



**Silver Bells Hotels Ltd v Kenya Ports Authority & 4 others (Civil Appeal
E097 of 2021) [2023] KEHC 17528 (KLR) (5 May 2023) (Judgment)**

Neutral citation: [2023] KEHC 17528 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL APPEAL E097 OF 2021
DKN MAGARE, J
MAY 5, 2023**

BETWEEN

SILVER BELLS HOTELS LTD PLAINTIFF

AND

KENYA PORTS AUTHORITY 1ST DEFENDANT

KENYA REVENUE AUTHORITY 2ND DEFENDANT

EVERGREEN MARINE CORP. (TAIWAN) LTD 3RD DEFENDANT

GULF BADR GROUP KENYA LIMITED 4TH DEFENDANT

GUANZHOU DUN HUA TRADINGS CO. LTD 5TH DEFENDANT

JUDGMENT

1. This appeal arises from the decision of the Chief magistrate C.N. Ndegwa given on 23/6/2021 in Mombasa CMCC 237 of 2020. The Appeal has 9 odd ground. The grounds basically has 1 ground that is: -
 - a. Whether the suit was res judicata Mavoko Misc. Civil Application No. 21 of 2019. The appeal is opposed and submissions filed.

Pleadings

2. The Appellant filed suit on 24/2/2020 claims damages. He stated that there was a suit Mavoko Misc. Application No. 21 of 2019 company the Applicant to release the goods in consignment No. GLDUS748824. It appears the goods were sold in a public auction subsequently.
3. The 1st respondent stated the goods were released to the Inland container terminal and they are deemed to have been delivered to the plaintiff. The request to release was given by KRA to relocate the goods.



4. The 3rd and 4th Defendant filed defence stating that the goods were shipped to the 3rd defendant. The 3rd and 4th deny that they instructed the 1st and 2nd defendant not to release the goods.
5. The 3rd and 4th Defendants filed an application dated 10/6/202 seeking to strikeout the suit against them. They state that the suit against the 4th defendant violates the principle that one cannot file suit against an agent of a known principal.
6. The Appeal is herein is for allowing. The question that lingers in mind is whether the parameters of res judicata are met in those 2 cases. The definition of res judicata in Section 7 of the [Civil Procedure Act](#), which provides as follows: -

“Res judicata

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.

Explanation—The expression “former suit” means a suit which has been decided before

(1) the suit in question whether or not it was instituted before it

Explanation—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—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.”

7. The main pillars of res judicata is:-
 - a. The same issue was substantially the same.
 - b. The parties were litigating under the same title.
 - c. In a court of competent jurisdiction.
 - d. The matter was finally decided.
 - e. The issues were raised and either denied or admitted expressly or impliedly by the other party.



8. In essence, the suit must have been heard and determined the rights of parties. It is crucial that it is irrelevant whether the former suit was instituted before or after.
9. To be able to know whether the suit is res judicata, we end to settle: -
 - a. The cause of action in the former suit
 - b. Whether it was defended.
 - c. Whether there is a binding. Decision in the former suit.
10. The suit herein relates to purchase of various items from China in October 2018. The items are itemized in paragraph 9 of the plaint
11. The 5th Respondent had allegedly misplaced the original bill of lading No. 149805237797. A bill of lading is a document of title. There can be no release of documents without the same. In a bid to get a roundabout way, the Plaintiff obtained an order, which was to replace the bill of lading. However, the documents were not useful. The goods were auctioned on the specified date. As a result of the al, a new cause of action arose, the value of the goods and an unlawful sale the ale took place when there was an order in situ.
12. Though the defendants had been strictly instructed not to release the goods, they fraudulently released the same to a third party, on instructions of the 1st and or 2nd defendants. In a country governed by laws, authorities give options on the state where the documents of title are not released. The option available is to deposit bond which is 200% of the value. The applicant could not raise monetary bond and sought to raise other alternative security. Whether or not the release was ordered, the liability for misplacing the documents of title and excessive demurrage charges still continued.
13. The appellant served release order on 21/6/2019. When clearing the Appellant realized that the goods were sold on 10/5/2019 in short there were no goods to be released. Without the goods being release, the contractual liability for the value continues and subsists. The illegal sale gave rise to a completely new cause of action.
14. It is not a claim the Appellant could anticipated or used as a defence in the former suit. In tort every party has a duty to mitigate costs. Mitigating costs does not take away the main claim. A suit for release or issuance of alternative bond is not a claim on ownership. The goods, having been sold, it is important to know who is liable for the value.
15. The appellant filed this suit to challenge the sale by the 1st and 2nd defendants. They also claimed against the 3rd and 4th Defendant for failure to safeguard the goods. The cause of action herein arose on 10/5/2019 when the goods were sold. The appellant is not claiming that the goods be released to him. The issue of unlawful sale could not have been part of his defence.
16. Even if the goods had been released to the Appellant, they still retained the rights to claim for damages for delay in releasing the goods, loss of through extra bond. In the best case scenario, had the goods been released pursuant to the court order, the discharge of that bond and the financial costs of maintaining the documents till transshipment is done still remained.
17. If the goods were sold at value or below value, then the sellers owe the owner or the consignee the goods. It is also important to note that a Misc. Application does not decide rights between parties. It simply settles formal aspects as parties fight. For example, a misc. application for leave to appeal out of time with stay pending appeal does not make the application res judicata.



