



Kisabuli & another (Suing as administrators of the Estate of Halima Wamukoya Kisabuli) v M Oriental Bank Limited (Civil Suit E574 of 2023) [2024] KEHC 5407 (KLR) (Commercial and Tax) (6 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5407 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E574 OF 2023
JWW MONG'ARE, J
MAY 6, 2024**

BETWEEN

**MOHAMMED KISABULI 1ST APPLICANT
SULEIMAN MURUNGA 2ND APPLICANT
SUING AS ADMINISTRATORS OF THE ESTATE OF HALIMA WAMUKOYA
KISABULI**

AND

M ORIENTAL BANK LIMITED RESPONDENT

RULING

1. Before the Court are two Applications that pursuant to the directions of the court were canvassed together. The 1st Application is a Notice of Motion dated 22nd November 2023 seeking an injunctive order against the Respondents, their agents, representatives or any other person acting under their instructions, restraining the alienation, transfer, interference, sale, disposing off, laying to waste and/or in any other way trespassing and interfering with property known as Maisonette No. 3 (Volume N54, Folio 253, File 16604) on L.R. No. 2/280.
2. The Application was supported by the grounds on the face of it and by the sworn Affidavit of Mohammed Kisabuli who stated that following being served with a notice of public auction of one of the properties of the Estate of Halima Wamukoya Kisabuli, the Applicant came to learn that there had been an ongoing case where it was not a party being Nairobi High Court Commercial Case No. 096 of 2023, City Chemist(s) Nairobi Limited vs. M. Oriental Bank Limited.
3. Further, that the case had proceeded, documents and evidence presented, without the Applicant herein being granted an opportunity to be heard and orders made against it.



4. In a Replying Affidavit dated 5th December 2023 the Respondent stated that the Applicants are the directors and shareholders of City Chemists (Nairobi) Limited which company had previously filed other four suits against it.
5. The 2nd Application is a Notice of Motion dated 5th December 2023 filed by the Bank who sought orders that the Applicant's application dated 22nd November, 2023 and the Originating Summons dated 22nd November, 2023 be struck out for being res-judicata.
6. This Application was supported by the grounds set on the face of it and by the sworn supporting affidavit of Wilfred K. Machini who deposed that the Applicants' suit herein is *res judicata* since the Applicants, being the directors and shareholders of City Chemists (Nairobi) Limited, and which Company has previously filed other four (4) suits against the Respondent herein namely, HCCC 646 of 2007 (*City Chemists (Nrb) Limited & another vs Oriental Bank Limited*) in respect of the same subject property and which was dismissed by Honorable Lady Justice Abigail Mshilah on 10th September of 2019, and also HCCC Nos. 3609 of 1995, 370 of 2003 and HCCC E096 of 2023 over the same suit property, all of which have been dismissed by the court.
7. The deponent further stated that City Chemists (nairobi) Limited had recently filed a similar application dated 8th March, 2023 in HCCC 096 of 2023: *City Chemists (Nairobi) Limited versus M. Oriental Bank Limited and 2 others* seeking interlocutory orders of injunction over the suit property which was dismissed by Hon. Justice F. Mugambi on 19th June, 2023 as the Court acknowledged that it was barred by the doctrine of *res judicata*.
8. In response to the Bank's Application, the Applicants filed a Replying Affidavit dated 8th February 2024 denying the averments made by the Bank and stating that the suits were unrelated issues being presented by the current suit.
9. Upon directions of the court, both parties filed written submissions alongside their responses and the annexures therein. The court has carefully considered the said rival submissions and all the pleadings filed by the parties and has identified the following issues for determination:
 - a. Whether the suit is *res judicata*?
 - b. Whether an order of injunction should issue?
10. It was the Bank's submission that the Applicants herein are pursuing a common interest with City Chemists (nairobi) Limited which has previously filed 4 other suits with respect to the suit property where similar issues were raised, heard and finally determined by the courts. In addition, the Bank argued that Suleiman Murunga was a director of City Chemists (nairobi) Limited and he could not feign ignorance of the previous suits filed by the Company. Thus, the Bank maintained, the present suit and the Application ought to be struck out in its entirety for being an abuse of the court process and a waste of judicial time and resources.
11. Section 7 of the *Civil Procedure Act* on *res judicata*, reads 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.



