IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: WAKI, GATEMBU & M'INOTI, JJ.A)

CIVIL APPEAL NO. 2 OF 2010

BETWEEN

JULIUS MUTHOKA NDOLO.....APPELLANT

AND

1. PARK TOWERS LIMITED

2. KIRUNDI & COMPANY ADVOCATES

3. G. CHEGE KIRUNDI ADVOCATE ..... RESPONDENTS

(An appeal from the Ruling and Decree of the High Court of Kenya

at Milimani, Nairobi (H. Waweru, J) dated 19th May, 2006

in

HCCC No. 540 of 2001)

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JUDGMENT OF THE COURT

The main issue for our determination in this appeal is whether the finding by High Court **(Hatari Waweru, J.)** that the suit filed by the appellant was *res judicata* and, therefore, an abuse of court process, was proper. That decision was made 12 years ago on 19th May, 2006, but for some reason this appeal was filed four years later in January 2010 and was first fixed for hearing five years later when it was adjourned due to indisposition of the appellant's counsel. Another three years went by before the matter was heard in September 2018. It is certainly one of the unfortunate matters that has clogged the court system, but happily it can now be disposed of.

The suit that was struck out was filed by four persons, but three of them died thereafter and there is no indication that their estates were interested in the matter anymore. That is how the appellant's learned counsel **Mr. Francis Mulwa** explained the appeal which is filed by the appellant solely.

The suit relates to an agreement made on 11th April, 1995 between the appellant and the three deceased on the one part **(the vendors)** and Park Towers Ltd **(the 1st respondent)** of the other part, for sale of their leasehold interest in two properties in Nairobi known as LR Nos. 209/8408 and 8409, at Ksh.16 million. The transfer was duly completed and Park Towers took possession of the properties on 12th August, 1996. By another agreement dated 18th September, 1996, as well as a Deed of indemnity of the same date, some inconsistencies in the original agreement were varied. In that transaction, the Firm of Kirundi & Company Advocates **(the 2nd respondent)** acted for the 1st respondent while M/s Mutua Mboya & Nzissi, Advocates and later M/s Mulwa & Mulwa Advocates (no relation to Francis Mulwa) acted for the vendors.

Subsequent to completion of the transaction, a group known as **'Machakos Public Transporters Self-help Group'** claimed that the two plots were public utility plots used by motor vehicle owners for parking and was known as the ***"Old Machakos Bus Station".*** They claimed that in a fraudulent conspiracy, the Nairobi City Council had on 3rd August, 1994 allotted the Bus Park, as well as the retail market adjacent to it, to the vendors who were politically well connected. They sued the Council, the vendors and the 1st respondent in HCCC No. 871 of

1997 with a view to reversing the allotment and the sale of the property. However, that suit, as well as other disputes, were discussed between the parties and settled by consent. We shall shortly revert to the decree issued on 12th October, 1999 in terms of the consent.

For the next two years, no complaint seems to have been raised in respect of the properties or the transactions thereon. But, by a plaint dated 10th April, 2001 (amended on 30th April, 2001 and re-amended on 22nd January, 2004), the vendors, through F. M. Mulwa, Advocate, claimed that the 2nd respondent together with its senior partner, G. Chege Kirundi, **(3rd respondent)** had wrongfully and deceitfully withheld payment of a sum of Ksh.2,648,398/35 out of the purchase price, and a further Ksh.1,406,131 purporting it to be professional fees and disbursements. They sought payment of the total sum of Ksh.4,054,529/35 together with interest thereon at 25% from 12th August, 1996 when the sale transaction was completed.

The respondents filed their defence denying the claims as factually incorrect and contended that the same issues had been discussed and settled in the earlier suit, **HCCC No. 871 of 1997**. They gave notice of a preliminary objection to the competence of the suit on account of being *res judicata* and an abuse of court process. And so they did by their motion dated 15th December, 2005. The vendors opposed the application on the ground that the contract of sale was not part of the earlier consent and in any event, the 2nd and 3rd respondents were not parties to that suit. According to them, neither *res judicata* nor estoppel applied to the matter which should be allowed to proceed to hearing on merits.

