REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL APPEAL NO. 257 OF 2010

(Appeal arising from the ruling and order of Honourable Mr S.N. Riechi, Chief Magistrate (as he then was) dated 28th April 2010 vide Milimani Chief Magistrate's court CM CC 5779 of 2008)

SAN ELECTRICALS LTD…………………………………..……APPELLANT

VERSUS

SITIMA ENTERPRISES LIMITED …………………………1ST RESPONDENT

JAYANTILAL SANDIR

JYOBITEN JAYANTILAL CHOTAL

ASHIK JAYANTILAL CHOTAI

NISHIT JAYANTILAL CHOTAI T/A

SAN ELECTRONICS ………………......………………….….2ND RESPONDENT

JUDGMENT

This appeal arises from the ruling and order of Honourable Mr S.N. Riechi, Chief Magistrate (as he then was) dated 28th April 2010 vide Milimani Chief Magistrate's court CM CC 5779 of 2008.

The appellant Sitima Enterprises Ltd were the plaintiffs whereas the 2nd Respondents herein were the defendants in the lower court. The plaintiff's claim against the defendants, according to the plaint dated 10th September 2008 was that between the year 2007 the defendants requested and the plaintiff delivered goods in the ordinary course of business to the defendants which goods were valued at kshs 332,295/20cts but that the defendant failed refused and or ignored to pay the plaintiff the debt due despite several demands and intention to sue and the defendant had issued to the plaintiff several cheques that had on presentation to the bank been dishonoured.

The plaintiff therefore claimed for kshs 322,295.20 the value of goods, interest at prevailing Commercial Bank lending rates; costs of the suit and interest therein at court rates.

In their written statement of defence dated 15th December 2008, the defendants denied the plaintiff's claim. They also contended that the plaint as drawn was inchoate, vague and devoid of material

particulars and they reserved the right to raise preliminary objection seeking to strike out for offending the mandatory provisions of the Civil Procedure Act and Rules. They also denied ever issuing bouncing cheques as alleged. In the alternative, they pleaded that if at all any goods were supplied to them by the plaintiff, then they were fully paid for, further that if at all cheques were drawn then they were for the supply of goods which the plaintiff failed to supply within the agreed time; that the said cheques were replaced with cash payments and so the plaintiff was obliged to return the cheques but declined to do so and was fraudulently attempting to gain benefit by alleging dishonoring of the same. The defendant further contended in the alternative and without prejudice to each of the denials above that if the goods were ordered or supplied then it was an implied term of conditions of the agreement that the goods should be reasonably fit for the purpose for which the defendants required them; they should be reasonably fit for the purpose for which they were required and that they should be of merchantable quality. In this case it was contended that the goods were of shoddy quantity and not of merchantable quality and not fit for the purpose for which the defendants required them hence the defendants were entitled to reject the said goods therefore they were not liable to the plaintiff in respect of the goods.

On 6th February 2009, vide an application dated 4th February 2009, the plaintiff's counsel sought the striking out of the defendant's defence dated 15th December 2008 and urged the court to enter summary judgment in favour of the plaintiff against the defendants as prayed. The plaintiff had contended that the defence did not raise any triable issue since they had acknowledged the debt and made attempts to liquidate the same with cheques which had perpetually bounced; that the defence was a sham, frivolous, vexatious, an abuse of the court process and only meant to delay the plaintiff's realization of monies due to it and that it was in the interest of justice.

