Anniversary Press (K) Limited v National Water Conservation & Pipeline Corporation (Civil Suit 280 of 2011) [2024] KEHC 4175 (KLR) (17 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4175 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT 280 OF 2011

HM NYAGA, J

APRIL 17, 2024

BETWEEN

ANNIVERSARY PRESS (K) LIMITED ..... PLAINTIFF

AND

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION ..... DEFENDANT

RULING

1. By a Notice of Motion dated 14th December, 2023 brought under Sections 1A, 1 B & 3A of the *Civil Procedure Act*, Order 22 Rule 25, Order 45 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, the Applicant seeks for orders that: -

    i. Spent

    ii. Spent

    iii. This Honourable Court be pleased to direct the Deputy Registrar to recalculate the interest chargeable and due under the Honourable Court Judgement dated 24th November, 2017.

    iv. In the alternative, this Honourable Court be pleased to direct the Deputy Registrar to oversee the recalculation and precomputation of the interest chargeable and due under the Honourable Court judgement dated 24th November,2017 which recalculation shall be jointly done by a certified accountant of each of the parties in the presence of the registrar.

    v. The costs of this Application be in the cause.

2. The application is predicated on the grounds set out therein and is also supported by an affidavit of the applicant's Chief Accountant, one CPA. Margaret Kithunzi sworn on even date.

3. The gist of the application is that vide a judgement of this Honourable Court dated 24th November,2017, the Applicant was condemned to pay for the pans worked on that were not in contention and their interests from the date that the payment became due to when it would be paid at Court rates which amounted to Kshs. 5,565,867.00; 51% of the work done on the Ngori Ngori pan which amounted to Kshs. 1,285,200.00; and interest on the amount due to Ngori Ngori pan at court rates from the date of filing until payment in full.

4. That the Applicant began the process of paying a sum of Kshs. 4,200,672.00 on 21st October, 2011 by partially paying the uncontested pan sum leaving a balance of Kshs. 1,365,195.00 for the undisputed sum, and therefore the total outstanding sum for the uncontested pans and Ngori Ngori Pan as at 7th December, 2020 was Kshs. 2,650,395.00.

5. The Applicant continued to make payment on the outstanding judgement of Kshs. 2,000,000.00 on 8th December, 2020 and Kshs. 4,000,000.00 on 13th April, 2021 thus clearing the outstanding Principal Sum of Kshs. 650,395.00 and the balance of Kshs. 2,564,039.98 settled the part payment of the outstanding interest of Kshs. 5,913,644.98.

6. That on 23rd July, 2021 the Applicant made another payment of Kshs. 2,544,618.00 which cleared the final outstanding interest, and an amount of Kshs. 19,421.98 was in account of the applicable taxes.

7. The Applicant's contends that it has complied with the judgement of this Honourable Court and thereby ought not to be condemned to pay the judgement sum thrice and that it is unconceivable that sum of Kshs. 9,450,407 can attract interest of Kshs. 42,422,956.14 within a period of 4 years which is over 5 times the principal sum.

8. It is the Applicant's assertion that there is imminent danger that the Plaintiff/Respondent, through the Interfield Auctioneers are likely to execute by attaching its assets in satisfaction of this Court's warrants to its detriment thereby rendering both the Application and the main suit nugatory.

9. The Respondent in opposition to the Application filed a Notice of preliminary Objection dated 18th December,2023 premised on the following grounds: -

    i. That the Application before court and the Notice of Appointment of Advocates dated 14th December, 2023 violates the mandatory provisions of Order 9 Rule 9 of the *Civil Procedure Rules*, 2010.

    ii. That the Application dated 14th December, 2023 runs afoul the principle of *Res Judicata*.

10. On 29th January, 2024, I directed the parties to file submissions with respect to the Preliminary Objection.

Respondent's Submissions

11. The Respondent submitted that failure to comply with Order 9 Rule 9 of the *Civil Procedure Rules* is fatal to any proceedings purportedly undertaken by a non-compliant party. To buttress his submissions, he relied on the case of *John Langat v Kipkemoi Terer & 2 others* [2013] eKLR, *Florence Hare Mkaha -v- Pwani Tawakal Mini Coach & Another* [2014] eKLR; & *Stephen Mwangi Kimote v Murata Sacco Society* [2018] eKLR

12. In regards to whether the Application herein is *res judicata*, the respondent submitted that the applicant had filed two similar applications dated 24th November, 2020 and 5th April, 2023 challenging interest and seeking an order of recalculation of the same which were all dismissed on grounds of being res judicata.

