and 376 Kibuyuni Village

c. Pending the inter-parties hearing and determination of the suit, there be an injunction restraining the Defendant, its agents, servants or employs from advertising for sale, selling by public auction or private treaty, transferring, disposing or in any other way alienating the parcel of land known as Mombasa/ Bock I/ 261 Shimanzi; LR NO. MN/I/7601 Nyali; Kwale / Shimoni Adjudication /352 and 376 Kibuyuni Village.

3. The plaint in this matter seeks the following prayers: -

a. A declaration that the Defendant is estopped from reneging on the promises and representations made to the plaintiffs with regard to the marketing and sale of the Suit properties by private treaty as agreed in the meeting held on 20th December 2019.

b. A declaration that Defendant is not entailed to sell LR No. MNI/7601 Nyali and Mombasa/ Block I/ 261 Shimanzi until and unless it has first realized all the other security or collateral in its possession.

c. A permanent injunction restraining the Defendant, its agents, servants or employees from advertising for sale, selling by public auction or private treaty, transferring, disposing or in any other way alienating the parcel of land known as Mombasa /Block I/ 261 Shimanzi; LR No. MN/I/7601 Nyali while the Defendant still has any other security or collateral in its possession.

d. A permanent injunction restraining the Defendant, its agents, servants or employees from advertising for sale, selling by public auction, transferring, disposing or in any other way alienating the parcel of land known as Kwale/Shimoni Adjudication / 3532 and 376 Kibuyuni Village except upon sale by private treaty.

e. Costs of the suit together with interest at court rates from the date of judgment.

4. The Defendant filed an application dated 7/9/2021 by the firm of Lumatete Muchai (though the application is indicated to be filed by advocates for the plaintiff. All these applications and a notice of preliminary objection were decided at once. The questions regarding injunctions have been settled by justice Chepkwony.

5. The plaintiff filed another application dated 12/9/2023 seeking the following orders: -

a. Spent

b. Pending hearing and determination of the application, this court be pleased to issue an order of temporary injunction restraining the respondent, by himself, his servants, agents and/or any person from auctioning the properties Title No. Mombasa Municipality Block/ 26 Shimanzi and LR no. MB/I/7601 (CR 21439).

c. Pending the hearing and determination of this suit this court be pleased to issue an order of temporary injunction restraining the respondent, by himself, his servants, agents and/or any person from auctioning the properties Title No. Mombasa Municipality Block/ 26 Shimanzi and LR no. MB/I/7601 (CR 21439).

d. Costs be provided for.

6. The grounds are that the previous lawyers failed to expedite the suit. They were also having disputes over fees as a result there was a delay in prosecuting the case with attendant consequences.

7. It is evident that even if the application had not been heard before the ruling, the application does not disclose a prima facie case. In the case of *Mrao Ltd V First American Bank of Kenya Ltd & 2 others* (2003) KLR 125, the Court of Appeal, held as follows regarding what constitutes a prima facie case: -

> " The principles which guide the Court in deciding whether or not to grant an interlocutory injunction are well settled. In Giella v Cassman Brown to refer to a case which shifts the evidential burden of proof, rather than as giving rise to a legal burden of proof in the manner he was considering, which was in relation to the pleadings that had been put forward in that case....So what is a prima facie case? I would say that in civil cases it is a case in which on the material presented to the Court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

8. The test for issuance of an injunction was set out in the locus classic case of *Giella = vs = Cassman Brown & Co. Ltd* (1973) EA, 358, 360, sets out principles for grant of injunction. The court, stated as follows, though the wisdom of Spry VP, as then he was, as follows: -

> " The conditions for the grant of an interlocutory injunction are now, I think, well settled in east Africa. First, an applicant must show a prima facie case with a probability of success. Secondly, an interlocutory injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not adequately be compensated by an award of damages. Thirdly, if the court is in doubt, it will decide an application on the balance of convenience."

9. The said test was explained in the case of *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR where the Court of Appeal was of the view that these test in Giella (*supra* are sequential) are sequential. The Court stated: -

> " In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;
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> a. establish his case only at a prima facie level,
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> b. demonstrate irreparable injury if a temporary injunction is not granted, and
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> c. ally any doubts as to (b) by showing that the balance of convenience is in his favour.
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> These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraha Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable.

> In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between."

