

**IN THE COURT OF
APPEAL AT
NAIROBI**

(CORAM: JAMILA MOHAMMED, MUCHELULE & JOEL NGUGI, JJ.A)

CIVIL APPEAL NO. NAI E574 OF

2024 BETWEEN

DINESH KUMAR ZAVERCHAND JETHA.....APPELLANT

AND

GUARANTY TRUST BANK (K) LIMITED.....RESPONDENT

*(Being an Appeal against the Ruling of the High Court of
Kenya at Nairobi, (Mshila, J.) dated 3rd March, 2023*

in

HCCC No. 438 of 2016)

JUDGMENT OF THE COURT

1. This appeal arises from the ruling of the High Court (A. Mshila, J.) delivered on 3rd March, 2023, by which the learned Judge upheld a preliminary objection and struck out **High Court Civil Case No. 438 of 2016** on the ground that the suit was *res judicata* within the meaning of section 7 of the Civil Procedure Act.
2. The dispute between the parties is rooted in a long-standing commercial relationship. The Respondent bank advanced various financial facilities to Maizena Millers Limited, a company in which the Appellant was a director (“the company”). Those facilities were secured by, among other instruments, debentures over the company’s assets and personal guarantees executed by the directors of the company, including the Appellant.

3. In the year 2005, the Respondent instituted **Nairobi High Court Civil Case No. 379 of 2005** against the company and its directors (including the Appellant) seeking recovery of sums then outstanding. That suit was fully heard and, after a protracted litigation history, judgment was ultimately delivered on 21st February, 2020 in favour of the Respondent.
4. More than a decade earlier, however, and while the recovery suit was still pending, the Appellant instituted **High Court Civil Case No. 438 of 2016** in his personal capacity. In that suit, the Appellant challenged the validity of a charge allegedly created over his property in favour of the Respondent to secure the loans to the company; challenged the statutory notices issued by the Respondent; and contested the Respondent's entitlement to exercise its statutory power of sale over the charged property. The gravamen of the Appellant's case was that the charge was invalid, the statutory notices were defective, and the amount demanded far exceeded the sum lawfully secured.
5. The Respondent responded not by filing a defence, but by raising a preliminary objection dated 4th May, 2022. In that objection, the Respondent contended that the Appellant's suit was barred by the doctrine of *res judicata* on account of the earlier proceedings in **HCCC No. 379 of 2005**. The High Court upheld that objection and struck out the suit in a ruling dated 3rd March, 2023, precipitating the present appeal.
6. The memorandum of appeal assails the impugned ruling on several related grounds. In substance, the Appellant contends that the learned Judge erred in law and in fact in upholding

the preliminary objection and striking out the suit; in failing to

appreciate that the objection did not raise a pure point of law but was founded on disputed facts requiring ascertainment; in misapprehending the identity of the parties, the nature of the relationships between them, the reliefs sought, and the issues for determination in **HCCC No. 379 of 2005** as compared to the Appellant's suit; in wrongly concluding that the judgment delivered on 21st February, 2020 conclusively determined the issues raised in the Appellant's case; in characterising the Appellant's suit as an attempt to circumvent the doctrine of *res judicata*; and in failing to accord due consideration to the Appellant's written submissions and cited authorities.

7. The appeal came before us for plenary hearing on 14th January, 2026. Mr. Steve Kimathi, learned counsel, appeared for the Appellant and orally argued the appeal, relying also on his written submissions which had been duly and timeously filed in accordance with the Court's directions. Mr. Greg Karungo, learned counsel, appeared for the Respondent and likewise addressed us orally. His written submissions, however, were filed on the morning of the hearing. In the circumstances, and in the interest of fairness to the Appellant, while we permitted Mr. Karungo to make oral submissions, we did not place reliance on the written submissions filed on the day of the hearing. We also did not place reliance on a "supplementary record of appeal" filed by Mr. Karungo on the morning of the hearing which, in fact, sought to adduce additional evidence which was not before the trial Judge.
8. Before us, the Appellant challenged that decision on both procedural and substantive grounds. In summary, the Appellant

argued that the plea of *res judicata* did not raise a pure point of law capable of determination by way of a preliminary objection; that resolution of the objection required a comparison of pleadings and issues in the two suits and an interrogation of the capacity in which the parties litigated; and that the learned Judge, therefore, erred in entertaining and upholding the objection at a preliminary stage.

