Housing Finance v Kihiu (Civil Appeal 202 of 2019)
[2026] KECA 408 (KLR) (27 February 2026) (Judgment)

Neutral citation: [2026] KECA 408 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL 202 OF 2019

J MOHAMMED, F TUIYOTT & WK KORIR, JJA

FEBRUARY 27, 2026

BETWEEN

HOUSING FINANCE ..... APPELLANT

AND

NATHANIEL NGURE KIHIU ..... RESPONDENT

(Being an appeal from the judgment and decree of the High Court of Kenya at Nairobi (Njuguna, J) dated 7th June 2018 in H.C.C.C. No. 530 of 2014)

JUDGMENT

1. Our courts accept that the English decision of Henderson v Henderson (1843) 3 Hare 100, 67 ER 313 sets out a comprehensive discourse of the doctrine of res judicata that is codified in section 7 of the *Civil Procedure Act*.

2. The provision reads:

> "7. Res judicata
>
> 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.
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> Explanation. — (1) The expression "former suit" means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation. — (2) For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. — (3) The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. — (4) Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. — (5) Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. — (6) Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating."

3. Regarding the scope and application of the doctrine, the Court in Henderson famously states:

> " In trying this question I believe I state the rule of the Court correctly when I say that, 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 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."

4. Housing Finance (HF or the appellant) and Nathaniel Ngure Kihiu (the respondent) have been engaged in a dispute that never seems to end over a loan advanced by HF to the appellant through an agreement entered into on or about 28th April 1997.

5. By a plaint dated 26th August 2004 filed before the subordinate court, the respondent sued HF challenging the manner in which interest on the loan was computed ultimately seeking judgment, in the main, for the sum of Kshs.39,800 together with interest at the rate of 19% from 1st June 2003 as well as discharge of charge over Nairobi/Block 90/186, collateralized in favour of HF to secure the debt.

6. In a remarkably short judgment Hon. M. K. Kiema (RM) found that the respondent was still indebted to the appellant in the sum of Kshs. 368,209 and proceeded to dismiss the suit with costs. That judgment which was delivered on 25th August 2011 was challenged by the aggrieved respondent vide Nairobi Civil Appeal No. 436 of 2011, Nathaniel Ngure Kihiu vs Housing Finance Company of Kenya Limited.

7. The appeal was still pending when the respondent commenced fresh proceedings being Civil Case No. 2691 of 2013 Nathaniel Ngure Kihiu vs Housing Finance, again in the subordinate court, regarding

the same facility disputing certain debits to his account and asserting that at the time of discharge of charge in February 2012, he had over paid the bank a sum of Kshs.1,304,148.10, a sum he claimed.

8. In those proceedings the respondent disclosed the existence of the previous suit which had been finalized and the appeal therefrom which he contended had been overtaken by events. The respondent further made the proverbial assertion that the issues raised in the second suit were not the same as those in the former proceedings.

9. The second suit suffered a premature end because in a ruling delivered on 17th April 2014, Hon. Cheruto C. Kipkorir (RM) upheld a preliminary objection by HF that the second suit was res judicata the first suit.

10. Aggrieved by that decision, the respondent moved the High Court in NRB Civil Appeal No. 530 of 2014. This time round success was on the side of the respondent. In setting aside the decision of the subordinate court, L. Njuguna, J. observed and held:

> "The appellant filed the former suit in the year 2004 and though it is not clear when the judgement was delivered it must have been in the year 2011 and more particularly on 25/8/2011 going by the letter dated 21/10/2011 by Orina & Co. Advocates. That being the case, it can clearly be seen that even after the judgment had been delivered, the appellant's loan account remained active and other entries were made for example a sum of Ksh.58,612 was debited into his account on 3/11/2011 being Auctioneers fees, a sum of Ksh.37,494.00cts was posted on 7/2/2012 as outstanding premiums and a further sum of ksh.468,189cts was posted on 7/2/2012 which is reflected as refund.
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> What does this therefore mean? It can only mean one thing, that these matters could not have been subject of the former suit since by the time those items were posted, judgment had already been delivered and the respondent's argument that the appellant ought to have amended his plaint cannot hold any water."

11. The decision is the subject of this appeal in which the appellant raises the following grounds:

> " 1. The learned Judge erred in law by failing to find that CMCC No. 2691 of 2013 was res judicata.
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> 2. The learned Judge erred in law failing to find that the matters directly and substantially in issue in CMCC No. 2691 of 2013 were directly and substantially in issue in CMCC No. 9427 of 2004 which had been heard and determined by a Court of competent jurisdiction.
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> 3. The learned Judge erred in law by allowing the Appeal and setting aside the Ruling and Order of Hon. Kipkorir, Senior Resident Magistrate, dated 17th April 2014.
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> 4. The learned Judge erred in law by finding that there were special circumstances to exclude the application of res judicata to CMCC No. 2691 of 2013.
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> 5. The learned Judge failed to exercise her discretion properly and judiciously in considering the Appeal that was before her and in this respect failed to fully consider and have due regard to the Submissions and authorities placed before her.