12. The Court of Appeal expounded on the doctrine of the *res judicata* in the case of The *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others*, [2017] eKLR, where it held that:-

“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;

- a) The suit or issue was directly and substantially in issue in the former suit.
- b) That former suit was between the same parties or parties under whom they or any of them claim.
- c) Those parties were litigating under the same title.
- d) The issue was heard and finally determined in the former suit.
- 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. It is the courts view therefore that flowing from the above decision that the doctrine of *res judicata* is applicable if the issue(s) in dispute in the previous litigation or suit were between the same parties as those in the current suit; the issues were directly or substantially in issue in the previous suit as in the current suit and they were conclusively determined by a court of competent jurisdiction.

14. The court has taken time to peruse and carefully consider the annexures by the Bank as well as the Application currently before it. What stands out is that Maisonette No.3 (Volume N54, Folio 253, File 16604) on L.R. No. 2/280 is the suit property across all the suits that were previously filed namely; HCCC 646 of 2007 (*City Chemists (Nrb) Limited & another vs Oriental Bank Limited*), HCCC 096 of 2023: *City Chemists (Nairobi) Limited versus M. Oriental Bank Limited and 2 others*, Court of Appeal Civil Application No. E280 of 2023: *City Chemists (Nrb) Limited Versus M Oriental Bank Limited and another*, HCCC 3609 of 1995, 370 of 2003.

15. The court notes that the issues in all these suits are anchored on the suit property as well as a loan that was issued by the Bank herein and the Applicants through various titles have attempted to stop the disposal of the suit property.

16. In their defence, the Applicants argued that the suit herein was brought by the personal representatives to the estate of Halima Wamukoya Kisabuli and not City Chemists (Nrb) Limited who were the previous Applicants in the various suits.

17. In determining the question what is *res judicata* the court in the case of *Nancy Mwangi t/a Worthlin Marketers vs. Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 others* [2014] eKLR quoted the case of *E.T vs. Attorney General & Another* (2012) eKLR wherein the court noted thus:-

“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 a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi vs National Bank of Kenya Limited and 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., in the case of *Njangu vs Wambugu and another* Nairobi HCCC 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 fact lift on every occasion he comes to court, then I do not see the use of the doctrine of *res judicata*.....”

18. This rationale of the doctrine of *res judicata*, was expounded by the Court of Appeal in its decision in *Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others* (*supra*) where the court stated thus:-

“The rule or doctrine of *res judicata* serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectra of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favorable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of *res judicata* thus rest in the public interest for swift, sure and certain justice.”

19. The court notes that the rationale for the doctrine of *res judicata* exists to protect public interest so that a party should not endlessly be dragged into litigation over the same issue or subject matter that has otherwise been conclusively determined by a court of competent jurisdiction. There should be an end of litigation one way or the other and it is imperative that judicial rulings must be ultimate, obligatory, and definitive. In my view, it constitutes injustice if a party is compelled to re-litigate issues that have already been resolved by the court, over and over again.
20. In the matter before the court, the court noted that the said Applicants are the administrators of the said estate of Halima Wamukoya Kisabuli and are also the directors and shareholders of City Chemists (Nairobi) Limited. It is equally notable that all their suits were against the Respondent (the Bank). The court therefore concludes that the former suits were between the same parties or parties under whom they or any of them claimed thus they were litigating under the same title.
21. It is the courts finding that the Applicants herein are therefore pursuing a common interest with City Chemists (Nairobi) Limited by virtue of their directorship and/ or shareholding with respect to the suit property being L.R. No. 2/280, where similar issues were raised, heard and finally determined by the Courts in the aforementioned suits. In the present suit the Applicants under the guise of being administrators of the estate of Halima Wamukoya Kisabuli are seeking an audience with the court over the same issues.
22. I am satisfied and do find that the present suit herein is *res judicata* and as such the court lacks the requisite jurisdiction to hear and determine the same. This therefore means that there is no reason for the court to take any step to consider the rest of the issues raised in the Applicants’ Application. Consequently, the suit as well as the Application is hereby dismissed and the Bank’s Application is allowed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 6TH DAY OF MAY, 2024.

.....
J.W.W. MONG’ARE

JUDGE

In the presence of;



Mr. Ochieng for the Plaintiff/Applicant.

Ms. Kimona holding brief for Bundotich for the Defendant/Respondent.

Amos - Court Assistant

