Kwale International Sugar Co Ltd v Kenya Bureau of Standards (Civil Cause 1 of 2020) [2023] KEHC 17439 (KLR) (9 May 2023) (Ruling)

Neutral citation: [2023] KEHC 17439 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CAUSE 1 OF 2020

DKN MAGARE, J

MAY 9, 2023

BETWEEN

KWALE INTERNATIONAL SUGAR CO LTD ..... PLAINTIFF

AND

KENYA BUREAU OF STANDARDS ..... DEFENDANT

RULING

1. This matter ought to be straight forward. However, I had to read request of documents to determine a simple question.

2. The question is whether this suit is *res judicata* Mombasa Civil Appeal No 2 of 2020. Kenya Bureau of Standards vs Kwale International Sugar Company Ltd and 2 Others.

3. The answer to the questions of what *res judicata* means and whether it applies to this matter, a background will be necessary both to the concept of res judicata and this dispute. At the back of my mind, I have 2 questions which will help me answer the question. When did the course of Action arise and whether the issues in this matter could be raised or be part of the claims in the former suit.

4. Strangely though, it is not the primary suit that is said to be res judicata but on the Appeal. I shall revert on this shortly.

5. I am aware that striking out a suit is of the last resort, unless it cannot be salvaged. The courts will always be slow to do so. In the *Yaya Towers Limited vs Trade Bank Limited (In Liquidation)* Civil Appeal No 35 of 2000 where the court expressed itself thus:

> "No suit should be summarily dismissed unless it appears so hopeless that it is plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment."

6. This cannot apply where a suit is res judicata as litigation has to come to an end. A party cannot, clothe an already litigated case as a new one by adding a few new clauses. However, a case, that has not been litigated must be allowed to proceed.

7. In the locus classicus case of *Amalgamated Union of Kenya Metal Workers v Jaykay Mechanical Engineering Limited* [2019] eKLR, Justice RIKA stated as doth: -

> " Parties cannot regurgitate recognition dispute, barely 2 years after signing the Recognition Agreement, and after another dispute was resolved by the Court leading to that Agreement. Judicial work should not be cyclic, where disputes are resolved, only for unsatisfied Parties to endlessly resurrect them, by devious means.

Submissions

8. Parties filed copious amounts of submissions. They relied on literally the same authorities but differed on the interpretation of res judicata. I therefore do not propose to deal with the law on res judicata but a factual issue whether this suit is res judicata case 2 of 2020.

Background

9. There was a raid in the premises of the Respondent's factory at Ramisi wherein sugar was impounded. This resulted in the filing of Petition No 226 of 2018 - *Kwale International Sugar vs Kenya Bureau of Standards and other*. The petition was allowed on November 7, 2019. There was an Appeal from that Judgment on the violation of rights vide Mombasa Case 2/2020.

10. My understanding is that the petition is effectively alive. The decision of the Court of Appeal set aside the judgment of EK Ogola J. Nothing more.

Res Judicata

11. Section 7 of the *Civil Procedure Rules* provides as doth: -

> " 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.
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> 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.
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> 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.
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> 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.
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> 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.
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> 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".

12. The essence of res judicata, is to avoid claims that have been fully adjudicated from being – re-re-litigated again. In the case of *James Katabazi & 21 Ors v the Attorney General (of Uganda)* the Court stated for the doctrine to apply: the matter must be 'directly and substantially' in issue in the two suits, the parties must be the same or parties under whom any of them claim, litigating under the same title; and the matter must have been finally decided in the previous suit.

13. A litigation in in an appellate level where a matter is still alive, cannot be said to be *res judicata*. Can the parties raise this issues at the appellate level.

14. In the case of *Uhuru Highway Development Limited v Central Bank of Kenya & 2 others* [1996] eKLR the court stated as doth: -

