



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL SUIT HCCC 627 OF 2005

KOLABA ENTERPRISES LIMITED PLAINTIFF/DECREE HOLDER/RESPONDENT

Vesus

SHAMSHUDIN HUSSEIN VARVANI 1ST DEFENDANT/JUDGMENT DEBTOR/

APPLICANT

MEFUZABANU SHAMSHUDINVARVANI.....2NDDEFENDANT/JUDGMENTDEBTOR/

APPLICANT

RULING

Striking out suit: Abuse of process of court

[1] I am considering the application dated 14.8.2013 which is asking the court to strike out this suit for being an abuse of the court process. The application is expressed to be brought under Order 51 rule 1, Order 2 rule 15 of the Civil Procedure Rules (hereafter the CPR), and section 3A of the Civil Procedure Act (hereafter the CPA). Parties filed written submissions which I have considered below.

Applicants' submissions

[2] According to the Applicants, a similar suit as this was filed in **NBI HCCC 423 OF 2004** in which the subject matter was settled by consent order dated 13th October, 2004. The decretal amount of Kshs.3, 754,996/- in the consent order/decreed has been fully paid. There is no appeal which was preferred on HCCC 423 of 2004. Therefore, this suit No HCCC 627 of 2005 should be struck out for being an abuse of the court process.

[3] They based their claim of abuse of the process of the court on the principle of *res judicata* cast in Section 7 of the Civil Procedure Act Cap 21 that:

“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”

[4] The test to determine whether a matter is *res judicata* was stated in **BERNARD MUGO NDEGWA -VS- JAMES NDERITU GITHAE AND 2 OTHERS (2010) e KLR**, and the Applicant must show that:

1. the matter in issue is identical in both suits
2. the parties in the suit are the same
3. sameness of the title/claim
4. concurrence of jurisdiction
5. Finality of the previous decision.

Same-parties requirement

[5] The Applicant argues that the Defendants in this present case were the Plaintiffs in the **HCCC No. 423 of 2004 as “KITS 2000 LIMITED”**. The Plaintiff Company herein was the 1st Defendant being **“KOLABA ENTERPRISES LIMITED”**. Although, the Defendants in the current suit are the guarantors of the lease agreement forming the subject of the first suit, it is submitted that this does not make the suit to be between different parties. The guarantors are directors of the same company. The wisdom underlying the doctrine of *res judicata* is based on the need to protect the integrity of the judicial process by preventing an abuse of process through incessant litigation of essentially the same dispute. When dealing with a plea of *res judicata*, it is not a question of engaging in legal niceties or finding distinction in company law concerning the separation of the legal fiction of a company from its directors. It is a question of inquiring into the substance of the dispute. The former exercise would amount to splitting of hears. They posed: Is the dispute essentially between the same parties?

[6] In answering the question, the Applicant made an interesting remark or rather observation, and I will tackle this in my rendition later; *that if the court was to engage in hair splitting venture of company law, the objective of the doctrine of res judicata is lost. It is about saving the courts time and resources not haggling over legalese.* They did not stop there. *Parties are given one bite at the cherry to air their grievances and once the matter is put to rest, any more litigation from the back door is scowled upon. The court has other matters to attend to not just sitting in judgment over the same case brought in a different cast over and over again.*

Same issue argument

[7] The Applicants submitted that a look at the Plaints in the two cases reveal that the issues for determination in both complaints are largely the same and revolve around payment of debt. In the case of **KAMUNYE AND OTHERS -VS- PIONEER GENERAL ASSURANCE SOCIETY LIT (1971) EA page 263** it was held that *res judicata* applies not only to points upon which the first court was actually required to adjudicate 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. The rationale of *res judicata* was stated in **POSIYANA SEMAKULA -VS- SUZAN MAGALA AND OTHERS (1979)**; to bring an end to litigation between the parties. The Plaintiff argues that in the first case the Plaintiff then, Kits 2000 Ltd was seeking an injunction and declaration that no rents were due. In the present case, he further argues, the Applicants/Defendants (who are Directors of Kits 2000 Ltd, the Plaintiff in the previous suit) have been sued as guarantors under a lease agreement to pay arrears of rent. This it is claimed makes the whole difference! What a play on words! Isn't the issue revolving around payment of debts on a lease agreement? Aren't the issues raised in this latter suit "... points which properly belonged to the subject of litigation in the former suit and the parties exercising reasonable diligence might

have brought forward at the time?” The answer is irresistibly in the affirmative.

