REPUBLIC OF KENYA

IN THE HIGH COURT AT MIGORI

CIVIL APPEAL NO. 33 OF 2015

(FORMERLY KISII HCCA NO. 133 OF 2012)

BETWEEN

AKAMBA PUBLIC ROAD SERVICE VEHICLE ……..…. 1ST APPELLANT

SAMWEL NYAMUME OSERE ……..……..…… 2ND APPELLANT

AND

JOSEPH SALIMA SALIMA suing as the administrators of the

estate of DICKSON MANENO SALIMA (Deceased) …..... RESPONDENT

AND

(Being an appeal from the Ruling and Order of Hon.E. M.Nyagah, SRM in Senior Principal Magistrates Court at Migori in Civil Case No. 51 of 2011 dated 11th October 2012)

JUDGMENT

1. The appellants appeal against the refusal by the subordinate court to strike out the suit on the grounds that it was *res-judicata*.

2. The facts giving rise to this appeal are not in dispute and are as follows. By a plaint dated 15th February 2010, Anna Robi Marwa filed ***Migori SPMCC No. 20 of 2010*** on behalf of the estate of her husband, Dickson Maneno Sarima, against Akamba Public Service Vehicle seeking damages following his death in a road traffic accident on 27th April 2009. The suit was defended by the appellants. In a judgment dated 2nd November 2010, the learned magistrate held as follows regarding the capacity of the plaintiff;

> *In her testimony the Plaintiff did not adduce any evidence on this issue other than just stating that the deceased was her husband. There was not produced letter of administration making her the Administratix of the Deceased's estate. This only is a fatal omission.*

Although the learned magistrate found that there was lack of capacity she proceeded to determine that the plaintiff had not proved liability and as a result dismissed the suit.

3. Undeterred by dismissal of the suit, the Joseph Maneno Salima now suing as the administrator of the estate of Dickson Maneno Sarima, filed ***Migori SPMCC No. 50 of 2011*** on behalf of the

deceased's estate and the dependants seeking damages for the death of the deceased as a result of the road accident caused by the appellants on 27th April 2009.

4. By a Notice of Motion dated 22nd September 2011, the appellants moved the court invoking, *inter alia*, **section 7** of the ***Civil Procedure Act (Chapter 21 of the Laws of Kenya)*** seeking orders to strike out the suit and dismiss the respondent's claim. The ground of the application was the suit was *res-judicata* for the reason that the subsequent claim being pursued by the legal representative of the deceased had already been dismissed in the previous suit. The applicant argued that the original suit was brought on behalf of all the beneficiaries and dependants of the deceased and that the plaintiff could not argue that he was not party to the earlier suit which had been dismissed.

5. In opposing the application, the respondent submitted that the plaintiff in the previous suit, Anna Robi Salima, was not the plaintiff in the latter suit. He contended that Anna Robi Salima and Joseph Maneno Sarima were two distinct persons hence the doctrine of *res-judicata* was not applicable. The respondent further contended that the suit was dismissed for want of *locus standi* as it emerged that Anna Robi Marwa did not have letters of administration *ad litem*. The respondent urged the gist of the ruling was that the plaintiff did not produce the letters of administration and since Joseph Salima Salima had now obtained a grant *ad litem,* he was the right party to sue under the ***Law Reform Act*** and the ***Fatal Accidents Act***.

6. After hearing the parties, the learned magistrate dismissed the application on the grounds that in the previous suit, Anna Robi Marwa failed to prove that she was the administrator of the estate of Dickson Maneno Salima hence Jackson Salima Salima was not prevented from establishing that he had the *locus standi* to agitate the second suit. The court held that since the two were distinct persons, the doctrine of *res-judicata* was not applicable.

7. It is the order declining to strike out the suit that precipitated this appeal and in the memorandum of appeal dated 1st October 2012, the appellant raised the following grounds of appeal;

a. *The learned trial magistrate erred in law and in fact in failing to appreciate that MIGORI SPMCC NO. 51 of 2011 was res-judicata, the same cause of action having been adjudicated and determined on merit in the earlier suit being MIGORI SPMCC NO. 20 OF 2010.*
b. *The learned trial magistrate erred in law and in fact by hearing the appellant's application dated 22nd September 2011 and purported to deliver a ruling on a preliminary objection which was never canvasses and argued before him.*
c. *That the learned magistrate erred in law by misapprehending the legal issues raised by the appellants and the applicable tests and principles applicable while considering the issues raised.*

8. The issue in this appeal is whether the second suit was barred by the doctrine of *res-judicata*. In this appeal, the parties reiterated the arguments made in the subordinate court. The appellants' position is that since the first suit was dismissed, the second suit could not be filed while the respondent takes the position that the first suit, having been dismissed on the grounds of *locus standi*, was not a bar to filing the second suit. Mr Marwa, learned counsel for the respondent, submitted after the learned magistrate had found that the plaintiff in the earlier suit had no *locus standi*, all the findings were really *obiter dicta* and as such the determination was not one on the merits.