13. In view of the foregoing, the respondent thus submitted that this application is not only res judicata but also an abuse of the court process. In buttressing his submissions, the Respondent placed reliance on Section 7 of the *Civil Procedure Act* and the cases of *Henderson v Henderson* (1843-60) ALL E.R 378, *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR, *Njangu v Wambugu and Another* Nairobi HCCC No. 2340 of 1991 (unreported), *Siri Ram Kaura v M.J.E. Morgan* CA 71/1960 (1961) EA 462, *Uhuru Highway Development Ltd v Central Bank of Kenya, Exchange Bank Ltd* (in voluntary liquidification) and Kamlesh Mansukhlal Pattni Civil Appeal No. 36 of 1996.

Defendant/Applicant's Submissions

14. On whether the Application offends the mandatory provision of Order 9 Rule 9 of the *Civil Procedure Rules*, 2010, the Applicant submitted in the negative for reasons that there is Notice of Appointment of Advocates filed by its advocate and the consent dated 5th December, 2023 between its previous and the current Advocates allowing the latter to come on record.

15. With respect to whether the Application is res judicata, the Applicant submitted that the application presents new issues, those of inordinate delay and unjustifiable computation of interests and as such it is not *res judicata*.

16. The Applicant thus urged this Court to dismiss the Preliminary Objection and to hear its application on merit.

V – Analysis & Determination

17. I have considered the application and the Preliminary Objection as well as the submissions filed. The following issues crystalize for determination: -

    a. Whether the application dated 14th December, 2023 violates the provisions of Order 9 Rule 9 of the *Civil Procedure Rules*.

    b. Whether the Application is res judicata

18. Order 9 Rule 9 of the *Civil Procedure Rules* provides: -

> "When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court—
>
> (a) upon an application with notice to all the parties; or
>
> (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be."

19. The provisions of Order 9 Rule 9 of the *Civil Procedure Rules* make it mandatory that any change of Advocates after judgment has been entered must be through an order of the court, upon application with notice to all parties or upon a consent filed between the outgoing advocate and the proposed incoming advocate.

20. In the case of *Kazungu Ngari Yaa Mistry v Naran Mulji & Co*. [2014] eKLR, the court in considered the import of Order 9 Rule 9, and held as below:

> " The provision envisages two different scenarios and the only commonalities are that, there has been a judgment and there was advocate on record previously. In first scenario under (a), the new advocate or the party in person makes a formal application to the Court with notice to all parties who participated in the suit for grant of leave to come on record or act in person. Under this first scenario, the consent of the previous advocate is not necessary, but the party must give notice to the other parties and then satisfy the Court to grant leave. In the second scenario under (b), the new advocate or party in person needs to secure the written consent of the previous advocate on record, file the consent in Court and then seek leave to come on record. My understanding of the scenario under (b) is that a formal written application is not necessary and that once the written consent has been filed, an oral or informal application would be sufficient to move the Court."

21. The reasoning behind the said provision was also well articulated in the case of *S. K. Tarwadi v Veronica Muehlmann* [2019] eKLR where the judge observed as follows:

> " ...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him...."

22. In this case, I note the Applicant's counsel had not complied with the above provisions of the law. However, when it was pointed out by the Respondent's counsel, the counsel promptly regularized that position by filing a consent dated 5th December, 2023 between the previous firm of advocates of the Applicant and herself, allowing her to take over the matter. The mischief meant to be addressed by the said rule has therefore been cured by the consent executed by the parties.

23. Even if I was to hold that the advocate was improperly on record and struck out the application, it would just result in the applicant filing the same application again.

24. In broad interest of justice the aforesaid consent is adopted as the order of this court and therefore Doris N. Mwangi Advocate is deemed as properly on record in place of the firm of N.M Kamwendwa & Co. Advocates.