The trial court, Ms A. Ireri Resident Magistrate did strike out the defence and allowed the application, thereby entering judgment for the plaintiff as prayed, on 17th August, 2009. The plaintiff then proceeded to draw decree and certificate for costs and applied for execution. On 26th October 2009, in execution of decree herein, the plaintiffs agents –auctioneers served upon the appellants herein with proclamation and warrants of attachment and sale of the appellant's goods, purporting to execute decree against the 2nd respondent herein San Electronics. The appellant contended that it was in no way connected to San Electronics as the appellant was a limited liability company. It therefore filed objection proceedings to execution, which application dated 9th November 2009 was dismissed with costs on 27th January 2010 by S.N. Riechi (Mr) Chief Magistrate (as he then was) on the ground that the objector/applicant had not responded and was not present to prosecute their application dated 17th December 2009. Upon learning of dismissal of the application dated 9th November 2009, the objector/applicant herein lodged another application similar to the one 9th November 2009 and seeking the same orders, seeking stay of execution of goods and property of the objector who is not the judgment debtor in the suit; that the decree holder/plaintiff be condemned to settle auctioneers charges and the plaintiff/decree holder be condemned to pay objectors costs of the application and objection proceedings.

The above latter application was opposed by the decree holder/plaintiff /respondent who contended that the application was res judicata the application dated 9th November 2009 as dismissed on 30th November 2009 and that therefore the objector was estopped from filing another application seeking for the same prayers based on the same grounds contrary to section 7 of the Civil Procedure Act. The plaintiff/decree holder/respondent relied on the case of **Lucy Wairimu Mwaura V Aswirchand Hirji Shah & Others [2006] e KLR**. It was also contended that the advocate on record Ms Ithondeka & Company were not properly on record since they purported to file notice of change of advocates to take over the conduct of the matter on behalf of L.G. Menezes advocate after judgment without first seeking leave of court hence, contravening Order 111 Rule 9A of the Civil Procedure Rules. The decree holder/plaintiff relied on the decision of **AJ Limited & Another V Catering Levy Trustees** to argue that without proper authority the suit was rendered liable to be struck out. Further, those objection proceedings were filed on behalf of the objector a Limited liability Company without authority of the Board of Directors by a resolution.

On the grounds that the application dated 9th November, 2009 and the one dated 17th December 2009

were the same and similar in all material particulars, the trial court was satisfied that the application dated 9th November 2009 having been earlier dismissed, the objector could not revive it by filing a similar application. He found the latter application res judicata and dismissed it with costs on 26th April 2010.

It is that ruling and order of S.N. Riechi (Mr) Chief Magistrate (as he then was) that provoked this appeal. The Memorandum of Appeal dated 28th June 2010 sets out four grounds of appeal namely:

> *1. The Honourable Learned Magistrate erred in law and misdirected himself in law and fact in finding that the application dated 17th December 2009 was res judicata which was not the case.*
>
> *2. That the Honourable Learned Magistrate erred in law and in fact in failing to consider issues of fact of law raised by the appellant in its application dated 17th December 2009.*
>
> *3. That the Honourable Learned magistrate erred in law and in fact by failing to find that the appellant and the 2nd respondent/judgment debtor are separate and distinct entities in law.*

The appellant prayed for an order setting aside the Honourable Magistrate's ruling dated 28th April 2010; an order granting the appellant the orders sought in the lower court as prayed in its application dated 17th December 2009; and an order that the respondent do pay the costs of this appeal and of the lower court proceedings.

This appeal was admitted to hearing on 4th May 2012 and directions given on the same day by Honourable Onyancha J.

Parties agreed on 16th March 2015 to canvas the appeal by way of written submissions.

All parties' submissions were filed on 19th May 2015.

On the issue of whether the application dated 17th December 2009 was Resjudicata, the appellants submitted that under Section 7 of the Civil procedure Act, the doctrine of Resjudicata can only be relied on where the parties, issues, subject matter are the same and the matter must have been heard finally decided by the court.

In the appellant's view, the earlier application dated 9th November 2009 was dismissed for non attendance to prosecute and not on merit hence the issues therein had not been determined or resolved and so they remained in dispute that is why it filed the application dated 17th December 2009.

