



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CIVIL APPEAL NO. 681 OF 2009

CATHERINE FRESHIA GATHONI.....APPELLANT

VERSUS

HUDSON ODINGO.....RESPONDENT

(Appeal against the ruling and order of Ms. Ileri (SRM) delivered on 26th November, 2009 in Milimani Commercial Court CMCC No. 266 of 2007)

JUDGMENT

1. The Appellant sued the Respondent seeking recovery of damages arising out of a road traffic accident alleged to have occurred on 3rd August, 2002. It was the Appellant's claim that she was on the material day travelling aboard motor vehicle registration number KAM 196R when the Respondent's motor vehicle registration number KAN 203L which was alleged to be driven recklessly rammed into KAM 196R as a result of which she suffered injuries.
2. The Respondent entered appearance and filed a defence in which he admitted both the occurrence of the accident and being the beneficial owner of KAN 203L. However, he denied, amongst others, negligence on his part; that the Appellant suffered any loss and damage and that there was no other previous proceedings in any court between him and the Appellant over the same subject matter. Particularly, the Respondent averred that the Appellant had lodged a claim against one Anne Andega Vesselsky who was the registered owner of KAN 230L in which she was awarded general damages of KShs. 407,013/= plus costs and interest. He further averred that the Appellant proceeded to file a declaratory suit against Royal Insurance Company East Africa Limited which suit was still pending.
3. The Respondent subsequently filed a Chamber Summons dated 9th March, 2009 seeking to strike out the plaint on grounds that the suit was res judicata for the reason that the Appellant had already obtained judgment in CMCC No. 670 of 2003 against Anne Andega Vesselsky (hereinafter "Anne") in respect of the same cause of action. Annexed to the supporting affidavit in support of the summons were a copy of the plaint in **Milimani CMCC No. 670 of 2003., Catherine Fresiah Gathoni v. Anne Andega Vesselsky**, a copy of a decree dated 6th September, 2005 emanating therefrom, warrants of attachment of movable property, proclamation and warrant for sale of property in execution of money decree against Anne.
4. At the hearing of the application, counsel for the Respondent submitted that the cause of action had been extinguished and that the suit was res judicata and barred by the doctrine of estoppel; that the cause of action in the suits were the same and that the Appellant had commenced execution, proclaimed Anne's goods and filed a declaratory suit. Referring to a copy of records, he submitted that it was clear who the owner of the vehicle was and that the Respondent's issue

