



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NOS. 165, 166 AND 167 OF 2015

SONY HOLDINGS LTD.....1ST APPELLANT

NAKUMATT HOLDINGS LIMITED..... 2ND APPELLANT

KNIGHT FRANK KENYA LIMITED..... 3RD APPELLANT

VERSUS

KEREN BUARON.....RESPONDENT

(An appeal from the ruling and order of Hon. F. R. Wangila Deputy Registrar delivered and signed at Nairobi on 14th April 2015 in Nairobi HCCC No. 16 of 2009)

JUDGMENT

1. This judgement is the outcome of an appeal against the decision of the Deputy registrar of this court made pursuant to the provisions of Order 49 rule 7(1) (b) of the Civil Procedure Rules. The history behind this appeal appear to be short and straightforward. Keren Buaron, the Respondent herein sued Sony Holdings Ltd, Nakumatt Holdings Ltd and Knight Frank Kenya Ltd, hereinafter referred to as the 1st, 2nd and 3rd Appellants, in which it sought for interalia, an order of injunction to restrain the Appellants from evicting the Respondent and or interfering in any manner whatsoever with the Respondent's enjoyment as a tenant of the premises known as L.R. no. 1879/1/557 sub lease unit 9.8, Westgate Shopping Mall, Westlands- Nairobi. Hon. Lady Justice Sitati granted the aforesaid orders on a temporary basis to last until the Respondent's motion dated 19th January 2009 is heard and determined. It would appear the Respondent was nevertheless forcefully evicted prompting the Respondent to take out contempt of court proceedings. While the aforesaid contempt proceedings are pending, Sony Holdings Ltd, the 1st Appellant took out the application dated 3rd May 2011 in which it applied to have the Respondent ordered to provide security for costs. The application was eventually heard and allowed on 26.6.2013 by Hon. A. K. Ndungu, the then Deputy Registrar. The Respondent was ordered to furnish kshs.2,400,000 as security for costs within 45 days. The Respondent took out the motion dated 31st July 2013 whereof it sought for leave to appeal against the decision of Hon. A. K. Ndungu. Hon. Mr. Justice Onyancha heard and determined the application dated 31.7.2013 in favour of the Respondent. In essence, the Respondent was given leave of 7 days to appeal and was also required to deposit in court kshs.2,400,000/= within the same period from 29th October, 2013. When the Appellants noticed that the Respondent had not furnished security for costs they each filed an application seeking to have the Respondent's suit dismissed for want of security. On 13th March 2014, Hon. F. R.Wangila, learned Deputy Registrar, allowed the Appellants applications by dismissing the Respondent's suit for want of security for costs. The Respondents being aggrieved by the

dismissal order took out the motion dated 26th March 2014 to have the orders reviewed and set aside and that the Respondent be allowed to deposit security for costs in court out of time. The Appellants each opposed the motion by filing notices of preliminary objection in which they all claimed that the Respondent's application was resjudicata and that the same was supported by an incompetent affidavit. The Appellants' objections were heard and dismissed by Hon. F. R. Wangila learned Deputy Registrar on the basis that they were technical. The Appellants were aggrieved by the aforesaid decision hence they preferred this appeal.

2. On appeal, the Appellants each filed a separate appeal with similar grounds vizly:-

1. ***THAT the learned Deputy Registrar erred in law and in fact in failing to appreciate that the matter directly and substantially in issue in the Plaintiff's application dated 26th March 2014 which is whether the Plaintiff should be allowed to deposit security out of time, has been directly and substantially in issue in same suit and between the same parties and in which a binding decision was made by Justice Onyancha on 13th November 2013.***
2. ***THAT the learned Deputy Registrar erred in law and in fact in failing to appreciate that the mere fact that the Plaintiff application dated 26th March 2014 is being brought after the suit has been dismissed does not remove it from the purview of res-judicata as long as the principal issue for determination which is whether the Plaintiff should deposit security out of time, has been the subject of previous judicial determination.***
3. ***THAT the learned Deputy Registrar erred in law and in fact in failing to appreciate that the Plaintiff application dated 26th March 2014 was a disguised appeal against an earlier order of a High Court judge made on 13th November 2013 and which could not lie as the Deputy Registrar lacks such jurisdiction.***
4. ***THAT the learned Deputy Registrar erred in law and in fact in failing to appreciate that the issue whether the Plaintiff's application was supported by a competent/valid affidavit is not an irregularity of form but instead an issue of substance that goes to the root of the application.***
5. ***THAT the learned Deputy Registrar erred in law and in fact in failing to appreciate sufficiently and/or at all the submission made by the 3rd defendant/Appellant.***

3. When the appeal came up for hearing, learned counsels recorded a consent order to have the same disposed of by written submissions. The learned advocates were also invited to make oral highlight over the written submissions.

