



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 7 OF 2018**

**COSMAS MROMBO MOKA.....PLAINTIFF**

**VERSUS**

**CO-OPERATIVE BANK OF KENYA LIMITED.....DEFENDANT**

**AND**

**LEGACY AUCTIONEERING SERVICES.....INTERESTED PARTY**

**R U L I N G**

1. This suit was filed by the plaintiff on the 04/7/2018 and found itself before this court sitting in Mombasa because the resident Judge in Malindi is on leave. It was necessary to run to Mombasa because together with the plaint was filed a Notice of Motion under a Certificate of Urgency which sought restraining orders to stop a sale scheduled for the 6/7/2018.

2. When the file was placed before me, I certified the matter urgent and directed that it be served for hearing *inter-partes* at 9.00am on the 6<sup>th</sup> July, 2018, noting that the sale was scheduled for the same day at 11am. The intention was to give the defendants a right to present before court any material that would enable the court determine whether or not there was a justification to conduct the challenged sale.

3. Come the date set, the Defendant did file not only a Replying Affidavit, but, also a Notice of Preliminary objection, challenging the propriety of the suit and the jurisdiction of the court to entertain it.

4. Both parties agreed, and the court accepted, that as preliminary Objection, being grounded on lack of jurisdiction, was capable of disposing off the suit, be argued first and prior to the application for injunction. The other reason the court adopted that approach beside the fact that the objection went to jurisdiction was the fact that the suit challenges the auction on the basis that the notices served were illegal, improper and a nullity for being contrary to the provisions of Land Act 2012, yet the Relying Affidavit, filed and which the court had a chance to peruse and appreciate exhibited pleadings and a ruling in a previous Suit no. 6 of 2015, Malindi, in which the question of service of notice had been litigated and an application founded on non-service of notices dismissed.

5. Such notices were in fact exhibited in the plaintiffs own application as a way of full disclosure as the law mandates. Despite that position the plaintiff position in the pleadings and submissions before court were that once the notices were stalled by the previous litigation and the defendant having accepted subsequent installment payments, the previous notices lapsed and the defendant was bound to serve fresh notices.

6. That however is a matter that goes to the merits of the suit and must await the determination on the objection on the propriety of the suit itself. The objection by the Defendant is on one preliminary issue and says:

**“TAKE NOTICE that the Defendant will, at the hearing of the Plaintiff’s Notice of Motion dated 4<sup>th</sup> July 2018, oppose the said Notice of Motion and the entire suit on the following point of law;**

**1. The present suit is res judicata and should be struck out in limine since the issues herein have been decided in Malindi HCC No. 6 of 2015; Cosmas Mrombo Moka vs Co-operative Bank of Kenya Limited and the suit dismissed on 24<sup>th</sup> July 2017.”**

7. That there was a prior suit, No. 6 of 2015, Malindi, between the same parties and seeking to stop the exercise of statutory power of sale is not in dispute. That the suit was dismissed for want of prosecution is also not contested. The point of contestation is whether a suit dismissed

for want of prosecution is deemed heard and finally determined in terms of section 7, civil Procedure Act, and the issues therein cannot be litigated afresh.

8. Section 7 of the Civil Procedure Act states:-

**“Res judicata**

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.

(Emphasis added)

*Explanation.* —(1) The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

*Explanation.* —(2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

*Explanation.* —(3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

*Explanation.* —(4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

*Explanation.* —(5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

*Explanation.* —(6) Where persons litigate *bona fide* in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating”.

9. In urging the point Mr. Kongere, advocate for the Defendant, cited to court the decision of the Court of Appeal in *Njue Ngai vs Ephantus Njiru Ngai & Another [2016] eKLR* decided on 03/01/2016. In which the gist and *ratio decidendi* was expressed in the following terms:

**“It is clear to us, as it was to the trial court, that the declaratory suit raised the same or substantially the same issues decided before the Appeals Committee and confirmed by the High Court in dismissing the appeal. The filing of it was in breach of Section 7 of the Civil Procedure Act and a matter that satisfies the tests for a defense of res judicata as stated above. We find no fault with the reasoning of the trial court and hereby affirm its decision. There must be an end to litigation”.**

10. Earlier on in the decision, the court said:-

**“Another issue may arise as to whether a dismissal of a suit for non-attendance of the plaintiff or for want of prosecution, amounts to a judgment in that suit. The predecessor of this Court answered that issue in the affirmative when considering the dismissal of a suit for failure by the plaintiff to attend court in the case of *Peter Ngome vs Plantex Company Limited [1983] eKLR* stating:-**

***Rule 4(1) does not say “judgment shall be entered for the defendant or against the plaintiff”. It uses the word “dismissed”. The Civil Procedure Act does not define the word “judgment”. According to Jowitt’s Dictionary of English Law 2<sup>nd</sup> ed p 1025:***

***Judgement is a judicial determination; the decision of a court; the decision or sentence of a court on the main question in a proceeding or/one of the questions, if there are several.”***