Upon considering the issue of *res judicata*, the trial court found that the central issue of the sale agreement was common to both suits, stating:

> ***"It is clear that both suits were dealing with similar issues that arose from the sale agreement in respect to the two properties as set out above. In my view the issues in the former suit were directly and substantially the same issues in the present suit. The parties were also the same except the 2nd and 3rd Defendants who have been sued in the present suit in their professional capacity derived from having acted for one of the parties in the sale transaction. But as will be seen the decree in the former suit encompasses them as well. I now must decide whether the decree in the former suit finally decided the issues in that suit."***

The court then examined the decree and was satisfied that it covered the parties as well as the subject matter in both suits. It held:

> ***"It is plain to me that the above orders contained in this decree settled all the issues between the parties in the previous suit. The settlement was much wider than the issues in the suit. The settlement also settled all other issues between the parties arising and that may arise out of the sale agreement, both as between themselves and as may be extended to their advocates, including the 2nd and 3rd Defendants. The present suit seeks to canvass issues that arise out of the sale agreement in question, and which were finally settled by the decree in the previous suit. It is clearly res judicata, and I so hold."***

It is those findings that aggrieved the appellant who laid out six grounds in the memorandum of appeal to challenge them. At the hearing, however, Mr. Mulwa urged grounds 1 and 5 together. They state as follows:

> ***"1. After making a finding that no document pertaining to the previous suit other than the amended plaint was annexed to the application from which this appeal arises, the learned judge of the superior court erred in failing to appreciate and hold that in the absence of proof of participation in the former suit by the Plaintiffs or their privies in the subsequent suit, the subsequent suit could not be res judicata as against the Plaintiffs therein.***

In his submissions, counsel contended that the vendors were introduced in the earlier suit by an amendment and there was no material on record to show that they were served with summons to enter appearance. According to him, the earlier suit was settled between the plaintiffs therein, that is, the **'Machakos Public transporters Self-help Group'** and the 1st respondent herein. The current appellant, he contended, was not a party to the consent. In both suits therefore, the parties were not claiming under the same title. Furthermore, counsel submitted, the subject matter in both suits was different as evident from the contents of the decree and the prayers made in the subsequent suit which were about the balance of the purchase price. Finally, he submitted that the earlier case was not heard and determined on its merits and therefore the doctrine of *res judicata* was inapplicable. Several authorities were placed at our disposal for consideration including: ***Nancy Mwangi t/a Worthlin Marketers vs Airtel Networks (K) Ltd (Formerly Celtel Kenya Ltd) & 2 Others [2014] eKLR; Nicholas Njeru vs Attorney General & 8 Others [2013] eKLR;*** and ***Uhuru Highway Development Limited vs Central Bank of Kenya & 2 Others [1996] eKLR.***

In response, learned counsel for the respondents, **Mr. Ndirangu,** pointed out that the decree in the earlier suit settled all matters including the issue raised in the latter suit. The appellant, he asserted, was a party to the earlier suit and his denial that he was not cannot be serious. In his view, the earlier consent could only be attacked on grounds of misrepresentation, fraud, collusion or such like vitiating grounds, but none was raised in this matter. The subject matter was the same and so, *res judicata* applies. Counsel made available to us, without reference thereto, the following authorities for perusal: ***Kenya Commercial Bank Limited vs Muiri Coffee Estate Limited & 3 Others [2013] eKLR; Nicholas Njeru vs Attorney General & 8 Others supra; Mburu Kinyua vs Gachini Tuti [1978] KLR 69;*** and ***Wainaina vs Hass Civil Appeal No. 133 of 1984.***

We have considered the matter fully. As stated earlier, the issue urged before us is whether the suit, **HCCC 540 of 2001**, filed by the appellant, together with three deceased others, was *res judicata* as declared by the trial court.

