Kemusalt Packers Production Limited v Dubai Bank Kenya Limited (In Liquidation) & 2 others (Civil Appeal E032 of 2021) [2023] KECA 651 (KLR) (9 June 2023) (Judgment)

Neutral citation: [2023] KECA 651 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT MALINDI

CIVIL APPEAL E032 OF 2021

P NYAMWEYA, JW LESSIT & GV ODUNGA, JJA

JUNE 9, 2023

BETWEEN

KEMUSALT PACKERS PRODUCTION LIMITED ..... APPELLANT

AND

DUBAI BANK KENYA LIMITED (IN LIQUIDATION) ..... 1ST RESPONDENT

PETER KAHI ..... 2ND RESPONDENT

ANTONY MUTHUSI ..... 3RD RESPONDENT

(An appeal from the Ruling of the High Court at Malindi (R. Nyakundi J.) dated 26th February 2021 in Malindi Civil Suit No. 28 of 2016)

JUDGMENT

1. On February 26, 2021, the High Court at Malindi (R Nyakundi, J) delivered a ruling dismissing an application dated July 1, 2020 that had been filed by Kemusalt Packers Production Limited, the Appellant herein, in Malindi Civil Suit No 28 of 2016. The Appellant had sought orders in the said application of a mandatory injunction directing the Dubai Bank Kenya Limited (In Liquidation), Peter Kahi and Anthony Muthusi, the 1st, 2nd and 3rd Respondents herein, to forthwith cease and desist from running, managing, occupying or in any other way interfere with the Appellant's asset known as LR No 22138 (Grant 28851/1) North of Malindi, Kilifi County pending the hearing and determination of the suit in the High Court; that the firm of Messrs Oraro & Company Advocates be disqualified from further acting for any party in the matter; that the 1st Respondent to produce the original deed of assignment of debenture dated March 5, 2009; the OCS Marereni Police Station to help enforce the said orders; and that the 1st Respondent's counterclaim dated April 11, 2018 as against the Appellant be struck out or stayed.

2. In summary, the grounds for the application were that the on September 21, 1999, the Appellant entered into a loan agreement with the East African Development Bank (EADB) and a first floating charge on all its assets both present and future was created to secure the said loan, interest and charges thereon by a debenture dated October 18, 1999. Further, EADB had a contractual obligation to serve written notice on the Appellant and declare the principal of and all accrued interest on the loan to be due and payable upon the happening of the events set out in the loan agreement, and could appoint any person or persons to be receiver of all or part of the assets of the applicant. However, that despite these terms, the 1st Respondent appointed the 2nd and 3rd Respondents as receivers by way of Deed of Appointment dated September 6, 2016, and pursuant to a deed of assignment that was executed between EADB.

3. The Appellant contended that the 1st Respondent had no contractual right to appoint any receiver over any or all the assets of the Appellant for the reason that: there was no valid deed of assignment executed between EADB and Dubai Bank (in Liquidation); only EADB could lawfully appoint receivers and they had never appointed any receivers over the assets of the Appellant; under section 593 of the *Insolvency Act* of 2015 the tenure of the receivers was to expire automatically at the lapse of 12 months on September 5, 2017 and no extension of their term had been applied for as required under section 594 of the said Act; the 2nd and 3rd Respondent were in blatant breach of their duties as receivers/ administrators of the Appellant, and the Appellant detailed the alleged breaches and mismanagement by the said receivers, and that by retaining the same advocates that had sued the company that they were administering under receivership, were thereby in direct conflict of interest .

4. The Appellant further contended that the 1st Respondent had indulged in an abuse of the Court process by introducing a counterclaim against the Applicant dated April 11, 2018 which was a replica of the subject matter in, and sub judice HCCC No 467 of 2015 - Kenya Deposit Insurance Corporations as the Liquidator of Dubai Kenya Limited (IL) vs Kemusalt Packers Production Limited and others, which involved the same parties. Further, that the firm of Oraro & Company Advocates, which represent the 2nd and 3rd Respondents in this suit, had been retained by the 1st Respondent to sue the Appellant in the counterclaim, and was therefore in conflict of interest and could not effectively prosecute and defend the Appellant. Lastly, the Appellant asserted that though the suit had been scheduled for hearing on March 31, 2020, the same could not proceed due to the outbreak of Covid-19 pandemic which had paralyzed most of the court operations, and there was no clear sight when the matter would be concluded despite the Appellant continuing to suffer irreparable harm from the unlawful acts of the 1st and 2nd Respondents, which could not be atoned by way of damages.

5. The Respondents filed grounds of opposition to the application dated July 1, 2020, and a replying affidavit sworn on July 24, 2020 by John Masega Ombasa, the 1st Respondent's Resolution Officer. The deponent stated that the EADB entered into a deed of assignment with the 1st Respondent on March 5, 2000 and the charge that the Appellant had executed in favor of EADB was transferred by EADB to the 1st Respondent on November 16, 2000. He annexed copies of the said instruments. Therefore, that the 1st Respondent has a beneficial interest in the assets of the Appellant by virtue of being a holder of a debenture on the assets. The main contention by the 1st Respondent was that the orders sought by the Appellant were *res judicata*, having been previously determined in various applications in Malindi Civil Suit No 28 of 2016 and in other cases.

6. In particular, that on November 21, 2016, Chitembwe J varied orders that had been issued on an application filed by the Appellant in Malindi Civil Suit No 28 of 2016 on November 8, 2016 and allowed the receivers to go back to the Appellant's premises, subject to compliance with the orders issued by Angote J in Malindi ELC Case No 265 of 2016; that the Appellant's application

of November 8, 2016 sought similar injunctive relief as the application of July 1, 2020 and was compromised on 12 March 2018 when parties recorded a consent before W. Korir J (as he then was) that the status quo be that the receivers remain in full control and possession of the Appellant; that the prayer that the receivers be removed from office was also determined in a ruling delivered on September 20, 2019 when a similar application filed by the Appellant in Malindi Miscellaneous Cause 2 of 2019 was dismissed; that the consent orders of March 12, 2018 also compromised the issue of striking out or stay of the 1st Respondent's Counterclaim, by granting leave to the 1st Respondent to file a an amended Defence and Counterclaim.; that the Appellant filed an application dated October 28, 2018 in Malindi Civil Suit No 28 of 2016 to strike out and stay the Counterclaim which was partially allowed only to the extent of removing the 2nd Defendant in the Counterclaim, while retaining the Counterclaim against the Appellant in a ruling delivered on February 3, 2020; and that Olola J in his decision on March 13, 2020 in Malindi ELC No 90 of 2018 declined to grant orders that sought to oust Messrs Oraro & Company advocates from representing the Appellant. Kemusalt (in Receivership).

7. After hearing the parties, the learned trial Judge in his ruling elaborated on the history of the suit that had been filed by the Appellant, and found that the application was a guise by the Applicant to have yet another bite at the cherry where several attempts have fallen by the wayside and an abuse of the Court process, and that no exceptional circumstances have been espoused herein that would warrant the Court to grant an interlocutory order of mandatory injunction, and that for the issues raised to be resolved, the suit required to proceed to a hearing on its merits. The trial Judge accordingly dismissed the application dated July 1, 2020 with costs.

8. The Appellant being dissatisfied with the said ruling proffered this appeal and has raised eighteen (18) grounds of appeal in the memorandum of Appeal dated July 15, 2021. We heard the appeal on this Court's virtual platform on February 8, 2022, and learned counsel Mr. Munyua Ezekiel appeared for the Appellant, while there was no appearance for the Respondents despite their advocates on record having been duly served with the hearing notice in good time. There were also no submissions on record filed by the Respondents. This being a first appeal, the duty of this Court is reiterated as was set out in the decision of *Selle & Another vs Associated Motor Boat Co. Ltd & others* (1968) EA 123 which is to reconsider the evidence, evaluate it and draw our own conclusion of facts and law, and we will only depart from the findings by the trial Court if they were not based on evidence on record; where the said Court is shown to have acted on wrong principles of law as was held in *Jabane vs Olenja* (1968) KLR 661, or where its discretion was exercised injudiciously as held in *Mbogo & Another vs Shah* (1968) EA 93.

