



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO. 275 OF 2013

NANCY MWANGI T/A WORTHLIN MARKETERSPLAINTIFF

Vesus

AIRTEL NETWORKS (K) LTD

(FORMERLY CELTEL KENYA LTD).....1ST DEFENDANT

G4S LIMITED2ND DEFENDANT

SMART PRINTERS LIMITED3RD DEFENDANT

RULING

Introduction

[1] There are two Motions; one filed on 16 September, 2013 and the other on 8th January, 2014 by the 1st Defendant and 2nd Defendant, respectively. They both seek for similar orders. Indeed, the second application is premised on the first application. All the Defendants support the applications and proffer similar arguments. I, therefore, propose to deal with them together. I will first analyze the arguments of parties on the applications herein.

DEFENDANTS’ STATED THEIR POSITIONS

Arguments on res judicata

[2] The 1st Defendant argued that the cause of action herein arises from a sponsorship Agreement dated 2/10/2008 entered between the Plaintiff and the 1st Defendant. The suit is a replica of the one filed before the arbitrator whose award was set aside by Justice Havelock in High Court Misc. Application No. 544 of 2012. The following two prayers in the plaint are similar to those in the arbitral proceedings, namely:-

- a. A claim for Kshs.7, 969,296.00

b. A claim for Kshs.12,000,000.00

[3] On claim (a), Havelock J held that the expenses forming Kshs. 7,969,296.00 were under the sponsorship Agreement to be borne by the Plaintiff and therefore not payable by the 1st defendant. The court particularly found that to order the 1st Defendant to pay such money amounts to rewriting the contract, which power no court or tribunal can undertake. The relevant holding by Justice Havelock found at page 24 is as follows:-

“Leaving aside the advocates’ cost of the arbitral proceedings as well as the arbitral costs thereof, the Arbitrator made two pecuniary awards in favour of the Respondent herein. With regard to sub-paragraph (i) of the Award finding, the amount detailed as Shss.7,969,296/= is extracted from paragraph 19 of the Statement of Claim of the Respondent which is exhibited as “LK-2” to the affidavit in support of the Notice of Motion. That paragraph enumerated the costs incurred by the Respondent as regards the concert, breaking down each cost heading from (a) to (t). To my mind, those costs were almost entirely related to the duties of the Respondent as outlines in clause 2.0 of the Sponsorship Agreement....” (Emphasis added)

[4] On Claim (b) for Kshs. 12,000,000.00, the 1st Defendant submitted that the court found the claim to be an award for general damages for breach of contract which cannot lie in a claim based on contract. The learned judge, at page 24, held as follows:

“In my opinion, what the Arbitrator has awarded amounts to general damages and I find and adopt the reasoning of my learned brother Kimondo J. in the Airtel Networks case (supra) to the extent that there can be no general damages for breach of contract.”
(Emphasis added)

[5] The import of the aforementioned ruling is that the learned judge decided the matter on its merits. The Plaintiff did not challenge that decision. Accordingly, trial of the present suit would amount to sitting on appeal and this court has no jurisdiction to overturn the decision of Justice Havelock. Succinctly put, the High Court has no jurisdiction to overturn its own decision except on reviewing its own decision, a procedure that the plaintiff has not pursued. See the case of **E.T VS ATTORNEY GENERAL & ANOTHER (2012) eKLR** where it was held that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 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.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....” (Emphasis added)

[6] The upshot of the foregoing is that this dispute was considered in High Court Misc. Application No. 544 of 2012 and the present one is res judicata and an abuse of the court process. On that basis, it should be struck out and/or dismissed with costs. The 1st Defendant supplied the court with other statutory material and judicial decisions listed below:

1. Civil procedure Act, cap 21 laws of Kenya

2. E.T. Vs Attorney General & another (2012) eKLR

3. Celtel Kenya Ltd Vs Nancy Mwangi T/a Worthlink Marketers, High Court Misc. Application No. 544 of 2012 (unreported)

[7] The 2nd and 3rd Defendant also submitted on the question of res judicata and ouster of jurisdiction. They fully supported the arguments by the 1st Defendant that this suit is res judicata the dispute having been determined by arbitral tribunal, although the award was later set aside by Havelock J. The court, therefore, has no jurisdiction. They found support in Section 10 of the Arbitration Act, 1995 which precludes the court from intervening in disputes which are the subject of arbitration except as provided by the Act. One of the exceptions is an application to set aside the award which has already been invoked. The Plaintiff having failed to appeal against the order setting aside the award leaves her with no other alternative recourse to file suit. It would make nonsense of arbitration clauses if parties are to take the position that the setting aside of an arbitral award has the effect to revert the parties to their position prior to arbitration as the plaintiff contends herein. The setting aside of the award should be the end of the matter and the court has no jurisdiction to deal with it again. Introduction of two other parties is just but a camouflage to make this suit look as if it is different. They relied on 1) **NAIROBI HCCC CONSTITUTIONAL APPLICATION NO. 585 OF 2012 PROF. CHRISTOPHER MWANGI GAKUU v KENYA NATIONAL HIGHWAY AUTHORITY AND 24 OTHERS;** and 2) **HCC NB MISC APPLICATION NO.579 OF 2008 GEORGE WAITHAKA GITURU v THE HON. THE ATTORNEY GENERAL & ANOTHER.**

[8] The 2nd Defendant also pleaded limitation of this action based on Section 4(2) of the Limitation of Action Act, Chapter 22 of the Laws of Kenya. I will, not, however, determine that aspect at this stage as I belong to the school of thought that limitation of action is a matter for trial which should be determined by considering all circumstances of the case and the law applicable rather than in a summary manner and at preliminary stage. The less I say about that issue the better.

THE PLAINTIFF OPPOSED THE APPLICATION

[9] The plaintiff relied on her replying affidavits sworn on 22nd November, 2013 and 13th February, 2014 in her opposition to both applications by the 1st and 2nd defendant, and supported by the 3rd defendant. She also replied to the preliminary objection by the 3rd defendant. According to the Plaintiff, the court is being called upon to make a very drastic and draconian step of striking off pleadings of a party before a hearing on merits. In effect, the court is being invited to deny the plaintiff the non-derogable right to a fair hearing which is enshrined in article 50 of the constitution of Kenya, 2010. Thus such a step can only be exercised cautiously and in only rare and clear circumstances

[10] She posits further that this court has already ruled in its ruling of 28th March, 2013 Havelock J, that the arbitrator had no jurisdiction to hear the disputes arising between the parties herein. That issue is *res Judicata* and the plaintiff's only remedy lies with this honourable court- a fact the defendants have admitted by failing to ask this court to refer the matter to arbitration but rather to strike out the matter. The arbitral award and the proceedings were set aside for lack of Jurisdiction. The Court has previously held that Jurisdiction is everything without which all that is done is a nullity.

[11] The Plaintiff sought for and was granted leave to file a claim in negligence out of time (a copy of the order is annexed and marked as "**NNM 2**" to the plaintiff's replying affidavit sworn on **22nd November, 2013**). The High Court has unlimited Jurisdiction and in the absence of the arbitrator's competence to hear and determine the dispute herein, the Court has Jurisdiction to give the relief sought. It would be contrary to Public Policy if parties to a contract were to agree to oust the Jurisdiction of the Court as the defendants are purporting to do herein.

[13] The application before Honourable Justice Havelock was for setting aside of the award for

lack of Jurisdiction, the applicants did not ask the judge to rehear/review the merit of the case before the arbitrator and the parties did not argue the merits of the case but only dealt with the application for settling aside. If at all the case was ever heard on merit, the issue would be, what relief was granted for or against the plaintiff. The obvious reply would be that there was none. That the Court could not have conclusively finalized the matters herein through an application for setting aside the arbitral award, **because:-**

- a. Our Judicial system does not know a system of trial by affidavits, and if the courts wished to hear parties on the merits of the case vide affidavit evidence as opposed to *viva voce* evidence, it ought to have directed the parties to file affidavit evidence in respect to the main claim.
- b. The arbitral proceedings were a nullity and therefore, they could not have been a subject of appeal, to the High court, so that the High Court can be said to have pronounced itself upon the merits of the case. There was nothing on which it can be said that the High Court based its purported hearing on merits, when it already ruled that the arbitrator was without jurisdiction and therefore whatever he did was a nullity. In the case of **MCFOY v UNITED AFRICA CO. LTD, 1961] 3 ALL E R 1169 AT 1172**, Lord Denning observed that anything that is said to be a nullity is void *ab initio* and is as though it never existed. And that nothing can be done subsequently based on what is a nullity because one cannot put something on nothing and expect it to stay there. It will collapse.
- c. Public policy frowns on pronouncement of final judgment without hearing merits of a case or without proper adjudication of the case.

