



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CRIMINAL DIVISION - MILIMANI COURT
CRIMINAL REVISION NO. 43 OF 2019
IN THE MATTER OF CRIMINAL REVISION

BETWEEN

LUCY WAITHIRA MWANGI.....1ST APPLICANT
JULIUS KARIUKI MW.....2ND APPLICANT
JOHN IRUNGU GITHINJI.....3RD APPLICANT
AND
REPUBLIC.....1ST RESPONDENT
FREDRICK NJORA MWANGI.....2ND RESPONDENT
STEPHEN MAINA KIMANGA.....3RD RESPONDENT
PATRICK GITHINJI MWANGI..... 4TH RESPONDENT
NJUGUNA KAHARI &
KIAI ADVOCATES.....5TH RESPONDENT

RULING

1. The Applicants, who are accused persons in the lower court, Criminal Case No. 1967 of 2013 , by way of amended chamber summons dated 13th May, 2019, approached this court through the firm of Wangalwa Oundo and Company Advocates seeking orders as follows:

a)(Spent).

b) *That the honourable court do issue an order directing Patrick Githinji Mwangi, Stephen Maina Kimanga and/or their advocates M/s Njuguna Kahari & Co. Advocates to deposit in court the sum of Ksh. 22,000,000/- the property of Fig Tree Hotels which sum of money was recovered from Equity Bank A/C No. 091036124491 and deposited in the registrar's High Court Bank Account.*

c) *That in accordance with the evidence of Patrick Githinji Mwangi, given in court on 28th January, 2019, the Honourable court do order Patrick Githinji Mwangi to produce in Court the original Court order purportedly issued by Lady Justice Grace Nzioka ordering the release of Ksh. 22,300,000/- from the Registrar High Court account to the firm of Njuguna Kahari & Co. Advocates.*

d) *That the honourable court do issue an order directing the Investigating Officer to ensure the recovery of the sum of Ksh. 22,300,000/- which was deposited in this court with an intention to be used as an exhibit in this case is traced forthwith and returned into the custody of the court to be so held until final determination of this case or upon further orders of the court.*

2. The basis of the application is that the sum of money that was deposited in court for safekeeping as the prosecution intended to use it as an

exhibit was withdrawn from court and is now deposited in the account of the 5th Respondent. And unless, it is returned the case will be greatly compromised.

3. On the 21st May, 2019, the 5th Respondent, filed a Preliminary Objection in limine on a point of law arguing that this court lacks jurisdiction to entertain, hear and /or determine the application as amended as the principle issues raised therein have been raised, canvassed and determined by a court of competent jurisdiction in **HCC 183 of 2014-Stephen Maina Kimanga & 4 Others v Lucy Waithira Mwangi & 2 Others** and are therefore res judicata. That the Applicants' application is in flagrant and continuous disregard and disobedience of the orders of the High Court in HCCC 183 of 2014 issued on 23rd September, 2014 and for which they have been cited for contempt previously and convicted on 29th April, 2015 by the High Court, Hon. E. Ogola J; the Applicants, accused persons in the ongoing case seek aid of court to control criminal proceedings against them; the 5th Respondent being an agent of the 2nd - 4th Respondents is improperly enjoined in the proceedings as it is not a party in Criminal Case No.1967 of 2013 the basis of this revision; the 1st - 3rd Respondent lack locus and / or capacity to file the motion without the authority of Fig Tree Company Limited; the order releasing the sum to the respondents was done regularly and this court exercising criminal jurisdiction cannot overturn the orders of the trial court and Commercial Court.

4. On the 1st July, 2019, the 2nd 3rd and 4th Respondents filed a Preliminary Objection on points of law arguing that the 1st, 2nd and 3rd Applicants lack locus and / or capacity to file the motion without authority of Fig Tree Company Limited; release of the sum in question was by consent of the applicants and no appeal and/ or review of the consent order was proffered against the order; the court lacks jurisdiction to entertain and determine the amended application as the High Court is functus officio; enjoining the 5th Respondent due to their involvement in HCCC No.183 of 2014 is an abuse of the court process.

5. Preliminary objections raised were disposed of through written submissions. It was urged by the 5th Respondent that the Applicants had filed a similar application seeking similar orders, an application that was heard and determined by Nzioka J. who dismissed the same on the 15th November 2017. Therefore, the High Court sitting under the High Court Division being of the same jurisdiction cannot purport to supervise the Commercial and Admiralty Division as its supervisory jurisdiction is limited to the subordinate courts.

6. On the question of Res judicata, it was argued that issues raised in the amended chamber summons were raised, canvassed and determined by the court in HCCC 183 of 2014. In that regard it relied on the case of **Philes Nyokabi Kamau v Industrial & Commercial Development Corporation (2017) eklr** where it was held that

“From the above, the ingredients of res judicata are firstly, that the issue in dispute in the former suit between the parties must be directly or substantially in issue between the parties in the suit where the

doctrine is pleaded as a bar. Secondly, that the former suit should be between the same parties, or parties under whom they or any of them claim, litigating under the same title; and lastly that the court or tribunal before which the former suit was litigated was competent and determined the suit finally. ”

7. Also cited was the case of **Kenya Commercial Bank Ltd v Benjoh Amalgamated Ltd (2017) eklr** where the court of Appeal held that;

“... The elements of res judicata have been held to be conjunctive rather than disjunctive. As such, the elements reproduced below must all be present before a suit or an issue is deemed res judicata on account of a former suit;

(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.”

8. Further, it was urged that the 1st- 3rd Applicants had the right to appeal against the decision of the lower court delivered on 31st May, 2016 but failed to exercise the same, therefore, they are precluded from seeking revision of the decision of the lower court. It relied on the case of **Republic v John Wambua Munyao & 3 others (2018) eklr** where the court held that:

“... In my view, the revisionary jurisdiction of the High Court should only be invoked where there are glaring acts or omissions but should not be a substitute for an appeal. In other words parties should not argue an appeal under the guise of a revision. It is for this reason that the decision whether or not to hear the parties or their advocates is discretionary save for where the orders intended to be made will prejudice the accused person ...”

9. That the Applicants who were ordered to hand over the management of the Fig Tree Hotel Limited by E. Ogola J. and have not purged the contempt, lack locus and /or audience before the court. **The case of Bugerere Coffee Growers Ltd v Sebaduka & Another (1969) EA 147** was cited where the court held that:

“When companies authorise the commencement of legal proceedings, a resolution or resolutions have to be passed either at a

company or Board of Directors' meeting and recorded in the minutes, but no resolution had been passed authorising the proceedings."

10. That a consent order was entered on the 31st May, 2016 and no evidence has been tendered to suggest that orders given were irregular, unlawful or illegally obtained, and that the 5th Respondent having not been an accused person before the criminal trial was improperly enjoined in the proceedings.
11. Similarly, the 2nd- 4th Respondents submitted that this court lacks jurisdiction to determine the chamber summons for being res judicata; the Applicants are in contempt of court orders; orders of 31stMay,2016 are incapable of being revised; this court cannot sit as an appellate court against the decision and there is misjoinder of parties.
12. The Applicants (Respondents to the Preliminary Objections) and 1st Respondent did not file submissions per the directions of the court.
13. The circumstances that prevailed were that the three Applicants herein were accused of mismanaging funds belonging to Fig Tree Company Ltd, a matter that resulted in arraignment and subsequent criminal proceedings, in CMCRC No.1967 of 2013. As the matter progressed, a suit was filed against them in the Commercial and Admiralty Division of the High Court, Nairobi-HCC 183 OF 2014. An order was sought to restrain them from dealing with management of the Fig Tree Company Limited.
14. In the meantime, on the 1st September, 2014, Hon.Ogembo,CM (As he then was) made an order for a sum Ksh 24 Million that was held in the company's fixed deposit account to be deposited in court. Subsequently, on the 23rd September, 2014 the court reached a finding that the 2nd ,3rd, 4th Respondents, and Another, were bonafide Directors of the company. The Applicants were stated to have withdrawn some money from the Company's fixed deposit account leaving a balance of Ksh. 22,382,027/- a sum that was released to the 5th Respondent, the 2nd - 4th Respondents' agent, following a court order that was not objected to. The stated sum was released to the 2nd – 4th Respondents, being bona fide Directors of the company.
15. The Applicants who were aggrieved sought review of the order. A Preliminary Objection was raised, heard and a ruling dismissing the application was delivered on the 8th day of July, 2016. Being dissatisfied by the order of the trial court the Applicants exercised their right by filing an application in HCCC No. 183 of 2014. Orders sought were inter alia, for return of monies released back to the custody of the Chief Registrar. Nzioka J. who was seized of the matter dismissed it.
16. The 2nd, 3rd and 4th Respondents have raised questions that should be addressed before the chamber application can be considered. It therefore behooves this court to satisfy itself whether or not the amended chamber application should be considered on merit. In the case of *Mukisa Biscuit Manufacturing Co. Ltd v. West End Distributors Ltd. (1969) EA 696*, where Law J.A. and Newbold P. (both with whom Duffus V-P agreed), respectively at 700 and 701, held as follows:

Law, JA.:

"So far as I am aware, a Preliminary Objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection on the jurisdiction of the court, or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration."

Newbold, P.:

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increases costs and, on occasion, confuse the issues. This improper practice should stop."

17. The contention of the Respondents is that this court therefore lacks jurisdiction to determine the matter. The locus classicus on jurisdiction is the celebrated case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] KLR 1* where Nyarangi JA stated as follows:

"..... Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."

18. It is urged that the chamber summons herein was res judicata. **Section 7 of the Civil Procedure Act** provides thus:

"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. Therefore, the doctrine of res judicata prevents relitigation of the same cause of action. In the case of *The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)*, the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must 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 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.”*

20. The issue before the High Court (Commercial and Admiralty Division) concerned funds that were released by the trial court, in the sum of Ksh. 22,382,027/- following a consent order by the parties in the matter that the Applicants sought to review in vain. Nzioka J. who was seized of the matter dismissed the application. In the instant application the Applicants seek production of the original order of Nzioka J. and an order directing the sum of ksh. 22,000,000/- to be deposited in account held by the Registrar of the High Court, a sum of money that was released by consent of the parties.

21. It is apparent that issues raised were substantially before Nzioka J. Parties concerned were the same, except the 1st Respondent, who was the prosecutor, and the 5th Respondent who was the agent of the 2nd, 3rd and 4th Respondents that has been misjoined in the application. The suit between the parties was determined with finality, and, by a court that was competent, hence cannot be pursued further. An injustice of parties wasting resources in the court system must be avoided. In that regard, this court lacks jurisdiction to entertain the matter as raised in the amended chamber application.

22. It is urged that this court cannot revise and/ or sit as an appellate court against its decision. Article 165 (6) of the constitution provides thus:

“...The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.”

23. The High Court having heard and determined the application for review, no appeal was filed. The Criminal Division being of concurrent **jurisdiction** with the Commercial and Admiralty Division, this court cannot sit as an appellate court over the decision delivered in HCCC 183 of 2014, as the Constitution confers on it jurisdiction to supervise subordinate courts and not courts of equal status.

24. The upshot of the above is that preliminary objections raised are meritorious. The Amended Chamber Summons dated 13th May, 2019 be and is hereby struck out with costs to the 2nd, 3rd, 4th and 5th Respondents.

25. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 13TH DAY OF MAY, 2021.

L. N. MUTENDE

JUDGE.