9. In addition, the grounds upon which we can interfere with the exercise of the learned trial Judge's discretion were set out in *United India Insurance Co Ltd, Kenindia Insurance Co Ltd & Oriental Fire & General Insurance Co. Ltd vs. East African Underwriters (Kenya) Ltd* [1985] eKLR as follows:

> " The Court of Appeal will not interfere with a discretionary decision of the judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the judge to the various factors in the case.
>
> The Court of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

10. The Appellant's counsel condensed the grounds of appeal to six issues in his submissions, namely whether the circumstances prevailing warrant the grant of a mandatory injunction; whether the counterclaim dated 11th August 2018 was sub judice Nairobi HCCC 467 of 2015; whether the Learned trial Judge departed from his ruling dated February 3, 2020 which had stayed a similar counterclaim; whether the representation of the Appellant and the Respondents by the same firm of advocates was tantamount to conflict of interest and whether it affects the Appellant's right to a fair trial, and whether the elements of a valid and enforceable consent were demonstrated. We note that the counsel has not deemed it necessary to list as one of the issues, that of whether its Appellant's application dated July 1, 2018 was *res judicata*, despite the learned trial Judge dedicating substantial time and effort in the impugned ruling to a detailed history, description, and analysis of the various applications made by the Appellant and the orders and rulings thereon, which led to the conclusion in the ruling that

> "No exceptional circumstance have been espoused herein that would warrant the court to grant an interlocutory order of mandatory injunction. To the contrary the circumstances that avail themselves herein predicate the denial of any such order as the application is an abuse of the court process"

11. It is also notable that ground 2 in the Appellant's Memorandum of appeal states as follows: "The Learned Judge erred in law and fact by declining to address the pertinent issued raised by the Appellant. This he did by solely focusing on the Respondents' objection on *res judicata* in total exclusion of any and all other issues that the parties had raised. By doing as he did, he overlooked the well settled legal principle that the doctrine of *res judicata* can apply to the claim as a whole (cause of action estoppel), or to one or more specific (issue estoppel)." A successful plea of *res judicata* operates as a bar to subsequent proceedings involving the same issue as had been finally and conclusively decided by a competent court in a prior suit between the same parties or their representatives. Section 7 of the CivilProcedure Act in this respect 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 issue in which such issue has been subsequently raised, and has been heard and finally decided by such court."

12. In addition, the Supreme Court of *Kenya in the case of Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another* [2016] eKLR held that *res judicata* is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights, and stated its effect as follows:

> " 54. The doctrine of *res judicata*, in effect, allows a litigant only one bite at the cherry. It prevents a litigant, or persons claiming under the same title, from returning to court to claim further reliefs not claimed in the earlier action. It is a doctrine that serves the cause of order and efficacy in the adjudication process. The doctrine prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively.

13. Given that the effect of a plea of *res judicata* is that it precludes any further litigation involving the same parties, the same facts and the same rights, we will start with an examination of the issue whether or not the Appellant's application dated 1st July 2020 was *res judicata*. Depending on the outcome, we

will only proceed with a determination of any outstanding issues if at all, that were raised in the said application that we find not to be *res judicata*.

14. We have perused the various applications, rulings and orders that were annexed by the 1st Respondent in this respect to its replying affidavit in the trial Court. It is notable in this respect that the Appellant's application dated November 8, 2016 filed in Malindi Civil Suit No 28 of 2016 involved the same parties herein, and sought various injunction orders requiring the receivers herein to vacate the Appellant's premises, and hand over control of its assets, restraining them from dealing with any assets of the Appellant or conduct the business of receivers including managing the assets of the Appellant. The grounds for these orders were similar to those raised in the application of July 1, 2020 regarding the power of the 1st Respondent to appoint receivers. The record of proceedings in the trial Court shows that on March 12, 2018, the advocates for the Appellant and Respondents entered a consent before W. Korir J (as he then was) to the application dated November 8, 2011 being disposed of by an order that status quo be maintained pending the hearing and determination of the suit. The status quo at the time was that the receivers had been allowed back to the Appellant's premises. In addition, similar injunctions were sought by the Appellant in an application dated October 22, 2018 in Malindi Miscellaneous Cause 2 of 2019 by the Appellant against the 2nd and 3rd Respondents herein, which application was dismissed in a ruling delivered by Nyakundi J on September 20, 2019.

15. Clearly, the issue of whether the mandatory injunction sought in the application of July 1, 2020 should be granted is *res judicata*. We note that the Appellant had raised the validity of the consent orders as an issue in this appeal, however, the proper forum and procedure by which such a challenge ought to have been mounted was in the trial Court, in an application to set aside the consent orders. Additionally, there was no such prayer in the application dated July 1, 2020, that is the subject of the ruling appealed against. It is also notable that the reasons put forward for the prayer for production of the original Deed of Assignment of Debenture that was executed by EADB in favour of the 1st Respondent, was that there was no such Deed of Assignment of Debenture granted to the 1st Respondent over the Appellant's assets so as to support the prayers of mandatory injunctions sought to remove the receivers from the Appellant's property. This prayer was also the subject of an application dated July 20, 2018 filed by the Appellant in Malindi Civil Suit No 28 of 2016, although the ruling or outcome of the application is not indicated, but having found that the issue of the mandatory injunctions is *res judicata*, this prayer also falls by the wayside. In any event, it is notable that a copy of the deed of Assignment of the Debenture from EADB to the 1st Respondent was annexed by the 1st Respondent in its replying affidavit to the application dated July 1, 2020.

16. As regards whether the counterclaim dated August 11, 2018 was *sub judice* Nairobi HCCC 467 of 2015, it is notable that the application dated October 28, 2019 filed by the Appellant citing this ground only sought to strike out the counterclaim as against the 2nd Defendant therein, but left the counterclaim against the Appellant intact. In addition, the record of proceedings in Malindi Civil Suit No 28 of 2016 shows that the consent dated March 12, 2018, also compromised a pending application by the Respondents dated September 27, 2017, that had sought to amend the Defence and file a Counterclaim. If indeed the counterclaim was sub judice, Nairobi HCCC 467 of 2015 as claimed, the Appellant's counsel should have objected to the application and consent, and again the proper procedure in the circumstances is an application to set aside the consent order. To this extent the order seeking striking out of the counterclaim is not only *res judicata*, but a collateral attack on the consent order and in abuse of the process of Court.

17. Lastly, the 1st Respondent also relied on the decision by Olola J dated March 13, 2020 in Malindi ELC No 90 of 2018 to urge that the issue of the disqualification of the firm of Oraro and Company Advocates is also *res judicata*. We however find that the issue is not *res judicata* by dint of the said

decision for the reasons that while the Appellant was the 2nd Defendant in that case, the 1st, 2nd and 3rd Respondents were not parties thereto. In addition, there was no specific order sought therein for the disqualification the firm of Oraro & Company advocates, nor was the issue of the conflict of interest of the said firm canvassed in the said ruling.

18. We shall therefore proceed to address this issue as the only outstanding issue in the present appeal. It is notable in this respect that the trial Court while setting out the respective parties' arguments on this issue, appears not to have determined it one way or another, and therefore it erred to this extent. That, notwithstanding, as we stated above, this being a first appeal, we have the duty to reconsider the evidence, evaluate it and draw our own conclusion of facts and law. Having done so, pursuant to Rule 33 (a) of the Rules of this Court, we may confirm, reverse or vary the decision of the High Court in the exercise of this Court's jurisdiction of powers conferred in Section 3(2) of the *Appellate Jurisdiction Act*, which provides that:

> " For all purposes of and incidental to the hearing and determination of any appeal in the exercise of the jurisdiction conferred by this Act, the Court of Appeal shall have, in addition to any other power, authority and jurisdiction conferred by this Act, the power, authority and jurisdiction vested in the High Court."

19. The overriding objective in sections 3A of the *Appellate Jurisdiction Act* as interpreted by this Court in *Hunker Trading Company Limited v Elf Oil Kenya Limited* [2010] 1 KLR 226 requires us to inter alia adopt the use of:

> " ...an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail redesigning approaches to the management of court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day."

20. The Appellant's counsel in this respect submitted that the representation of the Appellants and the Respondents by the same firm of advocates was tantamount to conflict of interest and affected the Appellants right to a fair trial, and placed reliance on the decision case of *King Woolen Mills Ltd (formerly known as Manchester Outfitters Suiting Division Ltd) & another vs M/s Kaplan & Straton Advocates* [1993] eKLR where the Court of Appeal stated that the fiduciary relationship created by the retainer between client and advocate demands that the knowledge acquired by the advocate while acting for the client be treated as confidential and should not be disclosed to anyone else without that client's consent.

21. The counsel further submitted that the firm of Oraro and Company Advocates was therefore conflicted for the reasons that: the said firm acts for the 2nd and 3rd Respondents who are the receivers of the Appellant company; through their professional execution of duty, the receivers have confided with the firm on issues relating to the Appellant's company's business which amounts to confidential information; the firm have been instructed by the creditor, being the 1st Respondent to institute a counterclaim against the said company; the firm is conflicted since they are in possession of confidential information that would be necessary to successfully defend the company from the counterclaim; therefore the said firm cannot purport to would impartially defend the interest of the company. The Appellant's counsel urged that it is in the interest of justice that the said firm is barred firm is barred from representing any party in the proceedings.

22. The firm of Oraro & Company Advocates are on record for the 1st, 2nd and 3rd Respondents herein, while the Appellant is represented by the firm of Rachier& Amollo Advocates. The firm of Oraro & Company advocates has not represented the Appellant in the proceedings in the trial Court nor in this appeal, and strictly speaking the decision in King Woolen Mills Limited & another vs Kaplan and Stratton Advocates (supra) does not apply, as in that case the advocates were acting for both the borrowers and lenders, unlike in the present case where the advocates for the borrowers and lender/ debenture holder are different. As noted by Muli JA in the *King Woolen Mills Limited* case:

> " The facts in the present case are simple, Mr. Keith of the firm of advocates (the respondents) acted for the appellants as borrowers and the lenders between 1981-1982 or thereabout. He was to put together a deal whereby the appellants were to borrow money from the lenders – the off-shore Bank through the Acceptances. In all, Mr Keith drew up at least six documents and advised both his clients accordingly. It was not in dispute as evidenced by correspondence exchanged between the parties (supra) that contractual, fiduciary or retainer relationship existed between Mr Keith and the individual clients as their common advocate."

23. It is also notable that there was no blanket disqualification of the advocate in that case, but only in relation to proceedings arising from the loan transactions undertaken by the advocate in 1981 – 1982 when he acted for both the borrower and lender. The Appellant's counsel in this appeal seems to proceed on the premise that by representing the receivers, the firm of Oraro & Company is conflicted by virtue of accessing confidential information about the Appellant. However, this is a unique legal situation that arises during receiverships from what has been termed as the multi- faceted character of administrative receivership, where a receiver is appointed by a debenture holder by Professor R.M. Goode in his text on the *Principles of Corporate Insolvency Law* as follows at page 82:

> " It is much more difficult to identify the legal essence of administrative receivership. This is because the administrative receiver has two sets of powers and owes duties to two different parties, in consequence of which he does not fit readily into any identified mould. The first set of powers relates to the possession management and realization of the security. These powers are exercised in right of the debenture holder and, being given for the enforcement of the debenture holders' rights are unaffected by the company's liquidation. The second set of powers conferred by the company through the execution of the debenture and exercised by the receiver as agent of the company enables him to conclude contracts in the name of the company thus committing it to further liabilities, and to engage and dismiss staff and generally run the business. The agency power comes to an end on the winding up of the company except to the extent to which it is ancillary to the enforcement of the security."

24. It is in this context that receivers are stated to be agents of the company under receivership as they have power to bind the company by their actions, and have a duty thereby also to account to the company in the manner set out in the *Insolvency Act*. Section 586 of the *Insolvency Act* is specific that in performing and exercising the administrator's functions and powers set out in the Act, the administrator or receiver of a company acts as its agent. In all respects however, a receiver who is appointed by a debenture holder acts for the interests of the debenture holder, and therefore has this commonality of interests with the debenture holder. For this reason, we find that there is no conflict of interest created by the same firm of advocates being engaged by the Respondents herein. See also the decision by Chesoni Ag JA in *Lochab Brothers vs. Kenya Furfural Company Limited & Others* [1983] KLR 257, that the purpose of appointing a receiver is not for the benefit of the debtor, but for protecting the appointing debenture holder's interest, and a receiver therefore wears two hats that is the debtor's and the debenture holder's. Lastly, in the event of any derelictions or breaches of duty on the part of the receivers, the legal option

which is available and provided for in law is for the Appellant's directors or liquidator to sue the receivers as provided in section 591 of the *Insolvency Act*, and not to seek the disqualification of its advocates.

25. We therefore find that this appeal is not merited for the reasons we have given, and is hereby dismissed with no order as to costs, since the Respondents did not participate in the appeal.

26. It is so ordered.

DATED AND DELIVERED AT MOMBASA THIS 9TH DAY OF JUNE 2023

P. NYAMWEYA

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JUDGE OF APPEAL

J LESIIT

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JUDGE OF APPEAL

G. V. ODUNGA

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JUDGE OF APPEAL

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

Signed

DEPUTY REGISTRAR