***Mulla’s Indian Civil Procedure Code, 13<sup>th</sup> Ed Vol 1 p 798 says: “Judgment” means the statement given by the judge on the grounds of a decree or order,” “Judgment – in England, the word judgment is generally used in the same sense as decree in this code”.***

In my view, a judgment is a judicial determination or decision of a court on the main question(s) in a proceeding and includes a dismissal of the proceedings or a suit under Rule 4(1) of Order 1XB or under any other provision of law. A dismissal of a suit, under Rule 4(1) is a judgment for the defendant against the plaintiff. An application under Rule 3 of Order 1XB includes application to set aside a dismissal. This must be so because, when neither party attends court on the day fixed for hearing, after the suit has been called on for hearing outside the court, the court may dismiss the suit, and, in that event, either party may apply under Rule 8 to have the dismissal set aside or the plaintiff may bring a fresh suit subject to any law of limitation of actions: See Rule 7(1) of Order 1XB. This, I think, clearly shows that Rule 7(2) was intended to bar a plaintiff whose suit has been dismissed under Rule 4(1), only from bringing a fresh suit. That provision does not bar such a plaintiff from applying for the dismissal to be set aside under Rule 8”. [Emphasis added]

11. In his response the plaintiffs' counsel in a tacit concession submitted that they had intended to file an application in the earlier only to find out that it had been dismissed for want of prosecution but due to urgency involved opted to file a fresh suit.

12. On the fact that the same matter is being litigated for the second time, the counsel made submissions that in this suit the plaintiff litigates over a complaint of a wrong sum being claimed and then added that after the earlier suit had been filed the defendant accepted subsequent instalment payment and therefore is estopped from insisting on previous witnesses. To him the cause of action pleaded here was different from that in HCC No. 6 of 2015 because even the sums demanded were different.

13. He further submitted that the Defendant was barred by the doctrine of estoppel and waiver for insisting on the earlier notice which in his view became spent upon receipt of instalments. Without hesitation, the counsel failed to appreciate that waiver, acquiescence and estoppel cannot operate against a statutory enactment and in the context of this matter, so as to upset the bar upon court under section 7, civil Procedure Act.

14. The counsel then added that there had been a meeting on 30/5/2018 where the plaintiff made proposals to the defendant which to him necessitated that if the proposals by the plaintiff were not acceptable then the defendant was bound to issue and serve fresh notice. Again, in law, if any offers were made, such offers could only bind the offeree if same was met with an acceptance which culminated into a contract.

15. In his rejoinder to such submissions, Mr. Kongere, submitted that urgency explained by the plaintiff would not grant jurisdiction to court where none existed. On estoppel and waiver, the counsel pointed out that the suit herein was not grounded on the same and the same could not be relied upon if not pleaded.

16. On the difference in figures, counsel pointed out that the transaction and charge between the parties was one or at least a series of transactions incapable of separation.

17. Upon such arguments and papers filed, the only issue for determination is whether this suit, as filed, is *res judicata* – the matter has been heard and finally adjudicated upon before.

18. That issue is not difficult to decide as there are pleadings in the previous suit exhibited here. The two sets of pleadings by the plaintiff reveal that in both suits, the plaintiff's goal was and remains an order for injunction to stop sale of the property charged to the defendant by the plaintiff on the basis that the power to sell has not accrued. In fact in both suits the prayers are word-for-word save for prayer 3 in the current suit which is the only addition. That however does not change the character of the dispute or the cause of action. The truth and indisputable reality is that the two suits challenge the right of the Defendant to exercise its statutory power of sale. It matters not that the sums demanded has changed for that is inevitable in every contract where a debt attracts interests. It also does not matter that the plaintiff has by some ingenuity introduced a new prayer essentially challenging notices issued Pursuant to section 96, which as of necessity follow those under Section 90, of the Land Act. Whichever angle one looks at the matter the dispute in both suits is about exercise of chargee's power of sale by the Defendant.

19. The current suit is therefore a dispute between the same parties on a matter on the same dispute which was litigated upon in the previous suit which stands dismissed for want of prosecution and has not been sought to be reinstated. To this court it falls in all fours with what the court set as the ingredients of *res judicata* in ***Uhuru Highway Developers vs Central Bank of Kenya [1996] eKLR***.

20. However, there ought to be appreciated that in ***Uhuru Highway Developers vs Central Bank of Kenya (supra)***, the court was dealing with decision made on interlocutory applications and not a final and terminal verdict like it is alleged in this matter. In that decision the question was whether a decision made on an interlocutory application, duly argued and determined, invited the application of the *re judicata* rule against a subsequent application seeking same orders of injunction.

21. In this matter it is argued for the defendant that a suit dismissed for want of prosecution is hard and finally decided and thus a total bar to subsequent litigation on the same course of action. I do not agree that a suit dismissed for want of prosecution or non-attendance can be deemed heard and finally determined. My disagreement arises from my understanding of the expression as used by the statute, Section 7 Civil Procedure Act, that the matter ***has been heard and finally decided***.