Suit substantially determined by competent court

[8] According to the Applicants, the Plaintiff misled the court in stating in Paragraph 13 of the plaint dated 25th October 2005 that there is no other suit pending or previous proceedings between the same parties and herein on the same subject matter. The Plaintiff in the second suit is trying to bring this matter in form of a new cause of action, but which has already been determined by a competent court in earlier proceedings.

Finality of the previous decision/decre

[9] The subject matter of this suit was determined and duly concluded by a consent judgment filed by the parties in the High court in which the plaintiff(herein as defendants) agreed to pay to the plaintiff herein a sum of Kshs.3,754,996/- in installments by way of post-dated cheques and has duly completed the payments as ordered by court. If the Plaintiff in the present suit is dissatisfied with the terms of the consent order, the way out is not to bring another suit but to set aside that other decree. As it stands the court is put in the embarrassing position of having to deal with two decrees. In fact the reason the Plaintiff filed this suit is because the consent order did not contain an order as to the interest payable. Only the judgment debt was to be paid but with no order as to interest. The Plaintiff in this case, on realizing that he got a bad bargain now seeks to renege on his agreement by filling a different suit to seek interest. It should be noted that most consent orders involve a give and take negotiations where parties abandon their strict legal rights for a greater good i.e. so that the matter can be concluded expeditiously. If the parties are allowed to go back on their word yet the other party has altered their position to their own detriment, such a proceeding would be foul. It would water down the force of consent judgments and discourage parties from amicable settlement of disputes by granting each other concessions. The Plaintiff should therefore not be indulged by proceeding with this present suit just so that he can avoid his bargain in the Consent Order. The Defendants herein also gave an arm and a leg to help end the dispute, why should it be resurrected so that the Plaintiff can quench his thirst for interest payments?

Qui prior est tempore, potior est jure

[10] Moreover, when there are two decrees, the first in time prevails under the Latin maxim of **“Qui prior est tempore, potior est jure”** literally meaning where there are equal equities, the first in time shall prevail. The first decree was issued by court on the 29th of September, 2005 and the second on 5th December, 2005, thus the first in time should prevail.

Same claim argument

[11] The Plaint which was filed in this court under **CIVIL SUIT NO. 627 OF 2005** has the same claim as the previous suit of **HCCC 423 OF 2004**. Both claims are seeking payment of monies accrued due to unpaid rates utilities and securities while operating/carrying out business in the plaintiff's (herein) premises. The Plaintiff is misleading the court by failing to indicate in the plaint filed on 25th of October, 2005 that decretal amount Kshs.3,754,996/- has been fully paid as the final settlement.

Basis for striking-out relief

[12] For the foregoing reasons, the Applicant believes this suit should be struck out for being an abuse of process and let the losses lie where they fell. They concluded by quoting the scripture which the court should preach to the Plaintiff that:

“Listen! My beloved is knocking: “Open to me, my sister, my darling, my dove, my flawless one. My head is drenched with dew, my hair with the dampness of the night.”

“But I have taken off my robe – must I put it on again? I have washed my feet – must I soil them again?” Song of Songs 5:2-3

That let there be no more of this dispute by striking out this suit.

Respondent’s submissions

[13] The Respondent gave detailed background information to the application as follows:

- a. Kits 2000 Ltd. was renting four go-downs from the Plaintiff herein under a written lease for which the Applicants herein were guarantors for the payment of rent.
- b. Kits 2000 Ltd. being in arrears of rent, the Plaintiff instructed J. Nganga t/a Excellent Auctioneers to levy distress for rent.
- c. Kits 2000 Ltd. filed suit in Nairobi HCCC No. 423 of 2004 against the Plaintiff and the Auctioneer seeking an injunction against attachment and a declaration that all rents were paid. **See “EXHIBIT 1” Plaintiff.**
- d. At the hearing, Kits 2000 Ltd. entered into a **consent judgment** agreeing to pay Kshs.3, 754,996/- to the Plaintiff herein. See **“EXHIBIT 2” Decree.**
- e. **Kits 2000 Ltd did not honor the consent decree, sold its assets, vacated the godowns and disappeared.**
- f. The Plaintiff herein then filed this suit against the Applicants as guarantors under the written lease. **See “EXHIBIT 3” Plaintiff.**
- g. The Defendants did not enter appearance and judgment was entered for the Plaintiff and a decree issued on the 15th December, 2005. **See “EXHIBIT 4” Decree.**
- h. To avoid the consequences of the Decree the Applicants on the 18th January, 2006 filed Bankruptcy Proceeding in Bankruptcy Cause Numbers 8 and 9 and obtained Receiving Orders.
- i. In the Affidavit in Support of the Statement of Affairs both Applicants acknowledged owing Kshs.4, 000,000/- to the Plaintiff under the decree in this suit. **See “EXHIBIT 5” Statement of Affairs**
- j. The Applicants then started depositing monthly instalments in satisfaction of the decree with the Official Receiver.
- k. The Plaintiff noticing falsehoods in the Statement of Affairs engaged private investigators and discovered that the Applicants were conducting business from go-downs in the Industrial Area under the name MUN GRAPHICS, had a labour force of 40 persons, owned a fleet of motor vehicles and operated bank accounts.
- l. The Plaintiff filed an application to rescind the Receiving Orders for having been obtained through false Statement of Affairs. The application was heard by **Mutava J.** who granted the application and rescinded Receiving Orders. **See “EXHIBIT 6” Ruling.**
- m. The Official Receiver then paid to the Plaintiff a sum of Ksh.1,250,250/- that he had collected from the Applicants. **See “EXHIBIT 7” Letter from Official Receiver.**
- n. The Advocates for the Applicants M/s Nyaberi and Company then started paying monthly instalments of Kshs.200,000/- to the Plaintiff and after paying a sum of Kshs.2,000,000/- refused to pay anymore. **See “EXHIBIT 8” a bundle of forwarding letters from Nyaberi and Company.**
- o. The Plaintiff then filed an application to Show Cause why the Applicants should not be committed to Civil Jail for refusing to pay the balance, which amount as at 22nd October, 2013 stood at Kshs.4, 302,915.85. This application is part heard before the Deputy Registrar.

[14] They hold the view that the present application is intended to offer the Applicants reprieve or shield them from the consequences of the Notice to Show Cause application in this suit. Accordingly, they submitted that this application should be dismissed with costs on the following grounds:

- a. The parties in this suit and the parties in Nairobi HCCC No. 423 of 2004 are **not** the same. It is trite law that a body corporate is a legal entity totally different from its shareholders.
- b. The cause of action in the two suits is not the same. In Nairobi HCCC No. 423 of 2004 the

Plaintiff Kits 2000 Ltd. was seeking for an injunction and a declaration that no rents were due, in the present suit the Applicants have been sued as guarantors under the written lease to pay the arrears of rent.

- c. The Applicants **not having entered an appearance** and having paid a sum of Kshs.3, 250,750 /- partly through the Official Receiver and partly through M/s Nyaberi and Company in **satisfaction of the decree herein are estopped from denying the validity of the suit.**
- d. This application is based on false premise and an abuse of court process.

COURT'S RENDITION

Issues

[15] I have considered all the rival arguments and I am convinced these are the issues I should determine:

- a) *Whether this suit is res judicata;*
- b) *Whether this suit is an abuse of the process of the court; and*
- c) *Ultimately, whether it should be struck out.*

The issues are inextricably bound but I think good order and the sequential connexion they bear with and to each other pre-ordains that the first two should be dealt with together although in the same sequence they appear. One leads to the other; as the Applicants are saying that the suit is *res judicata* which in turn makes it an abuse of the process of the court. Then, ultimately, on that basis, it should be struck out.

Res judicata

[16] This subject is not novel at all; it has been satisfactorily decided upon by courts of law. Except, when it is pleaded, it should never be evaded; instead a court of law should comprehensively deal with the subject within the facts of the case, and deliver a decision. The doctrine of *res judicata* serves two important purposes; 1) it prevents multiplicity of suits which would ordinarily clog the courts, and heave unnecessary costs on the parties to litigate and defend two suits which ought to have been determined in a single suit; and 2) it ensures litigation comes to an end; disappointed parties are barred from camouflaging already decided cases in new garment-art of pleadings. The substantive law on *res judicata* is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“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”

[18] I do not want to re-invent anything. I wish only to adopt the following passage in the dictum of Wigram V-C, in **HENDERSON V HENDERSON (1843) 67 ER 313** as it summarizes *res judicata*:

“ ... 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 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.

