



REPUBLIC OF KENYA



**Jetha v Guaranty Trust Bank Kenya Limited (Commercial Case 438 of 2016)
[2023] KEHC 1438 (KLR) (Commercial and Tax) (3 March 2023) (Ruling)**

Neutral citation: [2023] KEHC 1438 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 438 OF 2016**

A MSHILA, J

MARCH 3, 2023

BETWEEN

DINSEH KUMAR ZAVERCHAND JETHA PLAINTIFF

AND

GUARANTY TRUST BANK KENYA LIMITED DEFENDANT

RULING

1. The Applicant filed a Preliminary Objection dated May 4, 2022 on the following points of law and grounds;
 - a. The Court has no Jurisdiction to hear or determine the main suit based on the Doctrine of Res Judicata as stipulated by Section 7 (Res Judicata) of the *Civil Procedure Act* (Chapter 21 of the Laws of Kenya), given that a related matter HCCC 379 of 2005 Fina Bank Limited (now known as Guaranty Trust Bank (Kenya) Limited v Maizena Millers Limited, Dinesh Kumar Zaverchand Jetha, Avinash Premchand Shah, Rajesh Zaverchand Jetha and Rashmkant Zaverchand Jetha, was fully heard and a final and conclusive Judgment issued on February 21, 2020 by Lady Justice Rachel Ngetich.
 - b. The said Court found and held that the 2nd Defendant Dinesh Jetha, confirmed executing documents in respect of bank facilities to the 1st Defendant Maizena Millers Limited, and that he, together with the 3rd to 5th Defendants therein, had guaranteed the credit facilities to the 1st Defendant company.
 - c. The said Court found and held that the 2nd Defendant confirmed that before signing memorandums of understandings he would sign guarantee forms.



- d. The said Court found and held that the 2nd Defendant had confirmed the amount claimed by Fina Bank Limited (now known as Guaranty Trust Bank (Kenya) Limited, as owing the sum of Kenya Shillings 42,000,000/-
 - e. The said Court entered Judgment against all the Defendants jointly and severally, including Dinesh Kumar Zaverchand Jetha, in the sum of Kenya Shillings 42,000,000/ with interest and costs.
 - f. The Court is Functus Officio having issued the final and conclusive Judgement on the merits February 21, 2022.
 - g. As a final decision had already been entered, the principle of functus officio estops the court from re-opening the matter on a merit-based re-engagement. Hearing the present matter would not only offend the principle of finality but would also be tantamount too sitting in an own appeal and would greatly prejudice the Defendant herein.
2. The Court directed the parties to canvass the Preliminary Objection by filing and exchanging written submissions; the parties' respective submissions are as set out hereunder;

Applicant'S Case

3. It was the Applicant's case that the Plaintiff/Respondent had previously made an application for the stay of these proceedings herein on account of HCCC No 379 of 2005. On September 17, 2019, Hon Lady Justice Nzioka directed the parties herein to file and serve an executive summary submitting why the Plaintiff/Respondent's application for stay of these proceedings should/should not be allowed.
4. [HCCC No 438 of 2016 Dinesh Kumar Zaverchand Jetha vs Guaranty Trust Bank stems from HCCC No 379 of 2005, Fina Bank Limited vs Maizena Maize Millers Limited](#) involves the same parties. Further, the issue in question in [HCCC No 379 of 2005, Fina Bank Limited vs. Maizena Maize Millers Limited](#) is whether the debt of Kshs 45,163,373/- sought by the Bank was secured by the suit property seeking to be preserved in HCCC No 438 of 2016 Dinesh Kumar Zaverchand Jetha vs Guaranty Trust Bank.
5. Further, the Applicant argued that in the instant case, the Plaintiff/Respondent vide his Complaint dated October 26, 2016 seeks two major Orders from this Court. First, a permanent injunction restraining the bank from exercising its power of sale or dealing with the Suit property pending hearing and determination of the suit. The Respondent also seeks a declaration that the Charge instrument dated April 30, 2012 is null and void.
6. On the other hand, the Defendant/Applicant herein instituted HCCC 379 of 2005 - Fina Bank Limited (now known as Guaranty Trust Bank (Kenya) Limited v Maizena Millers Limited, Dinesh Kumar Zaverchand Jetha and 3 Others seeking Judgment against the 1st - 5th Defendants jointly and severally for Kshs 45, 163,373/35 together with interest thereon at 10% per annum from June 2005 and costs. The 1st Defendant was sued as principal debtor and the 2nd - 5th Defendants as guarantors. Judgment was entered for the bank against the Defendants jointly and severally for Kshs 42,000,000 together with interest at Court rates from the date of filing the Suit and costs.
7. Before arriving at its final orders, the Court found and held that: the 2nd Defendant therein (the Plaintiff/Respondent herein) confirmed executing documents in respect of banking facilities to the 1st Defendant Maizena Millers Limited, and that he, together with the 3rd to 5th Defendants therein, had guaranteed the credit facilities to the 1st Defendant company.