18. Basically the order of 21/6/2019 was to replace the bill of lading. The goods no longer exist. There is thus a new cause of Action liability for the sold goods. Though connected to the original course of action the action relates as to who is liable for the loss of the goods. The special damages of 5,604,7000 could not be claimed in the Misc application
19. The court in that case could not have jurisdiction to order payment of compensation for breach of contract. At the time the order was issued, there was no issue of breach of contract.
20. These claims are not and cannot be said to relate to Misc. Civil Application No. 21 of 2019. The said suit did not determine the rights between the parties.
21. Even when the goods were released, the Appellant still retained the right to claim for damages for breach of contract. Even where no damages are suffered, the right to claim for damages for breach of contract still subsists. In that case the court issues only nominal damages.
22. This is equivalent to completion of a sale agreement. Even where parties enforce completion of the sale agreement, the wronged party still retains the right to claim for damages for late completion. Such a claim cannot be filed till the sale is completed.
23. In this matter, the order for release was completely overtaken by the sale, which prima facie appears illegal. I cannot understand how a party can be litigating on the release of goods while flagrantly not disclosing to the court that the goods are on sale. They then turn around to say, the matter is res judicata.
24. It therefore raises cause of action to challenge the sale. It is clear that the issue of the value of the goods has never been litigated upon. This is not a claim where a party adds one or two parties to change the cause of action. It is a case of a new cause of action arising in the course of the other sit being enforced.
25. From the second Respondent's Defence, they deem the goods to have been released to the Appellant. The order of release thus is in line with the defence of the 2nd Respondent but the 2nd Respondent does not offer any explanation on why the goods or their value is not in the hands of the Appellant.
26. Turning to the Misc. Application No. 21 of 2019 the dispute was between three Applicants, where the 5th Respondent and the Appellant together with Franklin Mwenda Kimata were the applicants. The 3rd and 4th respondents were the respondents. The Application was seeking the following orders: -
 - a. That this Application be certified as urgent and heard ex-parte in the first instance.
 - b. That the Honourable Court be pleased to grant an early hearing date for inter-parte hearing of this application.
 - c. That an order do issue compelling the Respondents, their agents, assigns and/or authorized officers to immediately and unconditionally release the Consignment cargo No. GLDU578824 to the 1st Applicant herein and/or its authorized agent.
 - d. That in the alternative, an order do issue compelling the Respondents to accept and take Title Deeds LR No. Kajiado/kaputiei North/67080 and LR No. 14781/139 situate in Mavoko Municipality-Machakos County and the same be charged in their favour as guarantee to secure the release of and subsequently release Consignment cargo NO. GLDU578824 to the 1st Applicant herein and/or its authorized agent.
 - e. That the costs of this application be provided for.
27. The 2nd respondent's defence was that they could not release without the original title documents. These could only be released subject to issuance of 200% of the value of declared value.



28. The issue was basically to get an alternative to a bank guarantee to release the goods. At the issue of ownership of goods was not in dispute. Indeed, the only question was the alternative to a bank guarantee, that is charging of title to Kajiado/Kaputie North 6708 and LR 1478/139 to secure release. The application was allowed and an alternative bond was to be given. The bond was overtaken by events.
29. The 3rd and 4th Respondents, as at the time of filing their replying affidavit on 8//5/2091 in the Mavoko suit did not have the gazette Notice No. 4499 dated 10/5/2019. This gazette notice could not have formed party of the defence on 8/5/2019.
30. The fact that the 3rd and 4th defendants were dishonest and concealed the fact that there is in process plans to sell the goods, which was due only two days later, speaks volumes. It however cannot be used against the Appellants.

