



**Le Vogue Hair Beauty Studios Limited v Kenya Deposit Insurance Co-operation
(As Liquidators of Prudential Building Society) & 2 others (Commercial Case
453 of 2013) [2023] KEHC 20713 (KLR) (Commercial and Tax) (2 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 20713 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 453 OF 2013
DO CHEPKWONY, J
JUNE 2, 2023**

BETWEEN

LE VOGUE HAIR BEAUTY STUDIOS LIMITED PLAINTIFF

AND

**KENYA DEPOSIT INSURANCE CO-OPERATION (AS LIQUIDATORS OF
PRUDENTIAL BUILDING SOCIETY) 1ST DEFENDANT**

BRISKY PROPERTIES LIMITED 2ND DEFENDANT

REGISTRAR OF TITLES 3RD DEFENDANT

RULING

1. This ruling relates to the Notice of Motion application dated 2 January 3, 2023, which seeks for the following orders:-
 - a. Spent;
 - b. The Honourable Court be pleased to dismiss the 1st Defendant's Counter-claim with costs to the Plaintiff and the 2nd Defendant.
 - c. Costs of this application be provided for.
2. The application is based on the grounds on its face and the Supporting Affidavit of James M. Kahumbura, the Director of the Plaintiff sworn on January 23, 2023.
3. The Applicant avers that it filed the suit seeking injunctive orders against the 1st Defendant who filed its Defence and Counter-claim in April, 2003. The Applicant states that the main issue in the suit



was in respect of Parcel No LR 209/4982 which had been charged by the Plaintiff to Prudential Building Society and had been irregularly discharged. The Plaintiff also avers that in the Defence and Counter-claim, the 1st Defendant wants the discharge of Charge to be reversed and further claim for an outstanding balance of Kshs.468,676,075.00 and interest of 27% p.a from July, 2003 until payment in full.

4. It is the Plaintiff's contention that the 1st defendant amended the defence and Counter-claim to include the 2nd and 3rd Defendants. The Plaintiff claim is that the 1st Defendant filed High Court Miscellaneous Civil Application No 685 of 2012 over the same subject matter and consequently filed an application in this suit seeking stay of proceedings which was dismissed by Lady Justice Maureen Odero on 26th October, 2018 on the ground that the application was filed after the institution of this suit.
5. The Plaintiff contend that the court then set down the suit for hearing but the court was later transferred and the 1st Defendant moved to set the suit in High Court Miscellaneous Civil Application No 685 of 2012 for hearing before Justice Alfred Mabeya which was a court of equal jurisdiction.
6. According to the Plaintiff, it compared the pleadings in both the Defence and Counter-claim in this suit and those in High Court Miscellaneous Civil Application No 685 of 2012 and found they are substantially the same. That Justice Mabeya head the suit in High Court Miscellaneous Civil Application No 685 of 2012 and dismissed it. It is the Plaintiff's contention that since the suit in High Court Miscellaneous Civil Application No 685 of 2012 was directly and substantially the same with this suit, the Counter-claim filed in this suit is resjudicata. Further, the Plaintiff holds that since it has already transferred the property to the 2nd Defendant, the Plaint which was essentially seeking injunctive orders will be compromised.

The Response

7. The application is opposed vide a Replying Affidavit of John Kaliku, an Advocate of the High Court of Kenya representing the 1st Defendant sworn on February 20, 2023 and a Replying Affidavit of Cynthia Ngendo, a Director of the 2nd Defendant sworn on February 20, 2023.
8. The 1st Defendant disputes that the doctrine of resjudicata is applicable to this case. It holds that in the Counter-claim in this case, it sought a declaration that the transfer of the suit property to the 2nd Defendant was fraudulent and sought its cancellation while in High Court Miscellaneous Civil Application No 685 of 2012, the claim was based on Company Law where it had sued the Directors of Prudential Building Society for breach of trust.
9. The 1st Defendant argues that the two suits are distinct in terms of the orders sought and the parties. It further states that the suit in High Court Miscellaneous Civil Application No 685 of 2012 was not dismissed on merit but at preliminary stage on a technical ground. It is the 1st Defendant contention that the cause of action in the two suits is not the same since the suit in High Court Miscellaneous Civil Application No 685 of 2012 was in respect to a Company exercising its statutory rights against former Directors while that in the Counter-claim in this suit is based on fraudulent discharge of the property. The 1st Defendant therefore holds that the Counter-claim is not resjudicata and the Plaintiff's application should be dismissed with costs.

Analysis and Determination

10. Having read and considered the application and response thereto alongside the submissions presented by both parties in regard to the grounds upon which each party has raised in support of their respective



cases, I find the main issue for determination being whether the 1st Defendant's Counter-claim is resjudicata.

11. The substantive law on resjudicata is found under Section 7 of the *Civil Procedure Act*, Cap 21 which provides that:-

“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”.

12. The High Court in the case of *Invesco Assurance Company Limited & 2 Others v Auctioneers Licencing Board & Another, Kinyanjui Njuguna & Company Advocates & Another (Interested Parties)*[2020]eKLR, held that:-

“A close reading of Section 7 of the Act reveals that for the bar of resjudicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated in conjunctive as opposed to disjunctive terms. The doctrine will apply only if it is proved that:-

- i. The suit or issue raised was directly and substantially in issue in the former suit.
- ii. That the former suit was between the same party or parties under whom they or any of them claims.
- iii. That those parties were litigating under the same title.
- iv. That the issue in question was heard and finally determined in the former suit.
- v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.”

13. In this case, the Application argues that the 1st Defendant's Counter-claim is similar to the claim in the suit in High Court Miscellaneous Application No 685 of 2012 which was dismissed. In determining this, I have read through the record of this file and from the history, it is clear that in an application dated 21st May, 2018, the 1st Defendant confirmed that this suit was identical to Miscellaneous Civil Application No 685 of 2012 and he sought to stay the suit pending hearing of Miscellaneous Civil Application No 685 of 2012. In her ruling Hon. Lady Justice Maureen Odero declined to issue stay orders of this suit pending the hearing of Miscellaneous Civil application No 685 of 2012 on the ground that it was filed after the main suit and was therefore subjudice. Miscellaneous Civil Application No 685 of 2012 was then set down for hearing before Hon. Justice Mabeya, who heard and dismissed the same.

14. It is thus common ground that the two relate to the same subject claim and the same parties. The issues in the Counter-claim having been established to be directly and substantially the same with those in Miscellaneous Civil Application No 685 of 2012 which was dismissed, there is no point of proceeding to hear the Counter-claim as the same is resjudicata. To do so would amount to a waste of precious judicial time and abuse of court process.

15. In the end, this Court finds that the application dated January 23, 2023 has merit and the same is allowed as prayed.



It is so ordered.

RULING DATED AND SIGNED AT KIAMBU THIS 31ST DAY OF MAY, 2023.

D. O. CHEPKWONY

JUDGE

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 2ND DAY OF JUNE, 2023.

HON. ALFRED MABEYA

JUDGE