8. The 2nd to 5th Defendants therein executed guarantees and that the guarantees executed were valid. The Defendants were issued with statements of account. The Plaintiff (the Defendant/Applicant herein) did not act contrary to legal provisions regulating the relationship between customer and bank.
9. It was the Applicant's contention that the issue of the validity of the Charge and all other related issues now raised by the Plaintiff/Respondent herein have been extensively dealt with in earlier decisions of the Court. By challenging the validity of a charge whose execution has been Ordered by the Court, the Plaintiff/Respondent is saying that this Court Ordered the execution of an invalid charge.
10. The Defendant/Applicant has submitted that this matter is res judicata because the Plaintiff/Respondent had previously made an application for the stay of these proceedings herein on account of HCCC No 379 of 2005. My Lady, the very fact that the Plaintiff/Respondent made this Application is more than enough evidence that HCCC No 379 of 2005 was related to the instant matter and raised the same issues.
11. Moreover, judgment has already been entered against the Plaintiff/Respondent in the sum of KShs 42,000,000 together with interests and costs in HCCC No 379 of 2005. The instant Suit not only offends the res judicata bar but also has the potential of giving rise to two contradictory judgments by the same Court if allowed, thereby bringing embarrassment to this Court and occasioning great prejudice to the Defendant/Applicant.
12. The injunctive orders sought in the Plaint dated October 26, 2016 have been the subject of a previous Ruling of this Court and so the same are res judicata. The issue of the validity of the Charge and all other related issues now raised by the Plaintiff/Respondent herein have been extensively dealt with in at least three earlier decisions of this Court.
13. Once this Court issued the final and conclusive Judgement on the merits dated February 21, 2020 in HCCC 379 of 2005 Fina Bank Limited (now known as Guaranty Trust Bank (Kenya) Limited v Maizena Millers Limited, Dinesh Kumar Zaverchand Jetha, and 3 others, it became functus officio.

Respondent'S Case

14. In response, the Respondent submitted that the Defendant's Preliminary Objection does not raise any point of law as the preliminary objections are based on disputed facts. For the Court to determine whether the Suit is res-judicata, it will have to ascertain facts and probe evidence. Therefore, a Preliminary Objection cannot be raised if any facts have to be ascertained from elsewhere or if the Court is called upon to exercise judicial discretion.
15. In addition, the Court ought to take into account that the Preliminary Objection must stem from the pleadings and raises pure point of law, and should not deal with disputed facts nor should it derive its foundation from factual information.
16. It was also the Respondent's contention that the issue of whether or not the suit is res judicata will require the ascertaining of facts. The Respondent relied on the case of *George Kamau Kimani & 4 others v County Government of Trans-Nzoia & another [2014] eKLR*. wherein the court dismissed the Preliminary Objection based on res judicata.
17. The Respondent opined that the Defendant should have filed a Notice of Motion annexing the annexing the previous pleadings to enable the court determine whether the matter is res judicata or not. Further the issue on whether or not the matter is res judicata facts have to be ascertained and a Preliminary Objection cannot be raised on disputed facts. Therefore, the Respondent prayed that the



Court holds and finds that what has been raised by the Defendant does not amount to a Preliminary Objection, hence the same be dismissed with costs to the Respondent.