6. The learned Judge, in all circumstances of the matter, failed to do justice as regards the Appeal that was before her and accordingly erred in law by issuing the Orders that she did."

12. At plenary hearing of the appeal, learned counsel Mr Mbaluto represented the appellant while Ms Kuria acted for the respondent. Both made useful highlights to the submissions filed on behalf of their clients.

13. The appellant submitted that the High Court erred fundamentally by finding that the particulars of indebtedness in the first and second suits were different. It being asserted that the rule or doctrine of res judicata was salutary, serving the aim of bringing finality to litigation, affording parties closure, preventing the waste of time and resources, and ensuring certainty and swiftness in the judicial process. This principle was rooted in the larger public interest that required litigation to conclude at some point. Citing the Court of Appeal decision in Keren Buaron v Sony Holdings Limited & 2 others [2017] KECA 273 (KLR), the appellant emphasized that res judicata applied where the same parties had litigated over the same issues concerning the same subject matter, and the matter had been determined on merit.

    Further reliance was placed on Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others [2017] KECA 477 (KLR), stressing that the rule exists to provide rest and closure, preventing endless litigation and ensuring a successful litigant reaped the fruits of their success. The appellant submitted that the issues raised in the second suit were directly and substantially in issue in the former suit, as both suits related to the very same charge instrument over the very same property (Land Reference Number Nairobi/Block 90/186) between the very same parties. The submissions referenced the finding in Salem Ahmed Hasson Zaidi v. Faud Hussein Humeidan [1960] E.A. 92, which supported the view that an issue substantially determined in a former suit remained directly and substantially in issue in the subsequent suit. Crucially, the doctrine applied not only to matters the court was actually required to pronounce judgment upon, but to all matters that could have been determined based on the parties' exercise of reasonable diligence (Pop-In (Kenya) Ltd & 3 others v Habib Bank AG Zurich [1990] KECA 62 (KLR)). The appellant contended that to institute the second suit, which essentially involved re-litigating issues that were (or could have been litigated) in the first suit, constituted an abuse of the process by the respondent. Given that the first suit ended with a final judgment that the respondent was indebted to the appellant in the sum of Kshs. 368,209/=, the respondent should not have been entertained in the second suit seeking a declaration of indebtedness against the appellant. The appellant questioned if any exceptional or special circumstances were disclosed that warranted a departure from the strict dictates of res judicata under section 7 of the *Civil Procedure Act*, relying again on the locus classicus of Henderson v. Henderson (1843) 3 Hare 100, 67 E.R, 313. It was submitted that if the different particulars were available previously, they should have been brought forward to easily avoid the determination of res judicata. Furthermore, the appellant stressed that the legal approach for res judicata required the issues to be substantially similar, not exactly similar, in line with the wording of Section 7 of the *Civil Procedure Act*. Since both suits involved the respondent alleging overpayment of the same loan secured by the same charge between the same parties, the doctrine applied.

14. In response, the respondent's filed two sets of submissions, one dated 4th September 2020 and the other 24th November 2023. The submissions condensed grounds of appeal into three, specifically urging the court to uphold the finding that the matters in issue in the second suit (CMCC No. 2691 of 2013) were not directly and substantially in issue in the former suit. The respondent urged the court to uphold the superior court's finding that the matters directly and substantially in issue in the two cases were different. The High Court correctly applied the law by finding that res judicata would not apply, even

though the parties and the underlying transactions were the same, because the dispute involved an ongoing borrower-lender relationship. The superior court below was supported as correctly finding that the respondent could not have sued on the issues raised in the second suit within the first suit, as the circumstances giving rise to those issues did not exist at the time of the first suit. Therefore, the principle of res judicata that any issue a party could have sued on but did not is considered res judicata cannot apply. While the parties were identical and appeared in the same capacity regarding the same relationship, the wrongs complained of in the second suit did not exist when the latter suit was filed. To support this interpretation, the respondent relied on the authority of Kavin Aggrey Wakoli & another v Housing Finance Company Kenya Ltd & 2 others [2015] KECA 380 (KLR) where in a dispute involving the same parties and the same chargor/chargee relationship around the same parcel of land, the Court declined to uphold res judicata. The authority was to the effect that where an alleged wrong takes place after a suit has been filed, the defence of res judicata is excluded in a subsequent suit filed in respect of that wrong, even if the later suit involves the same transaction and parties. The focus of the earlier suit was the alleged breach of contract, while the focus of the later suit was the alleged wrongful sale of the property. The respondent urged this Court to be persuaded by this authority and confirm the first appellate court's finding that the breaches complained of in the later suit could not have been included in the earlier suit because they had not occurred by the time the later suit was filed.