- should have been canvassed in the first suit and that to that extent the latter suit was res judicata.
5. The summons was opposed by a Replying Affidavit of James Kamande Mwaura Gichachi Advocate sworn on 23rd March, 2009. He contended that although warrants of attachment and sale of goods were obtained as claimed, no proclamation or execution was ever done against Anne. That the proclamation was never served on Anne rather it was delivered to Royal Insurance Company Limited. That Anne has never been traced ever since the Appellant commenced her claim occasioning judgment in default; that the Respondent knew that Anne was outside the jurisdiction and that is why he gave false information to the police on the ownership of KAN 203L; that it is after the Insurance company refused to settle the claim and with the knowledge that Anne could not be traced that the Appellant filed the declaratory suit only to discover that Anne was never the owner of KAN 203L nor was she insured by Royal Insurance Company. He stated that upon the insurance' denial of insuring Anne, the Appellant withdrew the declaratory suit.
 6. It was contended that the police abstract indicated that the Respondent was the driver and Anne the owner of the subject vehicle; this was confirmed by a search from the registrar of motor vehicles; that the Appellant found it unnecessary to enjoin the Respondent as the driver of the vehicle in the initial suit. It was contended that it was misleading for the Respondent to contend that the Appellant will obtain judgment against two different persons if allowed to proceed with the suit yet judgment in 670 of 2003 was obtained against a wrong person due to misrepresentation by the Respondent. That in the circumstances, judgment in 670 of 2003 was as good as non-existent. That the Appellant has never been compensated for the injuries sustained in the material accident.
 7. After considering both the application and submissions, the trial court came to the conclusion that the suit was res judicata for the reason that the Appellant already had a judgment against the owner of the motor vehicle and was barred by the doctrine of estoppel from suing the driver (Respondent) on the same cause of action and that it was the duty of the Appellant to have sued the correct party initially.
 8. Being aggrieved by the trial court's decision, the Appellant filed this Appeal raising a total of eight (8) grounds contained in the Memorandum of Appeal. This being a first appeal, this court is under duty to re-evaluate the facts afresh, assess it and make its own independent conclusions. See **Selle v. Associated Motor Boat Co. Ltd 1968 E.A. 123.**
 9. In her submissions, the Appellant reiterated the background facts of the case, arguing that she resorted to suing Anne out of the misrepresentation by the Respondent as to the ownership of the motor vehicle. That it is until the insurance company disclosed that their insured was the Respondent that she became aware of the real owner of the subject motor vehicle. She cited the case of **Nzuki Mwinzi Vs. Kenya National Assurance Co. (2001) Ltd & Another (2005) eKLR** to illustrate instances where the doctrine of res judicata should apply.
 10. The Appellant argued that the trial court failed to consider that her act of suing Anne was occasioned by failure by the Respondent to register himself as the owner of the motor vehicle contrary to law. That in holding that there was a valid judgment in her favour, the trial court failed to consider that the said judgment was against a wrong party, that there were triable issues between the Appellant and the Respondent which were not considered; she framed those issues to be, the misrepresentation by the Respondent and urged that they could only be resolved at a trial.
 11. The Respondent on the other hand held the position that the Appellant is barred by estoppel by record; reliance was placed on the then Order II Rule 1 of the Civil Procedure Rules (now Order 4 Rule 1) which provides that a Plaintiff is required to include the whole of the claim which he/she is entitled to make in respect of the cause of action and where a Plaintiff omits to sue in respect of or relinquishes any portion of his claim, he/she is precluded from afterwards suing in respect of the portion omitted or relinquished.
 12. On res judicata, it was the Respondent's argument that in the CMCC No. 670 of 2003, the Respondent was expressly mentioned as the driver but the Appellant did not want the Respondent to bear liability and asked the court to find the registered owner vicariously liable; that the cause of action and the subject matter in the suits were the same and that there was a conclusive determination in favour of the Appellant by a competent court in that Anne had been sued vicariously for the Respondent hence there is privity of parties making CMCC No. 266 of 2007 res judicata. The Respondent cited **Kamunye and Others v. The Pioneer General Assurance Society Ltd (1971) E.A. 263** and **Omondi v. National Bank of Kenya and Others (2001) E.A.**

177 in support of his said contentions.

13. I have carefully considered the record and the submissions made on behalf of the parties. It is my view that arising out of the parties' submission and the ruling appealed against, the issue for determination is whether the trial court was right to hold that Milimani Commercial Court CMCC No. 266 of 2007 was res judicata.
14. The substantive law on res judicata is set out in Section 7 of the Civil Procedure Act. The said section provides as follows:-

"No court shall try any suit or issue in which the matter directly or 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."

Explanation 4 to the said section provides

"Any matter which might and ought to have been made a ground of defence or attack in such former suit shall be deemed to have been a matter directly or substantially in issue in such suit."

15. Mulla on The Code of Civil Procedure, 16th Ed Vol. 1 at page 279 states:-

"Res judicata by its very words means a matter on which the court has exercised its judicial mind and has after argument and consideration come to a decision on a contested matter. This section requires that there should be a final determination..."

16. The doctrine of res judicata was discussed in Henderson v. Henderson (1843) 67 ER 313 as follows:-

"...where a given matter becomes the subject of litigation in, and adjudication by, a Court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward, as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the Court was actually required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

17. From the foregoing, it follows that when a plea of res judicata is raised, a court should always look at the decision claimed to have settled the issues in question and the entire pleadings of the previous case and the subject case to ascertain; what issues were really determined in the previous case; whether they are the same in the subsequent case and whether or not could have been covered by the decision of the earlier case; whether the parties are the same or are litigating under the same title; and whether the previous case was determined by a court of competent jurisdiction.
18. The issues in CMCC No. 670 of 2003 were that Anne was the registered owner of the subject motor vehicle which was negligently driven by the Respondent on the material day and caused an accident in which the Appellant sustained injuries. The particulars of negligence were that the Respondent was driving at an excessive speed under the circumstances, that he entered into a major road from a junction without stopping as required under the Traffic Rules, that he crashed into motor vehicle KAM 196R thereby causing the accident and that he failed to stop, brake, swerve or in any other manner try to control KAN 203L so as to avoid the accident. The Appellant claimed that she sustained a fracture of the left femur, laceration on the face and cut wound on the left hand and claimed special damages of KShs. 90,613/=. Following the failure to enter appearance and filing a defence, interlocutory judgment was entered against Anne and