Whether this suit is res judicata

25. 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"

26. 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..."

27. The principle of res judicata was also discussed in *IEBC v Maina Kiai & 5 Others* [[2017] eKLR as follows;

> " Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms:
>
> i. The suit or issue was directly and substantially in issue in the former suit.
>
> ii. That former suit was between the same parties or parties under whom they or any of them claim.
>
> iii. Those parties were litigating under the same title.
>
> iv. The issue was heard and finally determined in the former suit.
>
> v. 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."

28. Kuloba J., in the case of *Njangu v Wambugu and Anor.* 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*....."

29. The Respondent submitted that the Applicant had filed two applications like the current one challenging the interest of this Court's Judgement and the same were dismissed for being *res judicata*.

30. The first one that I was referred to is dated 24th November, 2020. In this application, the Applicant herein sought for stay of execution and leave to liquidate the undisputed sum of Kshs.9, 450,407.00 by way of equal monthly installments of Kshs.1,200,000/= with effect from 21.12.2020 and subsequently on 20th day of every succeeding month till payment in full and for review of the judgement in so far as the claimed interest was concerned.

31. My brother Hon. Justice Chemitei did not find merit in the above application and dismissed it on 4th March, 2021. On the issue of interest the court held as follows;

> " On the question of interest, there is no evidence tendered before this court to suggest it was excess. The issue of interest is the province of the taxing master and if there was such, which for now I cannot see then it was incumbent upon the Applicant to raise it. There is nothing new to permit this court carry out a review of the decree."

32. In the second application dated 5th April, 2023, the Applicant sought for stay of execution of the decree and all consequential orders and for an order reviewing the interest payable to the respondent and or directing the Registrar of this Honourable Court to recalculate and re-compute the interest payable to

the plaintiff. The Applicant's main stay in lodging the application was that the interest on the principal sum of Kshs. 9,450,407.00 was erroneously computed and as at August, 2019, the respondent was claiming a sum of Kshs.32, 139,235 from it and its attempts to have the issue of interest resolved amicably did not bear any fruit since the respondent insists that the interest was computed by the court.

33. The respondent in opposition to the Application stated that the matters raised therein were *res judicata* and the court was functus officio in the matter.

34. My sister, Lady Justice T.A Odera, dismissed the Application for being *res judicata*. She referred to the Court of Appeal case of *Siri Ram Kaura v M.J.E. Morgan*, CA 71/1960 (1961) EA 462 cited in the case of *Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende* [2022] eKLR where 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."

35. Flowing from above, she held that a party pleading res judicata are required to bring forth their entire case in a suit or application unless the Applicant come across new evidence that he could not after exercising reasonable due diligence, have come by at the time of trial.

36. The learned Judge further held that;

> " It is rather obvious from the perusal of the record that the parties and prayers sought in both applications are the same and the court was competent to hear the said application....
>
> I agree with the plaintiff that the instant application is *res judicata* and this court is functus officio in the matter..."

37. The grounds upon which the aforesaid previous applications were premised on the question of interest are the same with the grounds set out in the instant application. I therefore find the main issue brought forth in this application was substantially dealt with by the said Judges and there is nothing left for this court to determine.

38. In the end I am of the considered view that the present Application is *res judicata* and I dismiss it with costs to the Respondent.

39. Having said the above, I am aware that the Respondent had extracted warrants of attachment and sale. It is important that the figures in the same are properly extracted. The issue in controversy can be easily sorted out if the payments made by the applicant are taken account of.

40. I therefore direct that the matter be referred back to the Deputy Registrar for extraction of fresh warrants of attachment and sale. The Deputy Registrar is to consider all the payments made by the Applicant, to be confirmed by the Respondent prior to extraction of the warrants. The parties shall be at liberty to address the Deputy Registrar on such payments. I believe that will put this matter to rest.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 17TH DAY OF APRIL, 2024.

H. M. NYAGA,

JUDGE.

In the presence of;

Mr. Akango for Plaintiff/Respondent

Ms Mwangi for Defendant/Applicant

Court Assistant Philip