22. Much as I am bound by the decision in Njue Ngai (*supra*), it is of note that in that matter, the suit found to have been *res-judicata* was one challenging a determination the Provincial Land Disputes Appeal Committee on the merits. It was not that the Appeal to the High Court was dismissed for want of prosecution.

23. I understand the law to be that a matter is heard and determined after the court has delved into the merits. Where, like in this case, the suit was dismissed for want of prosecution, before the parties ventilate their grievances, I am hesitant and very reluctant to hold that the matter has been heard and finally determined. I hold the view that the finding by the Court of Appeal in Njue Ngai (*supra*) at paragraphs 18 and 21, were not the gist of the decision. I so say this with the appreciation that the same Court of Appeal prior to that decision, and even after, has always held and steadfastly so, that for *res judicata* to be invited and applied, the matter beyond being between the same parties, over the same cause of action and having been previously decided by a Court of competent jurisdiction must also have been heard and finally decided in the earlier suit. I have in mind the decision in ***Kenya Commercial Bank Ltd vs Benjoh Amalgamated Ltd [2017] eKLR*** a decision delivered on 15/12/2017 where the court said:-

**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.

Earlier own in the same court, differently constituted, in **The Tee Gee Electricals & Plastics Co. Ltd vs Kenya Industrial Estates, Kisumu CACA No. 333 of 2001**, (*Unreported*) said:

**“The superior court also found that the appellant’s suit was res judicata in view of previously instituted suit- Nairobi HCC No. 3016 of 1996. That suit which is identical to the Kisumu suit which gave rise to this appeal was filed on 5<sup>th</sup> December 1996. Moses Siagi, appellant’s advocate, in an affidavit sworn on 20<sup>th</sup> September 1996, and filed in Kisumu suit No. HCC 229 of 1998 deposed that he wrote to the Registrar High court Nairobi, on 2<sup>nd</sup> may 1997 indicating that the appellant had withdrawn the suit and annexed a letter to the affidavit. There is no evidence that the letter was received by the Registrar of the High Court. On the contrary, there is a ruling dated 15<sup>th</sup> January 1999, in the Nairobi suit showing that the suit was dismissed for want of prosecution on the application by KIE. Although the Kisumu suit was filed when the Nairobi suit was still pending, the Nairobi suit had been dismissed for want of prosecution by 25<sup>th</sup>, April, 2000 when the hearing of the Kisumu suit commenced. Since the Nairobi suit was not determined on the merits, the principle of res judicata, with respect, did not apply and the learned commissioner of assize was wrong so to find.”**

Elsewhere, the supreme court of India in **State of Maharashtra And Another Vs National Construction Company, Bombay**, Supreme Court civil appeal no1497 of 1996 delivered itself very unequivocally and said:-

**“The important words are “has been heard and finally decided”. The bar applies only if the mater directly and substantially in issue in the former suit has been heard and finally decided by a court competent to try such suit. That clearly means that on the matter or issue in question there has been an application of the judicial mind and a final adjudication made. If the former suit is dismissed without any adjudication on the matter in issue merely on a technical ground of non-joinder, that cannot operate as res judicata.”**

24. The purpose and only object of the **res judicata** rule is to bring litigation to finality so that nobody is vexed or just harassed with unwarranted litigation and attendant costs over same matter twice or more times over[1].

25. That is the only way respect for court process can be built and maintained. Concomitantly, the only purpose of the court is to determine disputes brought before it by parties in a robust and in a fair and proportionate manner. Fair determination connote that the thrust of the dispute has been placed before the court and a determination on the merits rendered. Here determination on the merits need not mean having oral evidence only. It includes consideration of merits even in applications like striking out and summary judgment where the merit of the case or defense is considered, tested and a determination rendered. Where however, the final determination is grounded on lapses like failure to attend court or take steps in prosecuting the case, the court would not have gone into the merits. I am always reminded that **‘the court is often said to exist from the purpose of deciding the rights of the parties not for purpose of imposing discipline[2]**. I hold the very humble opinion that on the event obtaining here the merits of the dispute have not been delved into and therefore a cardinal ingredient of res judicata principal shall be missing hence, therefore, a subsequently filed matter cannot and ought not to be adjudged *res judicata*. To strike out this suit as being *res judicata* would be to eject the plaintiff and his legal dispute into an abyss without prospect of being retrieved. If I ventured thus I would have failed in promoting the core duty of the court to strive to sustain claims for purpose of being heard[3].

26. Based on the foregoing reason, it not being denied that Malindi HCCC No. 6 of 2015 was dismissed for want of prosecution; I am not able to find this suit to be bad for being **res judicata**. For that reason alone, I find no merit in the Notice of Preliminary objection and I hereby dismiss same with costs.

**Dated and delivered at Mombasa this 10th day of July 2018.**

**P.J.O. OTIENO**

**JUDGE**

---

[1]Per the court of appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others (2017) eKLR**,

**“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and common-sensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute and calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”**

[2] *Philip Chemuolo & another vs Augustine Kubenbe (1982-1988) KAR 103*

[3] **P. M. N vs. Kenyatta National Hospital & 6 others [2015] eKLR**