



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 8 OF 2000

TANZANIA NATIONAL ROADS AGENCY..... PLAINTIFF

V E R S U S

KUNDAN SINGH CONSTRUCTION LTD..... 1ST DEFENDANT

KENYA COMMERCIAL BANK LTD.....2ND DEFENDANT

RULING

1. This Court is called upon to find that this suit is *res judicata* and that an order be made to strike it out.
2. The Notice of Motion dated 23rd June 2014 is filed by the Defendants. It is brought under Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B, 3A, 7 and 63(e) of the Civil Procedure Act Cap 21. The prayer sought is-

“That the Plaint dated 22nd March 2010 and filed in Court on 23rd March 2010 and Amended Plaint dated 13th April 2010 and filed in Court on 30th April 2010 and the entire suit herein be and are struck out for being *res judicata*.”

THE LAW

The doctrine of *res judicata* is set out in Section 7 of Cap 21 as follows-

“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.” (underlining mine)

3. The Court of Appeal in the case **KENYA COMMERCIAL BANK LIMITED –Vs- MUIRI COFFEE ESTATE LIMITED & 3 OTHERS [2013]eKLR** discussing that doctrine had this to say-

“If a Court of competent jurisdiction has adjudicated over a matter between parties or parties whom they claim and determined the issues raised in such matters then the same parties or others litigating through them are barred from re-litigating the same issues before any other Court. Such determination inevitably includes any judgments or orders

issued following by consent of the litigating parties ... those issues cannot be re-litigated. On that point this case falls on all fours with *Kamunge & Others –Vs- Pioneer General Assurance Society Ltd [1977]EA 263* at pg. 265 where this Court stated as follows on the issue of *res judicata*-

‘It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called.’

This Court has also stated in the case of *Pop-in (Kenya) Ltd and 3 others Vs. Habib Bank, A.G. Zurich C.A No. 80 of 1988* that a matter will be *res-judicata* not only on points upon which the Court was actually required by parties to form an opinion and pronounce a judgment but also on every point which properly belonged to the subject matter of litigation.”

BACKGROUND OF THE DISPUTE

4. The 1st Defendant (hereinafter referred to as ‘**Kundan Singh**’) prior to the filing of this suit filed a case being Nairobi Milimani Commercial Admiralty Division **Civil Case No. 164 of 2009**. In case **No. 164 of 2009** Kundan Singh, as the Plaintiff, sued Tanzania National Road Agency (herein after referred to as ‘**Road Agency**’) as the 1st Defendant and Kenya Commercial Bank Ltd (hereinafter referred to as ‘**KCB**’) as the 2nd Defendant. The dispute relates to a contract entered into on 1st August 2007 between Kundan Singh and Road Agency. The said contract was for the carrying out of upgrading of Mbeya-chunya-Makongolosi Road in Tanzania.

5. Kundan Singh executed performance guarantees issued by KCB which by **Civil Case No. 164 of 2009** Kundan Singh alleged Road Agency was unjustifiably recalling performance Guarantees. Kundan Singh therefore sought various prayers, that is permanent injunction to stop KCB from honouring the calling for the guarantees and injunction restraining Road Agency from repossession of Kundan Singh’s machinery.

6. Road Agency filed this case which touched on the dispute of the contract dated 1st August 2007. Road Agency by this case seeks orders against the KCB for declaration that KCB was bound to honour the terms of the performance guarantees and against both KCB and Kundan Singh a declaration that the running of the expiry date of the guarantee had stopped and for an order of special and general damages.

7. **Civil Case No. 164 of 2007** was held in abeyance while awaiting the determination of Arbitral proceedings between Kundan Singh and Road Agency. KCB was not involved in the arbitral proceedings. An award was finally issued on 25th January 2012 which award only dealt with issue of damages payable for the delay in performing the contract.

8. In this case a Ruling dated 29th July 2010 was delivered staying this case under the provisions of Section 6 of Cap 21. In that Ruling the Court found that the parties in this case were the same as in **Civil Case No. 164 of 2007**, that these two cases raised substantially the same issues and that the Road Agency’s additional claim in this case could have been raised in **Civil Case No. 164 of 2007**.

9. There was an appeal against the order staying this case and the Court of Appeal by its judgment of 14th October 2013 declined to lift the stay of this case on the ground that the **Civil Case No. 164 of 2007** had been heard and was pending enforcement of decree. The justices of Appeal were of the view that to grant an order to lift the stay would lead to legal “*absurdity*” since the appeal, according to the justices, had been overtaken by event.

10. It would however seem that it was not until 6th June 2014 when **Civil Case No. 164 of 2009** was marked as closed by consent of all parties.

THE NOTICE OF MOTION

11. Kundan Singh and KCB by their Notice of Motion dated 23rd June 2014 seek a determination that this case is caught by the doctrine of *res judicata* because the two cases were found to be substantially the same; and because **Civil Case No. 164 of 2007** was determined by being marked as closed.

12. A casual consideration of Section 7 of Cap 21 and the case Law on the doctrine of *res judicata* would make it abundantly clear that for a plea of *res judicata* to succeed the following must be shown to have occurred-

(i) That the issue in the subsequent case was directly and substantially in issue in the former suit;

(ii) That that issue was between the same parties or between parties under whom they are litigating; and

(iii) That the issue has been heard and finally determined by a competent Court.

13. I have considered the application, the affidavit evidence and their anextures and more importantly the pleading and I have formed the opinion that although the issues in both cases relate to the same contract, they are not entirely the same. But perhaps much more, the issue that will determine the Notice of Motion is that the **Civil Case No. 164 of 2007** was not heard on merit. It was marked as closed by consent of the parties. This case would have been found to be *res judicata* if the issues raised in **Civil Case No. 164 of 2009** had been determined. They were not. What I will however say is that the stay of this case issued by the Ruling of 29th July 2010 has now lapsed because the stay was pending the determination of **Civil Case No. 164 of 2009**.

CONCLUSION

14. The end result therefore is that the Notice of Motion dated 23rd June 2014 is dismissed with costs to Plaintiff.

DATED and DELIVERED at MOMBASA this 5TH day of MARCH, 2015.

MARY KASANGO

JUDGE