Airtel Networks Kenya Limited v Africa Management Communications Limited (Civil Appeal E103 of 2021) [2023] KECA 898 (KLR) (24 July 2023) (Judgment)

Neutral citation: [2023] KECA 898 (KLR)

REPUBLIC OF KENYA

IN THE COURT OF APPEAL AT NAIROBI

CIVIL APPEAL E103 OF 2021

KI LAIBUTA, A ALI-ARONI & JM MATIVO, JJA

JULY 24, 2023

BETWEEN

AIRTEL NETWORKS KENYA LIMITED ..... APPELLANT

AND

AFRICA MANAGEMENT COMMUNICATIONS LIMITED ..... RESPONDENT

(Being an appeal against the Ruling and Orders of the High Court of Kenya at Nairobi (A. Mabeya, J.) dated 25th February 2021 in H.C.C.C No. 166 OF 2014)

JUDGMENT

1. The appeal before us, which is against the ruling and orders of the High Court of Kenya at Nairobi (A Mabeya, J) dated February 25, 2021 in HCCC No 166 of 2014 has come a long way through twists and turns in what appears to be a well- orchestrated bid to evade the real issues in contention. It is inexplicable to see what litigants go through in what can at the very best be described as a race to nowhere expending invaluable resources in time and money to evade the course of justice. These words are penned in light of what the record as put to us reveals. That said, we are duty bound to pronounce ourselves with all due impartiality and profound respect for learned counsel who have played the lead role in taking the parties on a journey so long as to inspire distaste for our judicial system.

2. The long journey began when Airtel Networks Kenya Limited (Airtel) and Africa Management Communications International, a limited liability company more particularly described as AMC International (AMC International), entered into a "Corporate Voice E1 Service Level Agreement" (the Agreement) dated April 29, 2013. Under the Agreement, Airtel (the appellant) undertook to provide AMC International (the respondent) an ISDN space E1 technology service or facility to enable transmission of 30 voice channels and enable AMC International to make and receive corporate phone calls for a period of one year on express terms and conditions therein specified.

3. Sometime in October 2013, the respondent raised concern with the appellant over an inflated invoice No 10198614633 for KShs 659,582/43, which related to calls not made by the respondent in regions in which it did not trade or operate. The appellant denied the respondent's claim. Following exchange in correspondence in October 2013, the appellant suspended the E1 services to the respondent on October 15, 2013. This prompted the respondent's suit in Nairobi HCCC No 166 of 2014 vide its plaint dated April 8, 2014 claiming USD 250,000 on account of loss of business, costs of the suit and interest.

4. The appellant having entered appearance but failed to file a defence within the prescribed period, the respondent applied for and obtained default judgment on June 30, 2014. A decree was issued on 25th July 2014 in the sum of USD 250,000 together with interest thereon as prayed in the plaint. The trial court also awarded the respondent costs of the suit.

5. On June 13, 2016, the appellant moved the trial court by notice in which it prayed for: stay of execution of the decree; and orders to set aside the judgment and decree aforesaid. It also prayed that costs be in the cause. The appellant's Motion was supported by the affidavit of Ishmael Nyaribo, learned counsel for the appellant, sworn on June 13, 2016. The Motion was made on 10 grounds which we need not replicate here save to observe that the appellant's case was essentially that the court file had disappeared from the Registry, but resurfaced in July 2014 when the appellant filed its defence, whose date is not discernible from the incomplete copy on record; that the parties have never been heard; that the plaint and defence have never been prosecuted; and that the judgment of the court was ex parte.

6. By a ruling dated July 11, 2016, Ochieng, J set aside the judgment and decree on the grounds that the appellant's defence raised serious issues of both fact and law; that the appellant had also lodged a counterclaim against the respondent; and that, in his opinion, justice would best be served if the parties were given an opportunity to canvass their respective cases. In effect, the appellant's defence and counterclaim were admitted as part of the court record to facilitate hearing of the suit on its merits.

7. We take to mind the fact that, in its defence dated July 10, 2014, the appellant denied the respondent's claim contending, inter alia: that all billing by the appellant was based on the reflections from a PABX machine maintained by the respondent, and that the appellant had absolutely no access or control over the PABX machine or any other gadgets used by the respondent to make calls; that the appellant did not occasion any losses to the respondent; and that the appellant acted within the law and the contract.