4. I have considered the rival oral and written submissions. Two main grounds emerged for the determination of this court. The first ground is whether or not the learned Deputy Registrar had jurisdiction to entertain the motion dated 26th March 2014. The second ground is that the motion was resjudicata. Though the parties attempted to argue separately the two grounds, I think the same can be determined together since they are inter-related. According to the Respondent, the learned Deputy Registrar has jurisdiction to entertain the application to review, vary or set aside her own orders, judgment or decree pursuant to the provisions of Order 26 rule 5(1) of the Civil Procedure Rules. It is pointed out that the aforesaid provides that the Deputy Registrar may set aside the order dismissing the suit and extend the time for giving the required security provided the Plaintiff proves that he was prevented by sufficient cause from giving the required security for costs.

The Respondent also argued that its application was not resjudicata since the matters in issue were never heard and determined on merits by a court of competent jurisdiction. It is argued that the application for reinstatement of the dismissed suit has never been heard and that Plaintiff has not been given a chance to explain her reasons why she could not furnish security for costs as ordered by court. The Respondent further stated that the issues she raised have never been heard and determined on merits hence it cannot be said to be resjudicata.

5. The Appellants on the other hand are of the contrary view. They argue that the application that was placed before the learned Deputy Registrar was resjudicata hence the Deputy Registrar had no

jurisdiction to hear and determine the same. The Appellants gave the chronology of applications which were filed heard and determined prior to the motion dated 26.6.2014. The Appellants were of the view that the learned Deputy Registrar committed a grave misdirection when she determined that the motion was not resjudicata.

6. After considering the material placed before this court and the rival submissions of learned counsels, I have formed the following view of this matter. There is no dispute that Hon. F. R. Wangila, learned Deputy Registrar, in her ruling on 14th April 2015, dismissed the Appellants preliminary objection and directed the Respondent's motion dated 26.3.2013 to be heard on its merits. She also stated that the aforesaid motion was not resjudicata. There is also no dispute that the question regarding the deposit of security out of time was brought up in the Respondent's application dated 26th March 2014 was directly and substantially in issue in the application that was determined by Justice Onyancha on 13.11.2013. This fact was acknowledged by Hon. F. R. Wangila in her ruling delivered on 13.3.2015 while dismissing the Respondent's suit. It is trite law that a party is precluded from raising an issue in a subsequent proceedings that was directly and substantially in issue in previous proceedings.
7. Justice Kuloba, aptly expounded the law relating resjudicata in his text titled "**Judicial Hints on Civil procedure**" in part as

follows:

"..... a thing or matter adjudged; a thing judicially acted upon or decided; a thing or matter settled by judgement. In that expression is found the rule that a final judgement 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 and 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 to action, and of quality in persons 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."

8. With respect, I agree with the submissions of the Appellants that their objection to the Deputy Registrar's jurisdiction to entertain the Respondent's application is founded on the contention that the application is resjudicata and not that she has no jurisdiction to determine an application premised under Order 26 Rule 5(2) of the Civil Procedure Rules. Where it is shown that new proceedings are filed with the intention to upstage any findings made in earlier proceedings the court has the right to prevent an abuse of its process. The doctrine of resjudicata applies to take away the jurisdiction of the Deputy Registrar to entertain the Respondent's application. The ruling of Justice Onyancha was clear on point that the suit shall stand dismissed unless the Respondent deposits security for costs. The Respondent lost that opportunity when she failed to meet the terms of the order. Since there is no evidence to show that the Respondent has challenged Justice Onyancha's order on appeal, then the learned Deputy Registrar had no jurisdiction to entertain the application dated 26.3.2013. The matter was simply resjudicata and the learned Deputy Registrar should have ruled so.
9. In the end and for the above reasons, this appeal is found to be with merit. It is allowed. Consequently, the ruling and order of the Deputy Registrar delivered on 14th April 2015 is set aside and is substituted with an order upholding the preliminary objection dated 17.4.2014 and dismiss the Plaintiff's application dated 26th March 2013 with costs.
10. Costs of the appeal is awarded to the Appellants.

Dated and delivered in open court this 1st day of April, 2016.

J. K. SERGON

JUDGE

In the presence of:

..... for the Appellant

.....for the Respondent