The appellant cited Order 12 of the Civil Procedure Rules *on "hearing and consequences of non attendance"* and Rule 6 (1) and (2) of the same Order to the effect that:

> *1. Subject to Subrule (2) and to any law of Limitation of Actions where a suit is dismissed under this order the plaintiff may bring a fresh suit.*
>
> *2. When a suit has been dismissed under Rule 3 no fresh suit may be brought in respect of the same cause of action.*

The appellant relied on **HCC 58 of 2009 & HCC 79/2011 Paul Kipsigei Rono V Johana Kipkemoi Rono [2014] e KLR** where Honourable L.N. Waithaka applied the provisions of Order 12 Rule 6 of the Civil Procedure Rules and held that a suit that had been dismissed for want of prosecution could be resuscitated by another fresh suit.

On whether the trial magistrate considered the issues of fact and law raised by the appellant in its

application dated 17th December 2009, It was submitted on behalf of the appellant that the trial magistrate failed to consider the fact that the earlier application had been dismissed on a procedural technicality of failure to attend court to prosecute the same contrary to the principles espoused in Article 159 2(d) of the Constitution . Reliance was placed on **General Plastics Ltd V Safepark Ltd IPT 36/2002 and Equity Bank Ltd V Capital Construction Ltd [2012] e KLR.** The appellant also relied on the overriding objectives of the law under Sections 1A and 1B of Civil Procedure Act as emphasized in **HC Misc Application 699/2007- Lucy Bosire V Kehancha Division Land Disputes Tribunal & 2 Others [2013] e KLR.** It was also submitted that in any event, failure to attend court to prosecute the application dated 9th November 2009 was an act of negligence of an advocate which could not be visited upon his client as was held in the **Lucy Bosire V Kehancha Division Land Dispute Tribunal**(supra). It was submitted that objection proceedings were peculiar since the objector is usually not a party to the proceedings and therefore stands at an unfair position of its goods risking wrongful attachment and therefore dismissal of the application without hearing the objector deprived it of its goods hence the application dated 17th February 2009 should be reinstated and determined to conclusion.

On whether the objector and judgment debtor were distinct entities in law, it was submitted that the objector being a limited liability company was protected by the corporate personality as was espoused in the case of **Salomon V. Salomon & Company Ltd[1887] AC 22.** The appellant also relied on the decision in **Channan Agricultural Contractors (K) Ltd V Rosemary Nanjala Oyula & 2 Others CA 6/2010 [2013] e KLR** where a similar issue as this case arose as to whether Raju T/A Channan Agricultural Contractors Ltd were one and the same as Chairman Agricultural Contractors (K) Ltd, the only difference being the name **'Raju.'** The court held that the elementary rule that a limited liability company is a distinct legal person. It is distinct and separate from its shareholders and directors.

In this case it was contended that the judgment debtor is a partnership whereas the appellant is a limited liability company whose directors are distinct from the individuals in the partnership. It was further submitted that under Section 162(2) of the Companies Act upon incorporation a company became a legal entity with the capacity to own its own property which is a fundamental right under Article 40 of the Constitution hence the appellant should not be arbitrarily deprived of that right, having established, as required under Order 22 Rule 51 of the Civil Procedure Rules that it had an equitable or legal interest or right to the property that was being proclaimed and attached to satisfy decree unknown to the appellant who was not a party to the primary suit.

The appellant prayed that the appeal be allowed the lower court ruling be set aside and the application dated 17th December 2009 be reinstated for hearing on merit.

The 1st respondent who was the decree holder opposed this appeal and submitted through its counsel Lubulellah and Company advocates that the application dated 17th December 2009 was on all fours the same as that one dated 9th November 2009 which had been dismissed for non attendance to prosecute and that the appellant should have applied to set aside the order of dismissal and sought for reinstatement of that application instead of filing another application. Alternatively, that the appellant could have appealed against the order of dismissal made on 30th November 2009. Further, that the court was *functus officio* after rendering its decision on 30th November 2009 hence the subsequent application dated 17th December 2009 was an abuse of the court process and was therefore properly struck out as being contrary to Section 7 of the Civil Procedure Act. Mr Lubulellah advocate relied on **Rono Ltd V Caltex Oil(K) Ltd [2014] eKLR** where it was held that that the purpose of Section 7 of Civil Procedure Act is to bring finality to litigation and parties should not be allowed to relitigate on issues that have already been directly and substantially in issue in a former suit (or application) as the case may be between the same parties. Reliance was also placed on **Northwest Water Ltd V Binnie & Parties [1990] 3 ALL ER 542;Uhuru Highway Development Ltd V Central Bank of Kenya & 2 Others CA 36/1996.**