[14] In the case of **EVANS VS BARTLAM [1937] 2 ALI E.R 646**, the court held that courts should not pass judgments that are not properly adjudicated. The defendants have relied heavily on the principle of *res-judicata*. It is my submission that the *res judicata* principle as set out under S. 7 of the Civil Procedure Act, Cap 21 Laws of Kenya, is inapplicable in the current proceedings, as the action is different, the arbitral proceedings were annulled, and the parties to the instant suit are different from the parties in the arbitral proceedings. Further, the doctrine of *res judicata* covers matters decided on merit and with finality. It cannot be said to have been any adjudication as the adjudication by the arbitrator was set aside for being a nullity. That the claim herein raises real and triable issues both under contract as well as under the common law of negligence, upon establishment of a duty of care. The defendants appreciate and admit the fact that the claim raises real and triable issues and they have all filed their statements of defence. The plaintiff sets out the particulars of negligence on the body of the plaint

[15] The existence of an arbitration clause does not erode the jurisdiction of this court. In fact the law envisages a situation where jurisdiction is concurrent but the parties have the option as to which forum to attend. However, the choice of forum must be before any step is taken in the proceedings. This is just a system to ensure that the parties are afforded an opportunity to choose a forum that may be more advantageous to them over the court process. This explains why the Arbitration Act prescribes that the proceedings in the court are to be stayed, not struck out. The Act provides thus:-

6.(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

[16] In the instant case, the defendants have filed their defence; therefore, they cannot be heard to tell the court to refer the matter to arbitration. In fact, none of the defendants have sought the reference of the matter to the arbitrator. They all argue that **an arbitrator who lacked jurisdiction and therefore presided a nullity, had determined the issues herein on merit**. The Plaintiff submitted that if the court was to uphold that view, it would be a travesty of justice.

[17] In addressing the objection by the Defendants that the plaintiff does not disclose any reasonable cause of action disclosed, the court should not make a ruling on the merits of the plaintiff's case at this stage so as to guard against making conclusive remarks on the merits of this case. However I will point out some of the issues for trial, albeit in passing.

- a. The plaintiff will seek to prove at the main trial that the 1st defendant owed the plaintiff a contractual obligation as well as a duty of care, which both were breached by the 1st defendant to the detriment of the plaintiff.
- b. In relation to the 2nd and 3rd defendants, the plaintiff will prove to the satisfaction of this court that though there was no contractual relationship with them and the plaintiff, they professed to deliver professional or quasi professional services which they discharged unprofessionally, negligently and without due care, thus occasioning loss and damage to the plaintiff herein.
- c. The defendants admit having performed some duties in regard to the organizing of this event, but they seek to defend their position. See paragraphs 6, 7, 8, 9, 10 & 11 of the plaintiff's replying affidavit sworn on 13th February, 2014. There is a real issue as to whether the defendants owed a duty to the plaintiff and whether they discharged that duty. If so, did they discharge that duty in a negligent or unprofessional manner? These issues need to go to full trial.
- d. Relying on the cases of **BOW VALLEY HUSKY (BERMUDA) LTD v SAINT JOHN SHIPBUILDING LTD AND OTHER APPEALS [1998]2 LRC, 666** and **HENDERSON SYNDICATE v MERRET SYNDICATE LTD [1994]3 ALL E.R.506**, the plaintiff shall demonstrate at the trial that proof of breach of duty of care without proof of a contractual relationship is sufficient to found a claim against the defendants herein, both jointly and severally. And that is but one of the causes of action against the defendants herein. See the particulars of negligence in the pleadings.
- e. Further, it is submitted that, the applications herein are in the nature of a preliminary objection. A preliminary objection can only be raised on points of law only, when all the facts are settled. In this case, the facts are unsettled and highly contested and the defendants have filed their respective statements of defence and lists of documents admitting certain facts while evasively denying some other facts. The likelihood of success in this matter is so great that, the 2nd defendant has sought indemnity against the 1st defendant in the event the 2nd defendant is found liable.
- f. These issues can only get clearer when ventilated upon in a main hearing.