The Ruling of 23/6/2021

31. The ruling delivered on 23/6/2021 is the most unconventional, I have seen. Order 21 rule 4 states as doth; -

Contents of judgment

[Order 21, rule 4.] Judgments in defended suits shall contain a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision.

32. The rulings should mirror the judgments. The court should never surmise and must at all times, address concisely, issues raised by parties. The weighty issues raised were perfunctorily dealt with and did not even do justice to the victor.
33. There should be on record, the reasoning of the court, the issues for determination and the finding. The ruling does not deal with the issues raised by parties. The parties including the Respondents herein raised voluminous submissions including a preliminary objection on part of the 1st Defendant.
34. The same was totally not dealt with. This is a kind of ruling that causes anxiety among parties. The legal advisers should be in a position to advise their clients on the basis of the Ruling, that is, whether or not to concede the Appeal. This matter also offers an excellent opportunity to elucidate the law.
35. Before leaving the matter I end to address the issue raised but not arrested. The 1st Respondent posited that this court has no jurisdiction by dint of Section 62 of the Act. The said Section provides as doth:-

“ 62. Compensation (1) In the exercise of the powers conferred by sections 12, 14, 15 and 16, the Authority shall do as little damage as possible; and, where any person suffers damage, no action or suit shall lie but he shall be entitled to such compensation therefore as may be agreed between him and the Authority or, in default of agreement, as may be determined by a single arbitrator appointed by the Chief Justice.

(2) Nothing in this section shall be construed as entitling any person to compensation—

(a) for any damage suffered unless he would have been entitled thereto otherwise than under the provisions of this section; or



- (b) for any damage suffered as a result of the user of any works authorized under this Act unless such damage results from negligence in such user.

36. The section purports to have parties to refer disputes to arbitration. The power is vested in the CJ to appoint such an arbitration panel. The section is stand alone and is in conflict with the [arbitration Act](#). Arbitration in this country is governed by the [arbitration act](#), section 6 provides that a party wishing to have the matter referred to arbitration, must, at the time of entry of appearance, file an application for stay. Therefore any party who files defence or takes any other action, falls foul of section 6 and is bound to proceed with the suit.
37. Immunities from hearing by didn't of office were repealed upon passing of the new constitution. Only the president has certain limited immunities. In so far as the section purports to create immunity and refer persons to nonexistent Arbitration tribunals, it is not good law.
38. In effect, it forces parties to move from court to some arbitrator whose appointment is not certain. The section does not take into consideration the multifaceted nature of the disputes. In most cases, there are mixed cases.
39. I have seen cases where the courts have shied away from telling the king that he is naked. The procedure for such appointment has not been set out. Further KPA is not liable till a finding is made from a series of transactions. It is untenable to have two parallel processes. It is impracticable to move a claim that is arbitrable and that to bel litigated upon and separate the same.
40. This entails having two separate processes. It also immunizes KPA from litigation. Article 143 of [the constitution](#) stated as doth: -

“Protection from legal proceedings

- (1) Criminal proceedings shall not be instituted or continued in any court against the President or a person performing the functions of that office, during their tenure of office.
- (2) Civil proceedings shall not be instituted in any court against the President or the person performing the functions of that office during their tenure of office in respect of anything done or not done in the exercise of their powers under this Constitution.
- (3) Where provision is made in law limiting the time within which proceedings under clause (1) or (2) may be brought against a person, a period of time during which the person holds or performs the functions of the office of the President shall not be taken into account in calculating the period of time prescribed by that law.
- (4) The immunity of the President under this Article shall not extend to a crime for which the President may be prosecuted under any treaty to which Kenya is party and which prohibits such immunity.

41. In *Uber Technologies Inc. v. Heller* [2020] 2 S.C.R., the Canadian supreme court had this to say: -

“The [Arbitration Act](#) generally mandates a stay of proceedings when a court action relates to a matter governed by an arbitration agreement (s. 7(1)). Of the few exceptions to this



general rule, this appeal requires consideration only of whether Mr. Heller's action should proceed because "[t]he arbitration agreement is invalid" (s. 7(2)). Answering that question is really this simple. As a matter of public policy, courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law. This obviates any need to resort to, and distort, the doctrine of unconscionability.