9. Substantively, the Appellant contended that the elements of *res judicata* were not satisfied conjunctively. It was argued that the earlier suit concerned recovery of a corporate debt founded on lending facilities and guarantees, whereas the later suit raised distinct causes of action relating to the validity of a charge over the Appellant's property, the propriety of statutory notices, compliance with the *in duplum* rule, and the lawfulness of the Respondent's exercise of statutory power of sale. According to the Appellant, those issues were neither directly nor substantially in issue, nor finally determined, in the earlier proceedings.
10. Mr. Karungo, for the Respondent, opposed the appeal. In summary, the Respondent submitted that the preliminary objection met the threshold set out in ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696 (Mukhisa Biscuit)***, as it was founded on undisputed matters of record, namely the existence of ***HCCC No. 379 of 2005***, the identity of the parties, the lending and guarantee relationship between them, and the delivery of a final judgment on 21st February, 2020. According to the Respondent, no evidentiary facts required proof or interrogation.

11. The Respondent further contended that the Appellant's attempt to isolate issues such as the validity of the charge, statutory notices, interest computation, and enforcement steps amounted to an impermissible fragmentation of a single commercial relationship. Relying on the doctrine articulated by the Supreme Court in ***John Florence Maritime Services Ltd v Cabinet Secretary for Transport & Infrastructure & 3 Others (2021) (Petition No. 12 of 2019)***, the Respondent argued that all matters arising from the lending relationship either were, or ought with reasonable diligence to have been, raised and determined in the earlier suit.
12. The Respondent also urged that once the High Court correctly found that the suit was barred by ***res judicata***, its jurisdiction was extinguished and it could not lawfully proceed to interrogate the merits of the Appellant's claims without sitting on appeal over a judgment of a court of concurrent jurisdiction. In addition, the Respondent raised the argument that subsequent enforcement steps had rendered the appeal moot, though it maintained that, even on the merits, the appeal was devoid of substance.
13. This appeal, therefore, invites us, as a first appellate court, to re-evaluate the record and determine whether the learned Judge correctly applied the law relating to preliminary objections and the doctrine of ***res judicata***. In doing so, we are guided by the settled principle that, as a first appellate court, we are entitled to reconsider and re-evaluate the record and draw our own conclusions, while bearing in mind that we did not see or hear the parties. Further, where a trial court disposes of a suit at a preliminary stage, the appellate court

is entitled to intervene if

the trial court misdirected itself in law or applied the wrong principles.

14. The law governing preliminary objections is settled and uncontroversial. In ***Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1969] EA 696*** at pages 700–701, this Court defined a preliminary objection as a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct and which, if successful, may dispose of the suit. The Court emphatically cautioned that a preliminary objection cannot be raised where facts have to be ascertained or where the court is called upon to exercise discretion.
15. Those principles have since been consistently reaffirmed. The Supreme Court reiterated them in ***Hassan Ali Joho & Another v Suleiman Said Shahbal & 2 Others [2014] eKLR***, and again in ***Independent Electoral and Boundaries Commission v Jane Cheperenger & 2 Others [2015] eKLR***, underscoring that a true preliminary objection must be founded on uncontested facts apparent on the face of the pleadings.
16. Against that backdrop, it becomes necessary to turn to the doctrine of *res judicata* as applied by the learned Judge. The doctrine is anchored in section 7 of the Civil Procedure Act and is underpinned by the public policy imperative that litigation must, at some point, come to an end. It serves to prevent parties from being vexed twice over the same matter and to protect the integrity of the judicial process.
17. At the same time, the courts have repeatedly cautioned that

the doctrine is not to be applied mechanistically or expansively so as

to shut out legitimate claims. The elements of *res judicata* are conjunctive and must all be satisfied before a subsequent suit can be barred. This Court stated as much in ***Kenya Commercial Bank Limited v Benjoh Amalgamated Limited [2017] eKLR***.

