Premier Food Industries Ltd v Andus & Mahiu Trading Co. Ltd (Civil Appeal E077 of 2021) [2024] KEHC 5449 (KLR) (2 May 2024) (Judgment)

Neutral citation: [2024] KEHC 5449 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MURANG'A

CIVIL APPEAL E077 OF 2021

J WAKIAGA, J

MAY 2, 2024

BETWEEN

PREMIER FOOD INDUSTRIES LTD ..... APPELLANT

AND

ANDUS & MAHIU TRADING CO LTD ..... RESPONDENT

(An Appeal from the Ruling of Hon. M. Nyagah SRM at Muranga in Civil Case No 5 of 2021 delivered on 30th day of November 2021)

JUDGMENT

1. By a Plaint dated 19th January 2021, the Appellant sued the Respondent for a sum of Kenya Shillings 911,007 being the sum of goods delivered to the same between January 2019 and December 2019 as a result of distributorship agreement entered into by the parties.

2. By an application dated 26th May 2021, the Respondent took out a Notice of motion in which it sought for stay of proceedings herein and an Order for the production of the distributorship agreement between the parties herein and for the suit to be struck out. It was grounded on the grounds that the agreement had an arbitration clause as a dispute resolution mechanism and therefore the Court had no jurisdiction.

3. It was contended that the Appellant had requested for Judgement and there was need to stay the proceedings as the Respondent in view of the said clause could not enter appearance or file a defence as to do so would amount to acquiescence of the Court's jurisdiction.

4. The application was supported by the affidavit of Barnabas Kibue Gioche in which he deposed that the distributorship agreement giving rise to the claim herein had an arbitration clause in respect of all disputes and as such the Court had no jurisdiction which issue should be determined first.

5. In response to the application, the Appellant filed grounds of opposition as follows:

a. The Application offends the Provisions of Section 6 of the *Arbitration Act* and Order 11 of the *Civil Procedure Code*.

b. The suit was a simple debt and the Applicant having failed to list her Preliminary Objection down for hearing was using the same to buy time.

6. The Appellant filed a replying affidavit sworn by Martin Mutuku in which he denied the existence of the distributorship agreement which an arbitration clause which the Respondent had not produced in Court. It was contented that the Appellant had engaged the Respondent as a distributor and that the same had failed to make payment for the goods delivered and therefore the claim was purely a monetary claim.

7. It was deposed that the Respondent having filed as Preliminary Objection on point of law should have prosecuted the same and that her prayer seeking that the Appellant produce the agreement was in clear violation of Order 11 of the *Civil Procedure Rules* and amounted to a delay on the matter.

8. By a Ruling dated 24th August 2021, the Court dismissed the said applications as lacking merit as the Applicant had not annexed the said agreement.

9. Undeterred the Respondent on 26th August 2021 took out another Notice of Motion in which she again applied for stay of further proceedings herein and for the dispute to be referred to arbitration as provided for by the distributorship agreement between the parties.

10. The application was supported by the affidavit of Barnabas Kibue Gioche in which he deposed that he could not trace the agreement when they filed the application which was dismissed by the Court and annexed the said agreement and that the Court could not rewrite the agreement between the parties and therefore the matter should be referred to the arbitration.

11. In response, the Appellant swore an affidavit through Joseph Choge the CEO in which it was deposed that the application herein was res judicata and an abuse of the Court process the same having been dismissed.

12. It was deposed that she was a stranger to the attached agreement as the Executor did not have the Appellant's authority to execute the same and that there was no dispute to be referred to arbitration as the Respondent had not disputed the amount due and that the correct test to be applied is whether it is established beyond reasonable doubt by evidence that there at least a certain amount is presently due from the Defendant to the Plaintiff and that arbitration should not be extended to cover the area where there is no issue or difference, referable to arbitration in respect of that amount.

13. It was contended that referral of the matter to arbitration was not intended to cause delay or to deny a party who is rightly entitled to payment and that the application before the Court was in violation of Section 6 of the *Arbitration Act*.

14. By a Ruling thereon dated 30th November 2021, the subject matter of this Appeal, the Court found that the matter was not res judicata and that since the agreement provided for arbitration, the application was allowed.

15. Being aggrieved by the said Ruling the Appellant filed this Appeal and raised the following grounds of Appeal:

a. The Court erred in law and fact in not finding that the Respondent was in violation of Section 6 of the *Arbitration Act*.

b. The Court failed to pronounce itself on whether the Respondent had taken steps in the matter and had failed to comply with clear provisions of the *Arbitration Act*.

c. The Court failed to pronounce itself on the validity of the agreement dated 25th June 2019 and whether the same was capable of being enforced.

