



REPUBLIC OF KENYA



KENYA LAW
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**Abdi & another v Angwenyi & another (Civil Case 406 of 2013)
[2023] KEHC 4042 (KLR) (Commercial and Tax) (5 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 4042 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 406 OF 2013**

A MABEYA, J

MAY 5, 2023

BETWEEN

ADEN IBRAHIM ABDI 1ST PLAINTIFF

HASSAN ABDI GULED 2ND PLAINTIFF

AND

EZEKIEL ANGWENYI 1ST DEFENDANT

**SAMUEL ANGWENYI T/A UKAY CENTRE FOREX BUREAU 2ND
DEFENDANT**

RULING

1. By an order made on 7/10/2021, this Court directed that the application by the 1st defendant dated 29/9/2021 be served for directions on October 18, 2021. Come the said 18/10/2021, the Court directed that the 2nd defendant's application dated December 18, 2018 be re-served upon the plaintiff forthwith and the plaintiff responds to both applications within 14 days.
2. The applicants were to file and serve their submissions within 14 days and the plaintiff to file his submissions within 14 days of service. The matter was to be mentioned on 1/12/2021 to give a ruling date. The Court did not sit until December 20, 2021 when it certified urgent the plaintiff's application dated December 16, 2021 and made certain ex-parte orders thereto.
3. When the matter came up for directions on 4/1/2022, the Court extended the ex-parte order and directed that the application dated December 18, 2018 was to be determined by way of submissions on record. That being the case, no directions were given on the plaintiff's application of December 16, 2021 and this ruling is in respect of the 2nd defendant's application dated December 18, 2018.



4. The application is dated December 18, 2018 by the 2nd defendant. It was brought under order 10 rule 11 of the Civil Procedure Rules and sections 1A, 1B, 3 & 3A of the Civil Procedure Act.
5. The application sought orders to set aside the interlocutory judgment entered on 30/5/2015 and final judgment entered on 8/12/2017 and all consequential orders. It also sought that leave be granted to the 2nd defendant to file his defence and relevant pleadings in his defence to the suit. That one Michael Kiplagat Rotich, the process server who served the Summons in this suit, be summoned to appear in Court to be cross examined on his affidavit of service.
6. The application was based on the grounds found on the face of it and in the Supporting Affidavit sworn by Samuel Angwenyi on December 18, 2018. It was contended that the 2nd defendant was never served with the Summons, or an application for reconstruction of the court file or hearing notice. That the original file was closed on October 25, 2018 after an erroneous judgment had been entered in the skeleton file. It was also contended that execution against the 1st defendant had commenced and there was a risk that the 2nd defendant could be attached.
7. Vide their submissions dated 4/1/2022, the plaintiffs submitted that the application was res judicata as a similar application dated 14/12/2018 had been filed, prosecuted and dismissed vide ruling delivered on 22/5/2020. This Court has considered the pleadings, evidence, submissions and court record.
8. This Court has seen the application dated December 14, 2018 by the 1st defendant. The application sought a stay of execution of judgment and decree entered on 8/12/2017, setting aside of the interlocutory judgment entered on 30/5/2016 and final judgment of 8/12/2017, and leave to file a defence and other relevant pleadings. These were the exact same orders sought in the present application.
9. The application dated December 14, 2018 was dismissed by Muigai J in her ruling made on 22/5/2020. In that ruling, the court made findings that service of Summons was proper and the formal proof proceedings and final judgment were all regular. It further found that the draft defence did not raise any triable issues for trial. The Court further confirmed the judgment as entered for USD 315,484,3720(sic) with costs and interest. The Court has since confirmed that judgment was for USD 315,484.3720 plus costs and interest.
10. The doctrine of *res judicata* is set out in the Civil Procedure Act at section 7 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 can 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.”
11. From the record, it is evident that the prayers sought and issues raised in the present application have already been heard and determined upon by a court of competent jurisdiction. This Court cannot attempt to re-open those issues by going to the merit of the application.
12. The two applications were filed 4 days apart. They were similar in all ways. The 1st defendant prosecuted his application dated December 14, 2018 but the 2nd defendant did not prosecute the present application. However, he filed a Replying Affidavit sworn on 3/4/2019 in support of the 1st defendant’s application. He raised the same issues he raises in the present application.
13. Since the issues seem to be the same, the impugned affidavit of service is the same, the agent who is said to have been served with Summons is said to have received the same on behalf of both the 1st and



2nd defendant, the challenge on the re-construction of the court file is the same, the findings made on the application dated December 14, 2018 are binding on this Court. Any consideration thereof will amount to sitting on appeal on the decision of Muigai J.

14. It is unclear why the 2nd defendant did not prosecute his said application together with that of the 1st defendant at the time. Although his application is independent of that of the 1st defendant, the issues raised in his application are on all fours with that of December 14, 2018 by the 1st defendant. He supported the 1st defendant's application by filing a replying affidavit as aforesaid.
15. A court of competent jurisdiction having pronounced itself on those issues, this court cannot re-open them for consideration again.
16. In light of the foregoing, this court finds that the application dated December 18, 2018 is *res judicata* and is dismissed with costs to the plaintiffs. The interim orders are likewise discharged.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 5TH DAY OF MAY, 2023.

A MABEYA, FCI Arb

JUDGE