- damages were assessed at KShs. 407,013/=. The issues in CMCC No. 266 of 2007 are the same issues save that the Respondent was sued as the beneficial owner and the insured of KAN 203L and that the special damages sought were KShs. 77,013/=.
19. From the foregoing, it is clear that the issues and the cause of action in the two suits are the same and there exists a judgment on those issues which judgment has not been set aside. The Respondent argued that it was upon the Appellant to bring on board the Respondent in CMCC No. 670 of 2003 and that in accordance with explanation 4 of the Section 7 of the Act, the Appellant was barred from filing CMCC No. 266 of 2007. To buttress his argument the Respondent cited **Omondi Vs National Bank of Kenya (supra)** wherein the court held that parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.
 20. The question that arises is whether in having a different party in the subsequent suit, the doctrine of res judicata applies. It was contended by the Appellant that she had been misled by the Respondent to have sued Anne who was a wrong party. That since the Respondent had by his own acts i.e. of failing to change the particulars of the registration of the motor vehicle KAN 203L with the registrar of motor vehicles and misleading the police as to who was the owner thereof, he should not be allowed to benefit from his wrongful and fraudulent acts.
 21. It may well be that the Respondent acted fraudulently in misleading both the police and the Appellant as who the true owner of the subject vehicle was. However, the case that was before the trial court was not a claim for damages for misrepresentation, but one for negligence which had been fully litigated on and a judgment entered. It is not the Appellant's case that she never knew of the Respondent's existence. She knew that he was the driver of the offending vehicle but wilfully chose not to join him in the suit on the alleged ground that he was a mere agent. I do not agree with that. The Respondent was as liable for the accident as was the alleged owner of the vehicle. The cause of action against the Respondent, as a driver merged with the cause of action against the alleged owner in CMCC No. 670 of 2003 which was fully determined.
 22. Although the Respondent was not a party in CMCC 670 of 2013, I am not satisfied with the reasons advanced for the failure to join him as a party thereto. Whilst I agree with the Appellant's submissions that explanation NO. 4 to Section 7 of the Civil Procedure Act only talks of issues and not parties, I am not in agreement that since the Respondent was a mere driver, there was no basis for joining him in that former suit. It is the Respondent's wrongful acts that led to the institution of that suit. Anne was only held to be vicariously liable for the Respondent's actions. It does not matter that the Respondent was a driver. There was an opportunity for the Appellant to enjoin the Respondent in that suit but the Appellant chose not to.
 23. In any event, there is a final judgment that is still in force that has not been varied or set aside. To my mind, the only way the Appellant could have validly brought the 2nd suit against the Respondent, is first to have had that judgment set aside before instituting CMCC No. 266 of 2007. I hold so because once a final judgment has been pronounced, it acts as an estoppel on the issues determined therein. Those issues cannot be sought to be determined differently by one of the parties therein unless the earlier determination is set aside.
 24. In **Winfield and Jolowics on Tort, 17th Edn, London Sweet & Maxwell, 2006** at page 1103, the learned writer observe of the effect of a final judgment as follows:-

“Final judgment by a court of competent jurisdiction extinguishes a right of action. It has a two effect. First, it estops any party to the litigation from disputing afterwards the correctness of the decision either in law or in fact. Secondly, it operates as a merger of the original cause of action in the rights created by the judgment and these are either to levy execution against the Defendant or to bring new action upon the judgment (not upon the original claim, for that has perished)”

25. The question therefore that arises is, since the court has already determined the issues arising from the cause of action pleaded in the previous suit in favour of the Appellant against Anne, can the same cause of action be re-litigated with a view to have the same issues

determined against a different party, the Respondent? I think it will be an absurd position to do so. Public interest requires that there should be an end in litigating a cause of action that is based on particular set of facts. They should only be re-opened if there are other intervening factors that either change the cause of action or are based on a different set of facts.

26. In the circumstances, I am satisfied that the trial court was right and the appeal has no merit. The same is hereby dismissed with costs.

Dated, Signed and Delivered at Nairobi this 8th day of May, 2015.

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A. MABEYA

JUDGE