Submissions

16. Directions were issued that the Appeal be disposed of by way of written submissions and on behalf of the Appellant, it was submitted that the Respondent had not taken steps from the time she was served with summons to enter appearance and that the Appellant applied for Interlocutory Judgement which was duly passed. The same filed an application dated 26th May 2021 for stay of proceeding and production of documents which was duly dismissed by the Court.

17. That by virtue of Section 6 (1) of the *Arbitration Act*, the Respondent was obliged to bring application for stay of proceedings promptly as was stated by the Court of Appeal in *Naizsons (K) Ltd v China Road & Bridge Corporation Kenya* [2000] eKLR, where the Court held that it would consider whether the Applicant had taken steps in the proceedings other than steps allowed by the section, whether there were any legal impediments on the validity, operation or performance of the arbitration and whether the suit indeed concerned a master agreed to be referred to arbitration.

18. It was stated that upon receipt of the plaint the Respondent took steps by filing a Notice of Preliminary Objection which was withdrawn once the Appellant had filed grounds of objection. She went further and filed a notice to produce documents which was also responded to only to produce the said agreement in their application appealed against. It was contended that the Respondent had taken steps in the proceeding and had therefore given up his rights to pursue arbitration within the meaning of *Niazsons (k) Ltd* (*supra*).

19. It was contended that the same position was taken in the following cases : *Mt Kenya Universty v Step Up Holding (K) Ltd* [20128] eKLR where the Court held that the law obligated the Appellant to file the application seeking reference to arbitration simultaneously with the entry of appearance and thereafter take no further steps and *Safaricom Ltd v Flashcom Ltd* [2012] eKLR that the Defendant ought to have filed an application for stay of proceedings and reference to arbitration and not to have taken any other steps after entering appearance.

20. It was submitted that having entered Interlocutory Judgement the Court became functus officio and could not entertain any other application save for the setting aside of the said Judgement as was stated in the cases of *Raila Odinga & Others v IEBC & Others* [2013] eKLR and *John Gilbert Ouma v Kenya Ferry Services Ltd* [2021] eKLR.

21. It was submitted that the having dismissed the application dated 26th May 2021, the application dated 24th August 2021 became resjudicata as the issues of stay bending reference to arbitration had been conclusively dealt with.

22. It was finally submitted that there was no issue capable of being refereed to arbitration as the amount claimed was not disputed in support of this preposition reference was placed on the case of *South Eastern Kenya University v Geokarma Construction Ltd* [2022] eKLR and that Article 159 of the *Constitution* should not be used as a delay tactic as was stated in *Yes Housing Co-operative Society Ltd v Kenneth Onsare Maina* [2020] eKLR .

23. It was contended that the agreement relied upon by the Respondent was not capable of being enforced as it was not executed by the Appellants authorized agent and that the duty of proving so was with the Respondent.

24. On behalf of the Respondent it was submitted that the matter was not resjudicata as her Preliminary Objection was withdrawn before being heard in support of which the case of In *Accredo AG & 3 Others v Steffano Uccelli & Another* [2019] eKLR was tendered. It was contended that the distributorship agreement had an arbitration clause and therefore the primary suit was premature as the Appellant could not go against the said agreement in support of which reference was made to *Dock Workers Union Ltd v Messina Kenya Ltd* [2019] eKLR and *Adrec Limited v Nation Media Group Ltd* [2017] eKLR.

25. It was submitted that in pursuant of Section 6(1) of the *Arbitration Act*, the Respondent did not file a defence nor entered appearance but filed a Preliminary Objection on the Court's jurisdiction and to refer the matter to arbitration as provided for in *Fairlane Supermarket Ltd v Barclays Limited*.

26. It was contended that there was a dispute capable of being referred to arbitration in terms of Clause 14(1) of the agreement as was stated in *Adrec Limited* (*supra*) and that the said agreement was signed by the Appellant's director and was therefore valid.

Analysis and Determination

27. From the proceeding herein, the following issues are identified for determination:

    a. Whether there was an arbitration agreement.

    b. Whether the Respondent took steps which defeated her rights to arbitration.

    c. Whether there existed a dispute capable of being referred to arbitration.

    d. Whether the application Appealed against was *res judicata*.

28. For the purposes of this Judgement, I will start with the issue of res judicata, for should the Court find in favour of the Appellant on this issue then the same will have the effect of disposing of the Appeal. It was the Appellant's contention that having filed the application dated 26th May 2021 in which she sought for stay of proceedings and an Order for production of the distributorship agreement which was subsequently dismissed, the application dated 25th August 2021 in which the Respondent sought for stay of proceedings and striking of the suit became *res judicata* and that the Court became f*unctus officio*.

    a. The substantive law on *res judicata* is found in Section 7 of the *Civil Procedure Act* Cap 21 which provides that:

    b. "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"

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

    d. "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...".