[18] On the reasons above, the Plaintiff urged the court to dismiss the applications herein with costs to the plaintiff, and direct that the main suit be set down for hearing.

COURT'S RENDITION

Striking out of suit

[20] The heart of the two applications I am faced with is the prayer that the plaintiff herein should be struck out. Several grounds have been cited. Except, the application by the 2nd Defendant is brought under Order 2 Rule 15(1) (a) of the Civil Procedure Rules, 2010 and is, therefore, is tethered to the strictures in Order 2 Rule 15(2) of the Civil Procedure Rules, 2010 which provides that:

No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

[21] Accordingly, the first two grounds, namely, that: 1) **the plaintiff does not disclose a reasonable cause of action known in law against the second defendant; and 2) the second defendant has no knowledge of and is not a party to the alleged contract dated 3rd October, 2008 between the plaintiff and the first defendant which forms the basis of the claim;** are so circumscribed and I will deal with them as such. Case law and practice require the Court in determining an application under Order 2 Rule 15(1) (a) of the Civil Procedure Rules, 2010 to only look at the pleadings without probing for any evidence to see if the plaintiff is a real demurer,

hopeless and without a semblance of a cause of action. But if the plaintiff has a semblance of a cause of action which perhaps may be emboldened by amendment, or the application for striking out the pleading involves prolonged and serious arguments which require a serious discussion, the court should, as a rule, lean towards sustaining rather than dismissing or striking out the pleading. See the notoriously cited case of **D.T. DOBIE** and plurality of cases on that approach. I do not wish to multiply them. I have perused the plaintiff and it is apparent the 2nd Defendant is being sued as an agent of the 1st Defendant who was engaged in breach of the Sponsorship Agreement herein to sell and or distribute entry tickets into the concert. See paragraph 14 of the Plaintiff. According to paragraph 21 of the plaintiff, the 1st Defendant is accused of breach of duty of care arising out of the contract and of the contract itself. The 2nd and 3rd Defendants are accused for breached duty of care when they accepted to undertake and undertook the various roles assigned to them by the 1st Defendant although those appointments of the 2nd and 3rd Defendants were in breach of the Sponsorship Agreement. It is clear the 2nd and 3rd Defendants were not parties to the Sponsorship Agreement, but it is not a demurrer to charge them in a civil proceeding for breach of duty which in law constitutes a cause of action by itself. See the cases of **BOW VALLEY HUSKY (BERMUDA) LTD v SAINT JOHN SHIPBUILDING LTD AND OTHER APPEALS [1998]2 L.R.C, 666** and **HENDERSON SYNDICATE v MERRET SYNDICATE LTD [1994]3 ALL E.R.506**. The application for striking out the pleadings also involves prolonged and serious arguments which require serious legal discourse in a plenary trial. In sum, the plaintiff cannot be said to be devoid of a shred of a cause of action against the 2nd and 3rd Defendants. For those reasons, my discretion favours sustaining the suit rather than striking it out as against the 2nd and 3rd Defendants. Of course, the rationale behind that approach is that striking out of a suit is a draconian act which drives away the plaintiff from the judgment-seat, hence, it must be exercised cautiously, sparingly and only in the clearest of case. See the constitutional desire under Article 50 and 159 of the Constitution that courts should dispense substantive justice by allowing parties to ventilate their cases in an open and full trial. I am delighted how courts of law have, in sheer simplicity and clarity, enunciated on the need to safeguard the right to fair trial when faced with applications to strike out pleadings in an unambiguous expression that 'it is only in plain and obvious cases recourse should be had to the summary process of striking out pleadings'. In the present case, I will not allow the proverbial 'sword of the Damocles' to be drawn upon the plaintiff's suit. I save it. The application dated 8th January, 2014 is substantially determined. The other limb of the application dated 8th January, 2014 which saddles on the application dated 16th September, 2013 shall be determined once the application dated 16th September, 2013 is determined shortly.