18. It was the Respondent's submission that the suit herein is not res judicata for reasons that: the parties in HCC NO 379 OF 2005 are different from the parties in this particular suit; the nature of the relationships between the parties in HCC NO 379 OF 2005 and the present suit are different as the relationship of the parties herein is founded on the law of guarantees while the relationship between the parties in HCC NO 379 OF 2005 is anchored on the principal debtor's contract for the debt ; and the prayers sought in HCC NO 379 OF 2005 are distinct from the present suit noting that the proceedings herein were commenced by the Plaintiff in his capacity as guarantor while in HCC NO 379 OF 2005 the Defendant in its capacity as a lender sought to recover a sum of Kshs 45, 165,373 together with interest thereto.
19. Further to the above, the Plaintiff has disputed the service of the Statutory Notices as well as the amount demanded in the Statutory Notice for the sale of the property being Kshs. 124,957,497 whilst the amount secured by the alleged charge is for a maximum of Kshs 25,000,000. This was also not an issue for determination in Hcc No 379 Of 2005 as the issue therein was the debt allegedly due by the Company. The issues that fell for determination in Hcc No 379 Of 2005 were different from the issues being raised in the present suit. The issues for determination herein being inter alia validity of the charge, validity of the statutory notices and breach of the in duplum rule were not issues that were determined in Hcc No 379 Of 2005.
20. The Respondent thus submitted that he has demonstrated that the issues raised in the present suit were not and could not be raised in the former suit, the parties were not litigating under the same title, the parties are different and the issues raised herein have not been heard and determined by any Court. Therefore, a plea of res judicata does not rise.

Issues For Determination

21. The Court has considered the application, the Preliminary Objection and the respective written submissions and has framed only one for determination which is as follows;
 - a. Whether to uphold the Preliminary Objection dated May 4, 2022 on the grounds that the instant suit is res judicata?

Analysis

Whether to uphold the Preliminary Objection dated May 4, 2022 on grounds that the instant suit is Res Judicata;
22. The Plaintiff/Respondent herein has filed a preliminary objection citing that the instant suit is res judicata as the Plaintiff had admitted that there was a similar suit HCCC No 379 of 2005 which was heard and determined by Hon Lady Justice Rachel Ngetich and judgment delivered on February 21, 2020.
23. The preliminary objection raised on a point of law is on the grounds that the instant suit is therefore is res judicata. The issue for determination is whether the application falls within the ambit of Section 7 of the *Civil Procedure Act* which stipulates 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.'

24. This Court opines that for the doctrine of res judicata to apply, in this instance, there should be demonstration that the same issues have been heard and determined by a court of competent jurisdiction, same parties litigated under the same title and issues have been raised once more in this Petition

25. In case of *Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, [2017] eKLR*, it was 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.'

26. The *Civil Procedure Act* provides explanations with respect to the Application of the res judicata rule. Explanations 1-6 states thus:

' Explanation. —(1) The expression 'former suit' means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. —(6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.'

27. Having perused the proceedings in HCCC No 379 of 2005 attached to the Application, it is clear that the Defendant/Applicant filed proceedings against the Plaintiff as one of the parties therein and on February 21, 2020 obtained judgment against all the parties inclusive of the Plaintiff.

28. The Plaintiff who is the same party herein fully participated in the proceedings. It suffices to say that the Plaintiffs' arguments in respect of validity of the Charge, Statutory Notices and liability and relationships between the Bank and the customers were already addressed and the Judgment



conclusively dealt with the issues on merits and the Plaintiff is barred under the principle of 'res judicata'.

29. In this instance the institution of this instant suit by the Plaintiff is an attempt by the Plaintiff to circumvent the principle of res- judicata and amounts to an abuse of due process.

30. The upshot, is therefore, that this Court is satisfied that the Preliminary Objection is merited.

Findings And Determination

31. For the forgoing reasons this court makes the following findings and determinations;

- i. This court finds that the instant suit has all the elements of res judicata; the suit is found to be incompetent and it is hereby struck out with costs to be borne by the Plaintiff.

Orders Accordingly

DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 3rd DAY OF MARCH, 2023.

HON.A.MSHILA

JUDGE

In the presence of;

Miss Mabango holding brief for Kimathi for the plaintiff

Mrs. Otieno for the defendant/Applicant

Lucy-----Court Assistant