> " But we need not rely entirely on the Indian Authorities. Here at home in the case of *Mburu Kinyua Vs Gachini Tuti* (1978) KLR 69 the majority of this court held that a second application to set aside a judgement entered ex-parte would be res-judicata when the fact upon which it was based were known to the appellant. The dissenting judgement of Madan JA (as he then was) is the one which Mr Sharma and Mr Rebello asked us to follow in contradistinction to the judgements of Wambuzi and Law JJ A., Madan JA said this:
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> "I am not aware of any bar generally to presenting more than one applications until the conscience of the court comes to rest at ease that justice has been done. I would not go so far as to say that the court must act whether or not there is a right of appeal, review or application. It would depend on the circumstances in each case. Moreover, the liberty to present more than one application is always subject to the Court's power to prevent abuse of its process, including mulcting the offending party in costs. It is also of course subject to the rule of res judicata including what is laid down in explanation (4) to section 7, unless a special circumstance is present in which event I would be content to follow the following dictum of Wilgram V-C, in *Henderson V Henderson* (1843) 67 E R 313, 319, which the Privy Council described as the *locus classicus* of this aspect of *res judicata*, in *Yat Tung Investment Co Ltd Vs Dao Hrng Bank Ltd*. (1975) AC 581, 590:
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> Where a given matter becomes the subject of litigation in, and 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 matter which might have been 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 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"

15. I note that the Appeal arose from a Constitutional petition. The Appeal therefore is on a constitution petition issues. Can the constitutional petition for enforcement of rights be res judicata. Of course it

can, in the case of *Kivanga Estates Limited v National Bank of Kenya* [2014] eKLR, justice Havelok had this to say: -

> "In my view, the other authorities quoted by the Plaintiff herein were all along the same principles as expounded in the Court of Appeal authority, as above, by which I am bound. From the Defendant's authorities I found some assistance from the Judgement of my learned brother Majanja J. in the Fleur Investment case (supra) at paragraph 35 of his Judgement: "35. In my view, this petition is another suit filed to litigate the same matter between the same parties seeking similar relief. It is an abuse of the court process to file a multiplicity of suits seeking similar relief in respect of the same subject matter." Further, Angote J. came to a similar conclusion in the Chairman District Alcoholic Drinks Regulation Committee case (also supra) when he detailed at paragraphs 38 and 39 thereof: "38. A party who wishes to file a suit which is similar to an existing suit must withdraw the first suit first. This court cannot allow parties to be filing a multiplicity of suits on the basis that they have found that the previous suit(s) wanting either in content or form. The court must and should invoke its inherent jurisdiction to stop such abuse of the court process. 39. Abuse of court process includes a situation where a party improperly uses judicial process to the irritation, harassment and annoyance of his opponent and to interfere with the administration of justice."

16. The respondent file a Replying affidavit sworn by Benson Nzuka on February 2, 2023. In that affidavit the respondent stated that they concerted the illegality vide Petition No 225 of 2018.

17. The Court, Ogola JA delivered two judgments on March 7, 2019 and 07/11/19. The decision aggrieved the KBS who appeal on good or affair hearing for issuing 2 judgments.

18. Subsequent to the judgment on November, 2019 the plaintiffs filed this suit.

19. In the meantime, the Court of Appeal allowed the Appeal and remitted it back for trial.

20. According to the plaintiff the dispute in petition No 226 of 2018 is the Laboratory Report dated August 2, 2018 and release of sugar.

21. The issue of economic loss was not an issue.

22. The Applicant on the other hand contends that this issue is res judicata. The current application may have been triggered by an application dated May 11, 2022, which is unsigned but was applying to strike out the defence for being res judicata. The shoe is now on the other foot. The Respondent filed submissions dated February 22, 2023.

23. I have not had sight of the Applicants submissions.

Analysis

24. The claim in the other suit was of the declaration of nights.

25. The suit was remitted to the High Court for hearing. The Court of Appeal did not make final determination of rights.

26. The Court was of the view that the court was wrong.

27. Once the matter was remitted for rehearing, then the same is not the res judicata. There is no final determination. With that finding it is necessary to determine whether the causes of Action are different. It is necessary to determine whether the causes of action are different.

28. It is my view however that the is a need to consider consolidating the matters now pending in the High Court.

Determination

i. The application dated November 10, 2022 is bereft of merit and is dismissed in *limine*.

ii. The plaintiff is to have cost of the Ksh 30,000/= for the application.

iii. The Court to give directions immediately after this Ruling.

DELIVERED, DATED and **SIGNED** at **MOMBASA** on this **9th** day of **May, 2023**. Judgment delivered through Microsoft Teams Online Platform.

KIZITO MAGARE

JUDGE

In the presence of:

Obura for Mucheu for the Defendant

No appearance for the Plaintiff

Court Assistant - Firdaus

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