



**Murage v Heritage Insurance Company Limited (Civil Appeal
116 of 2019) [2023] KEHC 27390 (KLR) (Civ) (11 July 2023) (Judgment)**

Neutral citation: [2023] KEHC 27390 (KLR)

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

CIVIL

CIVIL APPEAL 116 OF 2019

DO CHEPKWONY, J

JULY 11, 2023

BETWEEN

ANTHONY MUNENE MURAGE APPELLANT

AND

HERITAGE INSURANCE COMPANY LIMITED RESPONDENT

*(Being an Appeal from the Ruling and order of Hon. P. Ngare Gesora
delivered on 31st January 2019 in Milimani CMCC No. 5935 of 2018.)*

JUDGMENT

Background

1. This suit was commenced before the lower court by way of a Plaint dated 12th June, 2018 by the Respondent. The Respondent's claim was for Kshs. 12,197,933.00 as at 31st January, 2018 with interest at the rate of 13.5% per annum and costs of the suit and interest against the Appellant.
2. In its Plaint, the Respondent pleaded that the Appellant was employed by the Respondent between February, 2010 and April, 2015. On 20th February, 2013, the Appellant applied for a mortgage loan of Kshs. 9,000,000/= from the Respondent which he was entitled to as a staff benefit. The Appellant's mortgage loan application was reviewed and an approval of Kshs. 8,200,000/= was granted whereby the Appellant was issued with a letter of offer dated 8th May, 2013 stipulating the terms of the loan.
3. Before the suit could be heard on 19th September, 2018, the Defendant/Appellant filed a Notice of Motion application dated 17th September, 2018 in which he sought for orders that;
 - a. The Plaintiff's suit against the Defendant be struck out for being Res judicata;



- b. The Plaintiff's suit against the Defendant be struck out as it is otherwise an abuse of the process of the court;
 - c. The costs of this application and those of the entire suit be borne by the Plaintiff.
4. The application was premised on the grounds on its face and further supported by the affidavit of the Appellant. In his affidavit, the Appellant deposed that the subject matter of the claim was also an issue in E&LR Cause No. 781 of 2015-*Christopher Onyango & 17 Other v Heritage Insurance Company Kenya Limited* which suit was determined and a subsequent appeal in the Court of Appeal also determined. He stated that the claim being one of the recovery of a staff benefit, the issue ought to have been raised and determined in the former suit. Consequently, he deposed that the Plaintiff's suit is Res judicata and otherwise an abuse of the process of Court. He asked the court to allow the application.
 5. In opposition to the Notice of Motion application, the Respondent filed a Replying affidavit dated 12th October, 2018 sworn by Godfrey Koi. In the affidavit, he deposed that he is the Managing Director of the Respondent Company and that it is true that the Appellant was one of the Claimants in ELRC Cause No. 781 of 2015, *Christopher Onyango & 17 Other v Heritage Insurance Company Kenya Limited*. It was deposed that the case was confined to employment issues specifically on whether the termination of employment on account of redundancy was procedurally done and in accordance with the law. That the Claimants also sought for an order prohibiting the Respondent from altering and or varying the interest rate of the loans or any other terms of the loans. They further sought for an order prohibiting the Respondent from repossessing and or selling the charged property.
 6. The Employment court delivered its Judgment wherein it held that the Claimants do continue paying their loans prior to being dismissed. There was no order barring the Respondent from proceeding with the realization process in the event the Claimant failed to pay the loan at the staff rate. Also, there was no order barring the Respondent from realizing the loan from unsecured Debtor.
 7. According to the deponent, the Respondent appealed against the decision in Civil Appeal No. 114 of 2016-*Heritage Insurance Company Kenya Limited v Christopher Onyango & 23 Others* where the Court of Appeal overturned the decision of the Employment Court and held that the termination of employment on account of redundancy of the Claimants was done in accordance with the law, whose net effect was that the Respondent could proceed and charge interest at commercial rate and proceed with the realization process.
 8. He stated that the case was confined to the commercial agreement between the Respondent and the Appellant and the same was not an issue for determination before the Employment court.
 9. On further advise by his advocates he deposed that:
 - a. The plea of res judicata is raised where a matter directly and substantially in issue in the present suit was directly and substantially in issue in the previous suit.
 - b. The issue of facility advanced to the Defendant was not directly and substantially in issue in ELRC No.781 of 2015 or the appeal and therefore the claim of res judicata is devoid of merit.
 - c. The Industrial court is a specialized jurisdiction. It does not exercise civil jurisdiction.
 - d. Section 4 (1) of the Industrial Court Act No.20 of 2011 provides that Article 162(2)(a) of the *Constitution* establishes the Industrial court for purposes of settling employment and industrial relations disputes.



- e. Section 12 of the Industrial Court Act gives the Industrial court exclusive jurisdiction to hear and determine disputes relating to employment and labour.
 - f. The issue of the facility advanced to the Defendant cannot be canvassed before Employment and Labour Relations Court.
10. Lastly, he deposed that the Defendant benefitted from the facility advanced by the Respondent and cannot frustrate the right to realize its security by raising points of law that lack merit. It is in the interest of justice that the application by the Defendant be dismissed with costs to the Respondent.
 11. The application was canvassed by way of written submissions whereby both parties filed their respective submission. Upon considering the submissions on record and the evidence the trial court delivered its ruling on 31st January, 2019. The court's finding was that the suit was not res judicata and ought to go for full trial for a decision to be rendered. In the end, the court dismissed the application with costs to the Plaintiff.
 12. Being dissatisfied with the ruling, the Appellant moved this court to challenge it by filing an appeal.

The Appeal

13. By a Memorandum of Appeal dated 28th February 2019, the Appellant raised the following Grounds of Appeal:-
 - a. The learned Magistrate erred in law by finding that since the Appellant contends that the Claim in CMCC No.5935 of 2018 ought to have been pleaded in the former suit that it demonstrates that the issues were not directly and substantially in the former suit.
 - b. The learned Magistrate erred in law by failing to consider explanation No.4 of Section 7 of the Civil Procedure Act that any matter which might and ought to have been ground of defence or attack in such former suit shall be deemed to be a matter directly and substantially in issue in such suit.
 - c. The learned Magistrate erred in fact and in law by failing to find that the issues as pleaded in CMCC No.5935 of 2018 are res judicata despite a determination on the same issues being made in Nairobi E&LR Cause No.781 of 2015.
14. It is proposed to ask this Honourable Court for the orders that: -
 - a. This appeal be allowed.
 - b. The ruling and order of Honourable P. Ngare Gesora (Mr) Chief Magistrate in CMCC No.5935 of 2018 delivered at Nairobi on 31st January, 2019 be set aside and the Appellant's Notice of Motion dated 17th September, 2018 be allowed with costs.
 - c. The cost of this appeal be borne by the Respondent.
 - d. This Honourable Court makes such further or other orders that will meet the end of justice.
15. On 18th February, 2022, this court issued directions that this appeal be canvassed by way of written submissions. Both parties have complied with the directions on filing of submissions, which this court will proceed to consider in its determination of the Grounds of Appeal.



Analysis and Determination

16. This is a first appeal arising from the lower court. It is therefore important for this Court to remind itself of its duty as the first appellate court. This court has a duty to re-evaluate, re-analyze and re-consider the evidence adduced in the lower court afresh and arrive at its own independent conclusion (see the case of *Selle & Another –v- Associated Motor Boat Co. Ltd & Others* [1968] EA 123).
17. Having carefully considered the record of appeal, the Grounds of Appeal and the rival submissions together with the plethora of authorities cited by both parties, this court finds that the sole issue crystalizing for determination is whether this matter is res judicata;
18. The principle of res judicata is enshrined under Section 7 of the *Civil Procedure Act*. It stipulates 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.”

19. The doctrine of res judicata implies that neither party will be permitted to raise the same issue in a subsequent suit or proceeding between the same parties once a question of fact or law has been decided on its merits between two parties in a suit or proceeding and the decision is final either because no appeal was taken to a higher court or because the appeal was dismissed, or no appeal lies.
20. The minimum requirements under the provision cited above were enunciated in the case of *Kamunye & Others –v- Pioneer General Assurance Society Ltd* [1971] EA 263 at 265, where the Court of Appeal stated as follows;

“The test as to whether or not a suit is barred by Res Judicata seems to me to be - is the Plaintiff in the second suit trying to bring before the court, in another way and in the form of a new cause of action a transaction which he has already put before a court of competent jurisdiction in earlier proceedings and which has been adjudicated upon. If so, the plea of Res Judicata applies not only to points upon which the first court was actually required to adjudicate but every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have brought forward at the time. The subject matter in the subsequent suit must be covered by the previous suit for Res Judicata to apply.”

21. Also, the court set out conditions to be satisfied by a party seeking to rely on the doctrine of res judicata in the case of *the Estate of James Karanja alias James Kioi (Deceased)* [2014] eKLR as follows;

“For the doctrine of Res Judicata to apply, three basic conditions must be satisfied. The party relying on it must show:-

- a. That there was a former suit or proceeding in which the same parties as in the subsequent suit litigated.
- b. The matter in issue in the latter suit must have been directly and substantially in issue in the former suit.



- c. That a court competent to try it had heard and finally decided the matters in controversy between the parties.”
22. Further, to succeed on a plea of res judicata, a party must demonstrate that (a) the matter in issue is identical in both suits, (b) that the parties in the suit are substantially the same, (c) there is a concurrence of jurisdiction of the court (d) that the subject matter is the same and lastly, (e) that there is a final determination as far as the previous decision is concerned (see *DSV Silo -v- The Owners of Sennar* [1985] 2 All ER 104).
23. The burden of proving res judicata is on the litigant who wishes to rely on it and in the circumstances of this case it was upon the Appellant.
24. I have had occasion to peruse the contents of both Judgments cited by the Appellant in his application before the trial court and find that in ELRC Cause No.781 of 2015, the Appellant was amongst the Claimants in the suit. The suit was filed by former employees of the Respondent challenging their termination on grounds of redundancy. In summary the Claimants in that suit were seeking the following prayers;
- a. A declaration that the declaration of redundancy was unlawful and illegal, the termination by the Respondent was unfair contrary to law,
 - b. An order reinstating the Claimants to their immediate positions prior to the impugned termination with full pay and benefits from 30th April, 2015,
 - c. An order prohibiting the Respondent from repossessing and or selling any property of the Claimants, bought, purchased or otherwise acquired by way of the said loans,
 - d. An order prohibiting the Respondent from altering and or varying the interest rates of the loans or any other term of the loan,
 - e. Damages for unfair termination in terms of Section 49 of the *Employment act*,
 - f. Damages for illegal and unlawful declaration of redundancy, general damages for unfair termination and costs.
25. The second suit cited by the Appellant in his application is Civil Appeal No.114 of 2016 which was basically an appeal to the Court of Appeal filed by the Respondent challenging the decision of the Employment and Labour Relations Court. The outcome of the appeal overturned the decision of the Employment and Labour Relations Court.
26. I have also had the opportunity to peruse the record and had a glance of the case that was cited as being res judicata and which is the subject of this appeal. This was CMCC No.5935 of 2018 at Milimani. In its Plaint dated 12th June, 2018, the Respondent prays for Judgment against the Appellant for:-
- a. Kshs.12, 197,933.00 as at 31st January, 2018 with interest at the rate of 13.5% p.a until payment in full.
 - b. Costs of the suit and interest thereon at court rates until payment in full.
27. The principle of res judicata has also been discussed in the *Halsbury's Laws of England*, Volume 12 (2005) 5th Edition, in the following terms:-

“The law discourages re-litigation of the same issues except by means of appeal. It is not in the interest of justice that there should be re-trial of a case which has already been decided



by another court, leading to the possibility of conflicting judicial decisions; there is a danger not only of unfairness to the parties concerned, but also of bringing the administration of justice into disrepute.”

28. As earlier stated, for the doctrine of res judicata to apply, the suit must have been adjudicated upon by a court of competent jurisdiction between the same parties and the same subject matter.
29. It is this court’s considered view that the suit before the trial court is not res judicata since the issues being raised were never subject of the case before the Employment and Labour Relations Court nor the appeal in the Court of Appeal. To put it into perspective, the matter before the Employment and Labour Relations Court was filed by the Appellant together with other claimants who were challenging their termination on grounds of redundancy by the Respondent. The suit before the trial court was filed by the Respondent seeking to realize the mortgage loan facility advanced to the Appellant. The question of the mortgage loan facility advanced by the Respondent to the Appellant was not handled in the previous suits and therefore the suit cannot be said to be res judicata.
30. In addition to all that has been stated above, it is worth noting that the mortgage loan advanced to the Appellant was based on a separate contract to that contained in the employment contract between the Respondent and the Appellant. This is to buttress the position of this court that the matter before the trial court is not res judicata.
31. Having said so, it is this court’s considered finding that the trial court made a correct finding in dismissing the Appellant’s application. Therefore, the ruling dated 31st January, 2019 is hereby upheld and an order that the matter before the trial court proceeds to full trial issues. Costs shall await the outcome of the trial in the lower court matter.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 11TH DAY OF JULY 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kigata for the Respondent

Mr. Mogere for the Appellant

Court Assistant - Martin