It was also contended that resjudicata doctrine applies to both applications and suit whether final or interlocutory as was held by Ringera J in **Kanorero River Farm Ltd & 3 Others V NBK (Ltd) HCC**

699/2001. The 1st respondent also maintained that the impugned application was also incompetent as it was filed by an advocate who was not previously on record contrary to Order 111 Rule 9A of the Civil Procedure Rules that require that a party wishing to change advocates after judgment, the latter advocate can only come on record with leave of court and or by an order of the court whether the change is consented to by the previous advocate or not. In this case it was argued that the requirement for leave of court or notice to the advocate on record was not complied with, which default rendered that application fatally defective. They relied on **AJ Limited & Another V Catering Levy Trustees & Others** (supra).

It was also submitted that objection proceedings were fatally defective as they were instituted without the authority of the purported objector; for reasons that the purported power of Attorney given to Pravin Kumar M. Kana by Vikram Shah and Alpana Sumit Shah never mentioned the objector company or to act on behalf of the company.

Further, that by the time the powers of Attorney were given on 28th September 2007 the objector company had not been incorporated on 20th November 2007 therefore not in existence.

Further, that the business was sold to individuals Sunil Vikram Shah and Alpana Sumit Shah and not the objector. The 1st respondent relied on **AJ Ltd** (supra) case and **Kabundu Holdings Ltd V Ruth Wakonyo & Another**. Finally, that in any case the said powers of Attorney were granted to Prann Madha Vji Kana and not Prann Kumar M. Kana who had sworn an affidavit in support of the objection proceedings.

The 1st respondent further submitted that the 2nd respondent acted as agent of the appellant judgment debtor hence it cannot be sued when there is a disclosed principal (see **Valentine Opiyo & Another V Masline Odhiambo T/A Ellyans Enterprises [2014] e KLR.**

The 1st respondent concluded that the appeal herein lacked merit and therefore it ought to be struck out on account of:

1. *Being an abuse of the court process.*

2. *Being contrary to the doctrine of res judicata; and*

3. *Being incurably defective having been brought with want of power or any authority.*

This being the first appeal, the court is obliged to adhere to the provisions of Section 78 of the Civil Procedure Act, that obliges a first appellate court to reassess, revaluate and reconsider the evidence and record as a whole and come to its own independent conclusion . In this case, the court will only assess the affidavit evidence on record and apply the law as appropriate.

Evaluating the record, the appeal herein is a consequence of the orders of Honourable R.N. Riechi (Mr) Chief Magistrate made on 28th April 2010 dismissing the appellant's application dated 27th December 2009 on the grounds that it was resjudicata the application dated 9th November 2009 which had been dismissed for non attendance and prosecution.

In my view, that issue of resjudicata forms the main ground of appeal for reasons that should this court find that the trial magistrate was correct on his findings that the latter application was resjudicata, then the court need not go into the other grounds of appeal raised including the failure of the trial magistrate to consider other legal issues that the application dated 17th December 2009 raised d first things first.

So, what was resjudicata about the application dated 17th December 2009? To answer that question, I begin by reproducing the application dated 9th November 2009 and comparing it with the one dated 17th

December 2009.

