Mistry Jadva Parbat & Co Limited Limited v Kenyatta University & another (Civil Suit E105 of 2021) [2024] KEHC 6179 (KLR) (23 May 2024) (Ruling)

Neutral citation: [2024] KEHC 6179 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL SUIT E105 OF 2021

DKN MAGARE, J

MAY 23, 2024

BETWEEN

MISTRY JADVA PARBAT & CO LIMITED LIMITED .... PLAINTIFF

AND

KENYATTA UNIVERSITY .... 1ST DEFENDANT

INTEREST RATES ADVISORY CENTRE LIMITED .... 2ND DEFENDANT

RULING

1. The Application dated 13/10/2021 has been pending before court for some time.
2. The Application seeks an order that pending the hearing and determination of this suit, the Judgement and proceedings in Milimani HCCC No 121 of 2008 be stayed.
3. It is premised on the grounds on the face of the Application as well as the supporting affidavit of Stephen Ndibui Kamau. It is deposed inter alia that Report dated 14/4/2021 conformed that the report by the 2nd Defendant is irregular as the 1st Defendant is indebted to the Plaintiff in the sum of Kshs 5,420,325,299.23. Further, that as such, the Judgement in Milimani HCCC No 121 of 2008 be stayed is fraudulent and should be stayed and/or set aside.
4. The 1st Defendant filed a Replying Affidavit dated 10th November 2021. The 2nd Defendant too filed a Replying Affidavit dated 17th December 2021.
5. It is contended by the Defendants that this court has no jurisdiction to entertain the matter which was determined by a court of equal jurisdiction.
6. Therefore, the position of the Defendants is that in the *prima facie*, this court has no jurisdiction to determine the Application and the main suit as they raise matters that are *res judicata*.

7. It is also deposed that the Plaintiff has not satisfied the conditions for granting stay of judgement and proceedings and for obtaining an injunction.

Submissions

8. The Plaintiff fled submissions dated 31/5/2022.

9. It was submitted that this court had jurisdiction to determine this matter. That the suit sought to ser aside a decree which was fraudulently obtained by the 1st Defendant. They relied on *Richard K Bunei & 8 others t/a Geoestate Development Services v Lorien Ranching Company Limited & 799 others* (2017) eKLR.

10. They also submitted that the Plaintiff had demonstrated a *prima facie* case with high chances of success. And that it stood to suffer irreparable loss if the proceedings were not stayed. Reliance was placed on the case of *County Government of Kwale v John Nyamongo Nyakongo t/a H.R Ganijee & Sons* (2020) eKLR.

11. They urged me to allow the Application dated 13th October 2021.

12. The 1st Defendant filed submissions dated 13th July 2022. It was submitted that this Court had no jurisdiction to stay Milimani HCCC No 121 of 2008.

13. It was further submitted that the matters in issue were already adjudged and the Court of Appeal had even dismissed the Appeal arising therefrom hence settling the matters in finality. They relied on Section 7 of the *Civil Procedure Act* to submit that the matters were *res judicata*.

14. They also submitted that the Plaintiff had not demonstrated a *prima facie* case with probability of success. They relied on *Giella v Cassman Brown* (1973) EA 358.

15. I was urged to dismiss the Application.

Analysis

16. The Application seeks stay of a suit in the High Court in Milimani HCCC 121 of 2008. The aforesaid case is concluded but this suit is challenging the propriety of Kshs 5,420,325,299.23. The answer to both real questions I must ask is whether, I have jurisdiction to stay a suit in another high court or court of co-ordinate jurisdiction. Secondly is there anything to stay in a concluded suit. I will give a negative.

17. The Respondent also raised an issue whether the suit was *res judicata*, which is provided under Section 7 of the *Civil Procedure Act* Cap 21 Laws of Kenya. It 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."

18. The *Civil Procedure Act* also provides explanations with respect to the application of the *res judicata* rule. In the dicta *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 v 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:

"(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."

19. In the case of *Attorney General & another ET v* (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 v 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".

20. In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v 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*.....".

21. 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."

22. *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:

> "14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was res-judicata and the entire suit was sub-judice 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."

23. 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."

24. The case questions other cases that had hitherto been decided by courts of competent jurisdiction. The only way to challenge a decision of a court is to review or Appeal but not though another suit. This reminds me the words of the near president Al gore: -

> "Now the U.S. Supreme Court has spoken. Let there be no doubt, while I strongly disagree with the court's decision, I accept it. I accept the finality of this outcome which will be ratified next Monday in the Electoral College. And tonight, for the sake of our unity as a people and the strength of our democracy, I offer my concession. I also accept my responsibility, which I will discharge unconditionally, to honour the new President-elect and do everything possible to help him bring Americans together in fulfilment of the great vision that … …Just as we fight hard when the stakes are high, we close ranks and come together when the contest is done. And while there will be time enough to debate our continuing differences, now is the time to recognize that that which unites us is greater than that which divides us. (adjusted to UK English)."

25. It is saddening that the plaintiff seeks to have this court supervise the decision of the high court in other cases, including Milimani HCCC 121 of 2008 and HCCC 351 of 2018 between the same parties. The dispute related to Kshs 5,420,325,299/=.

