IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: NYARANGI, GACHUHI & KWACH JJ A)

CIVIL APPEAL NO 80 OF 1988

POP-IN (KENYA) LTD & 3 OTHERS …………….. APPELLANTS

VERSUS

HABIB BANK AG ZURICH………………………...RESPONDENT

(Appeal from the Judgment and Decree of the High Court of Kenya

at Nairobi (Mr Justice A Rauf) dated 24th November, 1987 in Civil Case

No 1893 of 1987)

JUDGMENT

There is before us an appeal by the plaintiffs against the Ruling of the late Rauf J given on November 24, 1987 whereby he ordered that the suit was based on averments which were barred by the doctrine of estoppel with the extended aspect of *res judicata* as a result of which it was held that the whole suit had failed. The material ruling was preceded by another, dated August, 27, 1987 following preliminary objections which were taken on behalf of the defendant in an application for injunction filed on May 8, 1987 by the second, third and fourth plaintiffs. There are no facts to recite as no evidence was given and therefore the proceedings were held on pleadings and decision made on submission by counsel.

The submissions made by counsel for the appellants are to the effect that it was essential for the former suits to be adjudicated upon before *res judicata* is available. It was contended that the earlier actions 1480 / 86 OS and 1774 / 86 OS were withdrawn before adjucation and that HCCC No 2066 /86 was pending in the High Court awaiting a decision by a court of competent jurisdiction at the time HCCC No 1893 / 87 was decided upon. In the course of his submissions, Mr Shah suggested that the previous suits which had been withdrawn do not act as a bar to the institution of the action the subject–matter of this appeal, that the averments in HCCC No 1893 /87 therein raised by the first plaintiff could not have been raised in the two earlier suits as this plaintiff was not a party to the two originating summons, that is to say, 1480 / 86 OS and 1774 / 86 OS. We were urged to place the plaintiffs in a position where they owe the defendant some unspecified sums of money but the defendants also owes them and so the plaintiffs are praying for accounts to be taken between the parties necessitating a remission of the suit to the High Court for further proceedings.

On behalf of the defendant it is submitted by Mr Lakha that the first plaintiff’s suit is barred upon the principle of *res judicata* in its extended sense. Mr Lakha further submits that the suit of this particular plaintiff is barred from admissions made by that plaintiff in earlier proceedings. That brings us to the nub of this appeal, namely whether a wider sense of *res judicata* arises on the basis of the earlier suit HCCC

No 2066 / 86 between the same parties wherein the present claim of plaintiffs could have been made, should have been and was not made.

There can be no doubt that the parties to the suit HCCC No 2066/86 whose amended plaint was filed on June 2, 1987 are exactly the same ones who are parties to HCCC No 1893 of 1987. The claim against the bank is the same in both suits. The later suit was filed one year after HCCC No 2066 / 86, the former one. There is no assertion in the later action that some facts were not known earlier or that there was a fraud and the bank concealed some facts. Besides, it so happens that the second, third and fourth plaintiffs were, at all material time directors of the first plaintiff [vide HCCC No 1480 of 1986 (OS)] and that mortgages over their property was to secure repayments. In those circumstances, we see no reason why the first plaintiff could not have been joined in the earlier suit.

Despite Mr Shah's submissions to the contrary, we are quite clearly of the view that the matters raised in paragraphs 13A, 14, 15, 16 and 17 which could have been raised in the 1986 case.

As long as 1925 it was recognised that,

"The admission of a fact fundamental to the decision arrived at cannot be withdrawn and a fresh litigation started with a view of obtaining another judgment upon a different assumption of fact; ....Parties are not permitted to begin fresh litigation because of new views they may entertain of the law of the case, or new versions which they present as to what should be a proper apprehension by the court of the legal result either of the construction of the documents or the weight of certain circumstances. If this was permitted litigation would have no end, except when legal ingenuity is exhausted. It is a principle of law that this cannot be permitted ... : *Hoystead and Others v Taxation Commissioner*, (1925) All ER Rep 56 at p 62 Letters A.B.C."

On the application of *res judicata*, appellant's main and final position is well within the decision in *Yat Tung Investment Co Ltd vs Dao Heng Bank Ltd and Another* [1975] AC 581 as is clear from the following passage which repays quotation:

"But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings matters which could and therefore should have been litigated in earlier proceedings. The *locus classicus* of that aspect of *res judicata* is the judgment of wigram VC in *Henderson v Henderson* (1843) Hare 100, 115, where the Judge says:

Where a given matter becomes the subject of litigation in, and of 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 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."

Put simply, in the circumstances on the persuasive authority of the judgment in the *Yat Tung case*, the present complaint could have been made and should have been raised in the earlier suit numbered 2066 / 86 OS. It would be an abuse of process to raise the issues complained about in subsequent suit numbered HCCC No 1893 of 1987.

As a secondary line of attack. Mr Lakha contends that the appellants made specific admissions for specified amounts and that there are no challenges to the trial Judge's findings thereon.

It is easier if we start with the letter dated August 7 1985 from the respondent to the first plaintiff whereby the bank informed the plaintiff that as on August 6, 1985, the material current account showed debit balance of Kshs 2,329,536.67. On August 23, 1985, the bank served the first appellant with a final

notice and stated it wanted the amounts adjusted fully by August 29, 1985. In their reply to the defence in HCCC No 2066 / 86 OS the plaintiffs specifically admit the debt and refer to an agreement for payment. That was followed by an affidavit deponed to on June 4,

1986 by the third plaintiff on behalf of the other plaintiffs which pleaded with the defendant to give more time to the plaintif.

“To enable the plaintiffs herein to pay in full the first defendant herein.”

The first defendant in that case is the defendant bank in this case. In the result we have reached the conclusion that the High Court was right.

We therefore dismiss this appeal with costs.

Orders accordingly.

Dated and Delivered at Nairobi this 5th Day of October, 1990

J.O. NYARANGI

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JUDGE OF APPEAL

J.M. GACHUHI

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JUDGE OF APPEAL

R.O. KWACH

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JUDGE OF APPEAL