



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL APPEAL NO. 120 OF 2019

WAHESCO INTER PARCEL SERVICES LTD.....APPELLANT

-VERSUS-

1. ABDURAHMAN BAHASSAN)

2. SOMCHAND JETHA SHAH)

3. COUNTY GOVERNMENT OF MOMBASA).....RESPONDENTS

(Being an appeal against the Ruling/order of the Honourable J. Kassam [SRM] delivered on the 14th June, 2019 in Mombasa SRMC No. 2142 of 2018)

JUDGMENT

1. This is an appeal from the decision of the Senior Resident Magistrate's Court on an application dated **6th March, 2019** and filed by the Appellant on **7th March, 2019** seeking only one substantive prayer that the court grants it leave to enter a default Judgment against the 3rd Respondent; the County Government of Mombasa who had failed to file a statement of defence within the stipulated time. On the grounds in support thereof, it was averred that the 3rd Defendant had been served with the Plaintiff on **26th October, 2018** and it entered appearance on **30th October, 2018** but failed to file any defence to the Plaintiff.

2. That application was opposed by the 3rd Respondent through the replying affidavit sworn on **28th March, 2019** by its Director Legal Services, one **Mr. Jimmy Waliaula**. His disposition was that, there is another pending suit being **Mombasa High Court Civil Miscellaneous Application No.50 of 2014** which was consolidated with **JR. No.49 of 2014**, on **15th May, 2015**, involving the same parties with regard to the Appellant's failure to pay Cess Tax on a parcel of services business it operates. He added that the Appellant has never resorted to prosecute those matters which were stood over generally. It is on those grounds that the 3rd Respondent has sought to be allowed to file its statement of defence.

3. Upon considering the averments by each party, the trial court reached a conclusion that the suit before it was a total abuse of the court process given that there were two other similar matters pending before the high court over the same issues and the Appellant was therefore guilty of failing to disclose the same. In addition to that, the trial court was of the view that allowing the suit before it would have been tantamount to allowing a fresh suit through the backdoor and on that basis saw it appropriate to mark the suit as withdrawn.

4. Aggrieved by that decision, the Appellant has preferred the instant appeal and has approached this court vide the **Memorandum of Appeal** dated the **21st June, 2019** raising the following grounds; That:-

a) The Honourable Magistrate erred in law and in fact by directing that the Appellant's Notice of motion application dated 19th October, 2018 and notice of motion dated 6th March, 2019 and the entire suit be withdrawn without considering the

issues therein.

b) The Honourable Magistrate erred in law and in fact in failing to consider that the issue therein arose on 20/9/2018 whereas the judicial review was instituted in the year 2014 touching on cess tax imposed by the 3rd Respondent under The Financial Bill of 2014 and which are not the same issues raised as in the current suit which is about the erection of barriers by the 1st Respondent at the entrance of the Appellant shop.

c) *The Honourable Magistrate erred in law and fact by failing to consider that an interlocutory Judgment had already been entered against the 1st and 2nd Respondents and what was before her was an application for leave on whether to enter interlocutory Judgment against the 3rd Respondent or they be granted leave to file defence out of time.*

d) *The Honourable Magistrate erred in law and facts by failing to appreciate that the major dispute was between the Plaintiff and the 1st and 2nd Respondent and the 3rd Respondent was just a necessary party because its officers were used by the 1st Respondent to frustrate the Appellant's business operation in clamping down business trucks notwithstanding parking fees having been paid for the designated area.*

e) *The Honourable Magistrate erred in law by issuing an ambiguous ruling which is hard it had to tell whether it is a ruling or a Judgment.*

f) *The Honourable Magistrate erred in law and facts by issuing an ambiguous ruling/Judgment dealing with issues which were not before her thereby disallowing the Appellant Notice of Motion application dated 19th October, 2018 and 6th March, 2019 respectively.*

g) *The Honourable Magistrate erred in law and fact in failing to consider that in striking out the suit on the basis that there was another dispute between the Appellant and the 3rd Respondent has greatly prejudiced the Appellant who is losing Kshs.2,000/= daily unnecessarily in terms of labour to offload goods from a far distance other than its designated offloading area.*

5. Following the directions issued by this court on **8th February, 2021**, the appeal was canvassed by way of written submissions with the Appellant filing its submissions on **11th March, 2021** while the Respondents on the hand failed to file their submissions despite being granted numerous chances to do so.

Appellant's Submissions

6. It is the Appellant's submission that the 1st Respondent has sabotaged its economic prospects by erecting metal barriers in front of the Appellants shop. The Appellant had then sought his landlord who is the 2nd Respondent to compel the 1st Respondent to pull down the metal barriers but the 2nd Respondent had been hesitant to do so. Instead and according to the Appellant, the 1st Respondent colluded with the 3rd Respondent's officers to clamp the 1st Respondent's motor vehicle while offloading goods next to those metal barriers. It was that state of affairs which led to the filing of **Mombasa SRMCC No.2142 of 2018** substantially seeking a prayer for immediate and unconditional removal of the barriers blocking the access to the its shop **Number S4/5** located at **Plot No.111//33238**. In the Appellant's view, it was therefore wrong for the trial court to dismiss the suit before it on the basis of the existence of the case in **Judicial Review No.50 Of 2014** since in the former, the orders sought were for Certiorari, Prohibition and Mandamus to issue against the 3rd Respondent, the County Government of Mombasa from charging Cess fees which is a totally different cause of action as is in **SRMCC No.2142 of 2018**.

7. It is added that for the doctrine of sub-judice to apply as is provided under **Section 6 of the Civil Procedure Act (Cap 21) Laws of Kenya**, besides the suit being similar on both cases, the issue in both suits should be one or the same. The Appellant has gone on to rely on the case of **Richard Kiplangat Sigei –vs- Grace Sang [2020]eKLR**, where it was held that; for the doctrine of res sub-judice to apply, it is necessary that the issues in the subsequent suit be also directly and/or substantially the same issues in the other suit. With that point of view, it is the Appellant's case that sub-judice cannot apply to this case where **SRMCC No.2142 of 2018** concern was whether or not the metal barriers should be removed while **J.R No.50 of 2014** concerns the Finance Bill of 2014 by the County Government of Mombasa and especially the charging of Cess fees, hence, there was no nexus between the two cases.

Analysis and Determination

8. I have considered the issues raised in this appeal by reading through the proceedings before the lower court, the ruling of the court, the grounds raised in the **Memorandum of Appeal** and the submissions made by the Appellant's counsel. In my view, the issue which stands out for determination is whether the trial erred in dismissing the suit before it and subject of this appeal on basis of the same being res sub-judice.

9. However, this being a first appellate court, it is the duty of this court to evaluate afresh the evidence adduced at the lower court and draw its own conclusions albeit always bearing in mind that it neither saw nor heard the witnesses when they testified and should therefore make due allowance in that respect (see the case of **Selle & Another –vs- Associated Motor Boat Co. Limited & Others (1968) EA 123**).

10. It is with no doubt that the suit subject of this appeal was dismissed vide the ruling delivered on **14th June, 2019** although the same was indicated at its heading as a Judgment. A Judgment is only arrived at upon consideration of the material facts presented before the court and proven to the required standard on application of the relevant applicable law whereas a ruling on the other hand, is a decision on a party's motion before the conclusion of the hearing and may in certain circumstances be the final decision of the court.

11. By its ruling dated **14th June, 2019**, the trial court dismissed the Appellant's suit and the Applications pending therein for the reason that the suit was res sub-judice to other two consolidated suits pending before the High Court which in view of the trial court, concerned the same subject matter. According to the trial court, the issue of concern in all those cases was payment of Cess Tax and it would thus be prudent to await the outcome of the cases pending in the High Court which is the court with unlimited jurisdiction to hear any civil dispute.

12. This then leads to determining the issue of whether the suit before the trial court was res sub-judice the suits pending before the high court in line with **Section 6 of the Civil Procedure Act** which provides as follows:-

“No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”

13. From the above decision, for the doctrine of res sub-judice to apply the conditions precedent are that; *first*, there must exist two or more suits filed consecutively; *secondly*, the matter in issue in the subsequent suit must also be directly and substantially in issue in the previously instituted suit; thirdly that the parties in the suits or proceedings must be the same or must be parties under whom they or any of them claim and they must be litigating under the same title; and *lastly*, the suits must be pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

14. In the case of **Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013)eKLR**, the court held as follows:-

“It is not the form in which the suit is framed that determines whether it is sub judice. Rather it is the substance of the suit and looking at the pleading in both cases.”

15. Considering the above principles in light of the facts in the present case, I agree with the trial court’s finding to the extent that the parties in both in **SRMCC No.2142 of 2018** and **High Court Misc. suit No.50 of 2014** as consolidated with **Judicial Review Suit No.49 of 2014** are similar. Even if this court had no benefit of perusing the pleadings in **Judicial Review No.49 of 2014** allegedly pending before this court, a cursory glance of the trial court’s ruling as well as the pleadings filed by the parties in the subject appeal show that the cause of action was the payment of Cess tax by the Appellant.

16. Nonetheless, I have considered the Plaintiff in **SRMCC No.2142 of 2018** and established that the cause of action arose when the 1st Defendant erected metal grills which the Appellant alleged had completely blocked access to his shop. Therefore, the issue for determination therein was whether or not an order could issue directing the immediate and unconditional removal of the metal barriers while the payment of Cess Tax by the Appellant was not an issue at hand.

17. Clearly, the substance of those suits was not similar and it was thus wrong for the trial court to dismiss case number **SRMCC No.2142 of 2018** which in its substance sought the removal of metal barriers erected by the 1st Respondent on the basis of the existence of other suits whose substance was payment of Cess Tax charged by the 3rd Respondent. It is for that reason that I hold the view that the doctrine of res sub-judice should not and cannot apply on those particular facts.

18. Consequently, the present appeal is found merited and the same is allowed, with the following orders issuing; That:-

a) The trial court’s Ruling and Order dated 14th June, 2019 the subject of the appeal herein, are hereby set aside.

b) The Appellants suit herein Mombasa SRMCC No.2142 of 2018 against the Respondents to proceed for hearing of the pending applications on a date to be fixed at the court registry.

c) The costs of the appeal shall follow the costs in the suit.

It is so ordered.

JUDGMENT DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI ON THIS 4TH DAY OF NOVEMB, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

No appearance for either party

Court Assistant - Gitonga