[22] By that pronouncement, my work is made easier. I should now proceed to determine the application dated 16th September, 2013 which is stated to be brought under Sections 5, 7 and 8 of the Civil Procedure Act, 2010. The said application is founded on supporting Affidavit of LINDA KIRIKO sworn on 16th September, 2013 and the following grounds:-

- a. **The sponsorship Agreement relied on by the plaintiff and has been referred to in paragraph 3 to 8 of the plaintiff ousts the jurisdiction of this court.**
- b. **The plaintiff brought arbitral proceedings seeking judgment for:-**
 - i. **Kshs.7,969,296 in special damages; and**
 - ii. **Kshs.12,000,000 in general damages for anticipated profit and for breach of contract**
- c. **The said application terminated in favour of the Plaintiff where Mr. Evans Gaturu awarded the plaintiff the following:-**
 - i. **Kshs.7,969,296 in special damages**
 - ii. **Kshs.10,800,000 in general damages**
 - iii. **Costs of the arbitration and interest**

- d. **The 1st defendant was aggrieved by the said award and lodged an application in the High court for review/setting aside of the entire award**
- e. **The High Court considered the application in High Court Misc. Application NO. 544 of 2012 where Justice Havelock set aside that award and found that:-**
 - i. **With regard to Kshs.7,969,296/- the said expenses were entirely related to the duties of the plaintiff as outlined at Clause 2.0 of the sponsorship agreement and the same could not be transferred to the 1st defendant herein**
 - ii. **With regard to the Kshs.10,800,000/- the same amounts to general damages and there can be no general damages for breach of contract**
- f. **The court set aside the award because:-**
 - i. **Under the agreement the plaintiff was to shoulder the expenses amounting to Kshs.7.969,296/= particularized at Clause 2.0 of the agreement and no the 1st defendant and the award therefore amounted to re-writing the contract which no court or tribunal has jurisdiction to do; and**
 - ii. **There can be no general damages for breach of a contract**
- g. **The decision of the High Court properly settled the dispute between the parties and there is no appeal**
- h. **In the face of Clause 14 of the Sponsorship Agreement and the said High Court ruling by Justice Havelock, the Plaintiff is precluded from bringing this claim**
- i. **The matter is res judicata**
- j. **The court is by this suit being invited to seat on appeal of the decision of Justice Havelock.**

The other Issues

[23] From the above, the pleadings, the application, the affidavits and the submissions of the parties filed herein, I am in a position to decipher the other major issues for determination are:

- a) **Whether this court has jurisdiction over the proceeding herein; and**
- b) **Whether this proceeding is res judicata**

But I will invert the order and start with issue (b) for obvious reasons; the result of my analysis of that issue will determine whether I should consider issue (a).

Arguments around *res judicata*

[24] The subject of *res judicata* is not any novel at all; much judicial ink has been spilt on, and the subject is now sufficiently decided upon by courts of law. The doctrine of *res judicata* is important in adjudication of case and 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 in the 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”

[25] 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.

[26] Is this case *res judicata*? Unless it is abundantly clear, when *res judicata* is raised, a court of law should always look at the decision claimed to have settled the issues in question and 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. The test in determining whether a matter is *res judicata* was stated is summarized in **BERNARD MUGO NDEGWA -VS- JAMES NDERITU GITHAE AND 2 OTHERS (2010) e KLR**, as follows 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; and 5) finality of the previous decision. The more fundamental proposition in the circumstances of this suit and which will determine the issue of *res judicata* without going into the other details is; Whether the decision of the court in setting aside the arbitral award is a decision of finality in the sense of *res judicata*?

Finality of decision of court

[27] The arbitral tribunal made its award. The award was then set aside by the court on the basis that the arbitral tribunal did not have jurisdiction to try the subject matter. That finding has a bearing in the question of *res judicata* but let me decide on another related but fundamental issue.