8. In addition to its defence, the appellant counterclaimed Kshs 823,784/88 on account of unpaid service charge of Kshs 25,000 per month since suspension of service on October 15, 2013 together with the outstanding arrears allegedly due on account.

9. Dissatisfied by the ruling and orders of Ochieng, J dated July 11, 2016, the respondent moved to this Court on appeal in Civil Appeal No 211 of 2016 faulting the learned Judge for setting aside the default judgment and decree. As summed up by this Court on appeal, the grounds on which the respondent appealed to the court were:

> " ... that upon the learned Judge making the finding that the judgment was regular and lawful, it was incumbent upon him to apply the well- established principles of setting aside a regular and lawful judgment, but he failed to do so; that the burden was on the respondent to satisfy the court that there were justifiable reasons for setting aside the judgment; that, by failing to address the reasons for failure to file the defence, the Judge improperly exercised his discretion; that, while a court will exercise its discretion to avoid injustice or hardship resulting from inadvertence or mistake or error, it would not assist a person who deliberately seeks to obstruct or delay the course of justice; that the learned Judge failed to find that there

were no valid reasons to justify the failure to file the defence within the stipulated period and; that despite the respondent being aware of the judgment on August 31, 2015 it only filed the application to set aside the judgment on June 13, 2016 which was well over a year and even after participating in the execution proceedings initiated by the appellant."

10. Upon hearing the parties, the Court (W Ouko, W Karanja and H Okwengu, JJA) delivered its judgment on May 8, 2020 allowing the respondent's appeal and setting aside the ruling and orders of Ochieng, J dated July 11, 2016. In effect, the Court upheld the default judgment entered against the appellant on June 30, 2014.

11. Soon thereafter, the respondent moved to execute the decree by way of garnishee proceedings instituted vide its Notice of Motion dated June 8, 2020 supported by the affidavit of Emmanuel Mwaba (the respondent's Managing Director) sworn on June 8, 2020, and obtained a garnishee order *nisi* on June 11, 2020. In addition to the order nisi, the trial court ordered that the respondent's application for garnishee orders absolute be heard inter partes on July 15, 2020.

12. In a sharp turn of events before the date scheduled for inter partes hearing of the respondent's Motion aforesaid, the appellant filed a Notice of Motion dated June 23, 2020 supported by the affidavit of Joy Nyaga sworn on June 23, 2020 seeking, inter alia, stay of execution of the decree and orders setting aside the order nisi; an order seeking stay of all proceedings in the trial court pending hearing and determination of its Motion; orders striking out the respondent's plaint; orders setting aside the decree ex debito justitiae (as a matter of right which the court has no discretion to refuse); and costs of the application.

13. The appellant's Motion was predicated on a whopping 14 grounds most of which are argumentative and narrative of the factual background leading up to the appeal at hand, but which we need not reproduce here. However, we take the liberty to summarise those relevant among them as follows: that the execution proceedings were taken out prematurely in view of the fact that, the decree having been more than one year old, no notice to show cause had been issued to the appellant, and that party-and-party costs had not been taxed; that the entire proceedings were a nullity as there is no legal entity by the name "Africa Management Communications Limited;" that there was no judgment on record on the basis of which the decree sought to be executed was extracted; that the court could not have entered judgment in default of appearance while there was a memorandum of appearance on record; that there was an appeal pending in the Supreme Court against the decision of the Court of Appeal; that the affidavit of Emmanuel Mwaba supporting the respondent's Motion in garnishee proceedings was a forgery; and that "the proceedings were an abuse of the process of the court".

14. By a consent order recorded on July 1, 2020, the parties compromised the garnishee proceedings. The order read:

> " It Is Hereby Ordered By Consent:
>
> 1. That the Application dated June 8, 2020 be and is hereby marked as withdrawn.
> 2. That as consequence, the ex parte garnishee order *nisi* be and is hereby vacated.
> 3. That the consent order shall be extracted without the need of the learned counsels' approval.
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> Further Order:

4. That the matter is adjourned to July 30, 2020 to hear the prayers 4 - 8 of the Notice of Motion dated 23rd June 2020.

5. That the Plaintiff shall file and serve replies within 15 days from today."

15. The prayer Nos 4-8 referred to in the consent order aforesaid relate to stay of proceedings pending hearing and determination of the appellant's Motion; striking out of the plaint; setting aside the decree; costs; and any other orders the court considered fit and just to grant.

