



Muguika & 2 others v Consolidated Bank of Kenya & another (Environment and Land Appeal E011 of 2023) [2024] KEELC 933 (KLR) (22 February 2024) (Ruling)

Neutral citation: [2024] KEELC 933 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND APPEAL E011 OF 2023
EK WABWOTO, J
FEBRUARY 22, 2024**

BETWEEN

**KABURU MUGUIKA 1ST APPELLANT
PROSOYA KENYA LTD 2ND APPELLANT
LUCY KAIMURU KABURU 3RD APPELLANT**

AND

**THE CONSOLIDATED BANK OF KENYA 1ST RESPONDENT
PHILLIPS INTERNATIONAL AUCTIONEERS 2ND RESPONDENT**

(Being an appeal from the Ruling of Hon. Wendy K. Micheni (CM) delivered on 2/7/2023)

RULING

1. This ruling is in respect to the 1st Respondent’s preliminary objection dated 2nd October 2023 brought under Section 1A, 1B, 3A and 7 of the [Civil Procedure Act](#), Cap 21, Order 40 and 51 Rule 14(1) of the [Civil Procedure Rules](#), 2010. The preliminary objection sought that the proceedings be struck out on the grounds that:

The Appellant’s Application dated 16th August 2023 is “*res judicata*” on account of the trial Court’s Ruling dated and issued on 21st July 2023 by the Honourable Chief Magistrate, Ms. Wendy K. Micheni.

2. On 15th November 2023, the Court directed that the preliminary objection be canvassed by way of written submissions. The 1st Respondent filed submissions and an affidavit both dated 8th January 2024. It was submitted that the Appellants deliberately failed to disclose material facts and specifically the trial Court’s ruling in CMCC E431 of 2023 delivered on 21st July 2023. It was submitted that the



Appellants were attempting to re-litigate and re-canvass issues that were equally raised in the Appellants application dated 6th December 2022.

3. In opposition, the Appellants filed a replying affidavit dated 13th October 2023 sworn by Kaburu Muguika in which the Appellant urged the court to determine two issues; first; if this case had been decided with finality and secondly, whether the doctrine bars a litigant's right of appeal. The Appellants also filed undated submissions in which it was submitted that they had come into new facts that entirely changed the aspect of the case. Relying on the case of *Siri Ram Kaura v MJE Morgan* CA 71/1960, it was argued that since they had no previous knowledge of the facts, the new evidence should be adduced and the appeal duly heard.
4. I have considered the respective written submissions, cited authorities and affidavits placed before this Court. I take cognizance that the parties have consistently referred to the "Plaintiff's application dated 16th August 2023" There being no such application on record, I note all references of it to be a typographical error. The sole Notice of Motion application filed by the Appellants is dated 16th May 2023 and was filed on 17th August 2023. Bearing this in mind, the singular issue for determination is whether the application is "*res judicata*"?
5. In *Nitin Properties Ltd v Singh Kalsi & another* [1995] eKLR the Court of Appeal highlighted that:

"...A Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion..."
6. Section 7 of the *Civil Procedure Act* dictates that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated as follows :-
 - i) The suit or issue raised was directly and substantially in issue in the former suit.
 - ii) That the former suit was between the same party or parties under whom they or any of them claim.
 - iii) That those parties were litigating under the same title.
 - iv) That the issue in question was heard and finally determined in the former suit
 - v) That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit. [Emphasis Mine]
7. Looking at the facts herein, it is undisputed that all parties involved in the instant suit have now presented themselves to this appellate Court. My perusal of the ruling in CMCC E431 of 2023 confirms that the trial magistrate in determining the prayers sought in the application dated 6th December 2022 heard and determined all the issues presented in the Appellants application. The Appellants merely duplicated the prayers and the application in itself in an attempt at relitigating the issues raised in their application. Whichever way you may look at it, it is evident that the Appellants application is res judicata and this court cannot arrive at a different outcome.
8. Kuloba J., in the case of *Njangu vs Wambugu and another* Nairobi HCCC No.2340 of 1991 (unreported), held that:

'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 face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata.....”

9. In the Court of Appeal case of *Siri Ram Kaura – Vs – M.J.E. Morgan*, CA 71/1960 (1961) EA 462 the then EACA stated that: -

“The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of *res judicata*...

The law with regard to res judicata is that it is not the case, and it would be intolerable if it were the case, that a party who has been unsuccessful in litigation can be allowed to re-open that litigation merely by saying, that since the former litigation there is another fact going exactly in the same direction with the facts stated before, leading up the same relief which I asked for before, but it being in addition to the facts which I have mentioned, it ought now to be allowed to be the foundation of a new litigation, and I should be allowed to commence a new litigation merely upon the allegation of this additional fact. The only way in which that could possibly be admitted would be if the litigant were prepared to say, I will show that this is a fact which entirely changes, the aspect of the case, and I will show you further that it was not, and could not by reasonable diligence have ascertained by me before ...

The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.

It is therefore not permissible for parties to evade the application of Res judicata by simply conjuring up parties or issues with a view to giving the case a different complexion from the one that was given in the former suit.”

10. Justice G.V. Odunga(as he then was) in *Republic – Vs – Attorney General and Another Exparte James Alfred Koroso*, expressed himself thus on the issue of access to justice: -

“Access to justice cannot be said to have been ensured when persons in whose favour judgments have been decreed by courts or tribunals of competent jurisdiction cannot enjoy the fruits of their judgments due to road blocks placed on their paths by actions or inactions of others.”

11. In *Uburu Highway Development Ltd – Vs – Central Bank of Kenya, Exchange Bank Ltd (in voluntary liquidation) and Kamlesh Mansukhlal Pattni* the court in an earlier Application ruled that the Application before it was Res Judicata as the issue of injunction had been twice rejected both by the High Court and the Court of Appeal on merits and that the Ruling by the High Court had not been appealed against. The court further emphasized that the same Application having been finally determined “thrice by the High Court and twice by the Court of Appeal”, it could not be resuscitated by another Application.

12. A Decision of the court must be respected as fundamental to any civilised and just judicial system. Judicial determinations must be final, binding and conclusive. There is injustice if a party is required to litigate afresh matters which have already been determined by the court.



13. In the upshot and being guided by the above decided cases, this Court hereby finds that the preliminary objection dated 2nd October 2023 is merited and this court will proceed to uphold the same. The Appellants' application is struck out with an order that each party to bear its own costs.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF FEBRUARY 2024

E. K. WABWOTO
JUDGE

