NCBA Bank Kenya PLC v Africa tea & Coffee Limited & 2 others (Civil Appeal E290 of 2023) [2024] KEHC 16912 (KLR) (20 September 2024) (Judgment)

Neutral citation: [2024] KEHC 16912 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL APPEAL E290 OF 2023

F WANGARI, J

SEPTEMBER 20, 2024

BETWEEN

NCBA BANK KENYA PLC .... APPELLANT

AND

AFRICA TEA & COFFEE LIMITED .... 1ST RESPONDENT

DT DOBIE & COMPANY LIMITED .... 2ND RESPONDENT

RENTCO EAST AFRICA .... 3RD RESPONDENT

(Being an appeal from the rulings and orders of the Chief Magistrate's Court at Mombasa (Hon. J.B. Kalo, CM) both dated 22nd September, 2023 in Mombasa CMCC No. E364 of 2023)

JUDGMENT

1. This Appeal arises from two (2) Rulings of the Trial Court delivered on 22nd September, 2022 by Hon. J.B. Kalo, CM in Mombasa CMCC No. E364 of 2023.
2. The Appellant filed this Appeal and preferred the following grounds in the Memorandum of Appeal.
    a. The Learned Magistrate erred in failing to find that on the admitted and indisputable facts, the plea of res judicata applied to the suit before him;
    b. In any event, the Learned Magistrate erroneously exercised his discretion in granting the injunction.
3. It thus prayed that that the appeal be allowed with costs and the rulings and orders made on 22nd September, 2023 be set aside and substituted with an order striking out the suit with costs.
4. Directions were taken to have the appeal disposed of by way of written submissions. It is only the Appellant who complied with the directions. Its submissions are dated 7th March, 2024. In its

submissions, the Appellant referred the court to four (4) decided cases among them Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Another [2019] eKLR where the Court of Appeal dealt with issue of res judicata in a matter which had been dismissed for want of prosecution. The other parties did not file submissions.

Analysis

5. This Court has carefully considered the record of appeal, the Appellant's submissions and the authorities cited and the only issue that falls for this Court's determination is whether the Trial Court erred in granting the orders of injunction and allowing the suit to proceed despite the plea of res judicata.

6. This being a first Appeal, the Court should with judicious alertness re-evaluate the evidence and consider arguments by parties and apply the law thereto, and, make its own determination of the issue or issues in controversy. Except however, that it should give allowance to the fact that it neither saw nor heard the witnesses' testimonies.

7. This was aptly stated by the Court of Appeal in the case of Selle & Another vs. Associated Motor Board Company Ltd. [1968] EA 123 as follows:

> " The appellate court is not bound necessarily to accept the findings of fact by the court below. An appeal to the Court of Appeal form a trial by the High Court is by way of a retrial and the principles upon the Court of Appeal acts are that the court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect, in particular the court is not bound necessarily to follow the trial Judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the evidence or if the impression based on the demeanour of a witness is inconsistent with the evidence in the case generally."

8. I have perused the Memorandum of Appeal and the entire record of the Trial Court and I am alive to the fact that my task is to re-evaluate the evidence in order to establish whether or not the Trial Court erred in its finding.

9. On injunctions generally, the law is settled and this court cannot purport to re-invent the wheel. This was well settled in the case of Giella v Cassman Brown [1973] EA 358. A party must establish a prima facie case, demonstrate irreparable damage or harm its stands to suffer in the event the order of injunction is not granted and if the court is in doubt, consider where the balance of convenience tilts.

10. As conceded by the Appellant in its submissions, the order to grant or not to grant injunctions is discretionary. As has been held in various decisions of this court and other superior courts, an exercise of discretion cannot be interfered with unless it can be shown that the same was wrongly exercised. I have considered the Trial Court's ruling and note that the court observed that the 1st Respondent's averments in its supporting affidavit had not been challenged by way of a counter affidavit. The Appellant only filed a notice of preliminary objection.

11. In essence, what the 1st Respondent averred was not challenged by way of evidence. It has not been shown by the Appellant how the discretion to grant the order was wrongly exercised. The Trial Court as it were correctly exercised its discretion in granting the orders sought. It would be onerous for this court to set aside the orders of injunction granted by the Trial Court which had the benefit of interrogating the parties' rival positions first hand. On this score alone, I find no merit in upsetting the orders of injunction granted by the Trial Court. The orders of injunction stand. The first limb of the appeal fails.

