Anniversary Press (K) Ltd v National Water Conservation & Pipeline Corporation (Civil Suit 280 of 2011) [2023] KEHC 25129 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEHC 25129 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAKURU

CIVIL SUIT 280 OF 2011

TA ODERA, J

OCTOBER 5, 2023

BETWEEN

ANNIVERSARY PRESS (K) LTD ..... PLAINTIFF

AND

NATIONAL WATER CONSERVATION & PIPELINE CORPORATION ..... DEFENDANT

RULING

1. By a Notice of Motion dated 5th April 2023 and filed through the firm of N.K. Mwendwa & Co. Advocates and under Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 51 Rule 1, Order 45 Rule 1 of the *Civil Procedure Rules*, 2010, the Applicants herein seek the following orders: -

    a. Spent.

    b. That pending the hearing and determination of this application and/or further orders, this Honourable Court be pleased to order for a stay of execution of decree herein and all the consequential orders.

    c. That the Honourable Court be pleased to make an order reviewing the interest payable to plaintiff and/or directing the Deputy Registrar of this Honourable (sic) to recalculate and re-compute the interest payable to the plaintiff.

    d. That costs of this application be provided for.

2. The grounds on the face of the application are that there exists an error apparent on the face of the record and/or material variation in the decree extracted and sought to be executed by the Plaintiff visa vis the interest awarded by the Court. Despite the Judgment, the interest thereof had been erroneously computed and as at August 2019, the Plaintiff was claiming a sum of KShs. 32,139,235. The Plaintiff had allegedly received a sum of KShs. 12,745,290/= and was claiming an interest of KShs. 23,139,235/

=. The Plaintiff/Decree Holder has already proclaimed the Defendant's goods and threatened to cart them away in a bid to execute the decree. The Defendant is a Government parastatal and prudent use of public resources is vital.

3. The Application was supported by an affidavit sworn by Eng. John K. Muhia, the acting Managing Director of the Defendant Corporation. He deponed that there was an error apparent on the record to extent that there was a variation in the decree extracted from what was passed by the Court. He deponed that the interest was erroneously computed and as at August 2019, the Plaintiff was claiming KShs. 32,139,235/=.

4. The Application was opposed. The Plaintiff filed Grounds of Opposition dated 16th June 2023. and stated that the Application dated 5th April 2023 was res judicata and that the court is functus officio.

5. The application was canvassed by way of written submissions filed by both parties.

6. The Applicant filed its Submissions dated 6th July 2023. The Applicant submitted that Section 26 of the *Civil Procedure Act* speaks to interest in Court matters. It submitted that the interest payable should be calculated using the normal method (simple interest) and not the effective rate method (compound interest).

7. It is submitted that the interest in the instant matter appears to have been calculated using the effective rate method (compound interest) thereby coming to an erroneous working/computation thus rendering the decree invalid. The sum claimed as interest was extremely punitive, exorbitant, excessive, unconscionable and unreasonable and ought to be stayed for being illegal.

8. The Defendant submitted that the matter was not res judicata as the Plaintiff had not substantiated the same and no material was placed before the Court to affirm that the application was res judicata.

9. The Plaintiff filed its submissions dated 14th July 2023. It submitted that the present application is res judicata. It further submitted that for a matter to res judicata, the issues must be similar to those which were previously in dispute between the same parties and the same determined by a Court of competent jurisdiction. The doctrine also applies where a party raises issues in a subsequent suit which s/he ought to have raised in the previous suit. Also that vide an application dated 24th November 2020, the Court rendered a Judgment with regard to the said application. In the application, the Defendant sought to settle the decretal sum in monthly instalments. The Defendant also urged the Court to review the Judgment in so far as the interest claimed was concerned.

Determination

10. I have considered the Application herein, the Respondent's response to the Application and the Parties' Submissions.

11. I note that the Plaintiff has raised the issue of res judicata. I will first deal with this issue as the same will determine whether there will be need to proceed to determine the other issues in the instant Application.

12. In the case of *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017]* eKLR, the Court of Appeal held thus: -

> ''Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;
>
> 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 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 was raised.

13. In the case of Siri Ram Kaura v M.J.E. Morgan, CA 71/1960 (1961) EA 462 as cited in the case of Kennedy Mokua Ongiri v John Nyasende Mosioma & Florence Nyamoita Nyasende [2022] eKLR, the EACA stated that:

> "The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata...
>
> The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before...
>
> The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.
>
> It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a difference complexion from the one that was given in the former suit."

14. A party pleading res judicata is that Parties are thus required to bring forth their entire case in a suit or application. The fact that a party did not seek a certain order and/or prayer initially does not automatically allow them to subsequently seek the said order and/or prayer. The only exception to this rule is where a new set of circumstances arise or where the Applicant comes across new evidence that he could not, even after exercising reasonable due diligence, have come by at the time of trial.

15. I have perused the Defendant's Application dated 24th November 2020. The prayers sought are as follows:

i. That this application be certified as urgent and be heard ex-parte in the first instance.

ii. That pending the hearing and determination of this application and/or further orders, this Honourable Court be pleased to order for a stay of execution of decree herein and all the consequential orders thereto.

iii. That this Honourable Court be pleased to grant leave to the defendant do (sic) liquidate the undisputed sum of KShs. 9,450,407/= by way equal (sic) monthly installments of KShs. 1,200,000/= w.e.f. 21/12/2020 and subsequently on the 20th day of every succeeding month till payment in full.

iv. That this Honourable Court be pleased to review the judgment herein in so far as the claimed interest is concerned.

v. That costs of this application be provided for.

16. Grounds 11, 12, 13 and 14 read as follows: -

''11. That vide the Judgment made on 9/11/2017, the plaintiff herein was awarded interest at court rates on the sum of KShs. 9,450,407/=

12. That the foregoing notwithstanding the plaintiff is now demanding a sum of KShs. 32,139,235/= which constitutes interest at the rate of 100% on the principal sum.

13. That the foregoing rate of interest is unreasonable and unconscionable.

14. That in view of the foregoing, there is error apparent on record. ''

17. Hon. Justice H. Chemitei pronounced himself on the application dated 24.11.20 on 4th March 2021. The application was dismissed for reasons laid out in the said ruling. On the issue of interest, the Court held that '' 14. On the question of interest, there is no evidence tendered before this court to suggest that it was excess. The issue of interest is the province of the taxing master and if there was such, which for now I cannot see then it was incumbent upon the applicant to raise it. There is nothing new to permit this court carry out review of the decree."

18. It is rather obvious from a perusal of the record that the parties and prayers sought in both applications are the same and the court was competent to hear the said application. I further note that the Defendant was granted leave to appeal against the decision as relates the application dated 24th November 2020. It appears that the Defendant did not appeal but is now attempting a second bite at the cherry vide this application. Indeed, litigation must come to an end. I agree with the Plaintiff that instant application is res judicata and this court is thus functus officio in the matter.

19. In the end, I dismiss the Defendant's Application dated 5th April 2023 with costs to the Plaintiff/ Respondent.

DATED, DELIVERED AND SIGNED AT **KISII THIS 5TH DAY OF OCTOBER 2023.**

In the presence of: -

Akango for the defendant/ Respondent,

N/A for plaintiff /Applicant,

CA Lorraine Njiru

T. A ODERA

JUDGE

5.10.2023