15. On whether the learned judge erred in law by finding that there were special circumstances to exclude the application of res judicata, the respondent offered a two-fold answer: addressing whether the court erred in law, and whether that error should invalidate the court's overall finding. The respondent conceded that the superior court misdirected itself by finding that the respondent's case constituted special circumstances as contemplated in the classic case of Henderson vs Henderson. The respondent clarified that when it cited the authority (Housing Finance Company of Kenya Vs Captain J. N. Wafulwa (Court of Appeal Case No. 102 of 2013), which referenced the Henderson v Henderson passage on special circumstances in the submissions before the High Court, the point being made was that res judicata did not apply where the issues were different, not that the case fell under an exception to the rule. The special circumstances referred to in Henderson vs Henderson are exceptions to the rule against re-litigation, whereas the respondent's argument was that res judicata did not apply at all. However, notwithstanding this error by the superior court regarding special circumstances, the respondent submitted that the court's ultimate finding that res judicata did not apply was sound.

16. Lastly, on whether the learned judge failed to exercise her discretion judiciously, particularly by failing to consider and have due regard to the submissions and authorities placed before her, the respondent submitted that, save for the misapplication of the principle of special circumstances regarding Henderson vs. Henderson, the court considered and had due regard to the submissions and authorities presented. It was further argued that there was no basis for the court to be guided by the appellant's submissions because they were founded on a misapprehension of the principle of res judicata. Specifically, the appellant was alleged to have misunderstood that even where the parties and the transaction are the same, res judicata does not arise if the second suit is in respect of a wrong subsequent to the filing of the first suit. The appellant also allegedly misapprehended the principle by assuming there was a requirement in law to amend pleadings to incorporate a subsequent wrong where the two wrongs occurred in distinct and separate transactions.

17. Having reviewed the arguments and the material before us, we have no doubt that the outcome of this entire appeal turns on whether the cause of action set out in the second suit arose after the first suit had been finalized in a manner that it could not have possibly been raised in the earlier. It does not matter that the two causes of action were in regard to the same loan contract, the same facility or over the same security. The decisive factor is whether there was a new cause of action which arose after the determination of the first suit which could not have possibly been raised and agitated,

notwithstanding all diligence, in the first suit. Even if this may not amount to exceptional circumstance in the contemplation of a "special case" referred to in Henderson it would be similar to circumstances in Housing Finance Company of Kenya v J. N. Wafubwa [2014] KECA 695 (KLR) where this Court held:

> " In those circumstances can it then be said that the respondent's suit in HCCC 385 of 2011, based as it was to a large extent on circumstances that did not exist when High Court Misc. Cause No. 660 of 1997 (OS) was instituted in 1997, was res judicata? We do not think so.
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> In Henderson vs. Henderson the court alluded to "special case" when the general principles on res judicata will not apply.....
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> .... Even if the respondent's claims in High Court Misc. Cause No. 660 of 1997 (OS) and in HCCC 385 of 2011 were anchored on the legal charge, the developments to which we have referred that
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> occurred subsequent to the institution and determination of High Court Misc. Cause No. 660 of 1997 (OS) constitute special circumstances bringing this matter, in our view, within the exception of "special case" referred to in Henderson vs. Henderson (1843-60) ALL ER 378."

18. Further, while counsel Mbaluto doubted the viability of the argument by the respondent contending that the plaint was silent as to when the cause of action arose, we find that in paragraph 8 of the plaint, it is averred that the respondent had made an overpayment of Kshs.1,314,148.10 as at the time of discharging the security in February 2012. The discharge having happened about 6 months after the first suit had been determined then the new cause of action may have arisen after the conclusion of that suit. It is possible to see how this could have happened as the relationship between the two parties continued even after the first suit had been determined.

19. We add that as there was contestation as to the nature and character of the supposed new cause of action, and whether it in fact arose after the determination of the first suit, those would need to be proved by evidence and were not proper matters to be resolved as a preliminary demurrer. The controversy did not just involve a matter of law but contested facts.

20. As we conclude, we must refrain from commenting or deciding on Mr. Mbaluto's contention that any new cause of action arising after the determination of the first suit should have been taken up as new evidence in the appeal therefrom that was still pending as this argument was not taken up in the two courts below.

21. Ultimately, we are unable to find fault in the decision of the High Court and uphold it. The appeal is dismissed in its entirety with costs.

DATED AND DELIVERED AT NAIROBI THIS 27TH DAY OF FEBRUARY 2026.

JAMILA MOHAMMED

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JUDGE OF APPEAL

F. TUIYOTT

.....

JUDGE OF APPEAL

W. KORIR

.....

JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR.