



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 530 OF 2014

NATHANIEL NGURE KIHU.....APPELLANT

VERSUS

HOUSING FINANCE.....RESPONDENT

JUDGMENT

1. The Appellant herein, NATHANIEL NGURE KIHU filed this appeal against the ruling of Hon. C. C. Kipkorir Senior Resident Magistrate in Nairobi CMCC No. 2691/2013 delivered on the 17th day of April, 2014. The Appeal is based on the following grounds;

(a) The learned magistrate erred in law and in fact in finding that the matters directing and substantially in issue in Nairobi CMCC No 9427/2004 and Nairobi 2691/2013 were the same.

(b) The learned magistrate erred in law and in fact in upholding the Respondent's preliminary objection of *res judicata* and dismissing the Appellant's case.

(c) The learned magistrate erred in failing to find that most of the matters complained of in CMCC No. 2691/2013 were not in existence when Nairobi CMCC No. 9427 of 2004 was filed.

(d) The learned magistrate erred by failing to give due consideration to the Applicant's submissions.

(e) The learned magistrate erred by applying the wrong principles of law thereby arriving at a wrong decision.

2. The ruling the subject matter of this appeal was made pursuant to a notice of preliminary objection dated 25th day of June 2013 to the effect that the suit was *res judicata* to the extent that the same raises issues which were directly and substantially in contention in previous proceedings between the same parties namely CMCC No. 9427/2004 which was heard and determined by a court of competent jurisdiction.

3. The said preliminary objection was disposed off by way of written submissions.

4. In its submissions, the Defendant stated that the issues in the two suits were directly and substantially the same and also that the parties were same. According to the Defendant, a party may not raise issues in a subsequent suit that were directly and substantially in issue in a previously instituted suit. It relied on the case of **Garden Square Limited Vs Kogo & Another (2003) KLR 20** in which the learned Judge found the suit was *res Judicata* as the same issues were directly and substantially in issue between the same parties.

5. The Defendant submitted that the Plaintiff had sued it in respect of the very same charge instrument between the same parties and over the same property being Land Reference Number Nairobi/Block 90/186, reliance was made on the case of **Salim Ahmed Zaibi Vs Faud Hussein Humeimn (1960) E.A 97** in which the court held as follows;

“It appears to us that the learned counsel for the Appellant overlooks the fact that there may be a statutory direction that in case the Plaintiff neglects to provide evidence and to prove his claim as he is bound to do, the court do proceed to decide the suit on such material as is actually before it, and that the decision so pronounced shall have the force of a decree on the merits, notwithstanding the default on the part of the Plaintiff.”

6. The point the Defendant sought to advance in the case quoted above is that, courts have in the past interpreted *res judicata* broadly such that even where a case was summarily dismissed or a default judgment entered, the principle would still apply.

7. The Defendant contended that Section 7 of the Civil Procedure Act which outlines the principle of *res judicata* is couched in mandatory terms and hence argued that, the Plaintiff was strictly barred from instituting the subsequent suit as the issues were directly and substantially the same. It averred that this provision of the Civil Procedure Act was not made in vain but for a particular purpose.

8. It was further submitted that the plea of *res judicata* applies not only to points upon which the court was actually required by the parties to form an opinion and pronounce judgment but to every point which properly belonged to the subject of litigation and which the parties, exercising reasonable diligence might have been brought forward at the time. The case of **Pop – in (Kenya) Ltd & 3 Others Vs Habib Bank A.G Zurich (1990) KLR 609** was relied on, in which the Court of Appeal termed the raising in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings as an abuse of the court process by citing with approval the case of **Yat Tung Investment Company Limited Vs Dao Heng Bank Ltd & Another (1975) AC 581**.

9. On his part, the Plaintiff opposed the preliminary objection and submitted that the matters substantially in issue in CMCC No. 2691/2013 were not substantially in issue in CMCC No. 9427 of 2004 as contemplated by Section 7 of the Civil Procedure Act.

10. It was averred that though the two suits arose out of a loan agreement entered into between the parties and that the plaintiff based his claim on over payment, the matters in issue were not the same because in CMCC 9427/2004, the issue was whether the Plaintiff had over paid the Defendant the sum of Ksh.39,800 as at 5th June 2003 while in CMCC 2691/2013 the issue was whether the plaintiff had overpaid the Defendant Ksh.1,304,148.10cts as at February 2012 which therefore means that the wrong the Plaintiff complained about in CMCC No. 2691/2013 occurred long after the wrong complained about in the earlier suit.

11. The Plaintiff contended that the plea of *res judicata* cannot be sustained when the facts on which the party is relying were not in existence at the time of the former suit. He relied on the case of **Saifudeen Abdulla Bhai & Hussein Abdulla Bhai Vs Zainabu Mwinyi (2014) eKLR** in which the Plaintiff had filed an application for an injunction which had been granted but had lapsed due to the operation of the law and on filing another application for injunction, the Defendant raised the plea of *res judicata*. The Plaintiff successfully argued that the new application was in respect of a completely new construction which could not be said to be based on the same facts as the earlier application.