The law on the doctrine of *res judicata* is well trodden territory and the authorities placed at our disposal on both sides attest to that. It is a doctrine borne of the fundamental public policy that there must be an end to litigation and that no one should be harassed twice over with the same litigation. As was aptly observed in the ***Nancy Mwangi t/a Worthlin Marketers case (supra),*** citing the case of ***E. T. vs Attorney General & Another [2012] eKLR:***

"The courts must always be vigilant to guard litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another way and in a form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of Omondi vs National Bank of Kenya Limited and Others (2001) EA 177 the court held that, 'parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.' In that case the court quoted Kuloba, J., in the case of Njangu vs Wambugu and Another Nairobi HCCC No. 2340 of 1991 (unreported) where he stated, '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….."

Parliament, through our own **Civil Procedure Act** in ***section 7*** declared as follows:-

"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."

"*Explanation (4)* ***any matter which might and ought to have been made a 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."***

The scope and import of those provisions has been examined by courts on numerous occasions and we need not belabour them. Suffice it to quote this Court in the ***Nicholas Njeru case (supra)*** where it was stated thus:

"This doctrine has been applied in a number of cases including; Reference No.1 of 2007, James Katabazi and 21 Others vs The Attorney General of the Republic of Uganda EACJ where the Court stated that for the doctrine to apply:

(a) the matter must be 'directly and substantially' in issue in the two suits,

(b) the parties must be the same or parties under whom any of them claim, litigating under the same title; and

(c) the matter must have been finally decided in the previous suit."

See also the ***Uhuru Highway Development Limited case (supra).***

Finality in the decision does not connote a determination made after hearing oral evidence only. It extends to consents properly recorded before the court. *Explanation 4,* above, also widens the net to all matters that properly belonged to the litigation whether brought forward or not. In the ***Kenya Commercial Bank Limited case (supra)*** this Court stated thus:

"Those issues cannot be re-litigated. On that point this case falls on all fours with Kamunge & Others vs Pioneer General Assurance Society Ltd [1977] EA 263 at pg. 265" where this Court stated as follows on the issue of res judicata.

"It does not matter that the judgment was by consent and not on merit after trial. It is as binding as if the judgment was one after evidence had been called.."

This Court has also stated in the case of Pop-in (Kenya) Ltd and 3 Others vs Habib Bank, A. G. Zuric C. A. No. 80 of 1988 that a matter will be res-judicata not only on points upon which the court was actually required by parties to form an opinion and pronounce a judgment but also on every point which properly belonged to the subject matter of litigation."

This Court further stated in the ***Uhuru Highway Development Limited case***, that:

"..I would be content to follow the following dictum of Wilgram V-C, in Henderson vs Henderson (1843) 67 E R 313, 319, which the Privy Council described as the locus classicus of this aspect of res judicata, in Yat Tung Investment Co. Ltd. Vs Dao Heng Bank Ltd. (1975) AC 581, 590:

'Where a given matter becomes the subject of litigation in, and 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, 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 parties to form an opinion and pronounce a judgement, 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'."

Having examined the applicable law, we must now examine the two suits and the basis upon which *res judicata* was invoked.

The decision made in the former suit, **HCCC No. 871 of 1997**, was by consent of the parties and it resulted in the decree referred to earlier which we now reproduce:

"1. That this case is hereby settled in terms of the letter and agreement both dated 24th September, 1999 and signed by the Plaintiffs and the Third Defendant and produced in court by consent which provide:-

2. That the Plaintiffs jointly and severally hereby withdraw against all the Defendants allegations in High Court Civil Case No. 871 of 1997 and undertake to withdraw Court of Appeal Misc. Applications No. 43 of 1999 and No. 67 of 1999 and High Court Misc. Application No. 52 of 1999, and the Third Defendant, Park Towers Limited, the registered owner of L.R. No. 209/8408 and L.R. No. 209/8409, in turn undertakes to withdraw its complaint against the Plaintiff in Resident Magistrate Criminal Court Case No. 44 of 1998.