10. Having found that the application does not disclose a prima facie case, it is unnecessary to go to the other limbs. Secondly, the issues raised in the application have already been death with. The matter has been fully dealt with. That is what in latin is known as res judicata. Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya defines the doctrine of Res Judicata in the following terms: -

> " 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."

11. The *Civil Procedure Act* also provides explanations with respect to the application of the *res judicata* rule. Explanations 1-3 are in the following terms:

i. ''Explanation. (1)—The expression "former suit" means a suit that has been decided before the suit in question whether or not it was instituted before it.

ii. 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.

iii. 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.''

12. In the dicta in *in re Estate of Riungu Nkuuri (Deceased)* [2021] eKLR the court stated as follows: -

> The test for determining the Application of the doctrine of res-judicata in any given case is spelt out under Section 7 of the *Civil Procedure Act*. In Independent Electoral & Boundaries Commission vs Maina Kiai & 5 Others [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:
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> "(a) The suit or issue was directly and substantially in issue in the former suit.
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> (b) That former suit was between the same parties or parties under whom they or any of them claim.
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> (c) Those parties were litigating under the same title.
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> (d) The issue was heard and finally determined in the former suit.
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> (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised."

13. In the case of Attorney General & another ET vs (2012) eKLR where it was held that;

> "The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The

test is whether the plaintiff in the second suit is trying to bring before the court in another way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi s NBK & Others (2001) EA 177 the court held that "parties cannot evade the doctrine of *res judicata* by merely adding other parties or causes of action in a subsequent suit".

In that case the court quoted Kuloba J, (as he then was) in the case of Njanju vs Wambugu and another Nairobi HCC No. 2340 of 1991 (unreported) where he stated: 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 in every occasion he comes to court, then I do not see the use of doctrine of res judicata.....".

14. In essence therefore, the doctrine implies that for a matter to be res judicata, the matters in issue must be similar to those which were previously in dispute between the same parties and the same having been determined on merits by a court of competent jurisdiction. The court in the English case of *Henderson v Henderson* (1843-60) All E.R 378, observed thus:

> " ...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 a 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 case, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgment, 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."

15. *Res judicata* applies to applications just like suits. In the case of *Julia Muthoni Githinji v African Banking Corporation Limited* [2020] eKLR the court stated thus:

16. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was resjudicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

17. Similarly, in *Maumbwa & 3 others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment Maumbwa & 3 others v Kisemei (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

> By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

18. The replying affidavit by Paul Chelanga deals with the historical perspective of this matter.

19. The court has no business changing the course of the parties contract. In *National Bank of Kenya Ltd v Pipeplastic Samkolit (K) Ltd & another* [2001] eKLR, the Court of Appeal was of the considered position that: -

> This, in our view, is a serious misdirection on the part of the learned judge. A Court of law cannot re-write a contract between the parties. The parties are bound by the terms of their contract, unless coercion, fraud or undue influence are pleaded and proved. There was not the remotest suggestion of coercion, fraud or undue influence in regard to the terms of the charge.
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> As was stated by Shah JA in the case of Fina Bank Limited vs Spares & Industries Limited (Civil Appeal No 51 of 2000) (unreported):
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> > "It is clear beyond peradventure that save for those special cases where equity might be prepared to relieve a party from a bad bargain, it is ordinarily no part of equity's function to allow a party to escape from a bad bargain".

20. The Applicant did not appeal the court's decision. They made their bed lie om it. In the circumstances, I find no merit in the application dated 12/9/2023. I note that it is over 3 years since the plaintiff took any action. This matter will be listed for hearing before Court 5. If the same is not concluded by 31/12/2024, it shall stand dismissed with cost to the Defendant.

Determination

21. The upshot of the foregoing is that I make the following determination: -

    a. The application dated 12/9/2023 lacks merit and is dismissed with costs of Kshs. 30,00/= to the defendant payable within 30 days in default execution do issue.

    b. The Plaintiff to take steps to fix the matter for hearing and be concluded by 14/2/2025 failing which the suit be dismissed with costs.

    c. Mention on 14/3/2024 before Court 5.

DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 20TH DAY OF FEBRUARY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of:

Gikandi & Company Advocates for the Plaintiffs

Lumatete Muchai & Company Advocate for the Defendant

Court Assistant - Brian