12. The Appeal was disposed of by way of written submissions. The court has perused the submissions filed by both parties and they substantially mirror the ones filed in the lower court. I have, however, duly considered the same, the grounds of Appeal and the authorities cited.

13. The court has looked at the grounds of Appeal and in essence they can all be collapsed into one ground which appears as the first ground of Appeal which is;

“The learned magistrate erred in law and in fact in finding that the matters directly and substantially in issue in Nairobi CMCC. No. 9427 of 2004 and Nairobi CMCC No. 2691 of 2013 were the same.”

14. The plea of *re judicata* is provided for in section 7 of the Civil Procedure Act (CPA) which reads:

“No court shall try any suit 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 in which such issue has been subsequently raised, and has been heard and finally decided by such court.

15. Justice Richard Kuloba (as he then was) set out the Definition and essentials of *res judicata* as a thing or a matter adjudged; a thing judicially acted upon or decided; a thing or a matter settled by judgment. He further observes that, in that expression is found the rule that a final judgment rendered by a court of competent jurisdiction on the merits is conclusive as to the rights of the parties and their privies, and, as to them, constitutes an absolute bar to a subsequent action involving the same claim, demand or cause of action. To be applicable, the rule requires identity in thing sued for as well as identity of cause of action, of persons and parties for or against whom claim is made. The sum and substance of the whole rule is that a matter once judicially decided is finally decided.

16. The plea of *res judicata* is applicable only where the former judgment was;

- (a) That of a court of competent jurisdiction.
- (b) Directly speaking upon the matter in question in the subsequent suit and;
- (c) Between the same parties or their privies.

17. A cursory reading of Section 7 of the Civil Procedure Act reveals that there are clear conditions which must be satisfied before *Res judicata* can successfully be pleaded namely;

- (i) The matter directly and substantially in issue in the subsequent suit or issue must be the same matter which was directly and substantially in issue in the former suit.
- (ii) The former suit must have been a suit between the same parties or between the same parties under whom they or any of them claim.
- (iii) Such parties must have been litigating under the same title in the former suit.

(iv) The court which decided the former suit must have been a court competent to try the subsequent suit or the suit in which such issue is subsequently raised.

18. As noted by Justice Kuloba, there are at least three broad socially desirable ends served by the doctrine of *res judicata*.

(a) The principle protects litigants from harassment through relitigation of the same claims or issue.

(b) It helps to preserve the prestige of courts by avoiding inconsistent judgments.

(c) it saves the time of courts which could be spent on repetition of litigation.

19. Going by those conditions as stipulated in section 7 of the Civil Procedure Act and as set out herein above, and considering the submissions filed herein, the only condition in dispute is condition number 1, otherwise, the parties herein are in agreement that the parties in the two matters are the same, and that the former suit was heard and decided by a court of competent jurisdiction.

20. Before I consider the only ground of Appeal, it is important that I set out brief facts of the case that was before the Lower Court and which is the subject of this Appeal.

21. The Appellant (Plaintiff) pleaded that by an agreement dated 28th April, 1997 between the Respondent (Defendant) and himself, he executed a charge over all that parcel of land known as Land Reference Nairobi/Block/90/186 registered in his name, as security for repayment of Ksh.500,000/= advanced to him by the Defendant (Respondent). Under the charge, the Appellant would repay the loan within five years, with interest, until payment in full. It was also a term in the charge document that no part of the payment by the Appellant to the Respondent would be treated as a repayment of the principal until all interest due or deemed to be due or accrued had been paid. It was also an express term of the charge that the Respondent would only charge interest on the money secured.

22. The Appellant averred that the Respondent started computing interest prematurely and/or before the loan was advanced to him, that on various occasions the Respondent computed the interest due, erroneously, and/or contrary to the stated rate for the period and that it failed to correct the erroneous computation despite the written complaints over the same.

23. The Appellant further averred that although he faithfully made scheduled monthly loan repayments, the Respondent wrongfully, irregularly and unlawfully levied default charges, interest on arrears, other charges not provided for in the charge document and assorted unjustified fees and premiums. The sum total of all that, is that the Appellant alleged that he ended up overpaying the loan by a sum of Ksh.1,304,148.10cts which he claimed from the Respondent with costs.

24. The Respondent filed a defence to the claim denying each and every allegation, save what was expressly admitted. However, it is important to note that the Respondent admitted having entered into an agreement dated the 28th April 1997 but averred that the interest levied on the Appellant's loan account were strictly in accordance with the terms of the charge. The Respondent also denied having been overpaid by the Appellant to the tune of Ksh.1,304,148.10 as alleged.

25. In paragraph 8 of the defence, the Respondent raised a substantive point of law wherein it pleaded the plea of *res – judicata* stating that the Appellant had instituted a previous suit CMCC 9427/2004 which was heard and determined and that the matter involved the same parties and the same subject matter. This formed the basis of the preliminary objection dated the 25th June 2013 to which the Lower Court delivered a ruling on 17th April, 2014. That ruling is the subject of this Appeal.

26. The court has considered the grounds of Appeal and the submissions filed by the counsels herein. I have also taken the liberty to peruse the pleadings in CMCC No. 9427/2004 which form part of the record. It is noted that the two suits involve the same parties and the former suit CMCC 9427/2004 was determined by a court of competent jurisdiction.

27. The Appellant in his submissions filed in the Appeal has argued that the Lower Court ought not to have upheld the preliminary objection because the matters in CMCC No. 2692/2013 were not directly in issue in CMCC No. 9427/2004 as they did not exist when the former case was filed. On the other hand, the Respondent has argued that the issues in the two cases are the same.

28. A perusal of the plaint in the former suit shows that the Appellant was claiming a total sum of Ksh.39,800/- together with interest at the rate of 19% from 1st June 2003, he also claimed discharge of charge over the charged property plus costs and interest. He claimed to have overpaid the loan amount by Ksh.39,800/= as at the time he filed the former suit and that the other charges that he is claiming in the latter suit had not been levied by the Respondent at the time of the former suit. To this, the Respondent has submitted that the Appellant ought to have amended his plaint in good time before the hearing and/or the judgment in the former suit.

29. The breakdown of the Appellant's claim the subject of this Appeal, is as follows;

(i) Legal fees.....**Kshs.162,400/=**

(ii) Unjustified Auctioneers charges.....**Ksh.361,936/=**

(iii) Fictitious premiums.....**Ksh.37,494/=**

(iv) Overcharged Interest.....**Ksh.274,128.70cts**

(v) Unlawfully withheld by the Respondent.....**Ksh.468,190/=**

(vi) Being professional fees for the

loan recalculation.....**Ksh.80,000/=**

30. The Appellant alleges that, all these did not exist at the time of the former claim.

31. The Appellant filed the former suit in the year 2004 and though it is not clear when the judgment was delivered it must have been in the year 2011 and more particularly on 25/8/2011 going by the letter dated 21/10/2011 by Orina & Co. Advocates. That being the case, it can clearly be seen that even after the judgment had been delivered, the Appellants' loan account remained active and other entries were made for example a sum of Ksh.58,612 was debited into his account on 3/11/2011 being Auctioneers fees, a sum of Ksh.37,494.00cts was posted on 7/2/2012 as outstanding premiums and a further sum of Ksh.468,189.00cts was posted on 7/2/2012 which is reflected as refund.

32. What does this therefore mean? It can only mean one thing, that these matters could not have been subject of the former suit since by the time those items were posted, judgment had already been delivered and the Respondent's argument that the Appellant ought to have amended his plaint cannot hold any water.

33. It should be remembered that, to constitute *Res judicata*, the usefulness or otherwise of a suit is a question which is entirely beside the point. It is not necessary that the suit need be one which the Plaintiff was bound to institute, that is an issue that can only be determined by the trial court upon hearing the parties on merits. The Respondent has neither denied ever issuing the Appellant with the loan statement nor have they denied making those subsequent entries.

34. Though the Respondent has submitted that Section 7 of Civil Procedure Act is couched in mandatory terms, my considered view is that the Appellant's case is squarely within special circumstances as enunciated in the case of **Housing Finance Company of Kenya Vs Captain J. N. Wfulwa (Court of Appeal Case No. 102 of 2013)** where the Court of Appeal held in the relevant part;

“.....Even if the Respondent claims in High Court Misc. Cause No. 660 of 1997 (OS) and in HCCC 385/2011 were anchored on the legal charge, the developments to which we have referred that occurred subsequent to the institution and determination of High Court Misc. cause No. 660/1997 (OS) constitutes special circumstances bringing the matter within the exception of “special, case referred in Henderson Vs Henderson (1843) A11 ER 378.”

35. It is interesting that the learned magistrate in her ruling noted that some claims, like that of unjustified premiums and that of Ksh.468,189.00 withheld by the Respondent are reflected in his account in the year 2012 after judgment in the former suit, yet she fell into error by upholding the preliminary objection.

36. In the upshot, I hold that the Appeal has merits and the same is allowed with costs. The ruling in CMCC No. 2691/2013 dated 17th April 2014 is set aside and substituted with an order dismissing the preliminary objection. The Plaintiff's suit being CMCC No. 2691/2013 be set down for hearing on priority basis. Costs of the Appeal are awarded to the Appellant.

Dated, Signed and Delivered at Nairobi this 7th Day of June, 2018.

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L. NJUGUNA

JUDGE

In the Presence of

.....*For the Applicant*

.....*For the Respondent*