16. On 21st July 2020, the respondent filed a notice of preliminary objection seeking to have the appellant's Motion dated 23rd June 2020 struck out on the grounds that it was an abuse of the court process, and that the court lacked the requisite jurisdiction to entertain the application on two grounds, namely: that the Court of Appeal delivered judgment on 8th May 2020 effectively reinstating the default judgment entered in favour of the respondent; and that the appellant had filed an application in the Court of Appeal seeking certification to appeal to the Supreme Court from that judgment.

17. Soon thereafter, the respondent filed its reply to the appellant's Motion vide the affidavit of Emmanuel Mwaba (its Managing Director) notarised on 17th August 2020 deposing, *inter alia*, that the matters raised in the appellant's Motion were {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}} in view of the fact that the same had been raised in the High Court vide the appellant's Notice of Motion dated 13th June 2016; that the Motion was initially allowed by Ochieng, J, but that the same was subsequently dismissed by this Court on 8th May 2020 when setting aside the ruling of the learned Judge;

that the appellant's Motion was also {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}} in that the appellant seeks to have the same issues previously raised in its application to the Court of Appeal seeking certification to appeal to the Supreme Court re-litigated before the trial court; that That AMC is an abbreviation for Africa Management Communications and also trades as AMC International by virtue of its trade mark No 83051 and with a registered logo whereby it is known as AMC International; and that, right from the commencement of the proceedings, the appellant admitted the respondent's description. They prayed that the appellant's Motion be dismissed with costs.

18. In its ruling dated 25th February 2021, the High Court (A Mabeya, J) dismissed the appellant's Notice of Motion dated 23rd June 2020 on the grounds that it was res judicata as well as {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} sub judice}}. On the issue of {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}}, the learned Judge had this to say:

> "33. In the present case, all the issues sought to be raised could and should have been raised in the original application, it is no defence that a party prosecuted its case incompetently. The application that sought to set aside the judgment was dismissed. It was not struck out for any reason. Once it was dismissed the issues raised therein or capable of being raised therein were determined. That being the case and in view of Explanation 4 of section 7 aforesaid, all those issues raised now are barred

by dint of{{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}}."

19. On{{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}}, the learned Judged observed:

> " 34. I have also seen the averments in the application for certification that is pending before the Court of Appeal. One of the issues to be litigated is the plaintiff's non-existent. Clearly that is a live issue in that Court. This Court cannot venture thereto without breaching the provisions of section 6 of the *Civil Procedure Act*."

20. Aggrieved by the decision of Mabeya, J, the appellant moved to this Court on appeal on 17 grounds set out on the face of its memorandum of appeal dated 5th March 2021 essentially faulting the learned Judge for: holding that the matters before him were {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}} and {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}}; visiting mistake of counsel upon a litigant; "failing to decline to rule on the issue of jurisdiction;" holding that the respondent was a juristic person; ruling on matters not pleaded without inviting the parties to submit thereon; and for dismissing the appellant's Motion despite the parties having compromised it in part by consent.

21. Learned counsel for the appellant, M/s Majanja Luseno & Company, filed written submissions and list of authorities dated 28th June 2021 citing 10 judicial authorities to which we will shortly return. On their part, learned counsel for the respondent, M/s Madhani Advocates LLP, filed written submissions and case digest dated 27th April 2022 and a second set of "supplementary submissions" dated 7th July 2022 citing 11 authorities, to which we will shortly address ourselves.

22. We need to point out right at the onset that, this being a first appeal, it is also our duty, in addition to considering submissions by learned counsel, to analyze and re-assess the evidence on record and reach our own conclusions in the matter. This approach was adopted by this Court in *Arthi Highway Developers Limited v West End Butchery Limited and 6 others* [2015] eKLR citing the case of *Selle v Associated Motor Boat Co* [1968] EA p123.

23. In Selle's case (*ibid*), the Court held that:

> " An appeal to this Court from a trial by the High Court is by way of retrial, and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this Court must reconsider the evidence, evaluate it itself and draw its own conclusions, though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in this respect. In particular, this Court is not bound necessarily to follow the trial judge's findings of fact if it appears either that he has clearly failed on some point to take account of particular circumstances or probabilities materially to estimate the

evidence, or if the impression based on the demeanor of a witness is inconsistent with the evidence in the case generally."