9. The law pertaining to the doctrine of *res judicata* is captured under the provisions of **section 7** of the ***Civil Procedure Act*** 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 by such court.*

10. The doctrine has been elucidated by both learned authors and courts. In the case of ***Henderson v. Henderson*** **[1843] 67 ER 313**, the doctrine of *res judicata* was discussed described as follows:-

> *[W]here 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.*

11. In addition to the above exposition, I would also adopt as my own words what Mabeya J., recently stated in ***Catherine Freshia Gathoni v Hudson Odingo*** **NRB HCCA No. 618 of 2009 [2015] eKLR;**

> *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.*

12. It is not dispute that both the former suit and later suit concern a road traffic accident that occurred on 27th April 2009 involving the appellants' motor vehicle and the deceased who was a pedestrian. The cause of action in the previous suit was an action brought by the Anna Robi Marwa both under the ***Law Reform Act*** and the ***Fatal Accidents Act***. Under the former Act, it is necessary for the plaintiff to have letters of administration in order to file suit but not in the latter the plaintiff need only show that he or she is a dependant under the said **Act** (see ***James Mukolo Elisha & Another v Thomas Martin Kibisu*** **NRB CA Civil Appeal No. 31 of 2006 [2014]eKLR** and ***Troustik Union International & Another v Mrs Jane Mbeyu & Another*** **MSA CA NO. 145 of 1991[1993]eKLR**).

13. A reading of the plaint in the earlier suit clear shows that the claim was intended to be under both the ***Law Reform Act*** and the ***Fatal Accidents Act*** and indeed the plaintiff in that case set particulars in accordance with the ***Fatal Accidents Act***. By a judgment dated 2nd November 2010, the learned magistrate determined the suit on the basis that the Anna Robi Marwa did not have letters of administration and had not proved negligence against the defendants in that case.

14. In the later suit, the respondent now sued as the administrator of the estate of the deceased and acting on behalf of the dependants filed the suit against the same parties. In my view, the later suit is caught by the doctrine of *res-judicata* and the learned magistrate erred in holding that the Anna Robi and Joseph Salima Salima were two distinct entities. The question is not whether they are distinct entities but rather whether they are, in the words of **section 7** of the ***Civil Procedure Act***, "*parties under whom they or any of them claim litigating under the same title.*" Both Anna Robi and Joseph Salima Salima were claiming to represent the estate of the deceased and his dependants under both the ***Law Reform Act*** and the ***Fatal Accidents Act***. They filed the same suit in respect of the same cause of action and although the learned magistrate dismissed the suit on the basis of *locus standi*, in substance the claim was under both the ***Law Reform Act*** and the ***Fatal Accidents Act***. The only remedy for the plaintiff in that case was to appeal the decision dismissing the suit.

15. I recall the sentiments echoed by Justice R. Kuloba in his book, ***Judicial Hints on Civil***

Procedure, 1984 (Vol 1) at page 46 in a paragraph headed, ***"Guard against attempts to evade the doctrine [of res-judicata]"*** where he states that, *"One of the greatest difficulties which face those courts which try land suits is the disposition of the disappointed litigant to dress up a suit which has failed in a new guise and to try his luck once more …. Once a man has had his say, has taken his case as far as the law permits him, and has failed, he must be stopped from re-litigating the same matter."* Although, the learned author was referring to land cases, the observation applies with equal force to this case. The respondent cannot be permitted to dress a cause of action that has been dismissed in a different guise and hope to evade the doctrine of *res-judicata*.

16. The appeal is therefore allowed. The ruling and order of the trial magistrate dated 11th October 2012 is set aside and substituted with an order allowing the appellants' application dated 22nd September 2011 to the extent the suit the respondent's suit is struck out with costs.

17. The appellants shall have costs of the appeal.

DATED and **DELIVERED** at **MIGORI this 2nd day of June 2015.**

D.S. MAJANJA

JUDGE

Mr Otieno instructed by O. M. Otieno & Company Advocates for the appellant.

Mr Marwa instructed by Kerario Marwa & Company Advocates for the respondent.