The appellant in the chamber summons dated 9th November 2009 brought under Order 21 Rule 56 and 57 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act sought orders that:

> *1. The objector's company's properties proclaimed on the 26th October 2009 in execution of the decree in this suit carried out by M/S Eshikhoni Agency on instructions of the respondent decree holder/plaintiff's is illegal, unlawful , and wrongful and offends all tenets of the law.*
>
> *2. That the said attachment and execution process be lifted and the properties proclaimed be released forthwith to the objector.*
>
> *3. That the plaintiff/decree holder/ respondent be condemned to pay objector's costs of this application and objection proceedings.*

THE GROUNDS on which this application is based are:

> *a) THAT the objector is a limited liability company and is the absolute, legal and registered owner of the proclaimed properties.*
>
> *b) THAT the objector and the defendants in this suit are not the same and in any event, a limited company is a separate legal entity.*
>
> *c) THAT the objector company and the defendants are not the same person/entity in law, as the defendants, out of whom, the 3rd defendant is deceased and the 4th and 5th Defendant's have filed bankruptcy proceedings, are individuals trading as SAN ELECRONICS whilst the objector is a limited company neither is there a community of interest.*
>
> *d) THAT the objector is clearly not a defendant in this suit and hence is not the judgment debtor.*
>
> *e) THAT the plaintiff/decree holder/respondent had a duty to ascertain the legal position before proceeding to attachment.*
>
> *f) THAT the proclamation, attachment and execution process is blatantly illegal, unlawful and irregular.*

The application was supported by an affidavit sworn by Pravin Kumar M. Kana holder of registered General Powers of Attorney from directors of the objector company, Sumit Vikram Shah and Alpara Sumit Shah.

The above application can be found at page 55 of the record of appeal filed by L.G. Menezes Advocates for objector. At page 142 of the same record of appeal is a chamber summons dated 17th December 2009 brought under Order 21 Rules 56 and 57 of the Civil Procedure Rules and Section 3A of the Civil Procedure Rules and it prayed for orders:

> *1. THAT this honourable court be pleased to stay the execution of goods and property of the objector/ applicant who is NOT the judgment debtor in the suit.*
>
> *2. THAT the plaintiff/decree holder/respondent be condemned to settlement of the costs of the auctioneers charges.*
>
> *3. THAT the plaintiff/decree holder/respondent be condemned to pay objector's costs of this application and objection proceedings.*

THE GROUNDS on which this application is based are:

a) THAT the objector is a limited liability company and is the absolete, legal and registered owner of the proclaimed properties and was never a party to this suit and as such no execution ought to issue against .

b) THAT the objector and the defendants in this suit are not in any way connected and neither do the judgment debtors have any claim against the property proclaimed.

c) THAT the judgment entered was against individual parties who are not in any way related to the objector/applicant herein.

d) THAT the objector is clearly not a defendant judgment-debtor in this suit and hence he is not the judgment debtor and the execution as against it is illegal.

e) THAT the plaintiff /decree holder/respondent had a duty to ascertain the legal position before proceeding to attachment.

f) THAT the proclamation, attachment and execution process is blatantly illegal, unlawful and irregular.

The application was supported by the affidavit sworn by Pravin Kumar M. Kana.

From the above record of the two sets of applications as reproduced by me, albeit the wordings used in the two applications are not exactly the same, I have no doubt in my mind that the applications were brought under the provisions of Order 21 Rule 56 and 57 of the Old Civil Procedure Rules, which provisions relate to the institution of objection to attachment proceedings, by a person has a legal or equitable interest or right over the property attached in execution of a decree wherein the objector was not a party. I reiterate that the 1st application dated 9th November 2009 was dismissed on 30th November 2009 for non attendance to prosecute.

Consequent to that dismissal is when the appellant/objector herein filed the application dated 17th December 2009 seeking the same orders as those that were sought in the application dated 9th November 2009. The trial magistrate dismissed the application dated 17th December 2009 on grounds of being Resjudicata and hence this appeal. The question is, was the trial magistrate correct or did he err in dismissing the application dated 17th December 2009 for being Resjudicata?

The appellant contends that it was an error of law and fact on the part of the trial magistrate to have dismissed the latter application since under Order 12 Rule 6 (1) of the Civil Procedure Rules which also applies to applications, where a suit(or application) is dismissed under that order for non attendance, a party can bring a fresh suit and that is what informed the objector’s latter application. They relied on several decisions to support their opposition while castigating the trial magistrate for acting contrary to the established law. The respondent/ decree holder on the other hand maintains that the latter application offended Section 7 of the Civil Procedure Act hence the trial magistrate was correct in his findings and decision.

According to the appellant, Resjudicata doctrine only applies where a matter has been heard and determined on merit between the same parties over the same subject matter and by a court of competent jurisdiction. The respondent thinks otherwise and maintains that it is an abuse of the court process to bring the same application as that which was dismissed, instead of applying to set aside the dismissal order and or appealing against it.

Section 7 of the Civil Procedure Act which embodies the doctrine of Resjudicata enacts:

“ 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, or has been heard and finally decided by such court."

Explanation notes 1-6 sets out under the said Section 7 explains application of the Resjudicata rule, as was stated by Wingram V-C in the case of **Henderson V Henderson [1843]67 ER 313** thus!

> ***" ………where a given matter becomes the subject of litigation in and adjudication by, court of competent jurisdiction, the court requires the parties to the litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the subject of litigation in respect of 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 pleas of Resjudicata 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 property belonged to the subject litigation and which the parties, exercising reasonable diligence, might have brought forward at the time."***

I have anxiously considered the above provisions and the provisions of Order 12 Rule 6 of the Civil Procedure Rules which are in parimateria to the old Rules which provides:

"When only a defendant attends (Order 12 Rule 3)

> *1. If on the day fixed for hearing, after the suit has been called on for hearing outside the court only the defendant attends and he admits no part of the claim, the suit shall be dismissed except for good cause to be recorded by the court.*
>
> *2. If the defendants admits any part of the claim, the court shall give judgment against the defendant upon such admission and shall dismiss the suit so far as it relates to the remainder except for good cause to be recorded by the court.*
>
> 3. If the defendant has counterclaimed, he may prove his counterclaim do far as the burden of proof lies on him.

The question that arises is whether the plaintiff, or in this case the applicant objector is permitted to file a new case if the dismissal is under Order 12 Rule 3 above. The answer is found in Order 12 Rule 6 which provides:

"Effect of dismissal [Order 12 Rule 6"

> *1. Subject to Subrule (2) and to any Law of Limitation of Actions, where a suit is dismissed under this order the plaintiff may bring a fresh suit.*
>
> *2. When a suit has been dismissed under Rule 3 no fresh suit may be brought in respect of the same cause of action."*

That provision of Order 12 Rule 6(2) of the Civil Procedure Rule is unambiguous. It is trite that no fresh suit can be brought in respect of the same cause of action where a suit has been dismissed under Rule 3 of the Order 12 reproduced above.

I have no doubt that the application dated 17th December 2009 sought the same orders as those sought in the application dated 9th November 2009 which was dismissed for non-attendance to prosecute. Need I therefore say no more than to state that none of the advocates referred the court to that very explicit provision of the law. I must emphasize that dismissal of suit or application for want of attendance under Order 12 is very different from dismissal of suit or application for want of prosecution under Order 17, in as much as the effect could be the same. In the case of **Salwem Ahmed Hasson Zaidi V Faud Hussein Humeidan [1960] EA 92**, at the hearing of the suit, the plaintiff

did not appear but the defendant did. The plaintiff's suit was dismissed for non attendance. A new suit was filed. The East African Court of Appeal held that the latter suit was resjudicata and held that a judgment pronounced against a party under the then Rule 178 of the Rules of court (similar to our Order 12 Rule 3 must be deemed to be a decision on the merits and have the same effect as a dismissal upon evidence, and accordingly, the matters in issue in the first action must be deemed to have been heard and determined, the dismissal of the earlier action therefore operated as Resjudicata.