[28] Is the decision by the court in setting aside the award a decision of finality for purposes of *res judicata*? Without administering any sudden shock on the Defendants, I think not. The court was considering whether the award was rendered in accordance with the law. It found it was not because the arbitral tribunal lacked jurisdiction. The entire process was a nullity and what Lord Denning stated in the case of **MCFOY v UNITED AFRICA CO. LTD, 1961] 3 ALL E R 1169 AT 1172**, is pertinent; that anything that is said to be a nullity is void *ab initio* and is as though it never existed. And that nothing can be done subsequently based on what is a nullity because one cannot put something on nothing and expect it to stay there. It will collapse. If that be so, the decision of the arbitral tribunal was nothing and never existed in the lenses of law. The court was not considering the merit of the award as the jurisdiction of the court under section 35 of the Arbitration Act is limited to the strict grounds set out in the said section; and the court in exercise of the jurisdiction in section 35 of the Arbitration Act is not concerned with facts and merits of the arbitral proceedings. It is simply concerned with the legality and propriety of the arbitral proceedings. Similarly, the observation by Justice Havelock in his ruling especially on the obligations of the parties in the agreement and the nature of the relief granted by the arbitral tribunal were made as part of and in resolution of the question of jurisdiction of the arbitral tribunal but not as conclusive findings of facts or merits of the dispute. Care should be taken when applying the doctrine of *res judicata* in the circumstances of this case, which are peculiar in a sense and relate to a decision which set aside an arbitral award for lack of jurisdiction.

Accordingly, with all due respect to the counsel for the Defendants, the decision by the court in setting aside the arbitral award was neither a decision of finality on the issues in dispute nor a substitution for the decision of the arbitral tribunal. Their arguments on res judicata, therefore, fail. I declare this suit is not res judicata. In arriving at that decision, the court is fully aware of the necessity to enforce res judicata in adjudication of cases as it was well cast in the case of **E.T VS ATTORNEY GENERAL & ANOTHER (2012) eKLR** that:

“The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi Vs National Bank of Kenya Limited and Others (2001) EA 177 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.’ In that case the court quoted Kuloba J., in the case of Njangu Vs Wambugu and another Nairobi HCCC No.2340 of 1991 (unreported) where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic fact lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

How about ouster of jurisdiction?

[30] The discourse on res judicata will not be complete without a rendition on the claim that this court is divested of jurisdiction by virtue of Clause 14 of the Sponsorship Agreement and the High Court ruling by Justice Havelock. Fantastic arguments have been offered by the Plaintiff around section 6 of the Arbitration Act. The Plaintiff argued that existence of an arbitration clause does not erode the jurisdiction of the court. She posits that the law envisages a situation where jurisdiction is concurrent but the parties have the option to choose the forum to attend. To her, that is just a system to ensure that the parties are afforded an opportunity to choose a forum that is more advantageous to them over the court process. This explains why the Arbitration Act prescribes stay of proceedings as opposed to striking out the proceedings. I take the following view on the matter. Section 6 of the Arbitration Act is styled in a manner that does not per se oust the jurisdiction of the court. Perhaps, I should state, it provides for delayed jurisdiction in matters subject of arbitration agreement. See the opening part of section 6 of the Arbitration Act below:-

6.(1) A court before which proceedings are brought in a matter which is the subject of an arbitration agreement shall, if a party so applies not later than the time when that party enters appearance or files any pleadings or takes any other step in the proceedings, stay the proceedings and refer the parties to arbitration unless it finds—

[31] The section, however, is a strict one and should be utilized in accordance with the prescriptions of time in which a party should apply for stay of proceedings and referral of the matter to arbitration. There is no application for stay of these proceedings or referral of the subject matter to arbitration which has been made by the Defendants especially the 1st Defendant. In the circumstance and in view of my appreciation of the law, I would be reluctant to declare that this court is divested of jurisdiction over these proceedings. What I have said is enough and I should say no more for fear of making comments or observations which may touch on the merits of the suit.

Findings and Orders

[32] The plaint herein discloses a reasonable cause of action against the Defendants. It will not be struck out as prayed for by the Defendants. Secondly, this suit is not res judicata and the court is not divested of jurisdiction on the matter. The cause will, therefore, be tried in a plenary trial of the suit in accordance with the applicable substantive law as well as the rules of procedure. The

upshot is that both applications, the one filed on 16 September, 2013 and the other on 8th January, 2014 by the 1st Defendant and 2nd Defendant, respectively, are dismissed with costs to the Plaintiff.

Dated, signed and delivered in open court at Nairobi this 14th July, 2014

F. GIKONYO

JUDGE