26. The dictates of the constitutional order are that court decisions are final unless Appealed. In *Lake steel Supplies v Dr. Badia and another Kisumu* HCCC No 191 of 1994 Justice R C N Kuloba opined that: -

> "The exercise of review entails judicial re-examination, that is to say, are consideration, and a second view or examination, and a consideration for purposes of correction of a decree or order on a former occasion. And one procures such examination and correction, alteration or reversal of a former position for any of the reasons set out above. The court of review has

only a limited jurisdiction circumscribed by the definitive limits fixed by the language used in Order 44 rule 1, of the Civil Procedure Rules. A review is by no means an appeal in disguise whereby an erroneous decision is reheard and corrected, but lies only for patent error. It can only lie if one of the grounds is shown, one cannot elaborately go into evidence again and then reverse the decree or orders that would be acting without jurisdiction, and to be sitting in appeal. The object is not to enable a judge to rewrite a second judgement or ruling because the first one is wrong...On an application for review, the court is to see whether any evident error or omission needs correction or is otherwise a requisite for ends of justice. The power, which inheres in every court of plenary jurisdiction, is exercised to prevent miscarriage of justice or to correct grave and palpable errors. It is a discretionary power. In the present application it has not been said or even suggested that after the passing of the order sought to be reviewed, there is a discovery of new and important matter of evidence which, after the exercise of due diligence, was not within the Applicant's knowledge or could not be produced by him at the time when the ruling was made."

27. In the case of *Ogwari v Ibrahim; Akinyi (Applicant)* (Civil Appeal E223 of 2022) [2024] KEHC 4965 (KLR) (9 May 2024) (Ruling), I posited as hereunder: -

> " I see nothing in the Applications that is amenable to Review. The court has no jurisdiction to sit on Appeal of its own orders. There is no error apparent on the face of the record. The parties must learn to live with final decision of the courts. Trumping up applications with a view to defeat a proper suit a suit filed in a proper court makes no legal sense. The court has already determined the Appeal in the best way it did."

28. This is provided for in Article 165 (6) of the *Constitution* provides that: -

> 'The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.'

29. A superior court is defined under article 162(1) as 162. (1) The superior courts are the Supreme Court, the Court of Appeal, the High Court and the courts referred to in clause (2).

30. Does this court have jurisdiction to question a decision of the High Court. The answer lies in the supreme court decision of *Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others* [2012] eKLR, the Supreme Court stated as doth: -

> " This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the *Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the *Constitution*. Where the *Constitution* confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

31. Though the application sought stay, I am satisfied that I have no jurisdiction to grant the orders sought. In *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] eKLR, Justice Nyarangi JA, as then he was stated as follows: -

> " Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law down tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage which will show that what I have already said is consistent with authority: "By jurisdiction is meant the authority which a court as to decide matters that are litigated before it or to take cognisance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior court or tribunal (including an arbitrator) depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given."

32. In the circumstances both the suit The dispute relates to a sum of Kshs 5,420,325,299.23, 2nd defendant is entitled to costs for a baseless suit and application.

33. The Supreme Court set forth guiding principles applicable in the exercise of that discretion in the case of *Jasbir Singh Rai & 3 others v Tarlochan Singh Rai & 4 others*, SC Petition No 4 of 2012; [2014] eKLR, as follows:-

> " (18) It emerges that the award of costs would normally be guided by the principle that "costs follow the event": the effect being that the party who calls forth the event by instituting suit, will bear the costs if the suit fails; but if this party shows legitimate occasion, by successful suit, then the defendant or respondent will bear the costs. However, the vital factor in setting the preference is the judiciously-exercised discretion of the Court, accommodating the special circumstances of the case, while being guided by ends of justice. The claims of the public interest will be a relevant factor, in the exercise of such discretion, as will also be the motivations and conduct of the parties, before, during, and subsequent to the actual process of litigation.... Although there is eminent good sense in the basic rule of costs– that costs follow the event – it is not an invariable rule and, indeed, the ultimate factor on award or non-award of costs is the judicial discretion. It follows, therefore, that costs do not, in law, constitute an unchanging consequence of legal proceedings – a position well illustrated by the considered opinions of this Court in other cases.

34. The event is the dismissal of the suit. The 2nd respondent is entitled to costs for defending the suit. The same shall be agreed or taxed.

> "(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or judge shall for good reason otherwise order.
>
> (2) The court or judge may give interest on costs at any rate not exceeding fourteen per cent per annum, and such interest shall be added to the costs and shall be recoverable as such."

35. In this case the taxing master will deal with quantum of costs.

36. In the circumstances the Application dated 13/10/2021 lacks merit and is dismissed with costs. The suit is *res judicata* and is struck out accordingly. The court has no jurisdiction to deal with a suit filed in another superior court. The suit is untenable and anathema to good order and is accordingly dismissed with costs to the 2nd Respondent.

Determination

37. The upshot of the foregoing is that I make the following orders: -

    a. Application dated 13/10/2021 lacks merit and is dismissed with costs.

    b. The suit is *res judicata* and is struck out accordingly.

    c. The court has no jurisdiction to deal with a suit filed in another superior court.

    d. The suit is untenable and contrary to good order and is accordingly Struck out with costs.

DELIVERED, DATED AND SIGNED AT VIRTUALLY ON THIS 23RD DAY OF MAY, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

KIZITO MAGARE

JUDGE

In the presence of: -

Miss Broke for the 2nd Respondent

No appearance for the Plaintiff

Court Assistant- Brian