3. That the Plaintiffs jointly and severally do hereby deliver L.R. No. 209/8404 and L.R. No. 209/8409 forthwith to Park Towers Limited, the registered owner.

4. That the Third Defendant, Park Towers Limited, as the registered owner, do hereby take possession forthwith of L.R. No. 209/8408 and 209/8409 and resume formal general management and maintenance of the properties in line with Nairobi City Council by-laws and the laws applicable to the suits premises.

5. That the Third Defendant, Park Towers Limited, do forthwith resume collection of parking fees from all the users of L.R. No. 209/8408 and 209/8409 as the owners.

6. That the Third Defendant, Park Towers Limited, do hereby appoint Sammy D. Muathe as its sole agent for the smooth exercise of delivery by the Plaintiffs of L.R. No. 209/8408 and L. R. No. 209/8409 to the Third Defendant, Park Towers Limited, and collection of parking and maintenance of L.R. No. 209/8408 and L.R. No. 209/8409 by the Third Defendant.

7. That the Plaintiffs jointly and severally hereby confirm and acknowledge that the issues raised in the High Court Civil Case No. 871 of 1997 and in the affidavits of Benson Syuma Kanui sworn on 9th April, 1997 and a supplementary affidavit of Benson Syuma Kanui sworn on 15th April, 1997 have been correctly and legally addressed by all the Defendants through their respective replying affidavits, and in particular that of the Town Clerk, Nairobi City Council, sworn on 5th September, 1997 and that of the Director of City Planning and Architecture sworn on 17th September, 1997, and the facts in the affidavits are in compliance with the Local Government Act, Cap. 265, the Physical Planning Act 1996, the land Acts, and the Companies Act, Cap. 486…..

8. That each party shall meet its Advocates cost.

9. That each and every party in the above suits and applications do hereby confirm severally and jointly that any claim or claims that may exist among them and to each of them by one of them or their lawyers are hereby withdrawn and no such claim or claims may hereinafter be raised or revived howsoever.

10. That the Third Defendant, Park Towers Limited, hereby withdraws its counterclaim against the Plaintiffs.

11. That each party to bear its own costs for the counterclaim."

The decree is not challenged on its accuracy or authenticity. There is a procedure for challenging decrees even where they were recorded by consent. The appellant's first contention is that he was not party to the earlier suit but that contention is not borne out by the record. He was listed as defendant '2C'. The contention is rejected. As properly observed by the trial court, the only parties who were not in the earlier suit but were sued in the latter suit were the Firm of Advocates (2nd respondent), and its senior partner (3rd respondent). However, reading **clause 9** of the consent, the conclusion is inescapable that the parties and their lawyers wanted finality in all matters pertaining to the sale transaction of the disputed property, hence the expansive clause. There is no compelling reason, therefore, for faulting the finding by the trial court that the 2nd and 3rd respondents were covered in the consent. We also agree with the trial court that the subject matter in both suits was the sale of the disputed property which the plaintiffs in the earlier suit sought to reverse, but which in the ensuing settlement was affirmed and the property reverted to the 1st respondent. In our view, any claim of unpaid balances of the purchase price, as is made in the latter suit, properly belonged to the earlier suit for inclusion in the final decree. *Explanation 4* above applies.

Having so found on the basic elements of the principle of *res judicata*, we find that it was properly invoked and applied in this matter. It follows that there is no merit in the appeal and we order that it be and is hereby dismissed with costs.

Dated and delivered at Nairobi this 25th day of January, 2019.

P. N. WAKI

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JUDGE OF APPEAL

S. GATEMBU KAIRU, FCIArb

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a

true copy of the original.

DEPUTY REGISTRAR