[19] Is this case *res judicata*? Unless it is abundantly clear, when *res judicata* is raised, a court of law should always look at the entire pleadings-of the previous case and the instant case- to ascertain; 1) what issues were really determined in the previous case; and 2) whether they are the same in the subsequent case and were covered by the decision of the earlier case. One more thing; the court should ascertain whether the parties are the same or are litigating under the same title and that the previous case was determined by a court of competent jurisdiction. Let me start with the two simple propositions of the law. Doubtless, the previous case was decided by a court of competent jurisdiction. The other thing; the parties were not the same or litigating under the same title. My own view is that the plaintiff in the instant suit was the 1st Defendant in the previous suit. The defendants in the instant suit were not parties in the previous suit. They have been sued under a deed of guarantee they signed with the plaintiff in this case to ensure the rent arrears, utilities and securities incurred under the lease have been paid in full at all times. The question of parties catapults the court into the following submissions by the Applicants in that respect that:

“The Defendants in this present case were the Plaintiffs in the HCCC No. 423 of 2004 as “KITS 2000 LIMITED”. The Plaintiff Company herein was the 1st Defendant being “KOLABA ENTERPRISES LIMITED”. Although, the Defendants in the current suit are the guarantors of the lease agreement forming the subject of the first suit, it is submitted that this does not make the suit to be between different parties. The guarantors are directors of the same company”.

And the Applicants continued to submit again, that:

“In the present case, he further argues, the Applicants/Defendants (who are Directors of Kits 2000 Ltd, the Plaintiff in the previous suit) have been sued as guarantors under a lease agreement to pay arrears of rent. This it is claimed makes the whole difference! What a play on words! Isn’t the issue revolving around payment of debts on a lease agreement”?

[20] The Applicants did not stop there, they submitted:

When dealing with a plea of res judicata, it is not a question of engaging in legal niceties or finding distinction in company law concerning the separation of the legal fiction of a company from its directors. It is a question of inquiring into the substance of the dispute. The former exercise would amount to splitting of hairs.

They then posed: **“isn’t the dispute essentially between the same parties?”** And in answering the question, the Applicants made further interesting remark or rather observation; **“that if the court was to engage in hair splitting venture of company law, the objective of the doctrine of res judicata is lost. It is about saving the courts time and resources not haggling over legalese”.** There was no elaboration on these statements, and if I understood that submission well, I make little of the argument of *splitting hairs in company law*, when all that the Respondent did was to state, and correctly so, that the company is distinct from those who compose it. The submission by the Applicants is rather strange and indefensible, especially if, in the context of this case, it is intended to denote that there are aspects of company law which are less or not important at all. It should be appreciated that the separate corporate personality is the best legal innovation ever in company law. See the famous case of **SALOMON & CO LTD v SALOMON [1897] A.C. 22 H.L** that a company is different person altogether from its subscribers and directors. Although it is a fiction of the law, it still is as important for all purposes and intents in any proceeding where a company is involved. Needless to say, that separate legal personality of a company can never be

departed from except in instances where the statute or the law provides for the lifting or piercing of the corporate veil, say when the directors or members of the company are using the company as a vehicle to commit fraud or other criminal activities. And that development has been informed by the realization by the courts that over time, promoters and members of companies have formulated and executed fraudulent and mischievous schemes using the corporate vehicle. And that has impelled the courts, in the interest of justice or in public interest to identify and punish the persons who misuse the medium of corporate personality. That short treatise is necessary in answering the question whether the defendants are the same parties or being sued in the same capacity as in the previous suit.

[21] Litigating as the same party or under same title is a vital component of the law on *res judicata*. The defendants in the current suit are directors of KITS 2000 LTD which was the plaintiff in the previous suit. KITS 200 LTD is a limited liability company which had filed the suit seeking an injunction against the defendant, who is the plaintiff in the current suit. The current suit does not cite KITS 2000 LTD as a party. Further, upon perusing the pleadings herein, the defendants have not and could not have been sued as directors of KITS 2000 LTD because such a suit would be incompetent under the rule in **FOSS v HARBOTTLE (1843) 67 ER 189**. They have been sued as guarantors of the company under a guarantee in the lease agreement dated 14th July, 1999 which was to ensure due observance and performance by KITS 2000 LTD of the terms and conditions of the said lease, especially payment of all rents and utilities under the lease. Perhaps knowing what the status of a guarantee is in law would help. A guarantee is a separate and distinct contract from the lease herein and should be so separated for all purposes and intents. The covenants and the obligations in the guarantee are binding on the guarantor until they have been discharged or varied between the parties, i.e. the guarantor and the guarantee. See the case of **DR. SIMON WAIHARO CHEGE v PARAAMOUNT BANK OF KENYA LTD NBI MILIMANI HCCC NO 360 OF 2001**. That being the position, the defendants have not been sued in the same capacity as in the previous case. The party in the previous case was the Company whereas the parties in the current case are guarantors of the Company.

[22] The foregoing narrative and re-statement of the law also answers yet another important question; are both proceedings over the same subject matter? Whereas the question of rent arrears is common in both cases, the claims are not the same. The previous case determined the amount owing by consent of the parties. The current suit seeks to enforce the guarantee and obtain full payment of rent in accordance with the guarantee. It should be understood the ‘‘matter in issue’’ in section 7 of the CPR does not mean any matter in issue in the suit, but has reference to the entire subject in controversy: it is not sufficient that one or some of the issues are common. The entire subject matter in the subsequent suit must be covered by previous suit, not vice versa. That may not be said to be the case in this suit. See the case of **JADVA KARSAN v HARNAM SIGH BHOGAL [1953] 20 EACA 74**. Quite apart from the canons which define when a suit is *res judicata*, it is clear from the plaint that the consent judgment in the previous case, i.e. **NBI HCCC NO 423 OF 2004** is the basis for the current case, and the relevant disclosures with regard to the existence of that case between the plaintiff and the Company have been made in paragraph 8, 9 and 10 of the plaint. Those disclosures are sufficient and I do not think the Respondent can be accused of deposing to a falsehood in paragraph 13 of the plaint or for failing to disclose previous or existing proceedings as required under Order 4 rule 1(1) (f) of the CPR. This position I have taken is guided by the nature of the proceeding herein and the status of deed of guarantee in law. But I observe that the Respondents have raised several important issues, which are; 1) that the decretal sum in **NBI HCCC NO 423 OF 2004** has been fully paid; 2) that the current case wants to re-open the consent judgment and reap, though unfairly, other benefits, especially interest, which was not part of the consent judgment. It is trite law that a consent judgment is not the less a contract for it emanates from the parties and also gets court’s endorsement as an order of the court. And such consent judgment may be set aside or varied on appeal, or by the original court which passed it with the consent of the parties. It is also not prohibited for a party to file a fresh suit for the purpose of setting aside or variation of a consent judgment. I am not saying this is such case, but arguments by the Applicant are in that gender, which makes it difficult to deal with this proceeding under the doctrine of *res judicata* or as abuse of the process of the court. All these

issues are quite pertinent but should be addressed within the correct procedural framework demanded by the circumstances of the case. Why do I say this? The current case is concluded and a decree has already been issued. In the circumstances, it may not be appropriate approach to apply for the suit to be struck out, and more so, under such a wide and most imprecise ground of all the grounds; abuse of process of the court. Secondly, the arguments by the Applicant are good for an application to set aside the judgment and decree or for stay of execution of decree herein rather than for striking out of the suit. Take for a moment that this suit had not been concluded; the argument that the entire decretal sum has been paid in full and that the plaintiff has no right to interest on the decretal sum would only be a defence by the defendants to show that the guarantee is discharged.

[23] In the premises, this suit is concluded. It has not been opened up. The application surprisingly does not contain a prayer for the setting aside of the judgment and decree which would expose the case for the lethal blow of striking out. I find also that it is not *res judicata*. The parties are not the same or litigating under the same title. The guarantee is enforceable as long as the rent arrears have not been paid in full. The present suit is claiming that the total rents, utilities and interest are still outstanding which should be settled by the guarantors. The issues are to be litigated only upon the setting aside of the judgment herein. Broadly speaking, matters on quantum of the total amount payable or that the same have been fully paid, as it is being claimed herein, are to be resolved within the process of execution by way of motion to stay the execution and or to set aside the judgment and decree herein. Accordingly, the remedy to have the suit struck out is not available for as long as the suit is closed; concluded, and for the other reasons I have given above. The law must truly be re-stated by courts of law in order to do justice to all the parties. The upshot is that the application dated 14.8.2014 is dismissed with costs.

Dated, signed and delivered at Nairobi this 11th day of March, 2014

F. GIKONYO

JUDGE