18. The Supreme Court echoed that caution in ***Communications Commission of Kenya & 5 Others v Royal Media Services Limited & 5 Others [2014] eKLR***, warning that *res judicata* must be applied with circumspection lest it be converted into a blunt instrument for summary disposal of disputes that have not been conclusively determined.

19. In ***John Florence Maritime Services Ltd*** (supra) the Supreme Court stated the elements of *res judicata*:

“89. We restate the elements that must be proven before a court may arrive at the conclusion that a matter is res judicata. For res judicata to be invoked in a civil matter the following elements must be demonstrated:

a) There is a former Judgment or order which was final;

b) The Judgment or order was on merit;

c) The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and

d) There must be between the first and the second action identical parties, subject matter and cause of action.”

20. It follows that it is not sufficient to demonstrate merely that parties have previously been before a court or that the disputes arise from a related commercial relationship. What must be shown, with precision, is that the matter directly and

substantially in issue in the subsequent suit was directly and substantially in issue in the former suit; that the former suit was between the same parties or parties litigating under the same title; and that the issue was heard and finally determined by a court of competent jurisdiction.

21. In the present case, determining whether those conjunctive elements were satisfied could not, in our view, be resolved as a pure point of law. The High Court was required to compare the pleadings in **HCCC No. 379 of 2005** and **HCCC No. 438 of 2016**, to interrogate the capacity in which the Appellant was sued in the former suit and sued in the latter, and to ascertain the precise issues that were raised and determined in the earlier proceedings.
22. That exercise necessarily entailed factual ascertainment and evaluative judgment. It was not an exercise that could properly be undertaken at the preliminary objection stage, where the court is constrained to proceed on the assumption that the facts pleaded by the plaintiff are correct.
23. In addition, the capacity in which the Appellant featured in the two suits was not self-evidently identical. In the earlier suit, he was sued as a guarantor of a loan taken by the company in proceedings aimed at recovery of a corporate debt. In the later suit, he sued in his personal capacity as a registered proprietor challenging the validity of a charge and the exercise of statutory power of sale by the Respondent. Whether those capacities amounted to litigation under the same title was itself a substantive question that could not be resolved without a fuller examination of the pleadings and

evidence.

24. There was also no clear demonstration, on the face of the ruling, that the specific issues raised in the later suit — such as the validity of the charge, the propriety of the statutory notices, and compliance with the *in duplum* rule — were directly and substantially in issue and finally determined in the former suit.
25. In ***John Florence Maritime Services Ltd & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others [2015] eKLR***, this Court emphasized the importance of distinguishing between cause of action *res judicata* (cause of action estoppel) and issue *res judicata* (issue estoppel), and cautioned against conflating distinct causes of action merely because they arise from a related factual matrix.
26. The approach adopted by the High Court, with respect, risked extending the doctrine of *res judicata* beyond its principled bounds and converting it into a mechanism for summarily terminating fact-intensive disputes without a hearing on the merits. Such an approach undermines the careful balance that the doctrine seeks to strike between finality and access to justice.
27. We are fortified in this conclusion by the decision in ***Denise Granata v Invesco Assurance Co. Ltd [2022] eKLR***, where this Court cautioned against the use of *res judicata* to shut out suits raising distinct issues that had not been conclusively determined in earlier proceedings.
28. In the result, we are satisfied that the learned Judge erred in law in upholding the preliminary objection and striking out the Appellant's suit at a preliminary stage. The dispute raised

issues

that ought to have been ventilated through evidence and determined on the merits.

29. Accordingly, this appeal succeeds.

30. We, therefore, allow the appeal, set aside the ruling and order of the High Court dated 3rd March, 2023 by Mshila J., and reinstate **High Court Civil Case No. 438 of 2016** for hearing and determination on the merits before a Judge of the High Court other than Mshila J.

31. The costs of this appeal shall abide by the outcome of the matter in the High Court or as the High Court shall determine the issue of costs.

Dated and delivered at Nairobi this 30th day of January, 2026.

JAMILA MOHAMMED

.....
JUDGE OF APPEAL

A. O. MUCHELULE

.....
JUDGE OF APPEAL

JOEL NGUGI

.....
JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed
DEPUTY REGISTRAR