33. Expounding on the doctrine, Odunga J as he then was in the case of *Gladys Nduku Nthuzi v Letshango K Ltd & others* [2022] eKLR had this to say " 34. This brings us to what the doctrine of res judicata is all about.

35. Section 7 of the *Civil Procedure Act*, 2010 provides as hereunder:

> " 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."

36. It is now old hat that the said doctrine applies to both suits and applications as was held in *Abok James Odera v John Patrick Machira* Civil Application no Nai. 49 of 2001. However, as was held in the said suit, to rely on the defence of res judicata there must be:

(i). a previous suit in which the matter was in issue;

(ii). the parties were the same or litigating under the same title;

(iii). a competent Court heard the matter in issue;

(iv). the issue had been raised once again in a fresh suit.

37. As regards the rationale of the doctrine of res judicata, reliance was placed on the decision of the Court of Appeal in *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* (2017) eKLR.

> " The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre 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 favourable 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."

38. In the *Maina Kiai case* (*supra*), the Court quoted with approval the Indian Supreme Court in the case of *Lal Chand v Radha Kishan*, AIR 1977 SC 789 where it was stated;

> " The principle of res judicata is conceived in the larger public interest which requires that all litigation must, sooner than later, come to an end. The principle is also founded in equity, justice and good conscience which require that a party which has once succeeded on an issue should not be permitted to be harassed by a multiplicity of proceedings involving determination of the same issue. The practical effect of the res judicata doctrine is that it is a complete estoppel against any suit that runs afoul of it, and there is no way of going around it – not even by consent of the parties – because it is the Court itself that is debarred by a jurisdictional injunct, from entertaining such suit."

39. In *Lotta v Tanaki* [2003] 2 EA 556 it was held as follows:

> " The doctrine of res judicata is provided for in Order 9 of the *Civil Procedure Code* of 1966 and its object is to bar multiplicity of suits and guarantee finality to litigation. It makes conclusive a final judgement between the same parties or their privies on the same issue by a Court of competent jurisdiction in the subject matter of the suit. The scheme of section 9 therefore contemplates five conditions which, when co-existent, will bar a subsequent suit. The Conditions are: (i) the matter directly and substantially in issue in the subsequent suit must have been directly and substantially in issue in the former suit; (ii) the former suit must have been between the same parties or privies claiming under them; (iii) the parties must have litigated under the same title in the former suit; (iv) the Court which decided the former suit must have been competent to try the subsequent suit; and (v) the matter in issue must have been heard and finally decided in the former suit."

40. In *Gurbachan Singh Kalsi v Yowani Ekori* Civil Appeal no 62 of 1958 the former East African Court of Appeal stated as follows:

> " 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 cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgement, 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...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the Plaintiff to prove, if traversed, in order to support his right to the judgement of the Court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

41. In *Apondi v Canuald Metal Packaging* [2005] 1 EA 12 Waki, JA stated as follows:

> " A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

29. The issue which the Court is called upon to determine is whether the issue herein has been conclusively determined. From the applications it is clear that the first application was on production while the application appealed against was on the issue of striking out the suit and or referring the same to arbitration, the only issue in common was the prayer for stay of proceeding. The applications did not involve the same subject matter, which was conclusively determined by the Court on merit. I am therefore not persuaded that the matter was res judicata and hold so.

30. The other issue which the Court is called upon to decided is whether there was in existence an arbitration clause in the distributorship agreement, as submitted by the Respondent, the agreement signed by the parties and annexed to the application appealed from clearly provided for the settlement

of any dispute arising therefrom to arbitration and the parties having chosen that mode of settlement of dispute I find no fault with the trial Courts holding thereon the Respondent having proved the existence of the said agreement.

31. Did the Respondent take steps in the suit and therefore could not rely on Section 6 of the Act? From the nature of the applications filed by the Respondent, I take the view that they were of the nature of preserving the subject matter and not of conceding to the Courts jurisdiction and having not entered appearance the Respondent retained the right of referring the matter to arbitrations

32. Consequently, it follows that the other issues raised by the Appellant can be raised before the Arbitrator as they are purely matters of facts, it is for the Arbitrator to now determine whether there is an issue to be adjudicated before the same and whether the said agreement was properly executed.

33. From the matters stated herein, I have concluded that the trial Court was not at fault and therefore the Appeal lacks merit which I hereby dismiss with cost being in the cause.

34. And it is ordered.

DATED SIGNED AND DELIVERED AT MURANGA THIS 2ND DAY OF MAY 2024

J. WAKIAGA

JUDGE

In the presence of:

Ms Owuor for the Appellant

Mr. Wahome for the Respondent

Jackline – Court Assistant