The provisions of Order 12 Rule 6(20 speak for themselves. The remedy that the appellant herein had was to apply to set aside the order of dismissal as provided for under Order 12 Rule 7 which provides:

"Setting aside judgment or dismissal" [order 12 Rule 7]

"Where under this order judgment has been entered or the suit has been dismissed, the court, on application, may set aside or vary the judgment or order upon which terms as may be just."

The appellant did not pursue the above avenue after its application was dismissed for non attendance. Instead, it pursued a remedy that was expressly unavailable that of filing a fresh application. As I have stated, backed by express provisions of Order 12 Rule 6(3) no fresh suit or application can be brought after dismissal of the first application based on the same facts and grounds. The new application was untenable. It was Resjudicata and, in my view, an abuse of the court process. See **ELC 54/2014 Thomas K. Sambu V Paul K. Chepkwonyi [2015] e KLR,** See also **Mumbe Kisilu V Express Kenya Ltd [2015] e KLR;** and **Justina Angoro V Nelson Yabesh Bichanga & Another [2008] KLR.** In the latter case, Mwera J. (as he then was) found a subsequent application to a dismissed one to be resjudicata, albeit the earlier application had not been heard on merit. The Learned Judge held and I concur that bringing subsequent applications, even if the previous ones had not been heard on merit, amounted to an abuse of the court process. I agree.

There is no dispute that Section 7 of the Civil procedure Act equally applies to applications as it does to suits as was established in the case of **Uhuru Highway Development Ltd V Central Bank of Kenya & 2 others [1996] e KLR** wherein it was held:

> ***"Wider principles of resjudicata apply to applications within the suit. If that was not the intention, we can imagine that the courts could and would be inundated by new applications filed after he original one was dismissed. There must be an end to interlocutory application as much as there ought to be an end of litigation."***

In this case, Iam further fortified by Section 89 of the Civil Procedure Act which provides that the procedure in suits under this Act applies in all proceedings of a civil nature. This in my view includes applications.

In view of the foregoing, it follows that a party who is dissatisfied with a ruling of a court in one application cannot go on filing subsequent applications on the very same issue as it is barred by the rules of resjudicata.

Albeit the appellant argues that resjudicata did not apply in this case because there was no final decision on the merits, I disagree with that submission and contention for two reasons.

1. That Order 12 Rule 6(2) expressly provides that when a suit has been dismissed under Rule 3 that is, where suit or application is dismissed under that rule for non attendance, no fresh suit may be brought in respect of the same cause of actions, with the only available remedy being found in the provisions of Order 12 Rule 7 which allow for an application in the same suit or proceeding for setting aside or varying the judgment or order, upon such terms as may be just;

2. That where suit/application has been dismissed for non attendance, under Order 12 Rule 3, that decision is a determination and acts as estoppel that is why Rule 6(2) thereof bars the bringing of a fresh suit or application on the same grounds.

Again, an aggrieved party can only apply under Rule 7 of Order 12 to reinstate the same. It is on the foregoing that I concur with the findings and decision of the trial magistrate that the application dated 17th December 2009 was resjudicata.

That being the case, it would have been futile for the trialmagistrate to belabor to reach findings on the other grounds or legal issues in the suit for reasons that Resjudicata once taken is a preliminary point of law that goes to the jurisdiction of the court. It is not a procedural technicality that can be cured by taking cover in the provisions of Sections 1A and 1B or 3A of the Civil Procedure Act or even under Article 159(2) (d) of the Constitution.

It would equally be pointless for this court to venture into the merits and demerits of the other grounds of appeal as submitted, on having found that the issue of Resjudicata was well taken and decided upon by the trial court as a preliminary point of law .

Accordingly, I find no merit in this appeal and proceed to dismiss it. I uphold the finding and decision of Honourable R.N Riechi (Mr) Chief Magistrate (as he then was) made on 28th April 2010 dismissing the objector/applicant/ appellant's application dated 17th December 2009 with costs.

I also award costs of this appeal to the plaintiff/1st respondent.

Dated, signed and delivered in open court at Nairobi this 13th day of October 2015.

R.E. ABURILI

JUDGE