



REPUBLIC OF KENYA



KENYA LAW
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**Wanganga v Kenya Power & Lighting Company Limited (Civil Appeal
405 of 2019) [2023] KEHC 19969 (KLR) (Civ) (15 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19969 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL APPEAL 405 OF 2019

DO CHEPKWONY, J

JUNE 15, 2023

BETWEEN

HANNAH WANJIRU WANGANGA APPELLANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED RESPONDENT

*(Being an Appeal from the Ruling of Hon. L. L Gicheba (Mrs) (CM)
delivered on 5th July, 2019 in Milimani CMCC No.3558 of 2014)*

JUDGMENT

Background

1. The Respondent/Defendant filed a Notice of Motion application dated May 21, 2019, seeking for the following orders;
 - a. That the suit be struck out for being incompetent or otherwise an abuse of the court process.
 - b. That the costs of this application be borne by the Plaintiff.
2. The application was supported by the grounds on its face and further supported by the affidavit of Justus Ododa. In a nut shell, the deponent deposed that the Appellant filed a suit by way of Complaint dated June 20, 2014 seeking orders against the Respondent to remove and or relocate the ground mounted transformer No 14166 from the Appellant's suit property in respect of Massionette No 1 erected on LR No 209/12308/11.
3. That the April 17, 2019 the Appellant requested the court for leave to file a further list of documents upon which she filed a judgment of Milimani CMCC No 1918 of 2008 between Strive House Limited



–vs- South Development Limited. It was established that the subject matter of the suit also forms the substantial issue in Milimani CMCC No 1918 of 2008.

4. Judgment was delivered and the court granted the following orders:-
 - a. An order compelling the Defendant to relocate and/or in the alternative took the costs of relocation of the ground mounted Transformer No 1416 Power Sub-station No 1234813 from the Plaintiff's premises Massionette No 1 LR No 209/112308/11 to an alternative site.
 - b.
 - c. Costs of this suit and incident.”
5. The Appellant was the Director and sole witness in the proceedings in CMCC No 1918 of 2008 and testified that she is the proprietor and owner of the subject suit property.
6. M/S Strive House Limited transferred the said suit property LR No 209/12308/11 to the Appellant after Judgment in CMCC No 1918 of 2008 was delivered and the suit was concluded. The transfer of the suit property to the Appellant's individual name after the delivery of Judgment was a fraudulent and mischievous attempt by the Appellant to evade the doctrine of res judicata by introducing the Respondent so as to seek the same remedy that had been sought and obtained.
7. The Appellant was in full knowledge of the Civil Case No 1918 of 2008 since she was a Director of Strive House Limited and decided to unlawfully and fraudulently conceal the same so as to circumvent the said orders and embarrass the court. The Appellant's actions amounted to duplicity of suits. It is averred that the Court should not allow the Appellant to evade the doctrine of res-judicata by adding the name of the Respondent in an attempt to give the suit a belated cosmetic facelift whereas the cause of action has been determined in a previous suit by a court of concurrent jurisdiction.
8. The Respondent made the application to have the suit struck out for being maliciously frivolous, vexatious and an abuse of the court process given that the issues raised therein had already been heard and determined before a court of concurrent jurisdiction and there are existing orders on the same subject matter.
9. In response to the application, the Appellant filed a Replying Affidavit dated May 27, 2019 sworn by the Appellant. In her affidavit, the Appellant deposed that for the doctrine of res judicata to be applicable, there must be an identity of the thing at suit, identity of the cause, identity of the parties to the action and identity of the designation of the parties involved with those in an earlier action that was heard and determined.
10. The Appellant has contended that the res-judicata doctrine is not available where with regard to the designation of parties a party is involved as the agent of another. There is no identity of parties and designation of parties in the suit subject of the appeal and the parties in Civil Case No 1918 of 2008. The parties were Strive House Limited –vs- Southgate Development Limited while the parties in CMCC No 3558 of 2014 were Hannah Wanjiru Wanganga –vs- Kenya Power & Lighting Limited who are not identical at all.
11. That the Appellant testified in Civil Case No 1918 of 2008 as an agent of Strive House Limited having served as a Director of the Company but since she is the current registered proprietor of the premises LR No 209/112308/11, she is legally entitled to initiate the suit in her own capacity as the owner. Strive House Limited was the registered proprietor at the time the case was heard and determined.
12. The res-judicata doctrine is not available since the parties involved in both actions are different and independent from each other. The Notice of Motion lacks merit and should therefore be dismissed.



13. Upon considering the application, the trial Court delivered its ruling on July 5, 2019. In the ruling, the court held that the issues raised in the matter have already been determined in CMCC No 1918 of 2008 and the suit was struck out with costs for being res-judicata.
14. It is as a result of the said ruling delivered on July 5, 2019 that the Appellant preferred an appeal before this Court.

The Appeal

15. Being aggrieved by the trial's Court ruling delivered on July 5, 2019, the Appellant preferred an appeal before this Court vide a Memorandum of Appeal dated July 15, 2019, wherein he cited the following Grounds of Appeal:-
 - a. That the learned Trial Magistrate erred in law and in fact in striking out the suit for being res-judicata and failing to appreciate that there was no identity of parties and identity in designation of parties in Civil Case No 3558 of 2014 and in Civil Case No 1918 of 2008.
 - b. That the learned Trial Magistrate erred in law and in fact in failing to appreciate that the doctrine of res-judicata is not available where in regards to designation of parties a party is involved in an action as the agent of another and subsequently initiates the same action in a different capacity as his own agent.
 - c. That the learned Trial Magistrate erred in law and in fact in failing to appreciate that for the doctrine of res-judicata to be applicable there must be an identity of the parties to the action and identity of the parties with those in an earlier action that was heard and determined in finality.
 - d. That the learned Trial Magistrate erred in law and fact in striking out the suit and in disregarding the fact that the parties involved in both actions were different with separate legal personalities, independent from each other and with a capacity of suing and being sued in their own names.
 - e. That the learned Trial Magistrate erred in law and in fact in failing to appreciate the facts and circumstances of the matter before court and the submissions made on behalf of the Appellant and therefore exercised her discretion on wrong principles arriving at a wrong decision.
 - f. That the learned Trial Magistrate erred in law and in fact in failing to observe the overriding objectives of the *Civil Procedure Act* which is to facilitate a just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act.
16. The Appellant prayed for the orders that:-
 - a. The appeal be allowed.
 - b. The ruling and order of the Chief Magistrate's Court at Milimani Commercial Courts Nairobi in Civil Suit No 3558 of 2014 issued on July 5, 2019 in respect of the Notice of Motion dated May 21, 2019 be set aside.
 - c. The Respondent's Notice of Motion application dated May 21, 2019 be dismissed.
 - d. The costs of this appeal be awarded to the Appellant.
17. On June 13, 2022, the parties agreed to canvass the appeal by way of written submissions. Both parties complied and filed their respective submissions. The Appellant's submissions are dated March 18, 2022



while the Respondent's submissions are dated June 14, 2022. I have read through the Grounds of Appeal and the submissions for consideration in my analysis.

Analysis and Determination

18. In line with the above-cited case, I have read through the Grounds of Appeal, the proceedings and Judgment of the trial Court and the rival submissions together with the authorities cited. I find the only issue relevant for determination by this court is whether the suit before the trial court was res-judicata.
19. This being a first appeal, this Court is minded of its duty as an appellate court to re-analyze, re-evaluate and re-consider the evidence adduced before the trial court afresh before drawing its own inference. (See the case of *Selle & Another –vs- Associated Motor Boat Co Ltd & Others* (1968) EA 123).
20. The relevant provision on the doctrine of res-judicata is provided for under Section 7 of the [Civil Procedure Act](#). It provides 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.”
21. The doctrine of res judicata is founded on public policy and is aimed at achieving two objectives namely that there must be finality to litigation and that an individual should not be harassed twice with the same account of litigation. This was the position in the case of [Nicholas Njeru –vs- Attorney General & 8 Others](#) [2013] eKLR.
22. In the case of [Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others](#) [2017]eKLR, the Court of Appeal held that for a matter to be res-judicata, it has to be shown that whoever is pleading to confirm that:-
 - 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.
23. The court went further to cite the case of [Uhuru Highway Development Ltd –vs- Central Bank of Kenya](#) [1999]eKLR, where it was held and stated that:-
 - a. The former Judgment or order must be final;
 - b. The Judgment or order must be on merits;
 - c. It must have been rendered by a court having jurisdiction over the subject matter and the parties; and,
 - d. There must be between the first and the second action identity of parties, of subject matter and cause of action.



24. In the case of *Independent Electoral & Boundaries Commission –vs- Maina Kiai & 5 Others* (supra)

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

25. I have carefully read through the record and a comparison of the two suits shows that Civil Suit No 1918 of 2008 is between Strive House Limited –vs- Southgate Development Limited while Civil Suit No 3558 of 2014 is between Hannah Wanjiku Wanganga –vs- Kenya Power & Lighting Co Limited, relate to the same subject matter. Infact, a further perusal of the record indicates that the Appellant testified for the Plaintiff in CMCC No 1918 of 2008 over the same subject matter.

26. It is clear that the issues being canvassed in the Civil Suit No 3558 of 2014 were directly and substantially in issue in Civil Suit No 1918 of 2008. These issues relate to the same parties and have been tried by a competent court. In this Court’s view, to bring the same issues that have already been determined by a court of competent jurisdiction is an abuse of the court process, hence res-judicata.

27. Also it appears to the Court that the Appellant transferred the suit property from the previous owner where she was a Director, after hearing and determination of CMCC No 1918 of 2008 in a clinical manner to defeat the ends of justice and this Court cannot entertain conduct.

28. In conclusion, this Court cannot fault the trial Court finding that the suit was res judicata. This appeal therefore lacks merit and is hereby dismissed with costs to the Respondent.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 15TH DAY OF JUNE, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

M/S Wangui holding brief for Mr. Mungai counsel for Appellant

Court Assistant - Martin