12. On the plea of res judicata, it is not in doubt that the initial suit (Mombasa CMCC No. 1033 of 2017) had been dismissed for want of prosecution. Indeed, the 1st Respondent at paragraph 12 of its plaint dated 29th March, 2023 admitted as much. The plea of res judicata is provided for in section 7 of the *Civil Procedure Act*. 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."

13. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely; that there must be finality to litigation and the individual should not be harassed twice with the same account of litigation. This was stated in the Court of Appeal case of Nicholas Njeru v The Attorney General and 8 Others Civil Appeal No. 110 of 2011 [2013] eKLR.

14. From the foregoing, it is clear that for res judicata to suffice, a court should look at all the four corners set out above namely; the matter directly and substantially in issue in the subsequent suit must be the same matter which was directly and substantially in issue in the former suits; the former suit must have been between the same parties or parties under whom they claim; the parties must have litigated under the same title; the court which decided the former suit must have been competent and the former suit must have been heard and finally decided by the court in the former suit.

15. Though there is an admission by the 1st Respondent that there was a previous suit between the same parties, the Appellant elected to only exhibit the plaint dated 29th March, 2023 and filed on even date. The previous suit (Mombasa CMCC No. 1033 of 2023) was not part of the record. The Trial Court in its ruling noted as follows: -

> " ...In the instant application, the 3rd defendant elected to exhibit only an application in the former suit and the order dismissing the former suit. The pleadings in the former suit were not annexed to the supporting affidavit for the court to consider them and determine whether the issues therein were similar to the issues herein..."

16. Just as the Trial Court, this court has not had the benefit of the pleadings in the previous suit in order to satisfy itself whether the issues therein were similar to the new suit. Section 7 of the *Civil Procedure Act* sets out the parameters to be met before a suit is said to be res judicata. The conditions are conjunctive, not disjunctive. All must be met. On this limb alone, I am not convinced that the Appellant discharged its duty of proving that the latter case was res judicata.

17. Be that as it may, can a matter dismissed for want of prosecution said to be res judicata? The gist of section 7 of the *Civil Procedure Act* defines the principle of res judicata to apply where the issues in the previous suit ought to have been "heard and finally decided." Black's Law Dictionary 10th Edition defines the terms "heard and determined" as follows: -

> " of a case, having been presented to a Court that rendered Judgment.".

The term "hearing" is defined in the same dictionary as follows: -

> " A judicial session usually opens to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying."

18. Though the Appellant referred to a Court of Appeal decision in Co-operative Bank of Kenya Limited v Cosmas Mrombo Moka & Another, the same court in Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Limited [2005] KLR 97 held as follows: -

> " ...Both the policy rationale as well as our case law lean in the direction that a suit will only be deemed to be barred by res judicata when it was heard and determined on the substantive merits of the case as opposed to suits that are dismissed on preliminary technical points. Res Judicata bars a future suit only when the case is resolved based on the facts and evidence of the case or when the final judgment concerned the actual facts giving rise to the claim. For example, dismissal of a case for lack of subject matter or because the service was improper or even for want of prosecution does not give rise to judgments on the merits and therefore do not trigger the plea of res judicata. The last issue (dismissal for want of prosecution) was the issue in the Tee Gee Electrics and Plastics Company Ltd v Kenya Industrial Estates Ltd [2005] KLR 97; LLR CAK 6880. Here the Court of Appeal was explicit that res judicata does not apply if the earlier suit was dismissed for want of prosecution as the same was not heard on merits".

19. A suit that was dismissed or struck out for nonattendance or want of prosecution in my view is not synonymous with a suit that has been heard and determined. In the circumstances of this case, I am guided by Article 50 (1) of the *Constitution* which provide for fair hearing as well as Article 159 (2)(d) of the *Constitution* which direct this court to tend to the substance of the case and its attendant justice. In the instant suit, the previous suit was dismissed for want of prosecution. I am in total agreement with the Trial Court's ruling on this respect.

20. On costs, the same follows the event. Though the appeal fails, I note that there is still a live issue before the Trial Court and as such, I direct that costs shall abide the outcome of that suit.

21. The upshot of the foregoing is that the court renders itself as hereunder: -

    a. The Appeal lacks merit and the same is hereby dismissed;

    b. Costs to abide the outcome of the main suit;

    c. The matter be mentioned for further directions before the Trial Court on 17th October, 2024.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 20TH DAY OF SEPTEMBER, 2024.

....

F. WANGARI

JUDGE

In the presence of;

Mr. Kongere Advocate for the Appellant

Mr. Muchiri Advocate for the 1st Respondent

N/A for 2nd and 3rd Respondents

M/S Salwa, Court Assistant