[106] While the parties did not argue this appeal on the basis of public policy, we are of course not bound by the framing of their legal arguments. The central question to be answered in this appeal is not whether Uber's arbitration agreement is unconscionable, but whether it is invalid as contemplated by the *Arbitration Act* (i.e., unenforceable as a matter of contract law). Whether that question is viewed through the lens of unconscionability or public policy, the basis for reaching a conclusion on enforceability is substantially the same: the issues raised by the parties remain the focus (R. v. Mian, 2014 SCC 54, [2014] 2 S.C.R. 689, at para. 30; see also 1196303 Ontario Inc. v. Glen Grove Suites Inc., 2015 ONCA 580, 337 O.A.C. 85, at para. 87). Further, this Court has said that courts may consider issues of public policy on their own motion, and for a good reason that (by happy coincidence) touches on the very basis for my objection to the putative "arbitration agreement" in this case: "public policy and respect for the rule of law go hand in hand" (Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, [2006] 2 S.C.R. 612, at para. 59).

42. My understanding is that pursuant to schedule 6 section 7 of *the constitution*, provides as doth: -

"Existing laws (1) All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution."
43. Further the law limits access to the courts. It is limiting the right established under article 159 without saying so. By its wording, the same hinders access to justice. It is anathema to the good governance and constitutional order by placing the chief justice and the president of the supreme court as the appointing authority for a matter likely to reach her. In the hierarchical system of government, the freedom to choose alternative dispute resolution mechanism is therefore judilrising ADR.
44. The long and short of this finding is that section 62 of *Kenya Ports Authority Act* is unconstitutional and not binding. The right to sue Kenya Ports Authority before the court of law as properly established cannot be vitiated.
45. The 1st respondent is therefore properly sued the said section offends article 24 of *the constitution* as there is no indication that it is meant to limit access to courts and the right to fair hearing and right to administrative action. I therefore dismiss the preliminary objection and hold that the 1st respondent is properly sued.
46. Regarding amendment, the court is enjoined to decide, even when dismissing a claim on all issues. This is because it is not the last court. This has been said by the Court.
47. However, applies to all applications. The courts, other than the last court must decide on all issues raised.
48. A party cannot be driven from the judicial system to the alternative unless they had prior thereto had an agreement in writing



49. There was no appeal by the 1st Respondent for failure to decide the said application. It was deemed to have been determined. The last issue was on issue of Amendment. The same was dismissed by the implication The court did not assign any issue for not allowing the application dated 14/10/2020.
50. The amendment is a routine amendment correctly the descriptive parts of the 3rd defendants and the name of the said firm. It also adds one prayer. There is no serious opposition to it in the circumstances, the court ought to have allowed the same. I allow the same. This settles all the applications in the record of appeal
51. The issues areas such determined as follows:
- a. I therefore find that the suit herein is not *res judicata*.
 - b. The amendment ought to have been allowed.
 - c. The preliminary objection ought to have been dismissed in limine
 - d. The matter in the court below should proceed against all the 5 Respondents.

Determination.

52. The upshot of all the foregoing, is that I allow the appeal in the following terms: -
- a. The Ruling dated 23/6/2021 is set aside, *in toto*.
 - b. The suit was filed in the subordinate court is not *res judicata* Mavoko Misc. Civil Application No. 21 of 2021.
 - c. The court has jurisdiction to hear and determine the case against the 1st Respondent, Kenya Ports authority
 - d. Section 62 of [Kenya Ports Authority Act](#) is unconstitutional, null and void.
 - e. Costs of 250,000/= to the Appellant payable by the 3rd and 4th Respondents thin 30 days.
 - f. The matter be heard on priority basis before any other Magistrate with pecuniary jurisdiction except Hon. C.N. Ndegwa
 - g. For avoidance of doubt, the applications dated 27/3/2020 and 10/6/2020 are marked as dismissed with costs to the Plaintiff in the lower Court herein payable by the respective applicants
 - h. The Application for amendment dated 14/10/2020 thus allowed.
 - i. Costs in the cause.
 - j. The appellant do amend the plaint in 15 days from the date of this Judgment hereof.
 - k. This file is closed.
 - l. The matter be listed before the Chief Magistrate on 29/5/2023 for pretrial direction on the main suit.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 5TH DAY OF MAY, 2023.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE



JUDGE

In the presence of:

No appearance for parties

Court Assistant - Aziza