24. Having considered the record of appeal, the written and oral submissions of learned counsel for the appellant and learned counsel for the respondent, we are of the considered view that the appeal herein stands or falls on our finding on the following 7 main issues, namely: whether the learned Judge erred in holding that the respondent was a juristic person; whether the appellant raised a jurisdictional issue, and whether the learned Judge made a ruling thereon; whether the issues raised in the appellant's Motion dated 23rd June 2020 were {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}}, and whether the same was {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}}; whether the learned Judge erred by visiting mistake of counsel on a litigant; whether the learned Judge erred by ruling on matters not pleaded without inviting the parties to submit thereon; whether the learned Judge erred by dismissing the appellant's Motion despite the parties having compromised it in part by consent; and what orders ought we to make in determination of the appeal, including orders on costs.

25. We need to point out right at the outset that this Court's judgment delivered on 8th May 2020 allowing the respondent's appeal and setting aside the ruling and orders of Ochieng, J dated 11th July 2016 remains in force and unchallenged, save for the appellant's Motion for certification with intent to appeal to the Supreme Court. However, the status of that application has not been addressed by any of the parties. Suffice it to observe that this Court (W Ouko, W Karanja and H Okwengu, JJA) upheld the default judgment entered against the appellant on 30th June 2014. It is the execution of this judgment by way of garnishee proceedings that the appellant set out to challenge mainly on the ground that the respondent does not exist, essentially re-opening the respondent's suit previously determined on appeal to this Court. Notwithstanding this finding, we nonetheless proceed to pronounce ourselves on the issues now raised before us.

26. On the 1st issue as to whether the learned Judge erred in finding that the respondent was a juristic person, learned counsel for the appellant M/s Majanja Luseno & Company submitted that Africa Management Communications Limited is not an entity known in law. According to them, it is not a company, and there are no records of its incorporation. They exhibited a letter from the Registrar of Companies and the impugned decree to bolster their position that the respondent is non-existent. In their view, a suit can only be maintained by proper parties. They submit that a suit commenced by an entity which is not legally incorporated and/or constituted is fatally defective. Accordingly, the court has no jurisdiction to receive and deal with a matter that is commenced by an entity not known in law, and that such a suit is for striking out.

27. Counsel cited the cases of *Goodwill & Trust Investment Limited & Another v Witt & Bush Limited* Nigeria SC No 266 of 2005 for the proposition that for a court to be competent and have jurisdiction over a matter, proper parties must be identified and, where proper parties are not before the court, then the court lacks jurisdiction to hear the suit; *Sietco (K) Limited v Fortune Commodities Limited & Another* [2005] eKLR submitting that a suit commenced by a non-existent party is a nullity *ab initio* and incurably bad in law; *Banque International De Commerce De Petrograd v Goukassow*(1923) KB p.683 for the principle that a non-existent person cannot sue; and *Kenya Power and Lighting Kenya Limited v Benzane Holdings Limited T/A Wyco Paints* [2016] eKLR for the proposition that a company that has been dissolved cannot maintain an action and, conversely, no action can be brought

against it simply because it does not exist in the eyes of the law. They urged us to allow the appeal and award costs to the appellant.

28. On their part, learned counsel for the respondent M/s Madhani Law LLP submitted that the reasonable test was whether a reasonable person knew who was suing it or, rather, Airtel (the appellant) knew who was suing it. According to counsel, the learned Judge correctly applied this test, and that the grounds set out in the appellant's Notice of Motion to refer the matter to arbitration clearly acknowledges the parties and admits that there is a dispute between them. According to them, the supporting affidavit of Linda Kaai Kiriku sworn on 23rd February 2015 also acknowledges the relationship between the parties. They submit further that, in its defence and counterclaim, the appellant admits the relationship between the parties; that, moreover, the appellant's counterclaim made reference to the respondent in its correct name, African Management Communications International Limited; that the appellant knew who was suing it and against whom it intended to counterclaim; that a reasonable person looking at all the documents would clearly identify that there was a misdescription of the plaintiff/respondent; and that, despite the misdescription, the cause of action between the parties does not change.

29. Learned counsel cited the case of *J B Kohli & Others v Bachulal Popatlal* [1964] EA p219 for the proposition that the question is not whom the plaintiff intended to sue, but whether a reasonable man reading all the documents in the proceedings before the court, and having regard to all the circumstances, would entertain no doubt that the defendants were the defendants intended to be sued by the plaintiff. The test must be: how would a reasonable person receiving the documents take it. Counsel also cited the cases of *Alexander Mountain & Co v Rumer Ltd* (5) [1948] 2 All ER p.482; *Auburn Court Limited v Jamaica Citizens Bank Limited* (CL, A 019/1991); and *Nzomo Wambua v Wote Town Council* [2008] eKLR, all for the proposition that misnomer of a plaintiff is not a ground for setting aside proceedings, or for a Motion in arrest of a judgment, or non-suit at trial at least if it appeared that the defendant was aware that the action was brought by the person who actually sues.

30. On the authority of the foregoing persuasive decisions, we take to mind that, in paragraph 1 of its defence and counterclaim, the appellant expressly admitted the contents of paragraphs 1 and 2 of the plaint in so far as they were descriptive of the parties. In particular, the respondent was described in paragraph 1 of the plaint as "an international company duly incorporated in Kenya and registered under the *Companies Act*, Cap 486 Laws of Kenya". It is noteworthy that its name in both the plaint and defence was reflected as Africa Management Communications Limited, which counsel representing the parties had inadvertently omitted the word "International" from the respondent's name. From the pleadings, it is clear to our mind that the parties were at all times on the same page that the respondent was indeed the one and the same AMC International Limited with whom the appellant had contracted. It is equally instructive that, along with the defence and counterclaim, the appellant filed a bundle of documents containing copies of account summaries in which the respondent was described as "African Management Communications International Limited". In our considered view, the appellant knew the company by whom it was sued, the one against whom it raised a counterclaim.

31. If the respondent was non-existent as the appellant now wants us to believe, it does not say with whom it contracted; to whom it provided connectivity services; against whom it raised bills from time to time; from whom it received monthly payments in relation to whom it suspended services and levied a service charge as claimed in its counterclaim; and against whom was its counterclaim raised. Indeed, we are at a loss as to how the appellant would prepare and file a bundle of documents containing copies of its account summaries in which it clearly descried the respondent as "African Management Communications International Limited" and, thereafter, turn around to deny its existence after a series of proceedings in the High Court, the appeal to this Court, the certification sought to move to the

Supreme Court, the return to the High Court, the consent order vacating the garnishee orders, and now the appeal before us to defeat execution of the respondent's decree.

32. The appellant's claim that the respondent does not exist merely by reason of its misdescription in the plaint and in the defence and counterclaim as "African Management Communications Limited" cannot stand in light of the admission in paragraph 1 of the appellant's defence of the respondent's description as a "limited liability company". Moreover, this plea comes too late in the day long after pleadings had closed in the High Court, and with no attempt to seek leave for amendment.

33. The fact that this issue was raised for the first time in the appellant's Notice of Motion dated 23rd June 2020 was, in our view, designed, *inter alia*, to obstruct the inter partes hearing of the respondent's garnishee proceedings instituted by way of its Motion dated 8th June 2020 with the possibility of ultimate execution. It is instructive that the appellant's Motion came on the heels of the consent order recorded on 1st July 2020 after the parties agreed to have the garnishee order nisi vacated to allow hearing inter partes. Among the orders sought by the appellant was to strike out the respondent's plaint on the grounds, *inter alia*, that it did not exist as a legal entity.

34. It is clear to us that the appellant raises that issue at this point in time to obstruct the respondent's course of action to execute its decree notwithstanding express admission in its statement of defence and counterclaim of the respondent's description, which was not in issue thus far. With profound respect to learned counsel for the appellant, that belated contention can only be construed as an afterthought, the entertainment of which can only be viewed as intended to subvert the course of justice. We hasten to observe that, in every case, parties are bound by their pleadings. Order 2 Rule 6 of the *Civil Procedure Rules* provides that:

> 6. Departure [Order 2, rule 6.]
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> 1. No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.
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> 2. Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.

35. In the same vein, this Court in *Independent Electoral and Boundaries Commission & another v Stephen Mutinda Mule & 3 others* [2014] eKLR cited the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled "The Present Importance of Pleadings." The same was published in Current Legal Problems, [1960] at p.174 whereof the author had stated:

> " The court itself is as bound by the pleadings of the parties as they are themselves. It is no part of the duty of the court to enter upon any inquiry into the case before it other than to adjudicate upon the specific matters in dispute which the parties themselves have raised by the pleadings. Indeed, the court would be acting contrary to its own character and nature if it were to pronounce any claim or defence not made by the parties. To do so would be to enter upon the realm of speculation. Moreover, in such event, the parties themselves, or at any rate one of them might well feel aggrieved; for a decision given on a claim or defence not made or raised by or against a party is equivalent to not hearing him at all and thus be a denial of justice....

In the adversarial system of litigation therefore, it is the parties themselves who set the agenda for the trial by their pleadings and neither party can complain if the agenda is strictly adhered to. In such an agenda, there is no room for an item called "Any Other Business"

in the sense that points other than those specific may be raised without notice."

36. Lord Denning in *Jones v National Coal Board* [1957] 2 QB 55 proceeded to quote Lord Green MR in *Yuill v Yuill* [1945] ALL ER 183 who had explained that -

> " Justice is best done by a judge who holds the balance between the contending parties without himself taking part in their disputations for, by descending into the arena the judge is liable to have his vision clouded by the dust of conflict."

37. To say the least, we find ourselves caught up in a "dust of conflict," but one that does not by any means cloud our vision in light of our clearly elucidated statute and case law on the issues at hand. We entertain no doubt in our minds that misdescription of parties in pleadings is by no means fatal. As Majanja, J correctly held in *EMK Advocates v Rhombus Construction Company Limited* [2021] eKLR –

> " 7. I am therefore in agreement with the Advocates that the use of EMK Advocates and not Ericson Mungami Khayota is a misdescription and an honest mistake capable of rectification. It will not prejudice the Respondent in any way, is not fatal to the proceedings and does not defeat their claim. In *Fubeco China Fushun v Naiposha Company Limited and 11 Others* ML HCCC No 222 of 2012 [2014] eKLR, Gikonyo J, expressed the following view which I agree with:
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> 'The use of Fubeco China Fushun as the Plaintiff, at worst, is a misdescription of the party, that is, China Fushun No 1 Building Engineering Company Limited. Such misdescription of the Plaintiff is not fatal to the proceedings and does not defeat a party's cause of action. In taking this decision, the Court is guided by the constitutional desire to serve justice which is the very reason why courts have been given unfettered discretion in ordering an amendment in such case in order to reflect and have the correct parties before the Court. Under that power, the Court would still allow the amendment to correct the misdescription. I so order for the avoidance of doubt. I hold and find that this is not a case of non-existent or faceless entity that would invariably be incapable of suing or being sued. It is a case of pure misdescription of a party and is governed by the same law on misdescription of parties in a contract.'"

38. In J B Kohli and Others v Bachulal Popatlal [1964] 1 EA 219 where the defendant had been incorrectly described, Crabbe, JA held that:

> " In my view the question is not whom the plaintiff intended to sue but whether a reasonable man reading all the documents in the proceedings before the resident magistrate and having regard to all the circumstances would entertain no doubt that "Haji Essa Adam & Sons" were the defendants intended to be sued by the plaintiff. If he would have no doubt as to the person to be sued it would be a case of misnomer. In *Davies v. Elsby Brothers Ltd*. (3), Devlin, L.J proposed the following tests ([1960] 3 All E.R. at p.676):
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> 'The test must be: How would a reasonable person receiving the document take it? If, in all the circumstances of the case and looking at the document as a whole, he would say to himself: 'Of course it must mean me, but they have got my name wrong', then there is a case of mere misnomer. If, on the other hand, he would say: 'I cannot tell from the document

itself whether they mean me or not and I shall have to make inquiries', then it seems to me that one is getting beyond the realm of misnomer. One of the factors which must operate on the mind of the recipient of a document, and which operates in this case, is whether there is or is not another entity to whom the description on the writ might refer.'"

39. In view of the foregoing, we agree with counsel for the respondent that misdescription of the respondent as "African Management Communications Limited: instead of "African Management Communication International Limited" was not fatal, and did not defeat the respondent's claim against the appellant. Moreover, the appellant is bound by its pleadings by which it admitted the respondent's proper description as reflected in the binding contractual documents and account summaries as "African Management Communications International Limited". The appellant well knew the company by whom it was sued, and the legal entity against whom it raised a counterclaim. To turn around at the 11th hour and claim its non-existence is an afterthought entertained in vain. Accordingly, this ground of appeal fails.

40. Turning to the 2nd issue as to whether the appellant raised a jurisdictional issue (as to the respondent's existence), and whether the learned Judge made a ruling thereon, the appellant's case was that the suit was commenced by an entity that was not legally incorporated or constituted. According to the appellant, the suit was fatally defective and the court had no jurisdiction to receive and deal with the matter. In its view, one of the limited exceptions to the finality of judgments is the exceptional but salutary power of the court to revisit a judgment improperly obtained by fraud so as to imperil its integrity as a seat of justice. On the authority of *Takhar v Gracefield Developments Ltd & Others* [2019] UK SC 13, the appellant submitted that the basis upon which the plaintiff (the respondent) sued and obtained judgment as an international limited liability company was not true and, thus, the deception constituting fraud. Accordingly, the suit was a nullity ab initio as the respondent lacked legal personality.

41. In reply, learned counsel for the respondent contend that the learned Judge correctly exercised his discretion and arrived at the correct decision having properly applied the principles for striking out as settled in the case of *D. T. Dobie & Company (K) Ltd v Muchina* [1982] KLR 1 where this Court held that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable. According to the learned Judges, if a suit shows a mere semblance of a cause of action, it ought to be allowed to go forward, for a court of justice ought not to act in darkness without the full facts of a case before it.

42. In their submission, learned counsel contended that a reasonable person looking at all the documents would clearly identify that there was a misdescription of the respondent. Suffice it to observe that this issue is as good as settled, having found that the misdescription of the respondent is inconsequential, and that the parties are bound by their pleadings to the effect that the respondent's claim against the appellant was valid and sustainable, and that the appellant's belated challenge that stands in the way of execution of the decree is an afterthought that must fail.

43. Closely linked to the issue as to whether the respondent had legal personality to bring the suit culminating in the successive Motions, appeal, and the impugned ruling, is the question as to whether the matters raised in the appellant's Motion were res judicata or {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}}. And that is the crux of the 3rd issue before us.

44. In this regard, the appellant contends that the doctrine of claim preclusion ({{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}}, {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}}, abuse of process, etc.) had no application to the said Motion. According to the appellant, its basis was distinct and separate from the cause of action upon which default judgment was entered in the respondent's favour. On the authority of *Takhar v Gracefield Developments Ltd & Others* (*Supra*), the appellant contended that the cause of action to set aside a judgment in earlier proceedings for fraud was independent of the cause of action asserted in earlier proceedings. It contends that the principles of res judicata and res sub judice cannot apply simultaneously, and that neither obtained in this case. According to learned counsel, neither of the two principles obtained because neither arose in the proceedings but, if they did, the issues raised in the appellant's Motion were neither res judicata nor sub judice.

45. On their part, learned counsel for the respondent sided with the learned Judge in finding that the application to set aside the judgment and decree was res judicata. According to counsel, it was undisputed that the appellant had previously applied to set aside the judgment, and that the prayers sought were identical to those in the application culminating in the impugned ruling, the subject of challenge before us.

46. The appeal before us is against the interlocutory orders of the High Court (A. Mabeya, J) who, in his ruling dated 25th February 2021 rendered in determination of the appellant's Motion dated 23rd June 2020 by which it sought to have the respondent's plaint struck out and all consequential orders set aside. The learned Judge is now faulted for dismissing the appellant's Motion on the grounds, *inter alia*, that it was {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}} as well as {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} sub judice}}. On the issue of {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata}}, the learned Judge had this to say:

> " 30. Explanation (4) of Section 7 of the *Civil Procedure Rules* provides as follows:
>
> '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 a suit."

47. That being the case, it was open to the defendant to raise the issues it seeks to raise currently in the original application that was heard. These include; the lawfulness and/or regularity of the default judgment, the state of the court record as to the alleged absence of judgment or request for judgment including the issue of the standing of the plaintiff. The name of the plaintiff as well as the entity the defendant entered into contract with were always there for the defendant to confirm and challenge.

There is nothing novel or new that has arisen that can circumvent the provisions of section 7 of the *Civil Procedure Act*.

48. In view of the foregoing, we agree with the decision in *Mohamed Dado Hatu v. Dhadho Gaddae Godhana & 2 Others* [2017] eKLR, wherein the court expressed itself as follows: -

> 'The law is thus clear on the principle of res judicata. Parties cannot litigate in instalments and cannot give their cases a cosmetic uplift by having new parties reopening issues that have already been heard and determined by courts of competent jurisdiction. ... The doctrine aims at bringing litigation to an end and affords parties closure and respite from the specter of being vexed by issues and suits which have already been determined by a competent court'.

49. In the present case, all the issues sought to be raised could and should have been raised in the original application. It is no defence that a party prosecuted its case incompetently. The application that sought to set aside the judgment was dismissed. It was not struck out for any reason. Once it was dismissed the issues raised therein or capable of being raised therein were determined. That being the case and in view of Explanation 4 of section 7 aforesaid, all those issues raised now are barred by dint of res judicata.'"

50. A careful examination of the record as put to us demonstrates a clear case of litigation by instalments. It is not enough for the appellant to argue that the basis of its application was independent of the cause of action upon which the impugned judgment was made. Explanation (4) of Section 7 of the *Civil Procedure Rules* is couched in no uncertain terms. We agree with the learned Judge's interpretation of the explanation that "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 a suit". Moreover, it was open to the appellant to raise the issues it raises in its Motion in the previous applications determined in the respondent's favour. To raise those issues in opposition to the respondent's garnishee proceedings is tantamount to re-opening matters brought to a close by this Court, whose judgment on appeal remains unchallenged, except for the pending application for certification.

51. On the question as to whether the issues raised in the appellant's Motion was {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}}, the learned Judge correctly observed:

> " 34. I have also seen the averments in the application for certification that is pending before the Court of Appeal. One of the issues to be litigated is the plaintiff's non-existent. Clearly that is a live issue in that Court. This Court cannot venture thereto without breaching the provisions of section 6 of the *Civil Procedure Act*."

52. Having carefully examined the record as put to us, the rival written and oral submissions of learned counsel, we find nothing to fault the learned Judge for arriving at the conclusion that the matters raised in the appellant's Motion were both {{term{refersTo |title Already heard and determined on merits by a competent court and therefore may not be pursued further by the same parties;

a cause of action may not be relitigated once it has been judged on the merits;

finality} res judicata }}and {{term{refersTo |title Before another Court of competent jurisdiction by way of a previously instituted suit between same parties canvassing it under the same title;

Under judgment.} res sub judice}}. We are not persuaded by the appellant's submission that the two doctrines cannot apply to the same case. We hasten to observe that we have been invited to pronounce ourselves on the precise issue at hand. We do not think it improper to do so. We have, on the one hand, been urged to find that the issues introduced in the Motion to resist execution of the respondent's decree by way of garnishee proceedings have been determined with finality in previous proceedings, and we make that finding.

53. We have also been invited to pronounce ourselves on the effect of the application for certification to pave way for appeal to the Supreme Court. In doing so, we agree with the learned Judge that he was bereft of jurisdiction to pronounce himself on the issues sought to be challenged in the Supreme Court. Moreover, this Court had upheld the judgment and decree sought to be executed, and that the issues now raised are tantamount to re-litigation or litigation by instalments of which we need not say more.

54. Turning to the 4th, 5th and 6th issues as to whether the learned Judge erred by visiting mistake of counsel on a litigant; whether the learned Judge erred by ruling on matters not pleaded without inviting the parties to submit thereon; whether the learned Judge erred by dismissing the appellant's Motion despite the parties having compromised it in part by consent, it is noteworthy that those issues only feature in the appellant's memorandum of appeal. Indeed, none of those issues were pursued by the appellant in its written and oral submissions. In the circumstances, we are unable to address ourselves on any of them lest we appear to advance the appellant's case in that regard. The least we can do is to presume that those issues stand abandoned.

55. Having carefully examined the record of appeal and the grounds on which it is anchored, the impugned ruling, the rival submissions of learned counsel for the appellant and for the respondent, the cited statute law and judicial authorities, we reach the inescapable conclusion that the appeal has no merit and is hereby dismissed with costs to the respondent. Accordingly, the ruling and orders of the High Court (A. Mabeya, J) dated 25th February 2021 are hereby upheld. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 24TH DAY OF JULY, 2023.

DR. K. I. LAIBUTA

.....

JUDGE OF APPEAL

ALI-ARONI

.....

JUDGE OF APPEAL

J MATIVO

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR